THE JURISDICTION OF THE EUROPEAN COURT OF JUSTICE IN RESPECT OF THE COMMON FOREIGN AND SECURITY POLICY*

MARIA-GISELLA GARBAGNATI KETVEL**

The purpose of this article is to consider the scope of the jurisdiction of the European Court of Justice in the field of the Common Foreign and Security Policy, as set out in the Treaty on European Union. Pursuant to Article 46 TEU, the ECJ has virtually no competence over foreign policy and security matters—although some limited scope for judicial supervision may be derived from the combined effect of this provision with Article 47 TEU, which prevents encroachment by EU law on Community competence, with respect both to reviewing the choice of legal basis and to determining any violations of EC policy-making procedures. It is submitted that the absence of judicial control over the exercise of powers by the Union and its Member States in this area of potentially sensitive action does not guarantee the preservation of the institutional balance established by the EU Treaty. It may also prove incompatible for individuals to have a legal remedy in the event of a breach of directly effective CFSP provisions.

Indeed, as long as a decade ago, the Court itself had highlighted the need to ascertain the limits of the powers of the Union vis-à-vis the Member States, and of those of each institution of the Union vis-à-vis one another. The Court had also drawn attention to the legal issues which may arise from the absence of judicial supervision in the field of intergovernmental cooperation, stating that the judicial protection of individuals affected by the activities of the Union must be guaranteed and structured in such a way as to ensure consistent interpretation and application both of Community law, and of the provisions adopted within the framework of the Second and Third Pillars.[1] The Constitutional Treaty, however, confirms the *status quo* as regards the role of the Union judiciary over the CFSP. Nonetheless, some of its provisions represent a notable step forward in the right direction—even though the lack of

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** Laurea in Scienze Politiche (Catholic University of Milan); MSc European Studies (London School of Economics); Doctor of Laws (University of Trieste); Visiting Fellow, BIICL.

[1] Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union, Luxembourg May 1995, para 4.

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gisellaketvel@hotmail.com

clarity as to the actual extent of the exclusion of the jurisdiction of the Court leaves some scope for ambiguity.

I. THE JURISDICTION OF THE EUROPEAN COURT OF JUSTICE PURSUANT TO THE TREATY ON EUROPEAN UNION

Article 46 TEU currently stipulates the limits of the jurisdiction of the ECJ in relation to matters covered by the EU Treaty. The provisions of the Community Treaties concerning the powers of the Court and the exercise of those powers shall apply to:

- Provisions amending the Community Treaties (Titles II–IV, Articles 8–10 TEU);[2]
- Provisions on Police and Judicial Cooperation in Criminal Matters (Title VI, Articles 29–42 TEU)—under the conditions provided for by Article 35 TEU;[3]
- Provisions on Enhanced Cooperation (Title VII, Articles 43–5 TEU)—under the conditions provided for by Articles 11 and 11a TEC, and Article 40 TEU; and
- the Final Provisions of the EU Treaty (Title VIII, Articles 46–53 TEU).

Consequently, the jurisdiction of the Court does not extend to Title I (Articles 1–7 TEU), which sets out the Common Provisions on which the Union is based—with the exception of Article 6(2) on respect of fundamental rights by

[2] Under Art 68 EC, the jurisdiction of the Court to rule on disputes and questions of interpretation relating to Title IV of the EC Treaty is subject to certain restrictions: only courts of last resort are required to seek a preliminary ruling (para 1); jurisdiction is excluded in case of measures connected with the removal of controls on persons on grounds of public order or internal security (para 2); and the interpretative rulings given by the Court in response to a request made by the Council, the Commission or a Member State shall be binding for any new cases or matters pending, but not affect judgments of national courts which have become *res judicata* (para 3). Art 68 has been of very limited use so far; see Case C-555/03, order of 10 June 2004, *Warbecq* (not yet reported), where the Court found that it had no jurisdiction to answer the questions referred by a national court against whose decisions there is no judicial remedy under national law (paras 11–16).

[3] Art 35 TEU makes provision for the Court's jurisdiction to judge actions for annulment brought by the Member States or the Commission (para 6); to rule on disputes between Member States, and between Member States and the Commission (para 7); and to give preliminary rulings in relation to a range of measures adopted under Title VI of the EU Treaty, provided that the Member States have declared that they accept the involvement of the Court (paras 1–2). Upon acceptance, Member States retain the power to declare whether they intend to restrict the power to make preliminary references to courts against whose decisions there is no judicial remedy (para 3). In any event, the Court is prevented from reviewing the validity or proportionality of national police operations or national measures concerned with the maintenance of law and order and the safeguarding of internal security (para 5). Art 35 has already been invoked on a few occasions, see Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge* [2003] ECR I-1345; Case C-105/03, judgment of 16 June 2005, *Pupino* (not yet reported) and Case C-176/03, judgment of 13 Sept 2005, *Commission v Council* (not yet reported).

the institutions of the Union and of the purely procedural stipulations of Article 7)—nor to actions undertaken by the Member States in the field of the Common Foreign and Security Policy (Title V, Articles 11–28 TEU).

As regards the Common Provisions, the lack of powers of judicial review was confirmed by the ECJ in *Grau Gomis*. Here, a request for a preliminary ruling concerning the obligations of the Member States under Article 2 TEU was dismissed as inadmissible, the Court holding that—pursuant to Article 46—it 'clearly [had] no jurisdiction to interpret that article in the context of such proceedings'.[4] Nonetheless, it has been pointed out that the Court may resort to the Preamble and the Common Provisions of the EU Treaty in order to interpret and clarify the scope of Union activity[5]—just as the Preamble of the EC Treaty, in so far as it refers to the action of the Community, may be used to interpret and clarify the objectives of the Community.[6] The Court has indeed made use of the provisions of Article F (1) (now 6) TEU[7] and Article 3 TEU as aids of interpretation of the EC Treaty.[8]

As regards the Common Foreign and Security Policy, the decision not to grant the Court any powers of judicial review can be ascribed to a number of reasons.

Member States are generally averse to the involvement of the Community judiciary over the CFSP, fearing it might constrain their sovereignty in the field of international politics. In this respect, the arguments for keeping the power of the Court in check essentially reflect the arguments against giving the Union competence to decide foreign, security and defence policy matters, all of which are sensitive areas where Member States are reluctant to surrender their sovereign rights to the EU. Because of the highly political nature of the issues involved, the scope for judicial review of decisions and actions taken in the field of foreign policy has traditionally been rather limited:[9] according to the doctrine of the 'act of Government' domestic courts cannot

[4] Order of 7 Apr 1995, Case C-167/94 [1995] ECR I-1023, para 6.

[5] A Tizzano 'Il ruolo della Corte della Corte di giustizia nella prospettiva dell'Unione europea' (1994) LXXVII RDI 922, at 926 and Y Petit 'Commentaire à l'art L' in V Constantinesco, R Kovar, D Simon *Traité sur l'Union européenne. Commentaire article par article* (Economica Paris 1995) 803, at 804.

[6] Case 43/75, *Defrenne* [1976] ECR 455.

[7] Case C-473/93, *Commission v Luxembourg* [1996] ECR I-3207, para 35.

[8] Judgments of 21 Sept 2005, Case T-306/01, *Yusuf and Al Barakaat* and Case T-315/01, *Kadi* (not yet reported), para 164 of the former. See also below.

[9] As M Koskenniemi explains, '[i]t is conventional to think of foreign and security policy as a realm of sovereign wills and national interests *par excellence*. If law should play a role in it, it is only as an instrument for the expression and realization of those wills and interests . . . providing a language and institutional arrangements that sometimes facilitate the attainment of consensus. . . . But in the realm of vital interests, national security, peace and war, rules cannot constrain' ('International Law Aspects of the Common Foreign and Security Policy' in M Koskenniemi (ed) *International Law Aspects of the European Union* (Nijhoff The Hague 1998) 27, at 27–8.

interfere in the political choices defined by the executive, which normally enjoys a wide margin of discretion.[10]

Also, the very scope and nature of the powers of the European Union under Title V make it difficult to exercise judicial review and supervision. This is due to the generic formulation of CFSP objectives, the open character of Treaty provisions and the fact that, as a general rule, foreign and security policy can hardly be implemented by means of strong legislative instruments. Accordingly, CFSP measures tend to be 'essentially short-term in character and potentially both wide-ranging and sensitive': being often adopted in rapid response to international events, they are not designed to lay down a permanent framework of mutual legal obligations between the Member States, but to mould a collective response to a specific situation, crisis or international negotiation.[11]

Finally, some Member States harbour suspicions as to possible judicial activism on the part of the ECJ, which might result in the creation of a body of 'Union law'—as opposed to Community law[12]—and lead to some of the EC law doctrines developed by the Court in several path-breaking rulings—on the scope and nature of the external relations of the Community, its treaty-making power and the legal effect of international obligations—spilling over into the CFSP, despite its specific intergovernmental character.[13]

It is submitted that fears that the ECJ might become the ultimate adjudicator in foreign policy matters—understandable though they may be—are perhaps exaggerated. In fact, it is hard to envisage a situation of judicial runaway powers, with the Community courts substituting their own judgment for politically sensitive decisions taken by the Member States and the institutions of the Union in the field of CFSP. In fact experience has shown that whenever the Court has had the opportunity to hear disputes touching upon matters involving to some extent the exercise of political discretion by national authorities, it has generally demonstrated a considerable degree of self-restraint.

This is perhaps best illustrated by the reasoning of Jacobs AG in the case of the Macedonian sanctions.[14] The Commission had brought an action under

[10] See L Collins 'Foreign Relations and the Judiciary' (2002) 51 ICLQ 485 and T Franck *Political Questions/Judicial Answers. Does the Rule of Law Apply to Foreign Affairs?* (Princeton University Press Princeton 1992).

[11] E Denza *The Intergovernmental Pillars of the European Union* (OUP Oxford 2002) at 312.

[12] N Neuwahl 'Foreign and Security Policy and the Implementation of the Requirement of 'Consistency' Under the Treaty on European Union' in D O'Keeffe and P Twomey (eds) *Legal Issues of the Maastricht Treaty* (Chancery Law London 1994) 227, at 244.

[13] M Cremona points out, however, that in the external policy field 'legal integration has been a legislative more than a judicial process' (with the notable exception of the development by the Court of the doctrine of implied powers) 'The Union as a Global Actor. Roles, Models and Identity' (2004) 41 CML Rev 553, at 571.

[14] Opinion of 6 Apr 1995, Case C-120/94, *Commission v Hellenic Republic* [1996] ECR I-1513. For an extensive assessment, C Stefanou and H Xanthaki *A Legal and Political Interpretation of Articles 224 and 225 of the Treaty of Rome—The Former Yugoslav Republic of*

Article 298 EC against Greece for adopting restrictive trade measures against the Former Yugoslav Republic of Macedonia. Greece contended that such measures were justified under Article 297 EC, which exceptionally allows Member States to act unilaterally 'in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'.[15] In what has been described as the 'judicial text which comes closest to establishing some kind of political question doctrine in the framework of EU constitutional law',[16] the Advocate General dismissed the possibility that a matter might escape judicial control on account of the political nature of the issues raised. However, he acknowledged that the 'paucity of judicially applicable criteria' severely limits the scope and intensity of the judicial review that may be carried out by the Court (para 50) on what is essentially a decision 'of a political nature' (para 65).[17]

Far from representing an instance of judicial abdication, the opinion achieved a difficult balance between the interests at play. On one hand, it showed the Community judiciary to be clearly aware of the sensitive context in which decisions with foreign policy implications need to be taken. On the other hand, it refused to regard the role of the Court as entirely subordinate to the political power of the Member States—even though the degree of judicial supervision that can be exercised, as a matter of Community law, over the discretion they enjoy in assessing a threat to their external security is confined to ensuring that the exceptional powers provided for by the EC Treaty are not abused. Since the Commission discontinued the case, following the political settlement of the dispute, the ECJ did not have an opportunity to rule on the matter.[18] It did, however, take a similarly cautious approach when considering questions related to the international obligations of the Member States,[19] and

Macedonia Cases (Dartmouth and Ashgate Aldershot 1997). See also R Fornasier 'Quelques réflexions sur les sanctions internationales en droit communautaire' (1996) 402 RMC, 670.

[15] On the 'wholly exceptional' nature of this provision (Case C-222/84, *Johnston* [1986] ECR 1651, para 26) which goes beyond the public security provisio laid down by the other exceptional clauses in the EC Treaty, see P Koutrakos 'Is Article 297 EC a 'Reserve of Sovereignty'?' (2000) 37 CML Rev 1339.

[16] P Eeckhout *External Relations of the European Union* (OUP Oxford 2004) at 452.

[17] Similarly, the Advocate-General argued that there was an important political dimension to the conclusion and termination of international agreements, which did not lend itself readily to judicial review (Case C-162/96 Racke [1998] ECR I-3655, paras 76–90).

[18] Order of 19 Mar 1996 [1996] ECR I-3040.

[19] For example, in *Commission v Portugal*, the Court dismissed the argument that to require the denunciation of an international agreement by a Member State would involve a disproportionate disregard of the foreign policy interests of the latter, pointing out that such interests cannot override the obligation of a Member State to remove any incompatibilities with Community law. According to the Court, Art 307 EC already incorporates the balance between Member State and Community interest, as it allows the Member States not to apply a Community provision in order to respect the rights of third countries deriving from a prior agreement and to perform their obligations thereunder, while choosing the appropriate means of rendering it compatible with Community law (Case C-62/98 [2000] ECR I-5171, paras 44–50).

when addressing the legal issues raised by the adoption of trade measures with significant foreign and security policy implications under the Common Commercial Policy. The case law of the Court on economic sanctions and exports of dual-use goods is evidence both of its determination to safeguard the integrity of the Community legal order, and of its reluctance to intervene by means of judicial ruling in areas of activity beyond the EC Treaty framework, where Member States retain their competence to act.[20]

II. THE LIMITED SCOPE FOR JUDICIAL REVIEW OF THE COMMON FOREIGN AND SECURITY POLICY

In spite of the constraints pursuant to Article 46 TEU, the activity of the European Union and its Member States in the field of the CFSP does not escape judicial supervision entirely.

Since the provisions of Title V of the EU Treaty are a matter of legal obligation under international law, the possibility is open for a Member State to bring an action against another Member State before the International Court of Justice.[21] All EU Member States are also members of the United Nations, and therefore parties of the ICJ Statute, which enables them to acknowledge the jurisdiction of the Court as regards all legal disputes having as their object the interpretation of an international treaty, with respect to all other States accepting the same obligation (Article 36). Also, the EU Treaty does not contemplate a provision similar to Article 292 EC, according to which the Member States undertake not to submit a dispute concerning the interpretation of the EC Treaty to any method of settlement other than those provided for by that Treaty. In practice, however, the likelihood of actual recourse by a Member State to the ICJ in order to adjudicate on a dispute in connection with the intergovernmental provisions of the EU Treaty is minimal: it is neither a realistic option, given the time-scale required and the possibility of a political settlement, nor indeed a desirable course of action, as it might compromise the further development of the CFSP and undermine the role of ECJ.[22]

But also as a matter of European law, the jurisdiction of the Court over the CFSP is not as restricted as it may at first appear from the wording of Article 46 TEU. For instance, it is clear that this provision cannot be interpreted so as to affect the scope of the existing powers conferred upon the Community

[20] For a detailed analysis, see P Koutrakos *Trade, Foreign Policy & Defence in EU Constitutional Law* (Hart Publishing Oxford 2001) esp. at 131–63.

[21] V Louis and M Dony (eds) 'Relations extérieures' in *Commentaire Megret* (Editions de l'ULB Bruxelles 2005) at 503; Denza (n 11) 311; Koskenniemi (n 9) 30; I Macleod, ID Hendry and S Hyett *The External Relations of the European Communities* (Clarendon Press Oxford 1996) at 424; MR Eaton 'Common Foreign and Security Policy' in D O'Keeffe and P Twomey (n 12) 215, at 222.

[22] Denza (n 11) 322.

judiciary by the EC Treaties in respect of matters falling within the scope of Community competence, regardless of any connections which may exist between the measures adopted in these areas and the CFSP. The Court of First Instance favoured this approach in *Svenska Journalistförbundet*,[23] where it held that the fact that it had, by virtue of Article 46, no jurisdiction to review the legality of Title VI documents did not curtail its powers of judicial review over matters concerning public access to those documents. The assessment of the legality of the Council decision refusing access was based upon the jurisdiction of the Court on the basis of Article 230 EC to review the legality of Council measures taken under the relevant legislation on public access to Council documents.[24] The Court was not, therefore, required to adjudicate on the intergovernmental cooperation in the sphere of Justice and Home Affairs as such.[25] This reasoning was subsequently confirmed by the CFI with respect to documents adopted on the basis of Title V.[26]

What is more, Article 46 should be interpreted to the end that—even though it denies the Court any jurisdiction to review or to interpret *directly* the provisions of Title V of the EU Treaty—it does not prevent it from adjudicating on these provisions *indirectly*. In this respect, a specific role for the Court may be derived from the structure itself of the European Union. As is well known, two different policy-making processes co-exist within the Union—the more supranational 'Community method' and cooperation of an intergovernmental character within the Second and Third Pillars of the Union—each operating pursuant to the powers and procedures laid down in the EC and EU Treaties, respectively.[27] These are characterized by different legislative procedures and by peculiarities in the role of the institutions, the typology of instruments adopted, and their implementation and enforcement. Indeed, differences extend to the whole organization of legal relations, including the operation of the general principles of law, and the principles of direct effect and primacy of Community law.[28] Whether the subject matter of an act falls within Community or Union competence has substantial implications for the legal quality and effectiveness of the measure adopted, and for the powers of the institutions.

[23] Case T-174/95 [1998] ECR II-2289.

[24] Council Decision 93/731/EC of 20 Dec 1993 (OJ 1993 L 340/43).

[25] Para 85. The jurisdiction of the CFI to adjudicate on access to documents falling under Title VI had not been contested on a previous occasion (Case T-194/94, *Carvel and Guardian Newspapers* [1995] ECR II-2765).

[26] Case T-14/98, *Hautala v Council* [1999] ECR II-2489, paras 41–2.

[27] There exist, however, a few differences between the Second and Third Pillars of the EU. Foreign and security policy are *common* to the EU and its Member States, while there is police and judicial *cooperation* in criminal matters among Member States. There are also a number of notable exceptions to the purely 'intergovernmental method', such as Arts 23, 34, and 35 TEU. Finally, the EC Treaty itself contemplates a great variety of institutional procedures, depending on the policy-making area, all of which may be labelled as 'Community method'.

[28] A Dashwood 'The Relationship between the Member States and the European Community/European Union' (2004) 41 CML Rev 335, at 365.

The implications of the interaction between the Union and the Community are most evident in the field of external relations. Here, the traditional distinction between 'high' and 'low' foreign policy issues—the former consisting of foreign policy activities *lato sensu*, the latter grouping all external relations of an economic nature—is mirrored in a division of competence between the CFSP and the EC external relations. Foreign policy formulation takes place in the context of the Second Pillar, whereas most of the instruments and assets deployed for the material conduct of foreign policy—in particular, those of an economic nature—are dealt with in the framework of the Community's external policies. By definition, however, foreign policy is comprehensive of all aspects of external action: accordingly, Article 11 TEU states that the scope of the CFSP encompasses 'all areas of foreign and security policy', including economic[29] or other external aspects for which the instruments of action must be found in the Community Treaties.[30] As a result, it may prove hard to define a precise boundary between the respective competences of the Union and the Community in this context and a clear-cut allocation of matters among the different pillars of the EU, with respect to both their content and their objective. In the event of uncertainty as to the allocation of a subject matter either to the EC external competence or to the CFSP, what is the degree of discretion of the legislator, in deciding whether to have recourse to a legal basis under the EC Treaty, or under Title V of the EU Treaty?

The relationship between Member State and Community action in the field of external relations was considered by the Court prior to the formalization of the CFSP in the EU Treaty, in connection with the adoption by the UK of economic sanctions against the Federal Republic of Yugoslavia (FRY), which were more restrictive than those imposed by the Community. The UK submitted that national measures aimed at ensuring the effective application of sanctions were covered by national competence in foreign and security policy matters, so that their validity could not be affected by the exclusive competence enjoyed by the Community under the CCP. The Court held instead that the powers retained by the Member States 'must be exercised in a manner consistent with Community law'.[31] Hence, any additional measures, even where adopted in the exercise of national competence in matters of foreign and security policy, must respect Community rules adopted under Article 113 (now 133) EC.

The Court was then asked to rule on the compatibility of national import

[29] In the words of Jacobs AG, '[m]any measures of commercial policy may have a more general foreign or security policy dimension. When for example the Community concludes a trade agreement with Russia, it is obvious that that agreement cannot be dissociated from the broader political context of the relations between the European Union, its Member States, and Russia' (Case C-124/95 *Centro-Com* [1997] ECR I-81, para 41).

[30] These include development cooperation, environmental policy and the visa, asylum, and immigration policies.

[31] Case C-124/95 (n 29) para 25.

restrictions on dual-use goods with Community law. The first regime for dual-use items and technology exports consisted of an integrated mechanism—based on both the EC and CFSP pillars of the Union—establishing a rigid separation between political and economic aspects: a uniform system of export controls was set out in a Community regulation on the basis of Article 133) EC,[32] while measures regarded by the Member States as having a strategic nature were the object of a Joint Action pursuant to Article J.3 (now 14) TEU.[33] The Court, which had already found dual-use goods to fall within the scope of Community law,[34] established the applicability of Article 133 to export control on dual-use goods, holding that a measure, the effect of which is to prevent or restrict the export of certain products, cannot be deemed to fall outside the scope of the CCP on the ground that it has foreign policy and security objectives.[35] The matter has since been reallocated to the Community and a new regime introduced, based on the EC Treaty exclusively.[36]

With the exception of Articles 301 and 60 EC on economic and financial sanctions, the EU Treaty does not contemplate any specific rules for determining whether—and under which circumstances—one legal order is to take precedence over the other. It has, however, introduced a few general provisions on the relationship between the pillars and on the exercise of powers in the various policy-making areas of the Union. Article 3(1) TEU, for example, provides for the consistency and continuity of the activities carried out in order to attain the objectives of the Union and, in particular, for the overall consistency of the EU's external activities 'in the context of its external relations, security, economic and development policies'.[37] The Council and the

[32] Council Regulation (EC) 3381/94 of 19 Dec 1994 (OJ 1994 L 367/1).

[33] Joint Action 94/942/CFSP of 19 Dec 1994 (OJ 1994 L 367/8).

[34] Case C-367/89, *Aimé Richardt* [1991] ECR I-4621, see I Govaere and P Eeckhout 'On Dual Use Goods and Dualist Case Law: The Aimé Richardt Judgment on Export Controls' (1992) 29 CML Rev 941.

[35] Case C-70/94, *Werner* and Case C-83/94, *Leifer* [1995] ECR I-3189 and I-3231, respectively. For a comment, see N Emiliou 'Restrictions on Stategic Exports, Dual-Use Goods and the Common Commercial Policy' (1997) 22 ELR 68, at 74 and P Koutrakos 'Exports of Dual-Use Goods Under the Law of the European Union' (1998) 23 ELR 235, at 237.

[36] Council Decision 2000/9429/CFSP of 22 June 2000 (OJ 2000 L 159/218) repealing Joint Action 94/942/CFSP of 19 Dec 1994, and Council Regulation (EC) 1334/2000 of 22 June 2000 (OJ 2000 L 159/1). For a recent study, see B Weidel 'The Community Export Control System for Dual Use Goods—A Story of Reconquering Lost Ground?' in S Griller and B Weidel (eds) *External Economic Relations and Foreign Policy in the European Union* (Springer Wien New York 2002) 419.

[37] A distinction has been drawn in literature between 'horizontal' consistency, ie between the EC external relations and the CFSP (Art 3 TEU) and 'vertical' consistency, ie between the Union and its Member States (Art 13 (3) TEU), see HG Krenzler and HC Schneider 'The Question of Consistency' in E Regelsberger, P De Schouteete, and W Wessels (eds) *Foreign Policy of the European Union: From EPC to CFSP and Beyond* (Boulder 1997) 133, at 133 and Neuwahl (n 12) 235. Also, it has been noted that 'consistency' (as in the English version of the EU Treaty) indicates absence of contradictions, while 'coherence' (as in many other language versions) refers to positive connections. Clearly, the two terms have different meanings, since 'concepts of law can be more or less coherent, but they cannot be more or less consistent—they are either

Commission share the responsibility for ensuring such consistency. As a common provision of the EU Treaty, this provision is non-justiciable.[38] However, the Court referred to the requirement of consistency in the specific context of economic and financial sanctions, in order to justify recourse to the additional legal basis of Article 308 EC when Articles 301 and 60 EC do not give the Community institutions the power necessary to act for the purpose of attaining an objective pursued by the Union and its Member States under the CFSP.[39]

But the central provision is Article 47 TEU, according to which—with the exception of the provisions modifying the founding Treaties—'nothing in [the EU] Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them'.[40] This provision has two functions: it sets aside the general rule of Treaty law that a later Treaty (in this case the TEU) supersedes an earlier Treaty (in this case the EC and EURATOM Treaties) relating to the same subject-matter[41] and it reflects the objective of the Union to preserve the integrity of the *acquis communautaire*.[42] The activities of the Union must be carried out 'while respecting and building upon the *acquis communautaire*':[43] it is among the

consistent or not' (C Tietje 'The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy' (1997) 2 EFAR 211, at 212–13), but both are essential to the development of an integrated external policy, M Cremona 'External Relations and External Competence' in P Craig and G de Búrca (eds) *The Evolution of EU Law* (OUP Oxford 1999) at 169.

[38] According to some authors, the requirement of consistency in Art 3 TEU is linked to the principle of loyal cooperation in Art 10 EC—which prevents action being taken outside the Community framework when this would harm the development of the Community—in a way that would make it binding for the Community, see RA Wessel 'The Inside Looking Out: Consistency and Delimitation in EU External Relations' (2000) 37 CML Rev 1135, at 1150 and Cremona (n 37) 170.

[39] Case T-306/01 and Case T-315/01 (n 8).

[40] See also Art 29 TEU, which states that Police and Judicial Cooperation in Criminal Matters shall be carried out 'without prejudice to the powers of the European Community'.

[41] In this respect, Art 47 constitutes a subordination clause in the sense of the 1969 Vienna Convention on the Law of Treaties, which states that '[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail' (Art 30(2).

[42] Y Petit 'Commentaire à l'article M' in Constantinesco et al (n 5) 871, at 872.

[43] Since the EU Treaty does not offer any definition of what actually constitutes the *acquis communautaire*, the substance of the notion is rather difficult to ascertain. The traditional concept of *acquis* has been developed in the context of the successive accessions to the Community: new Member States must adhere to the EC founding treaties, to international agreements concluded by the Community and to Conventions stipulated under Art 293 EC, to secondary legislation and to other acts of the institutions, including measures whose legal status is unclear (eg the acts of the representatives of the Member States and other measures generally referred to as 'soft law': see C Curti Gialdino 'Some Reflections on the Acquis Communautaire' (1995) 32 CML Rev 1089, at 1089). It extends besided to the case law of the ECJ and to the general principles of Community law. For a comprehensive assessment, S Weatherhill 'Safeguarding the acquis communautaire' in T Heukels, N Blokker, and M Brus (eds) *The European Union after Amsterdam. A Legal Analysis* (Kluwer The Hague 1998) 153.

objectives of the Union to mantain in full such *acquis* and build on it (Article 2 TEU).[44]

The requirement to safeguard the *acquis* is aimed at ensuring respect for the Community legal order, by preserving the substantive competences and the decision-making process of the EC from the activities undertaken by the Member States and by the institutions of the Union in the field of intergovernmental cooperation. To this end, it is essential to avoid any confusion or overlap between their respective competences, when defining and implementing the policies of the Union. The Court has a relevant role to play in this respect: though not explicitly enshrined anywhere in the EU Treaty, its jurisdiction may be derived from Article 46, in conjunction with Article 47 TEU. As illustrated above, Article 46 exempts intergovernmental matters from the jurisdiction of the ECJ. However, subparagraph (e) also states that the provisions of the EC Treaty concerning the powers of the Court and the exercise of those powers shall apply to the final provisions of the EU Treaty—which include Articles 46–53. Article 47, therefore, can be deemed to lie within the jurisdiction of the Court.[45] Consequently, it confers jurisdiction upon the Court to ensure that intergovernmental measures and procedures do not encroach upon the powers conferred by the EC Treaty on the Community as regards other Community policies.

The Court was called upon to interpret this provision in *Airport Transit Visa*. The case originated from an action of annulment brought against a Council act adopted under Title VI of the EU Treaty but which, according to the Commission, should have been based on Title IV of the EC Treaty. The UK argued that the application was to be declared inadmissible, the jurisdiction of the Court pursuant to Article 46 being limited to reviewing measures whose legal basis is an EC Treaty provision. Fennelly AG, however, opined that the fact that the contested measure had been adopted under the EU Treaty did not prevent the exercise of the Court's powers of judicial review under the EC Treaty. He noted that the Court must be able to determine whether, in exercising their powers under Titles V and VI of the EU Treaty, the Council and the Member States do not encroach on the powers attributed to the

[44] It has been noted that the principle of consistency and the requirement to safeguard the integrity of the *acquis communautaire* are only partially targeted to the same aspects of policy-making: whereas the former aims at ensuring material consistency (ie conformity of the substance or content of EU action), the latter may impose an automatic choice for a certain set of legal instruments—and thus extends to procedural aspects, as the choice of legal basis determines which procedures are to be followed. Once this choice has been made, consistency comes into play for the specific content of the measure, B Weidel 'Regulation or Common Position—The Impact of the Pillar Construction on the Union's External Policy' in Griller and Weidel (n 36) 23, at 35–6.

[45] See A Dashwood (ed) *Reviewing Maastricht. Issues for the 1996 IGC* (LBE Cambridge 1996) at 218; Macleod et al (n 21) 414; M Cremona 'The Common Foreign and Security Policy of the European Union and the External Relations Power of the European Community' in D O'Keeffe and P Twomey (n 12) 247, at 256; JHH Weiler 'Neither Unity Nor Three Pillars—The Trinity Structure of the Treaty on European Union' in J Monar, W Ungerer and W Wessels (eds) *The Maastricht Treaty on European Union* (European Interuniversity Press 1993) 49, at 53.

Communities under the respective founding and amending Treaties. The Court was therefore 'not merely empowered, but obliged' to rule on whether a Council act which, on its face, had been adopted under Title VI, fell more properly within Community competence, as determined by Article 47. In so doing, the ECJ was neither interpreting provisions of the EU Treaty which are outside its jurisdiction, nor deciding whether acts are validly adopted thereunder, but was 'considering such acts only in their relation to the Community Treaties, where the Court's powers are incontestable'.[46] Following the opinion of the Advocate General, the Court dismissed the alleged lack of jurisdiction, finding that the terms of Article 46 allowed it to exercise judicial powers in relation to Article 47 and concluding that it was its task 'to ensure that acts which, according to the Council, fall within the scope of [Title VI] of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community'.[47] This was recently confirmed by the ECJ in *Commission v Council*.[48]

Both cases concerned the legality of measures adopted under Title VI of the EU Treaty, but scholars consistently point out that the reasoning of the ECJ in this context would apply, *mutatis mutandis*, equally to acts adopted in the field of CFSP. An opportunity to verify this was missed in *Miskovic* and *Karic*.[49] The applicants, citizens of the FRY, had challenged the choice of legal basis for the visa ban issued against them by means of a CFSP act,[50] arguing that the power to impose travel restrictions within the Union on third country nationals fell within the exclusive competence of the Community to conduct an immigration and asylum policy under Title IV of the EC Treaty. The case was discontinued following amendment of the contested measure by the Council. More recently, two further Second Pillar measures have been challenged before the Court.[51] On 21 February 2005, the Commission brought an action of annulment against a Council decision,[52] implementing a joint action on the EU's contribution to combating the destabilizing accumulation and spread of small arms and light weapons.[53] The Commission is also seeking a declaration of illegality of the joint action itself, which is an act of a general legislative nature on which the challenged CFSP decision is based. According to the institution, the contested measures affect Community powers in the field of development aid, and are therefore in breach of Article 47 TEU: not only does the Cotonou agreement already cover actions taken against the spread of

[46] Opinion of 5 Feb 1998, paras 8–16.
[47] Case C-170/96, *Commission v Council* [1998] ECR I-2763, paras 15–16.
[48] Case C-176/03 (n 3) para 39.
[49] Cases T-349/99 and T-350/99.
[50] Council Decision 1999/612/CFSP of 13 Sept 1999, amending Council Decision 1999/424/CFSP, implementing Council Common Position 1999/318/CFSP concerning additional restrictive measures against the FRY (OJ 1999 L 242/32).
[51] Case C-91/05, pending.
[52] 2004/833/CFSP of 2 Dec 2004 (OJ 2004 L 359/65).
[53] 2002/589/CFSP of 12 July 2002 (OJ 2002 L 191/1).

small arms and light weapons, but the Commission has concluded, pursuant to the same agreement, a Regional Indicative Programme for West Africa, giving support to a regional policy of conflict prevention and good governance, and providing for a moratorium on the import, export and production of light weapons in West Africa. Hence, the Commission argues, the Council lacked the necessary power to adopt the contested act under Title V of the EU Treaty.

In the light of the above case law, it seems established that it falls within the jurisdiction of the Court, by virtue of the combined provisions of Articles 46(e) and 47 TEU, to ensure that no legal instrument adopted under Title V of the EU Treaty undermines the *acquis communautaire*. A number of issues remain, however, unresolved.

In *Airport Transit Visa*, the Commission challenged a measure adopted by the Council on the basis of Article K.3 TEU,[54] arguing that it should in fact have been based on Article 100C EC (now repealed) giving the Community competence to determine the third countries whose nationals must be in possession of a visa for the crossing of the external borders of the Member States.[55] Given the existence of a specific legal basis in the EC Treaty for the adoption of the relevant legislation, the Commission claimed that the Council had no discretion to have recourse to a legal basis in the EU Treaty. Fennelly AG considered that, in order to rule on the legitimacy of the contested measure, it was first necessary to determine whether the latter could—though purportedly adopted under the Third Pillar—be regarded as a Community act, subject to judicial review pursuant to Article 230 EC. A finding that the measure in question was illegal could not flow simply from the fact that its subject-matter fell within the sphere of Community competence, but was subject to its actually being in breach of the EC Treaty (para 46). The Court ruled instead that the fact that the subject matter of the contested act fell within the scope of Community competence represented the only criteria against which to assess its legality, in which case it would have jurisdiction to annul the measure in question (para 17). Since the content of the joint action was found not to be within the scope of Article 100C, however, the Court dismissed the action on its merits.

As a result, the question of the possible effects of the annulment of a measure adopted by the Member States outside the Community framework remains a matter of speculation. Indeed, one may wonder whether the power to annul a formally non-Community act has actually been granted to the Court

[54] Council Joint Action 96/197/JHA of 4 Mar 1996 (OJ 1996 L 63/8).

[55] In the field of harmonization of visa policy, the Council had previously adopted Regulation (EC) 2317/95/EC of 25 Sept 1995 (OJ 1995 L 234/1) but airport transit visas had been left outside the scope of the legislation, which was subsequently annulled by the Court (Case C-392/95, *Parliament v Council* [1997] ECR I-3213). Since the entry into force of the Amsterdam Treaty, the visa, asylum and immigration policies have been dealt with in the framework of the EC Treaty, and are thus fully within the competence of the Community—but for the exceptions as regards the role of the Court pursuant to Art 68 EC.

by Articles 46 (e) and 47 TEU. Given that the contested measure had been taken in the intergovernmental framework, and that judicial supervision by the Court does not extend to Council decisions adopted in this context, it has been suggested that a ruling on the 'irrelevance or inefficacy of such an act in the Community order' would have been more pertinent: the Court might, at the most, annul any Community provisions taken in implementation of the intergovernmental measure.[56] It remains doubtful whether the combined effect of Articles 46(e) and 47 may result in the conferral upon the ECJ, in respect of provisions of Title V of the EU Treaty, of the same powers of judicial review which it enjoys under the Community Treaty. This is no longer an issue in respect of the Third Pillar, given that under Article 35 TEU the ECJ has in the meantime acquired jurisdiction to rule on actions of annulment in respect of some category of acts adopted in the field of Police and Judicial Cooperation in Criminal Matters.[57]

Also, the fact that such an approach towards jurisdiction at the margins of foreign policy was adopted by the Court in the context of an action for annulment does not seem to exclude the matter being raised in the context of a preliminary ruling on the validity of the acts of the institutions. It has been argued that national courts are under a duty to make a reference under Article 234 EC on the validity of a measure adopted pursuant to the EU Treaty, in accordance with the *Foto-Frost* case law,[58] in cases where the legal basis of an EU decision that has been implemented in the domestic legal order is questioned before a national court.[59] What is more, the Court of First Instance recently found that—even though it had no jurisdiction over acts adopted under Title VI of the EU Treaty, except under the conditions laid down in Article 35 TEU—it was competent to rule on an application for compensation for damages allegedly flowing from the adoption of such acts, in so far as the applicants relied on a misuse of powers on the part of the Council acting in the

[56] R Baratta 'Overlaps between European Community Competence and European Union Foreign Policy Activity' in E Cannizzaro (ed) *The European Union as an Actor in International Relations* (Kluwer The Hague 2002) 51, at 58–9.

[57] As was recently confirmed by the successful challenge brought by the Commission against the Council in Case C-176/03 (n 3). The Commission had argued that both the the purpose and content of Framework Decision 2003/80/JHA of 27 Jan 2003 on the protection of the environment through criminal law (OJ 2003 L 29/55) were in fact clearly a matter of EC competence. Although, as a general rule, neither criminal law nor the rules of criminal procedure fall within the competence of the Community, the latter is not prevented from taking measures which relate to the criminal law of the Member States, when it considers that the application of effective, proportionate and dissuasive criminal penalties by the national authorities is an essential measure for combating serious environmental offences. Since the contested provisions of the decision had as their main purpose the protection of the environment, the Court found that they could have been properly adopted on the legal basis of Art 175 EC. Therefore, the contested decision encroached on the powers conferred upon the Community and was annulled for being in breach of Art 47 TEU.

[58] Case 314/85 [1987] ECR 4199.

[59] See DM Curtin and IG Dekker 'The EU as a 'Layered' International Organization: Institutional Unity in Disguise' in Craig and de Búrca (n 37) 83, at 123.

field of Title VI, which results in an encroachment on the competence of the Community and deprives them of judicial protection.[60] Once again, the same reasoning could extend to measures adopted in the field of CFSP.

Finally, the judgment in *Airport Transit Visa* failed to specify under which conditions recourse to intergovernmental cooperation pursuant to the EU Treaty may be preferred to action in the framework of the EC Treaty. No distinction is made, based on the (exclusive, concurrent or shared) nature of the EC competence—or on whether the Community had already acted in the field at issue. It is clear that neither the Member States nor the institutions of the Community may take action in respect of a matter within exclusive Community competence outside the Community framework. But is protection of the *acquis communautaire* limited to areas falling within the exclusive competence of the Community, or does it extend to the entire range of Community activities? The Court seems to imply that it intends to protect Community competence against encroachment from the exercise of concurrent or shared powers by the Member States outside the framework of the EC Treaty. As a result, non-exclusive EC competence would preclude any Second or Third Pillar acts coming within its scope—even though it does not preclude national acts, or even acts of the Member States meeting in the Council.[61] This would grant preference to Community competence over alternatives offered by the intergovernmental pillars, meaning in principle that 'if something *can* be done via the EC, it *must* be done via the EC'.[62] As a result, the CFSP would not cover 'all areas of foreign and security policy', but have 'residual character',[63] ie extend to those areas where external action on the part of the Member States has not been excluded, because it comes within the scope of the EC Treaty. Some clarification in this respect will hopefully be provided by the Court in the aforementioned Case C-01/05.

In drawing the line between the First and Second Pillars of the Union and determining the proper scope of Community competence, the Court is effectively exercising its jurisdiction over CFSP measures indirectly, for having

[60] Case T-333/02, *Gestoras pro Amnistía* and Case T-338/02, *Segi* orders of 7 June 2004 (not yet reported), paras 41–2 of the latter.

[61] Eeckhout (n 16) 150 notes that such an approach to the relationship between Community and Union powers seems different from that taken by the Court in respect of the relationship between Community and Member States' powers. Indeed, in *Bangladesh* (Joint Cases C-181/91 and C-248/91, *Parliament v Council and Commission* [1993] ECR I-365) the Court first established that the Community competence was concurrent, and then accepted that Member States could act, even in common, as long as the Community had not.

[62] Weatherhill (n 43) 159–60. According to Eeckhout (n 16) 151, where the EC Treaty confers upon the Community powers for a specific form of foreign policy such as commercial policy and development cooperation, those powers take precedence, as *lex specialis*. Weidel (n 44) 49 lays out a different model, whereby matters falling into concurrent EC competence can be dealt with by EU law, as long as the Community has not enacted specific rules or occupied the field, whereas in the case of parallel or complementary competences, the decision-makers are free to make use of CFSP or PJCCM instruments, provided that EU law is compatible with EC law.

[63] B Martenczuk 'Cooperation with Developing Countries: Elements of a Community Foreign Policy' in Griller and Weidel (n 36) 385, at 412.

been adopted under an incorrect legal framework. This occurs whenever—as illustrated above—adoption under the Community Treaty is prevented and the matter is dealt with in the framework of intergovernmental cooperation. But arguably the Court would have similar indirect jurisdiction also in respect of instances of 'cross-pillar mixity' or 'hybrid acts',[64] ie measures covering both matters falling within Title V of the EU Treaty and matters governed by the EC Treaty, and thus having either a dual legal basis in the EC and EU Treaty, or a single legal basis within Title V. So far, there have only been examples of measures combining different legal bases within the EU Treaty,[65] and it remains to be seen whether recourse to a legal instrument, having one legal basis in the Community framework and another one in an intergovernmental pillar of the Union, would prove acceptable.[66] Instead, the Council has been increasingly referring, within a single legal instrument, to the different competences and procedures regulated by the Community and Union Treaties, notably in connection with international agreements.

At present, the EU may negotiate and conclude international agreements in the field of CFSP on the basis of Article 24 TEU.[67] Over the years, the practice of the institutions has shown a preference for unitary action and a tendency to bring matters belonging to other pillars within the scope of this provision. For instance, the agreement with Lebanon on terrorism signed in 2002 covers matters falling within the Second and Third Pillars, but also within the competence of the Community. The choice of a single legal basis for a distinctly 'cross-pillar' instrument, perhaps acceptable as far as the two intergovernmental pillars are concerned, may be doubted with respect to the inclusion of matters falling within Community competence—for which a specific Community legal basis is provided in Article 300 EC—into a single international agreement, negotiated and concluded under the CFSP. Problems

[64] Neuwahl (n 12) 246.

[65] eg Council Joint Action 96/688/CFSP of 22 Nov 1996 (OJ 1996 L 309/7)—which sought to strengthen the anti Helms-Burton legislation adopted by the Community (Council Regulation (EC) 2271/96 of 22 Nov 1996, OJ 1996 L 309/1) following the adoption by the US of sanctions measures against Cuba, Iran and Libya—had a dual legal basis under Arts 15 and 34 TEU. The two Council Common Positions of 27 Dec 2001 relating to the fight against terrorism (2001/930/CFSP and 2001/931/CFSP, OJ 2001 L 344, at 90 and 93 respectively) also contained objectives and priorities for action by the Union in both the Second and the Third Pillar. The First Pillar aspects of the anti-terrorist legislation, however, were implemented by Council Regulation (EC) 2580/2001 of 27 Dec 2001 (OJ 2001 L 344/70). See L Benoit 'La lutte contre le terrorisme dans le cadre du deuxième pilier: un nouveaux volet des relations extérieures de l'Union européenne' (2002) Rev Droit Un eur 283, at 302. According to Wessel (n 38) 1148, any issues of delimitation or supremacy between the Second and the Third pillar in case of conflicting provisions would have to be solved by applying the rule that *lex specialis derogat lege generali*: the scope of CFSP would be limited by the activities conducted in the field of PJCCM, regardless of their potential 'foreign policy' nature.

[66] Wessel (n 38) 1148–9 is in favour of such a possibility. *Contra* CWA Timmermans 'The Uneasy Relationship between the Communities and the Second Pillar: back to the 'Plan Fouchet'?' (1996) 1 LIEI 61–70, at 69.

[67] The procedure set out in this provision applies equally to the negotiation and conclusion of international agreements with third countries in the field of PJCCM (Art 38 TEU).

may arise in the coordination of Articles 24 TEU and 300 EC, which lay down two separate procedures for the negotiation and conclusion of international agreements by the Union and the Community. For example, the former provides for the association of the Commission, but not for the extensive powers which the European Parliament normally enjoys in respect of international agreements. Since, according to the case law of the Court, the correct legal basis is determined by the predominant subject-matter of the agreement,[68] it seems that recourse to a single legal basis may be had, provided that the provisions falling within Community competence are of a subsidiary or ancillary nature (ie they cannot change the essential objective of the agreement)[69] or, alternatively, if it is necessary under the principle of loyal cooperation, as in the case of traditional mixed agreements.[70] The issue was again raised in the context of the recent negotiation of an agreement with Switzerland, concerning its participation in the Schengen *acquis*. The directives for negotiation issued by the Council on 17 June 2002 foresaw a single text, to be negotiated on behalf of both the EC (by the Commission) and the EU (by the Presidency) for the Community and Third Pillar aspects of the Schengen *acquis*, respectively. The Commission argued that a distinct agreement for each pillar should be concluded, in view of the differences in procedure and legal effects of the two pillars.[71] The Council replied that the joint conclusion of an agreement by the Community and the Union was legally comparable to the established practice of the Council and the Commission, repeatedly confirmed by the Court, whereby international agreements are negotiated and concluded jointly by the Communities and the Member States, relying on different procedures under the different Treaties. In the Council's view, the negotiation and conclusion of two separate agreements 'would raise legal and institutional difficulties which could jeopardize the proposed

[68] Opinion 2/00 [2001] ECR I-9713, paras 22–3; Case C-281/01, *Commission v Council* (*Energy Star*) [2002] ECR I-12049, para 39.

[69] Opinion 1/78 [1979] ECR 2871, para 56.

[70] Opinion 1/94 [1994] ECR I-5267 and Case 25/94, *Commission v Council* [1996] ECR I-1469.

[71] The Commission noted that the application of the ratification procedure under Arts 24 and 38 to those parts of the agreement falling under Community competence would be in clear violation of EC Treaty provisions. Also, the EC-Treaty based part of a single cross-pillar agreement would require the opinion or the assent of the European Parliament, which would be contrary to the EU Treaty. As for the Court of Justice, not only was there a risk of its limited jurisdiction over the Third Pillar being extended to First Pillar issues, but a declaration of invalidity or a ruling on interpretation could affect the Third Pillar aspects of the agreement. Finally, whereas a classical mixed agreement combines matters of Community and Member State competence into a single agreeement, a cross-pillar agreement confronts two treaties, each with their specific attribution of powers to the institutions (or lack thereof): this kind of mixity might lead to an adaptation of the allocation of powers of the institutions which would be in clear contravention of the EC Treaty. The document containing the statement by the Commission (Doc 9110/02 of 25 June 2002) has not been published, but a copy of the statement was made available to members of the European Convention Working Group on Legal Personality at their meeting of 26 June 2002.

Agreement's aims, given that the Schengen *acquis* forms an inseparable whole'.[72] The final text of the Agreement does not make formal reference to Articles 24 and 38 TEU but is, in its substance, an agreement concluded at the same time in the name of the Union and of the Community.

A different issue arose in connection with the opening of negotiations by the European Union for the conclusion of two separate international agreements with Iran—a political agreement under Article 24 TEU, covering the CFSP and PJCCM matters relating to the fight against terrorism, and a trade and cooperation agreement under Article 133 EC. Concerns were voiced over a declaration, which would subordinate any decision by the Community on the suspension or termination of the trade agreement to a decision by the Union on the inconclusiveness of the political dialogue or of the anti-terrorism clause in the political agreement. The issue was finally settled by a common declaration by the Council and the Commission.[73]

This last example shows that a prejudice for the *acquis communautaire* as a result of intergovernmental activity may not only derive from the choice of legal basis for a measure; it may also be the result of the substance of a measure, which has been lawfully adopted under Title V of the EU Treaty, but which violates the EC Treaty provisions as regards the powers of the institutions within the Community legal order, or the procedural rules regarding the Community policy-making process. In other words, even where it does not entail an actual reduction of Community competence through an unlawful choice of legal basis, the activities carried out by the Member States within the framework of the Second Pillar may still negatively affect the powers of the Community institutions, and prejudice the specific procedures laid down in the EC Treaty. This is because the action of the Union in the field of foreign policy on the basis of Title V of the EU Treaty may have to be followed—indeed, it often is—by implementing activity undertaken at Community level. In order to put measures agreed in the framework of CFSP into effect, the Union needs to have recourse to the procedures established by the relevant provisions of the EC Treaty (notably, where it intends to make use of economic means to put pressure to bear on third countries for political ends). Can a CFSP instrument impose legal obligations on the Community and produce legal effect within the framework of the First Pillar, or should any impingement on Community action by the Council, deciding in the framework of the Second Pillar, be ruled out because it runs the risk of EC procedures being not only substituted for, but subordinated to, decision-making in the field of CFSP? Pursuant to Article 47 TEU, it seems clear that 'a Title V

[72] See the minutes of the General Affairs Council held in Luxembourg on 17 June 2002 (Doc 10062/02 of 8 Oct 2002).

[73] As reported by JP Kuijper in his intervention before the Working Group on Legal Personality on 26 June 2002 (Working Document No 3 of 3 July 2002. All the documents of the Convention are available on <http://european-convention.eu.int>).

instrument may not itself take legislative or executive action which could only lawfully be taken under the Community Treaties; nor can it legally bind the Communities or their institutions acting in accordance with the powers conferred on them by the Community Treaties'.[74]

So far, the practice of the institutions has shown that the risk of this type of encroachment of CFSP activity on Community competence is not merely hypothetical: on the contrary, recurrent institutional wrangles have emerged since the entry into force of the EU Treaty. For example, on the occasion of the adoption of the first common positions by the Union,[75] the issue arose whether—and to what extent—decision-making by the Council on CFSP matters might prejudice the exercise of Community powers. It was felt that, by making reference to (current or future) Community action in the operative part of a CFSP act,[76] the Council was clearly encroaching on EC competences and procedures. In the end, it was agreed to note that Union instruments would be implemented through the relevant Community measures, where appropriate on the basis of a proposal by the Commission. The Council subsequently issued an informal operational guide for the scope and content of EU common positions.[77] These may define the objectives, priorities and guidelines for the full scope of the external activities of the Union, and thus address areas of Community action. However, they must preserve the powers of the institutions, comply with the procedures governing the exercise of such powers and respect the rules for adopting decisions established by the EC Treaty. They may not require Community action but only, if necessary, take note of measures already adopted under the First Pillar, or of proposals which the Commission intends to put forward for the implementation of specific Community decisions arising out of the common position.

Concerns were also raised over the two-step procedure introduced at Maastricht for the adoption of economic sanctions against third countries consisting of a Council decision (generally, a common position) adopted on the basis of Title V of the EU Treaty, followed by a Community regulation based on Article 301 EC (and/or on Article 60 EC, in the case of financial sanctions) adopted by qualified majority on a proposal from the Commission. Since recourse to a Community measure is only had once a corresponding action under the Second Pillar has been agreed,[78] the Commission feared that the unanimity rule required for the adoption of CFSP decisions may extend, in

[74] Macleod et al (n 21) 416. See also Wessel (n 38) 1156.

[75] Council Common Position 94/779/CFSP of 28 Nov 1994 on the objectives and priorities of the Union towards Ukraine (OJ 1994 L 313/1) and Council Common Position 94/697 of 24 Oct 1994 on Rwanda (OJ 1994 L 283/1).

[76] As opposed to such a reference being inserted in the preamble, as suggested by Timmermans (n 66) 63.

[77] Doc 5194/95 of 6 Mar 1995. The document has not been published, but access may be obtained from the Council Secretariat.

[78] Wessel (n 38) 1159; Macleod et al (n 21) 355; Weidel (n 44) 28, n 13.

practice, to the adoption of EC regulations, and influence both the opening of the Community procedure and the contents of the Community measure.[79] Undoubtedly, the prerogatives of the Commission—in particular, its exclusive right of initiative—cannot be impaired by the adoption of an act on the basis of the EU Treaty. As a result, should the Council adopt a measure restricting economic relations directly by means of a decision on the basis of Title V, the Commission could rely on *Airport Transit Visa* to challenge the legality of such measure.[80] But is adoption by the Council of a CFSP decision, providing for recourse to economic measures, binding for the Commission, in the sense that the latter would be obliged to put forward the relevant proposals for implementation within the Community framework? Arguably, a refusal by the Commission could not lead to an action for failure to act under Article 232 EC, since the CFSP cannot be regarded as a source of legal obligations for the Community institutions.[81] However, the CFI has held that Articles 301 and 60 EC are 'quite special' provisions of the EC Treaty, explicitly establishing a bridge between Community actions imposing economic and financial sanctions and the objectives of the EU Treaty in the sphere of external relations. In the specific context of sanctions, 'action by the Community is . . . in fact action by the Union, the implementation of which finds its footing on the Community pillar after the Council has adopted a common position or a joint action under the CFSP'.[82] Articles 301 and 60 EC represent, therefore, an express exception to the general rule that Union law may not be legally binding for the institutions acting under the First pillar (they are 'modifications of the Treaty' for the purposes of Article 47) and an example of 'explicit subordination of the Community to CFSP decision-making'.[83]

A further problematic issue arose with the introduction of common strategies in the Amsterdam Treaty. Although established on the basis of Article 13 TEU, these are CFSP measures of a purportedly 'cross-pillar' nature,[84] which are meant to facilitate the coordination of the external policies and instruments of both the Community and the Union across the entire range of Union activity.[85] As such, they may need to be implemented through instruments

[79] Report to the 1996 IGC on the Operation of the Treaty on European Union, 10 May 1995, para 168.

[80] Neuwahl (n 12) 245.

[81] N Angelet 'La mise en œuvre des mesures coercitives des Nations Unies dans la Communauté européenne' (1993) RBDI 500, at 519 and P Gilsdorf 'Les réserves de sécurité du Traité CEE à la lumière du Traité sur l'Union européenne' (1994) RMC 17, at 22 (with respect, however, to the pre-Maastricht situation and the European Political Cooperation).

[82] Case T-306/01 (n 8) paras 160–1.

[83] Wessel (n 38) 1159 and Timmermans (n 66) 68.

[84] Denza (n 11) 291. See also the Presidency's Progress Report on the Implementation of the Common Strategy and the Presidency's Work Plan, submitted to the Helsinki European Council, Press Release No 13860/99.

[85] C Spencer 'The EU and Common Strategies: The Revealing Case of the Mediterranean' (2001) 6 EFAR 31, at 36.

other than those available in the CFSP framework.[86] Their all-encompassing nature has led to speculation as to the development of a hierarchy of acts in the EU's external relations, with the Community external policies increasingly subject to the objectives and instruments of CFSP.[87] However, an unconditional precedence of common strategies over Community law, resulting in the Community and its institutions being required either to adopt a specific measure on the basis of, and according to, the specific procedures of the Community framework, or to modify the substance of a Community measure, would undoubtedly affect the *acquis communautaire*, and would be subject to review by the Court.[88] Indeed, all common strategies hitherto adopted (on Russia, Ukraine and the Mediterranean region)[89] clearly state that they shall be implemented in accordance with the applicable procedure of the Treaties.[90]

Such contrasts among institutions are mostly of a political, rather than legal, nature. In general, they are tackled informally through political means, and settled by political compromise. It cannot be ruled out, however, that the ECJ may find itself having to examine the purpose and content of a CFSP measure, if only to interpret the relevant implementing Community legislation—thus reviewing indirectly the compatibility of CFSP acts with Community law.[91] The interactions between the two legal orders based on the EC Treaty and on Title V of the EU Treaty are likely to give rise to legal disputes touching upon not only the delimitation of competences between the Union, the Community and the Member States, but also the very boundaries of the jurisdiction of the Court.

[86] For example, the EU Action Plan on Common Action for the Russian Federation on combating organized crime—which implements the EU Common Strategy on Russia, adopted on the basis of Title V—touches in principle upon all three pillars of the Union. It concerns criminal matters referred to in Title VI, but extends to issues dealt with in the Community framework, such as money laundering.

[87] C Hillion 'Common Strategies and the Interface between E.C. External Relations and the CFSP: Lessons of the Partnership Between the E.U. and Russia' in A Dashwood and C Hillion (eds) *The General Law of EC External Relations* (Sweet & Maxwell London 2000) 287, at 287.

[88] Weidel (n 44) 54–55.

[89] 1999/414/CFSP of 4 June 1999 (OJ 1999 L 157/1), 1999/877/CFSP of 11 Dec 1999 (OJ 1993 L 331/1) and 2000/458/CFSP of 19 June 2000 (OJ 2000 L 183/5), respectively.

[90] For example, the Common Strategy on Russia and the Declaration of the European Council attached to it clarify that acts adopted outside the scope of Title V of the EU Treaty shall continue to be adopted according to the appropriate decision-making procedures provided by the relevant provisions of the Treaties, including the EC Treaty and Title VI of the EU Treaty.

[91] Denza (n 11) 320–21. U Everling 'Reflections on the Structure of the European Union' (1992) 29 CML Rev 1053, at 1063 and Neuwahl (n 12) 245 argue that the Court might even incidentally review the compatibility with EC law of the guidelines issued by the European Council, which would thus be subject to the indirect scrutiny of the ECJ. The Court, however, seems to have ruled out that possibility, see orders of 13 Jan 1995, Case C-253/94 P, *Roujansky* and Case C-264/94 P *Bonnamy* [1995] ECR I-7 and I-15, respectively.

III. THE JURISDICTION OF THE COURT OF JUSTICE OVER THE CFSP IN THE CONSTITUTIONAL TREATY

On 29 October 2004, the final text of a Treaty establishing a Constitution for Europe was signed in Rome.[92] The Constitutional Treaty is the outcome of a unique 'constitutional' process. On a mandate from the Laeken European Council, the Convention on the Future of Europe—an assembly of representatives of national governments and parliaments, including delegates from the candidate countries, the European Commission and the European Parliament—was convened, and asked to consider the key issues arising for the Union's future development. The text drawn up by the members of the Convention was subsequently discussed by an Intergovernmental Conference, and a complete text was adopted on 18 June 2004. At the time of writing, however, it is very uncertain whether the ratification process will be completed and the Treaty come into force—in its present form, at least.[93]

The Constitutional Treaty consolidates much of the existing *acquis communautaire*. It also introduces some significant changes to the structure, organization and powers of the European Union. Most notably, it abandons the current distinction between pillars: as a result, the Communities and the Union are brought within one single legal order, and organized by one single set of constitutional provisions.[94] Interestingly, however, neither the Convention nor the IGC deemed it necessary to introduce any substantial amendments to the existing Treaty provisions on the Court of Justice. The Convention did set up a specific 'Discussion Circle' to consider possible changes to the role, structure and functioning of the Court.[95] Most of the proposals put forward by the working party were eventually retained by both the Convention plenary and the IGC. However, these concerned mainly the nomenclature and structure of the Union judicature, and the procedure for judicial appointments. The debate about the future of the Court, which had so recently been conducted in the context of the reforms agreed at Nice—incidentally, yet to be given full

[92] OJ 2004 C 310.

[93] The Constitutional Treaty can only come into force once it has been adopted by each of the signatory countries in accordance with its own constitutional procedures. Pursuant to Art IV-447, it is scheduled to come into force on 1 Nov 2006 or, failing that, on the first day of the second month following the deposit of the last instrument of ratification. A declaration annexed to it stipulates that 'if, two years after the signature of the Treaty . . . four-fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council'. At the time of writing, 11 Member States had completed ratification, with a negative outcome of the *referenda* held in France and the Netherlands. Consequently, the European Council of 16–17 June 2005 called for a period of reflection to intensify and broaden the debate on the Constitution and agreed to alter, if necessary, the timetable for the ratification in different Member States, stating that it would come back to the matter in the first half of 2006 'to make an overall assessment of the national debates and agree on how to proceed' (Doc SN 117/05 of 18 June 2005).

[94] See Art IV-437, on the repeal of the Community and Union Treaties and Art IV-438, on the succession of a new European Union to the present one.

[95] See CONV 543/03 of 7 Feb 2003 and the Final Report of 25 Mar 2003, CONV 636/03.

implementation—was not reopened. The Constitutional Treaty thus leaves largely unmodified the essential features of the judicial architecture of the Union.[96]

One of the most relevant changes may be found in the provisions concerning the scope of the jurisdiction of the Court, consequent to the abolition of the tripartite 'pillar' structure of the Union. Article I-29 of the Constitution states that the Court will henceforth be known as the 'Court of Justice of the European Union'. This appears to confirm the trend towards the Court being considered, and considering itself, as a 'Supreme' or 'Constitutional' Court for Europe: as such it will, in principle, be able to rule on all matters of Union law, but for those exceptions provided for in the Constitution. Accordingly, the jurisdiction of the Court is unified and extended to the whole scope of the Union's activities, including policies on border controls, asylum and immigration, and police and judicial cooperation in criminal matters.[97] The restrictions imposed by way of the special preliminary reference procedures in Articles 68 EC and 35 TEU are abolished as a result.

During the Convention, the need was felt to re-examine the scope of the exclusion of CFSP from the jurisdiction of the Court, allowing for the possibility to review the legality of an action taken by the Union and its institutions in the field of CFSP, particularly where that action may affect the interests and rights of the individual. The Discussion Circle on the ECJ considered, namely:[98]

> (a) Whether Article 46 TEU should be repealed, and the jurisdiction of the Court extended to CFSP matters under the same conditions as those applying to areas currently covered by the EC;

Alternatively, some elements of the Court's competence could usefully be introduced, such as:

> (b) The right for the institutions of the Union and its Member States to bring an action of annulment against CFSP acts, on the grounds that they were taken in violation of the Constitution or of a rule of international law by which the Union or all the Member States have agreed to be bound;

[96] See A Tizzano 'The Court of Justice in the Draft Treaty establishing a Constitution for Europe' in N Colneric et al *Une Communauté de droit—Festschrift für Gil Carlos Rodríguez Iglesias* (Berliner Wissentschafts-Verlag Berlin 2003) 41 and T Tridimas 'The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?' College of Europe Research Paper no 8/2003, also published in T Tridimas and P Nebbia (eds) *EU Law for the 21st Century: Rethinking the New Legal Order* (Hart Publishing Oxford 2004) 113.

[97] With the exception of the validity or proportionality of operations carried out by the police or other law enforcement agencies of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security (Art III-377). This restriction is similar to that currently provided by Art 35 (5) in relation to Third Pillar matters (n 3) with the further qualification that such action be 'a matter of national law'.

[98] See Working Document No 10 of 12 Mar 2003 'Judicial control relating to the common foreign and security policy' and the Supplementary Report of 16 Apr 2003, CONV 689/1/03.

(c) The possibility for national courts to request a preliminary ruling on interpretation, when they have to decide on issues relating to the implementation of CFSP measures by the Member States—similarly to what is currently provided in Articles 68 EC and 35 TEU.[99]

In the end, most proposals to the effect of extending the jurisdiction of the ECJ over foreign policy and security matters proved politically unacceptable for the Member States. This is reflected in Article III-376(1) of the Constitution: the Court of Justice shall not have jurisdiction with respect to the general provisions in Part I concerning the Common Foreign and Security Policy (Article I-40) and the Common Security and Defence Policy (Article I-41), nor with respect to the provisions in Part III concerning such policies (Chapter II of Title V, Articles III-294 to III-313). It shall also lack jurisdiction with respect to Article III-293, insofar as it concerns the CFSP.

The provision in question is similar to Article 46 TEU, but cannot be regarded as its equivalent or successor in the Constitutional Treaty:[100] whereas the jurisdiction of the ECJ over the EU Treaty is generally excluded, except in those areas where it is expressly *conferred* to it and which are exhaustively listed in Article 46 ('shall apply'), the jurisdiction of the Court of Justice under the Constitutional Treaty extends as a general rule over the entire text, but for those instances where it is expressly *excluded* by virtue of Article III-376 (1) ('shall not have jurisdiction'). The general effect of both provisions may be the same, ie to exempt matters concerning foreign, security and defence policy from judicial supervision, but the two provisions are conceptually different, and indeed symptomatic of a shift in perspective.

This is also apparent in the failure to clarify whether the application of the principle of supremacy of Community law—of judicial origin, but formalized in the Constitutional Treaty as a principle of Union law—will extend to measures adopted in the field of CFSP. Article I-6 states, with no exception for the CFSP, that the Constitution and the law adopted by the institutions of the Union in the exercise of their competences shall have primacy over the law of the Member States. There is no indication that the legislation adopted by the Union in the field of foreign, security and defence policy is to have a relationship with the national legal orders which is different from that of the rest of

[99] On the jurisdiction of the Court pursuant to these provisions see, inter alia, H Labayle 'Le Traité d'Amsterdam. Un espace de liberté, de securité et de justice' in AA VV *Le Traité d'Amsterdam* (Paris Dalloz 1998) 105, esp. 153–5 and 165–8; S Peers 'Who's Judging the Watchmen? The Judicial System in the Area of Freedom, Security and Justice' (1998) 18 YEL 337; G Gaja 'The Growing Variety of Procedures Concerning Preliminary Rulings' in D O' Keeffe and P Bavasso (eds) *Judicial Review in European Union Law. Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer The Hague 2000) I, 146; T Tridimas 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 CML Rev 41; B Nascimbene 'Community Courts in the Area of Judicial Cooperation' (2005) 54 ICLQ 489.

[100] Tridimas (n 96) 21.

Union law.[101] However, in so far as the Court has no jurisdiction over CFSP provisions by virtue of Article III-376(1), it is for national courts to ensure respect for—and to determine the binding effect of—CFSP measures, as well as to solve any conflict which may arise between the latter and other provisions of the Constitutional Treaty.[102] It is, however, unclear what would happen if a national court were to make a reference to the Court of Justice for guidance on the effect of Article I-6 in relation to CFSP matters.[103]

As seen above, paragraph 1 of Article III-376 excludes, in principle, the jurisdiction of the Court in the field of CFSP. Paragraph 2, however, provides for two exceptions:

> [t]he Court shall have jurisdiction to monitor compliance with Article III-308 and to rule on proceedings, brought in accordance with the conditions laid down in Article III-365 (4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V.

The first exception originates, as for the EU Treaty, from the very structure of the Union. Consequent to the merger of the pillars, all provisions relating to the various external policies of the Union and the Community have been consolidated into a single text, Title V (on the external action of the Union) of Part III (concerning the functioning of the Union). A separate Chapter II within Title V details the substantive and procedural provisions relating to foreign policy, security and defence. As a result, with the exception of the general or institutional provisions in Part I of the Constitution[104] CFSP provisions have been brought under a single Treaty regime alongside the other external policies of the Union. The Constitutional Treaty, however, has maintained to some degree the peculiar status of the CFSP and has not entirely suppressed its intergovernmental features. The dichotomy between the economic and political external relations of the Union remains very much in existence, and the Union will continue to conduct its external activities according to different procedures,

[101] Dashwood (n 28) 365–6 and E Denza 'Lines in the Sand: Between Common Foreign Policy and Single Foreign Policy' in Tridimas and Nebbia (n 94) 259, at 268.

[102] K Lenaerts and I Maselis 'Le système juridictionnel de l'Union' in M Dony and E Bribosia (eds) *Commentaire de la Constitution européenne* 219, at 237, n 102.

[103] Denza opines that the formalizing of the doctrine of primacy and its extension to the CFSP would cause 'a significant shift in the balance of powers between the Union and the Member States towards the Union' which when taken together with a number of other specific changes to the rules governing the CFSP, would be 'sufficiently fundamental to call into question the ultimate independence of the Member States in the conduct of their foreign policy' House of Lords European Union Committee 'The Future Role of the European Court of Justice' 6th Report of Session 2003–04, HL Paper 47 of 15 Mar 2004, para 39.

[104] Such as Art I-16 on the CFSP, Art I-28 on the EU Minister of Foreign Affairs and Arts I-40 and 41.

[105] Indeed, the current overlap between CFSP and EC external competence is likely to become even more evident than today, giving rise to an increasing number of legal questions, see S Griller 'External Relations' in B de Witte (ed) *Ten Reflections on the Constitutional Treaty* (EUI Florence 2003) 133, at 136 and Eeckhout (n 16) 151.

depending on the policy area.[105] Decision-making procedures in the field of external relations have not been fully harmonized: different legal instruments remain in place and specific institutional and voting arrangements still regulate the exercise of the various competences concerned.[106] Even the explicit conferral of single legal personality to the Union (Article I-7) does not in itself provide a solution to the issues arising from the division of competence within the Union in the field of external relations. Hence, it will still be necessary to provide for both (a) the consistency of the overall external action of the Union, and (b) the delimitation of CFSP with respect to the other external policies. A further, relevant innovation concerns (c) the conferral of limited jurisdiction to the Court with respect to international agreements.

(a) The Constitutional Treaty contemplates two horizontal provisions—or 'provisions having general application'—in the field of the EU external relations: Article III-292 and Article III-293.

Article III-292 lays down a single set of principles and objectives for the development and the implementation of the action of the Union on the international scene.[107] The Constitutional Treaty thus confirms the need for consistency between the different areas of the Union's external action, and between these and the other policies of the Union. The same can be said of the task, entrusted to the Council and the Commission (assisted by the EU Minister for Foreign Affairs, a member of both institutions) to ensure that consistency and to cooperate to that effect. The wording is really not much different from that of the current Article 3 TEU; however, a potentially more powerful institutional mechanism is put in place, designed to ensure not just consistency, but integration of policy and which relies rather more on the European Council.[108] Also, the principle of consistency is no longer found in a provision outside the remit of the jurisdiction of the Court (Article III-376 makes no reference to Article III-292) and appears to have become amenable to judicial review. It remains to be seen whether this would be the case in practice, given the undetermined character of the notion of consistency—which is, besides, of a clearly political nature.

Article III-293 states that the European Council shall adopt European decisions identifying 'the strategic interests and objectives of the Union' and relating to 'the common foreign and security policy and to other areas of the external action of the Union'. It seems safe to assume that the creation of the new European decisions was inspired by the notion of common strategies;

[106] Dashwood (n 28) 364–5 and M Cremona 'The Draft Constitutional Treaty: External Relations and External Action' (2003) CML Rev 1347, at 1366–8.

[107] Cremona (n 13) 571 deems it 'unlikely that the inclusion in the Constitutional Treaty of specific principles and policy objectives governing all aspects of EU external action will present a basis for increased Court involvement . . . [as] the number of disparate objectives will lead inevitably to the recognition that the legislative institutions are entitled in each case to establish a balance between them'—although 'some of the over-arching principles, such as respect for international law, may perhaps be more easily applied'.

[108] ibid 569.

unlike the latter, however, the former do not represent an instrument of the CFSP, but a general instrument for the conduct of the Union's external relations.[109] Consequently, Article III-293 provides for them to be implemented 'in accordance with the procedures provided for in the Constitution'. Also, Article III-376(1) states that they shall be subject to the jurisdiction of the Court of Justice, 'insofar as they do not concern the CFSP'. The Court shall thus have competence to adjudicate on those parts of the European decision which fall outside the scope of CFSP.

(b) In general, under the Constitutional Treaty the Court of Justice would have competence in respect of all instances of interaction and overlap between CFSP and external policies of the Union. As illustrated above, Article III-376 (2) confers jurisdiction upon the Court to monitor compliance with Article III-308.

Article III-308 (1) provides that '[t]he implementation of the CFSP shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Constitution for the exercise of the Union competences as referred to in Articles I-13 to I-15 and I-17'. The wording of this provision differs from that of Article 47 TEU, because the first purpose of the latter—that of preventing the EU Treaty from superseding the EC and EURATOM Treaties—has become redundant, following the disappearance of the European Communities. The second function of Article 47 TEU—namely, the protection of the *acquis communautaire*—is, however, confirmed[110] and the Court is explicitly charged with the task of protecting Union competence from encroachment by the CFSP.[111]

An element of novelty is introduced by Article III-308(2), according to which '[t]he implementation of the policies listed in [Articles I-13 to I-15 and I-17] shall not affect the application of the procedures and the extent of powers of the institutions laid down by the Constitution for the exercise of the Union competences under Chapter II of Title V'. Consequently, the Court may be called upon to intervene not only where action taken pursuant to the CFSP exceeds the limits of CFSP competence, thus impinging on the Union's general competence, but also—conversely—where the action of the Union

[109] Griller (n 105) 137 points to the danger that intergovernmental mechanisms might be favoured over supranational ones: if, following the elimination of the pillar structure, the European Council—whose present task is to 'provide the Union with the necessary impetus for its development' and to 'define the general political guidelines thereof' (Art 4 TEU)—were to be the guardian of the coherence of the external activities of the Union, and could enact binding decisions covering the whole field, this might prejudice all other external activities of the Union, which would appear somewhat subordinated to its overall guiding capacity.

[110] To this extent only, is it then correct to regard Art III-308 as 'the equivalent of the present Art 47 TEU', Dashwood (n 28) 366, n 33.

[111] Curiously, the need to retain a provision similar to that of Art 47 TUE in the new constitutional text was not immediately felt within the Convention, and Art III-376 was only introduced at a relatively late stage of the proceedings, on a recommendation by the Working Party of Legal Experts.

exceeds the limits of Union competence, and impinges on the CFSP.[112] In the present system, no specific provision is made for safeguarding the CFSP from any interference by Community activity: in such instances, the jurisdiction of the Court flows directly from the provisions of the EC Treaty. The Community is an organization of conferred powers, which implies that each action needs to find its legal basis as well as its objective in the Treaty, subject to the supervision of the Court.[113] In exercising their competence under the First Pillar, the institutions must comply with the aims established by the Treaty and cannot act ultra vires—ie for purposes other than those expressly attributed to the Community. Hence, the external policies of the Community cannot pursue foreign policy objectives, unless these happen to coincide with the aims pertaining to areas of Community competence. On the contrary, CFSP consists of measures pursuing broad political objectives, so that its scope can only be defined *a contrario*, through the requirement of non-interference with other Union or Community policies. The obligation imposed upon the Union not to impinge on the CFSP translates into an obligation for the policies of the Union not to pursue foreign and security policy objectives. Given that the Constitutional Treaty has set out, in Article III-292, a single set of objectives for the whole of the external action of the Union, including the CFSP, the precise purpose and functioning of the safeguard clause in Article III-308 (2) is unclear.

There is also ambiguity in the Constitution as to the precise nature of Union competence in foreign policy matters.[114] Although a separate provision is devoted to it—Article I-16 in Title III ('Union competences') of Part I—the CFSP is not listed among the general categories of exclusive or shared competence, nor does it appear to constitute an area of supporting, coordinating or complementary action.[115] Given that both the Union and the Member States have the power to act in the framework of CFSP, but the latter are bound by measures adopted by the former, it would seem to have concurring or shared nature. Instead, a special category of CFSP competence has been introduced, whose nature is left undefined but which appears to be distinct from exclusive, shared, coordinating or supporting competence.[116] This begs the question whether the Council would be entitled to act on the grounds of CFSP provisions as long as it respected existing Union legislation based on its other competences. An interesting issue is whether the Court would find that Union

[112] A Tizzano 'La 'Costituzione europea' e il sistema giurisdizionale comunitario' (2003) 2/3 Dir Un eur 455, at 479.

[113] When Community competence fails to have an express legal basis, its action might still be justified according to either the theleological and *effet utile* approach, or Art 308 EC.

[114] Dashwood (n 28) 366, n 33 observes that Art III-308 provides that the 'implementation' of the CFSP shall not affect the Union's general competences, and vice versa, but says nothing as to how the conditions respectively governing the exercise of the two kinds of competence differ from one another.

[115] ibid at 365. See also Cremona (n 106) 572, n 74.

[116] Griller (n 105) 141.

competence is 'exclusive' in relation to CFSP competence (as seems implicit in *Airport Transit Visa*) or adhere to its case law, according to which every measure exceeding incidental features would in principle have to be based on the relevant competence clauses or, failing that, on the provision it is primarily related to.[117] In which case, the merging of the pillars would prevent recourse to CFSP instruments for measures with a prevailing affinity to other Union competences.[118]

(c) Because of the merging of the pillars and the explicit recognition of the legal personality of the EU, it became necessary to devise a single procedure for the negotiation and conclusion of international agreements. The new treaty-making procedure is laid down in Article III-325 of the Constitution and is modelled on Article 300 EC—albeit a few specificities have been retained for those agreements falling within the field of CFSP. The Discussion Circle on the ECJ considered whether the jurisdiction of the Court to deliver an advisory opinion, currently provided for in Article 300(6) EC with respect to agreements to be concluded by the Community with third countries or international organizations, should be extended to cover international agreements to be entered into by the Union in the field of CFSP. Article III-325(11) follows up on that suggestion, stating that an institution of the Union or a Member State may obtain the advisory opinion of the Court as to the compatibility of an international agreement envisaged with the provisions of the Constitutional Treaty. Since no specific exception is provided for the CFSP, the jurisdiction of the Court pursuant to paragraph 11 would appear to extend to the scope of the entire agreement, whether or not it deals, in part or exclusively, with CFSP matters.

The request for an opinion is likely to concern institutional and procedural matters, such as the procedure for the negotiation and conclusion to be followed, depending on the CFSP content of the agreement. For instance, according to paragraph 3, the Council has the task of choosing the negotiator on behalf of the Union (EU Foreign Minister or Commission) depending on the subject-matter of the agreement. Also, paragraph 6 states that the European Parliament shall be consulted on agreements not touching CFSP exclusively, but it does not elaborate on what would happen in case of an agreement falling partly within the CFSP, and partly within the external relations of the Union. International agreements concluded by the Union under Article III-325 will still need to contemplate separate political and economic chapters, dealing with specific policy fields and agreed under the specific decision-making procedure for that subject. The Court would then have jurisdiction on the delimitation of CFSP with respect to other Union competences, or on the compatibility of the agreement with the material provisions of the

[117] Case C-155/91, *Commission v Council (Waste Directive)* [1993] ECR I-939, para 20.
[118] Griller (n 105) 156.

Constitutional Treaty which are not related to the CFSP.[119] In this respect, the extent of the jurisdiction of the Court would not be limited to an *ex ante* evaluation of the content of the agreement in the context of an advisory opinion procedure, but may extend to an *ex post* review of the latter, for example in the context of an action of annulment brought against the act concluding the agreement,[120] or even under the preliminary ruling procedure. Although the CFSP aspects of the agreement are likely to be based on a CFSP act over which the Court has no jurisdiction pursuant to Article III-376, instances of overlap between the CFSP and other areas of Union competence, such as those described above, relate to precisely the kind of issues referred to in Article III-308, over which the Court has been granted explicit jurisdiction under Article III-376(2).

IV. ABSENCE OF JUDICIAL SUPERVISION OVER THE CFSP AND LEGAL PROTECTION OF THE INDIVIDUALS

The second exception in Article III-376(2) of the Constitutional Treaty to the absence of jurisdiction of the ECJ over foreign policy matters relates to the consequences for individuals, and for respect of their fundamental rights, stemming from the action of the European Union on the international scene. As a general rule, CFSP provisions are directed at Member States and do not contemplate rights and/or obligations for individuals. They are not 'self-executing', in the sense that they would be directly applicable in the national legal orders of the Member States, and capable of being relied upon before national courts.[121] The possibility of measures adopted under Title V of the EU Treaty having direct effect, however, cannot be ruled out.[122] In fact, the Union is increasingly adopting instruments which may affect individuals, directly or indirectly. This is most evident in the field of international economic sanctions.

Recent international practice has seen a reduction in the use of classic general trade embargos against a country and a preference for the imposing of so-called 'smart sanctions'—more targeted and selective measures (such as

[119] Louis and Dony (n 21) 327.

[120] Such actions have been brought on grounds of incompetence of the Commission to conclude an agreement (Case C-327/91, *France v Commission* [1994] ECR 3641, esp. paras 14–15) or because the concluding act had been adopted on an improper legal basis (Case C-360/93, *Parliament v Council* [1996] ECR, 1145).

[121] RA Wessel *The European Union's Foreign and Security Policy. A Legal Institutional Perspective* (Kluwer The Hague 1999) at 232.

[122] According to DM Curtin and IF Dekker 'The Constitutional structure of the European Union: Some Reflections on Unity in Diversity' in P Baumont, C Lyons, and N Walker (eds) *Convergence and Divergence in European Public Law* (Hart Publishing Oxford 2002) 59. Union law is, in principle, directly applicable in the national legal orders of the Member States: this may be derived *a contrario* from Art 35 TEU, which expressly stipulates that the legal instruments of the Third Pillar 'shall not entail direct effect'.

freezing of funds, prohibition of travel, embargos on arms and/or on other specific goods) aimed at exerting effective pressure on the targeted regimes and on identified individuals, while containing the economic and social repercussions for the population. There is, however, no explicit provision for the possibility of adopting economic and financial sanctions against individuals on the basis of the EC Treaty—the wording of Articles 301 and 60 EC refers to measures taken against 'third States'. The Council has given these provisions an extensive interpretation, using them as a legal basis for the adoption of sanctions against natural or legal persons exercising physical control over part of the territory of a third country,[123] or effectively controlling the government of a third country, as well as against those entities or persons associated with them, or providing them with financial support.[124] The CFI has recently confirmed the lawfulness of this practice, ruling that 'just as economic and financial sanctions may legitimately be directed specifically at the rulers of a country, rather than at the country as such, they may be directed at the persons or entities associated with those rulers, or directly or indirectly controlled by them'.[125]

Also, over the last few years, an extensive set of instruments has been adopted in connection with the fight against international terrorism, the most important of which is the freezing of funds of persons, entities and bodies involved in terrorist acts or in their financing.[126] In the absence of any connection with the territory or governing regime of a third country, the Council has had recourse to the supplementary legal basis of Article 308 EC, in conjunction with Articles 60 and 301 EC, so as to make it possible for the Community to impose economic and financial sanctions on individuals and entities suspected of contributing to terrorist activities. A new, specific provision was introduced in the Constitutional Treaty (Article III-322) to expressly enable the Council to adopt legislation not only for the interruption or reduction of economic and financial relations with a third country, as is currently the case (paragraph 1) but also for the adoption of restrictive measures against natural or legal persons and groups or non-State entities (paragraph 2). The CFI, however, has found no objections to this cumulative legal basis. Although the fight against terrorism cannot be made to refer, for the purposes of Article 308, to one of the objectives which Articles 2 and 3 EC entrust to the Community, the Court held that Articles 60 EC and 301 EC

[123] See Council Regulation (EC) No 1705/88 of 28 July 1988 concerning the interruption of certain economic relations with Angola in order to induce UNITA to fulfil its obligations in the peace process (OJ 1988 L 215/1).

[124] See Council Regulations (EC) No 1294/1999 of 15 June 1999 concerning a freeze of funds and a ban on investment in relation to the Federal Republic of Yugoslavia (OJ 1999 L 153/63) and 2488/2000 of 10 Nov 2000 maintaining a freeze of funds in relation to Mr Milosevic and those persons associated with him (OJ 2000 L 287/19).

[125] Case T-306/01 (n 8) para 115.

[126] Case T-306/01 (n 8) para 160.

> expressly contemplate situations in which action by the Community may be proved to be necessary in order to achieve, not one of the objects of the Community as fixed by the EC Treaty but rather one of the objectives specifically assigned to the Union by Article 2 of the Treaty on European Union, viz., the implementation of a common foreign and security policy.

Thus it is possible that a CFSP measure should demand of the Community the adoption of economic and financial sanctions going beyond those expressly provided for by Articles 60 and 301, when these provisions do not give the Community institutions the power necessary to act in order to attain the objectives pursued by the Union and its Member States under the CFSP.

The judgments at issue were the first to be delivered on the merit of cases, questioning the legality of EC regulations adopted in order to implement CFSP decisions providing for the freezing of assets of persons associated to various terrorist organizations. A first group of cases concerns the restrictive measures aimed at the Taliban, Usama bin Laden and the Al-Qaeda network[127] and at individuals and entities associated with them. Their names have been listed in various successive resolutions of the UN Security Council, and subsequently included in a list annexed to the CFSP common positions and EC regulations adopted by the Council of the Union in order to implement the UN decisions.[128] A second group of cases deals with the restrictive measures taken by the Community against persons and entities otherwise involved in terrorism, and not specifically identified by the UNSC.[129]

The issue is not merely one of legal basis. The shift from asset freezing primarily as a political measure against governments or persons linked to them, to asset freezing as a preventative measure, targeting terrorist individuals and groups, has raised the need to define the right balance between protection of fundamental rights and restrictions to these rights which are permissible on grounds of public interest, public order or the maintenance of international relations. Exemptions may normally be granted on humanitarian grounds, so as to preserve the right of subsistence of targeted individuals—allowing for payment for such basic expenses as foodstuffs, medical treatment and rent or mortgage for the family residence.[130] However, the same cannot

[127] See Cases T-362/04, *Minin*; T-299/04, *Selmani*; T-253/04, *Kongra-Gel*; T-49/04, *Hassan*; T-327/03, *Al Aqsa*; T-253/02, *Ayadi*; T-228/02, *Organization des Modjahedines du Peuple d'Iran* and T-318/01, *Othman*.

[128] Council Common Position 2002/402/CFSP (OJ 2002 L 139/4) and Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures against Osama bin Laden, the Al-Qaeda network and the Taliban and repealing Council Regulation (EC) 467/2001 of 6 Mar 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139/9).

[129] See n 65 above. Cases T-362/04, Minin; T-253/04, Aydar; T-299/04, Selmani; T-327/08, Al-Aqsa; T-47/03, Sison; T-228/02, Organisation des Modjaneclines du Peuple d'Iran. See also Cases 354/04 Gesturas pro Amnistía and C-355/04, Segi and Case C-229/05, PKK and KNK.

[130] See Arts 5 and 6 of Council Regulation (EC) 2580/2001 (n 69) and Art 2 of Council Regulation (EC) 881/2002 (n 128). With respect to the former, an application for interim relief

be said of procedural rights, such as the right to a fair hearing and the right to an effective remedy. A number of legal issues arise in this respect—ranging from the criteria to be applied and the evidence needed for proscription, to the opportunity for individuals to make representations prior to inclusion in the list, and/or to challenge the factual assertions relied upon. Where the relevant EU and EC legislation is intended to implement UNSC resolutions, the institutions have pointed out that—even if the contested acts were to be regarded as violating fundamental rights—the circumstances in which they were adopted preclude any unlawful conduct on their part, since the Community is under a legal obligation to put such resolutions into effect. This in turn raises questions as to the precise legal effects and the scope for judicial review of measures adopted by the UNSC under Chapter VII of the Charter, and of decisions of the UNSC committees which are normally instructed to supervise their implementation and to consider requests for exemption.[131]

For a long time, it has remained unresolved whether the mandatory resolutions decided upon by the UNSC could be regarded as binding on the Community, which is not a member of the UN, or the successor to the rights and obligations of the Member States for the purposes of public international law. As such, therefore, the Community is not directly bound by the UN Charter and it is not required to accept and carry out the decisions of the UNSC.[132] However, as members of the UN, EU Member States must comply with their obligations under the Charter, ie not only 'agree to accept and carry out the decisions of the Security Council' (Art 25), but also undertake the 'action required to carry out the decisions of the Security Council for the maintenance of international peace and security' (Art 48 §1) 'directly and through their action in the appropriate international agencies of which they are members' (Art 48 §2). Art 103 further provides that obligations of UN members under the Charter prevail over obligations under any other international agreement.[133] In the absence of clear indications from the

was dismissed on the grounds that the condition of urgency was not fulfilled, the applicant having failed to demonstrate that the possibility of obtaining an authorization by national authorities under these provisions, and the domestic remedies available to him under national domestic law against decisions taken by national authorities pursuant to these provisions, would not enable him to avoid serious and irreparable damage (Case T-47/03, *Sison* [2003] ECR II-2047, para 39.

[131] A Sanctions Committee, composed of all the members of the Security Council, has the task of maintaining an updated list of both the individuals and entities concerned, and the financial resources to be frozen, based on information provided by the States and regional organizations. On the basis of amendments by the Committee, the Commission regularly reviews the list annexed to the Community regulations. In *Bosphorus*, Jacobs AG emphasized the importance of UNSC Sanctions Committees, but declined to regard the opinion of the relevant committee as binding in that particular case, because such an effect was not provided for by the relevant provisions of the resolution (Case C-84/95 [1996] ECR I-3953, para 46).

[132] The Security Council has, however, developed a practice of calling on Non-Member States and on international organizations to comply with its resolutions, see S Bohr 'Sanctions by the United Nations Security Council and the European Community' (1993) 4 EJIL 256, at 262–3.

[133] Judgment of the ICJ of 26 Nov 1984, *Nicaragua* [1984] ICJ Rep 392, para 107 and order of the ICJ of 14 Apr 1992, *Lockerbie* [1992] ICJ Rep 113, para 39.

Community judiciary[134] scholars have pointed out that,[135] should the Member States decide to have recourse to Community instruments for the performance of their obligations under the UN Charter, the institutions would appear to be bound to adopt all necessary measures.[136] In particular, given that the Member States have conferred an exclusive competence in commercial matters on the Community, implementation of UNSC resolutions calling for trade and/or financial sanctions would have to be carried out through an EC measure.[137] Also, the Court has consistently held that Community powers must be exercised in compliance with international law and that Community law must be interpreted in the light of the relevant rules of international law.[138]

The issue was squarely raised before the CFI in *Yusuf and Al Barakaat and Kadi*.[139] Here, the Court established the supremacy of the obligations of the Member States under the UN Charter and UNSC resolutions over every other obligation of domestic law or international treaty law—including the European Convention on Human Rights and the EC Treaty. As a result, Member States must leave unapplied any provision of EC law (including primary law and the general principles of law) which raises any impediment to the performance of their obligations under the UN Charter. The Community is bound by those obligations and is required to adopt all the provisions necessary to allow the Member States to fulfil them. The Court held that judicial review of a regulation, which is limited to putting into effect resolutions of the UNSC, would

[134] According to JP Puissochet, the Court has made it clear that it tends to regard UNSC resolutions more as guidance for the interpretation of Community measures, rather then as legally binding provisions 'The Court of Justice and international action by the European Community: The example of the embargo against former Yugoslavia' (1997) 20 Fordham International Law Journal, 1557 at 1570. In fact, the Court has simply avoided to adress the issue directly. For example, in *Greece v Council*, it declined to examine an alleged breach of a UNSC resolution, on the ground that it was completely extraneous to the case before it (Case 204/86 [1988] ECR 5323, paras 27–8). In *Bosphorus* (n 131) Jacobs AG was of the opinion that the question, though interesting, did not fall to be decided (para 35). In *Centro-Com* the ECJ held that it was for national courts to determine whether national measures contrary to Art 113 (now 133) EC could be justified under Art 234 (now 307) EC, if they were necessary to ensure that the Member State concerned performed its obligations under the UN Charter and a UNSC resolution (n 29).

[135] See F Naud 'L'embargo: une valse à trois temps. Nations unies, Union européenne et Etats membres' (1997) RMC, 404, 25; A Sam-Simenot 'Les conflits de compétence entre la Communauté européenne et les Etats-membres dans le domaine des sanctions economiques edictées par le Conseil de sécurité de l'ONU (à propos de l'arrêt C-124-95 du 14 janvier 1997 de la Cour de justice des Communautés européennes)' (1998) Receuil Dalloz, 9, 83; K Lenaerts and E De Smijter 'The United Nations and the European Union: Living apart together' in K Wellens (ed) *International Law: Theory and Practice* (Kluwer The Hague 1998) 439, at 447–8 ; Eeckhout (n 16) 436–44; Wessel (n 38) 1161–2.

[136] See, by analogy, the question whether the Community is bound by the General Agreement on Tariffs and Trade (GATT), Joined Cases 21/72 to 24/72, *International Fruit* [1972] ECR 1219, para 11.

[137] See Case T-184/95, *Dorsch Consult* [1998] ECR II-667, para 74 in respect of a trade embargo imposed by a UNSC resolution.

[138] See Case C-286/90, *Poulsen and Diva Navigation* [1992] ECR I-6019, para 9 and Case C-162/96 Roche (n 17) para 46.

[139] Case T-306/01 and Case T-315/01 (n 8).

imply indirect scrutiny of the latter—whereas the Community judiciary has no jurisdiction to rule on the compatibility of mandatory measures decided upon by the UNSC with EC law or with fundamental rights as recognised in the Community legal order. However, the Court did find that it was empowered to review the lawfulness of EC legislation and, indirectly, of UNSC resolutions in the light of the higher rules of general international law falling within the scope of *jus cogens*—a body of peremptory norms of public international law from which neither the Member States nor the institutions of the UN may derogate. This includes, in particular, provisions intended to secure the universal protection of fundamental human rights. In the case at issue, the Court ruled that the rights to property, of defence and to an effective judicial remedy invoked by the applicants either did not fall within *jus cogens*, or were not infringed by the contested regulation.

A detailed analysis of the implications of the judgment is outside the scope of this article. However, a few general remarks can be put forward. First, it seems that a logical consequence of the reasoning of the CFI with respect to the lawfulness of recourse to Article 308 EC as a supplementary legal basis for the contested Community regulation—which seems to assert the supremacy of EU Law over EC Law as far as economic and financial sanctions are concerned[140]—would have been for the Court to identify the source of the obligation for the Community to give effect to the UNSC resolution in the CFSP common position adopted prior to the regulation—which would have allowed it to rely on Article 46 TEU, and declare its lack of competence. The argument that the UNSC is not *legibus solutus*, but is bound in its actions by respect for the peremptory norms of international law, immediately raises the question of how to identify the content of the latter, and who is competent to review compliance. The analysis conducted by the Court of whether the fundamental rights invoked by the applicants could be regarded as falling within *jus cogens*—a category which is notoriously difficult to identify—is likely to prove controversial. So is the claim by a regional court, such as the CFI, that it is entitled to exercise judicial review of resolutions adopted by the UNSC under Chapter VII of the Charter. So far, it has only been suggested that it should be for the International Court of Justice to determine whether non-compliance with a UNSC mandatory resolution is legally justified.[141] Finally, it may be asked whether it is appropriate for the UN to adopt measures which are not only binding for States, but impose obligations directly on individuals—particularly in the absence of effective judicial remedies before national,

[140] See n 82 above.

[141] A Orakhelashvili 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 EJIL 59, at 86–8; B Martencaule 'The Security Council, The International Court and Judicial Review: What Lessons from Lockerbie?' (1999) 10 EJIL 517, at 525–8 and R Bernhardt 'Ultra Vires Activities of International Organisations' in J Makarczyk (ed) *Theory of International Law at the 21st Century* (Kluwer The Hague 1996) 599, at 606–7.

supranational or international courts. The only means available to individuals for challenging measures of the UNSC is before the UNSC itself, and only through the Government of the State of which the applicants are nationals or in the territory of which they reside. In the light of the recent debate on the reform of the UN, the judgments of the Court are a timely reminder that the system is, in this respect, flawed.[142]

The CFI has perhaps shown more deference to the foreign and security interests at stake than would be desirable in a legal order based on the rule of law, to which a complete system of judicial remedies is inherent. The case of mandatory measures of the UNSC is certainly very specific, and hopefully the Community judiciary will tilt the balance in favour of the protection of fundamental human rights in future cases concerning economic sanctions, notably where there is no connection with the UN legal order—even though the exercise of judicial review may very well prove difficult because of the political sensitivity of the issue.[143] In the words of a leading expert:

> [i]n cases where the action of the Union or its representatives is not, or is partially, subject to judicial scrutiny or remedy, the issue for review is much more than enlarging admissibility—it is about access to justice. . . . When [individuals] attempt action before national courts, given that the acts are a result of direct applicability of EC measures, direct action before the ECJ is the more appropriate way forward. On the EU side the objection is that the Community has no discretion but to implement whatever the CFSP act requires it to do, autonomously or upon mandatory request of the UNSC, and the Court has no power to control CFSP acts.[144]

Though flowing from a legal instrument agreed on the basis of Title V of the EU Treaty, the actual obligations imposed upon individuals are mostly laid down in Community regulations, which may in turn be given effect in the domestic legal order of the Member States. Where the relevant provisions require implementation at national level, individuals may bring proceedings before a national court—which would then have the possibility, or be under a duty, to make a reference to the ECJ for a ruling on the interpretation or validity of the regulation (but not of the original CFSP measure).[145] However, where the relevant provisions of the Community regulations are directly

[142] For a commentary on the judgments see MG Garbagnati Ketvel 'The Court of First Instance and the Protection of Human Rights in the Fight Against Terrorism: A Case of Bravery or Recklessness?' European Law Reporter.

[143] See also Eeckhout (n 16) 464.

[144] M Vitsentzatos 'The EU as an International Actor: What Role for the European Courts?' paper presented at the BIICL conference on *EU External Relations and the Constitutional Convention* held on 10 Mar 2003.

[145] Curtin and Dekker (n 122) note that a CFSP measure could play a role in domestic proceedings if the national court allowed it to have direct effect, or whenever its indirect effect would be accepted, in the sense that 'all national authorities have the obligation to interpret national legislation and other measures as much as possible in the light of the wording and purpose of valid Union law'.

applicable (as in the case of anti-terrorist legislation) there simply is no national legislation to challenge. Recourse may be had to the CFI, provided that the applicants are directly and individually concerned. Finally, some CFSP acts imposing sanctions do not require implementation by means of Community and/or national measures.

The difficulties encountered by private parties in this respect can usefully be illustrated by reference to the cases of *Segi* and *Gestoras pro Amnistía*.[146] The applicants had brought an action against the Council, seeking compensation for damages allegedly suffered as a result of their names being included in a list of terrorist persons, groups and bodies, pursuant to a Council Common Position adopted on the basis of Titles V and VI of the EU Treaty.[147] Because of the absence of implementing measures, they could not challenge the legality of their proscription, before either national or Community courts.[148] Therefore, the insertion of the list in an instrument adopted in the framework of intergovernmental cooperation had effectively deprived them of a legal remedy. The CFI held that the only provision of the contested act from which the alleged damage to the applicants could flow was based on the Title VI and noted that, pursuant to Article 35 TEU, an action for damages is not provided for in the context of the Third Pillar. Nonetheless, it found that it had jurisdiction to rule on the matter, in so far as the applicants could rely on an encroachment on the system established by the EC Treaty, which resulted in the absence of judicial protection. However, given that the absence of a legal remedy did not, as such, disregard Community competence, both applications were dismissed.

The application brought by the two Basque associations in question before the European Court of Human Rights was equally unsuccessful. The Strasbourg Court noted that applicants who claim to be the victims of a violation of the European Convention on Human Rights must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally would occur. Given that the common position in question was not directly applicable in the Member States, and could not form the direct basis for any criminal or administrative proceedings against individuals, it did not give rise to legally binding obligations for the applicants.[149] Also, because the application was in any event inadmissible, the Court did not consider it necessary to rule on the question whether the applicants had exhausted the remedies which the Community system could offer them. So far, the ECtHR has failed to address whether the limited access of individuals to the Community courts

[146] Case T-333/02 and Case T-338/02 (n 60).

[147] Council Common Position 2001/931/CFSP of 27 Dec 2001 on the application of specific measures to combat terrorism (n 65).

[148] See also orders of 15 Feb 2005, Case T-206/02, *KNK* and Case T-229/02, *PKK & KNK* (not yet reported).

[149] 23 May 2002, Applications 6422/02 and 9915/02, *Segi and Gestoras Pro-Amnestia & Others v the Fifteen Member States of the European Union*, ECHR 2002-V.

leads to incompatibility with Article 6 §1 ECHR, and whether the provisions of Article 230 EC should be interpreted more extensively in the light of the Convention. Given its recent case-law, it is unlikely to do so in the near future. In *Bosphorus v Ireland*,[150] the Strasbourg Court confirmed that a State is responsible for all acts and omissions of its organs which allegedly violate the Convention, regardless of whether the conduct in question arises from domestic law or from the necessity to comply with international legal obligations.[151] However, the Court also found that a State—when it does no more than implement obligations flowing from its membership of an international organization to which it has transferred part of its sovereignty—is presumed not to have departed from the requirements of the Convention, provided that the protection of fundamental rights afforded by that organization can be considered to be 'equivalent' to that of the Convention system.[152] The Community system of protection of fundamental rights was considered to provide such equivalence.[153]

The concept of presumed compliance by the Community, however, should not be interpreted as preventing review of whether there was in fact, in the specific circumstances of a case, a breach of the Convention, as there may be exceptional situations where the protection afforded by the Community system may be found to have been manifestly deficient—for example, when there has been, in procedural terms, no adequate review in a particular case,

[150] The applicant had argued before the Irish Supreme Court that the impoundment in Ireland of an aircraft it had leased from the national airline of former Yugoslavia was contrary to its right to peaceful enjoyment of property and to its freedom to pursue a commercial activity. Asked for a preliminary reference, the ECJ held in *Bosphorus* that any measure imposing sanctions had, 'by definition', consequences which affected the rights of persons who were not responsible for the situation which had led to the adoption of sanctions. Moreover, the importance of the aims pursued by the regulation could justify 'negative consequences, even of a substantial nature, for some operators'. The contested measure, therefore, could not be regarded as disproportionate, 'as compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war and to the massive violations of human rights' in the former Yugoslavia (n 133, paras 21–6). For a critical evaluation of this approach, see I Canor 'Can Two Walk Together, Except They Be Agreed?—The Relationship Between International Law and European Law: The Incorporation of United Nations Sanctions Against Yugoslavia Into European Community Law Through the Perspective of the European Court of Justice' (1998) 35 CML Rev 137; a more positive appraisal is given by Koutrakos (n 20) 137 and Eeckhout (n 16) 447. In abidance with the ruling of the ECJ, the national court had little choice but to uphold the contested measure. Bosphorus then brought an application in Strasbourg against the Irish State.

[151] Art 1 ECHR. Also, Art 307 EC confirms that the obligations of the Member States under the Convention remain unaffected by Community law. See ECommHR, decision of 9 Feb 1990, *Application 13258/87*, *M & Co v FRG,* DR 64, 144/51 and ECtHR, judgment of 18 Feb 1999, *Appication 24833/94*, *Matthews v United Kingdom*, ECHR (1999) I, 251/Rep 1999-I, 251, para 32.

[152] The Court takes care to specify that any such findings of equivalence could not be final and would be susceptible to review in the light of any relevant change in the protection of fundamental rights (para 156).

[153] 30 June 2005, *Application 45036/98* (not yet reported) paras 153–65.

such as when the ECJ lacks jurisdiction.[154] Also, the scope of the presumption of compliance is clearly limited to the European Community and it remains to be seen whether it could extend to the intergovernmental cooperation conducted by the Member States pursuant to the EU Treaty. Would the action of a Member State in giving effect to a Second or Third Pillar measure (in compliance with its obligation under the EU Treaty) be cleared by the ECtHR in the same way as the action taken in compliance with its obligations under the EC Treaty? Would the Union system be presumed to provide the necessary 'equivalent protection'? This seems doubtful, given the current lack of jurisdiction over the CFSP, but the situation is more ambiguous in respect of the Third Pillar: although PJCCM acts may not be challenged by individuals before the Community courts, preliminary rulings may be sought under Article 35 TEU—albeit only on a reference from courts of last instance, and never in respect of common positions. Finally, would the circumstance that EU Member States discharge their obligations under membership of the UN through the Union (or the Community) constitute a factor precluding the illegality of the action of the latter? It is clear that the UN system does not provide 'equivalent protection'; however, it is likely that the Strasbourg Court would rely on the obligations of the Member States under Article 103 of the UN Charter in order to absolve their action.

In the course of the works of the European Convention, the Discussion Circle on the ECJ considered the possibility of giving individuals the right to institute proceedings before the Court of Justice, either (a) for the annulment of CFSP decisions which are of direct and individual concern to them, or (b) solely in order to claim damages based on the illegality of the act, without the Court having the right to annul the act or declare it void.

(a) Under the Constitutional Treaty, measures imposing economic and financial sanctions on third countries will remain subject to the jurisdiction of the Court.[155] Article III-376(1) does not limit the competence of the Court as regards Chapter V of Title V of Part III, which includes Article III-322(1): hence, this provision falls within the jurisdiction of the Court. However, the European decisions on which the restrictive measures are based will be adopted pursuant to Chapter II of Title V and therefore escape judicial control. The Court will also continue to rule on the legality of restrictive measures of an economic nature (such as the freezing of funds) taken against natural or legal persons. However, Article III-376(2) of the Constitution gives the Court jurisdiction to rule on proceedings, reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V. The Court's powers of judicial review, therefore, are not confined to the implementing

[154] See the concurring opinion of Judge Ress.
[155] Lenaerts and Maselis (n 102) 236.

measures but extend to the initial foreign policy acts.[156] In any event, legal action by individuals will be subject to the conditions imposed by Article III-365, 4 of the Constitution—which is similar to, though not a perfect equivalent of, Article 230 (4) EC.[157]

An unresolved point concerns whether the expression 'restrictive measures' in Articles III-322(2) and III-376(2) is to be understood as limited to measures of an economic nature, or whether it covers measures which might affect individuals other than from an economic point of view, such as visa bans. As regards Article III-322, it seems clear that, as illustrated above, paragraph 2 was added with the specific purpose of providing a legal basis for the adoption of restrictive measures of an economic nature against individuals. However, Article III-376(2) does not refer to restrictive measures taken under Article III-322, but more generally to restrictive measures taken 'on the basis of Chapter II of Title V', hence to all restrictive measures adopted pursuant to the CFSP. It is submitted, therefore, that individuals may challenge the legality of restrictive measures affecting their rights, irrespective of the object against which such measures are directed. Finally, Article III-322 enables individuals to bring annulment proceedings under Article III-365(4). However, it has been argued that once it is accepted that restrictive measures are subject to the jurisdiction of the Court, there is no reason why the review of their legality should be confined to direct action. The possibility of a challenge in preliminary reference proceedings is not expressly provided, but neither is it necessarily excluded.[158]

(b) Article III-376 does not provide for the possibility to claim damages for the illegality of a CFSP act. It cannot be ruled out, however, that the Union may incur non-contractual liability for acts adopted in the framework of Title V of the EU Treaty, or their effects. As the EU becomes increasingly involved in election monitoring, peace-keeping missions and crisis-management operations around the world, appointing special envoys to supervise their implementation, it is likely that challenges will be brought in relation to the particular conduct of those acting in its name, or for the personal injuries suffered by officers of the Member States while serving in such operations. A

[156] The Draft Constitution prepared by the European Convention did not appear to confer jurisdiction upon the Court over CFSP acts adopted prior to the restrictive measures. Art III-282 (2) stated that the legality may be challenged, of restrictive measures against natural or legal persons adopted by the Council 'on the basis of Article III-224' (the equivalent of Art III-322). This seemed redundant, given that the Court already has all forms of jurisdiction over First Pillar measures adopted pursuant to Arts 301 and/or 60 EC. Also, an express grant of jurisdiction where the measures are taken against natural or legal persons seemed to suggest that there was no jurisdiction where the sanctions are taken against countries: as a result, the Court's jurisdiction under the Constitution would have been more limited than presently exists under the Treaties. See House of Lords European Union Committee, 6th Report of Session 2003–04 (n 103) paras 104–6.

[157] See A Ward 'The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures' in Tridimas and Nebbia (n 96) 209.

[158] Tridimas (n 96) 22.

1999 case before the Dublin High Court, concerning an Irish officer who had been serving in the European Community Monitoring Mission in Bosnia-Herzegovina, prompted the Council to point out that such operation was, in fact, under the control of the Member States, thereby denying the liability of the Union.[159] Arguably, this may no longer be the case with respect to the stationing of military or police forces in the framework of the European Security and Defence Policy: such operations are usually launched by CFSP measure (in general, a Council joint action) and are conducted in the framework of international agreements concluded by the Union, under the responsibility of the Union.[160]

The liability of the Union has already been invoked—so far, unsuccessfully—in the context of the adoption and implementation of restrictive measures. The case of *Segi* and *Gestoras Pro-Amnistía* was illustrated above. In *Royal Olympic Cruises*,[161] a number of Greek companies brought an application for compensation against the Union before the Court of First Instance for the loss allegedly suffered as a result of the imposition of sanctions against the Federal Republic of Yugoslavia (FRY), thus indirectly questioning the legality of measures adopted on the basis of Title V of the EU Treaty. The applicants submitted that the relevant EC regulations had been adopted in implementation of CFSP acts which reinforced an international wrong (the military intervention in Kosovo). Consequently, they generated an objective tort liability for the Community, with no need to establish a causal connection between the (unlawful) conduct of the Community institutions and the alleged damage. The Court noted, however, that only a contribution by those institutions to the intervention by the Union might potentially have been considered to constitute a sufficiently direct causal link, whereas the adoption of the contested regulations did not in itself have any direct relationship with such intervention and the purported loss. The application was therefore rejected as manifestly unfounded.

V. CONCLUDING REMARKS

The Constitutional Treaty reflects the enduring reluctance on the part of the Member States to grant the European Court of Justice any jurisdiction over acts adopted in the field of the CFSP, which epitomize the exercise of their sovereign powers and national prerogatives. This is by no means satisfactory,

[159] Reported by Vitsentzatos (n 144).

[160] See Council Joint Actions 2004/570/CFSP of 12 July 2004 (OJ 2004 L 252/10) on the EU military operation in Bosnia and Herzegovina (EUFOR—Anthea); 2002/210/CFSP of 11 Mar 2002 (OJ 2002 L 70/01) on the EU Police Mission in Bosnia (EUPM); 2003/681/CFSP of 15 Dec 2003 (OJ 2003 L 249/66) on the EU Police Mission in Macedonia (PROXIMA) and 2004/847/CFSP of 9 Dec 2004 (OJ 2004 L 367/30) on the EU Police Mission in Kinshasa.

[161] Case T-201/99 [2000] ECR II-4005.

as legal issues may always arise in connection with the international action of the European Union. The powers enjoyed by the institutions and the Member States in the field of CFSP cannot be exercised in a legal vacuum,[162] particularly when this affects the rights of individuals. The absence of judicial control over the activity of the Union and its Member States pursuant to Title V of the EU Treaty results in the lack of any specific legal mechanisms either for the enforcement of CFSP provisions, or for authoritative interpretation on the status of CFSP provisions in the legal order of the Member States. Also, the Court is not entitled to review compliance with the decision-making procedures established by Title V of the EU Treaty, nor the choice of legal basis for a CFSP measure—unless it impinges on the competence of the Community.

In an increasingly rule-based foreign policy, the need is felt for an independent arbiter to rule on any procedural disputes which may arise in the field of CFSP between Member States, between Member States and EU institutions, and between institutions. Such disputes are inevitable, particularly given the many actors involved in the CFSP policy-making process.[163] If not over the substantive provisions of CFSP, perhaps the Court might have been given powers of judicial review at least over the procedural arrangements in Title V of the EU Treaty, with a view to ensuring that the respective competences of the institutions and their rights of participation in the policy-making process are respected. A distinction could have been drawn between political issues (concerning the principles and objectives of CFSP, and the means adopted to attain them) and strictly legal ones (concerning procedural matters in the definition of such principles and objectives, and in pursuing their concrete realization); the Court would not have jurisdiction over matters relating to the former, but could have been given jurisdiction on the latter.

Regrettably, however, the Constitutional Treaty failed to provide for an action of annulment to be brought by the institutions or the Member States in the event of a dispute concerning their respective powers and attributions in the CFSP policy-making process. The opportunity to grant at least certain national courts the possibility to ask the Court for a preliminary ruling in at least certain categories of proceedings was also missed. As a result, national courts will not be able to ask the Court for a preliminary ruling on the scope, meaning or validity of a CFSP measure or action. Instead, they will have to rule on the issue, if necessary to resolve the case before them. The *Foto-Frost* case law, requiring national courts to regard Community legislation as valid until set aside by the ECJ, would not apply, thus raising the possibility of inconsistent rulings in courts across the Union.

[162] The expression is by E Sharpston, evidence submitted to the House of Lords European Union Committee (n 103) para 96.

[163] For example, one could envisage the European Parliament bringing a case in connection with the powers it enjoys under the Interinstitutional Agreement of 6 May 1999 on budgetary discipline and improvement of the budgetary procedure (OJ 1999 C 172). See Neuwahl (n 12) 245 and Wessel (n 123) 225.

Despite these shortcomings, the Constitutional Treaty does manage to address at least some of the most sensitive issues relating to the lack of jurisdiction in the field of foreign and security policy, particularly as regards the rights of the individuals to challenge decisions adopting restrictive measures against them. Also, the jurisdiction of the Court to protect Community (now Union) competence from encroachment by the CFSP—which so far could only be derived from the case law—has been codified and given explicit recognition. Finally, the extension of judicial supervision to the CFSP provisions of international agreements might very well prove of momentous consequence.

The continued exclusion of the CFSP from the jurisdiction of the Court, however, seems hardly consistent with the inclusion of respect for human rights and the rule of law amongst both the values on which the Union is based (Article I-2) and the principles that are to guide its international action (Article III-292, 1 and 2, b)—*a fortiori* at a time when a Constitutional Treaty is adopted, the EU Charter of Fundamental Rights is made legally binding and a specific legal basis is introduced for EU accession to the ECHR.[164] The circumstance that the Union is not a party to the Convention has not prevented applications being filed in Strasbourg for an alleged breach by the institutions of the Community and/or the national authorities of the Member States in giving effect to Community law, the argument being that they may be held collectively or individually responsible for violations of the ECHR by the Community institutions.[165] The ECtHR may find that the principle of 'presumed compliance' does not apply to the CFSP, and that action taken by the Community or the Member States in implementation of CFSP acts is in breach of the Convention. Also, foreign policy is not outwith the jurisdiction of the ECtHR. Indeed, as seen above, the action of the Union in this field has already given rise to litigation in Strasbourg.

From a purely legal, rather than political, perspective there is no reason why, as a general rule, the conduct of the foreign and security policy of the European Union should per se not be amenable to judicial process. In a legal order based on the rule of law, it should be for the Court of Justice to draw the

[164] See Art 1-9 of the Constitutional Treaty. Fundamental rights are protected as general principles of EC law and, although the Court has not yet made reference to the EU Charter of Fundamental Rights, its Advocate Generals have repeatedly stated that the document—despite not having a legally binding effect similar to that of primary law—nonetheless gives an indication on the fundamental rights guaranteed by the Community legal order: see the Opinions of Advocate Generals Léger (10 July 2001, Case C-353/99P, *Hautala* [2001] ECR I-9565/9567, paras 82 and 83); Tizzano (8 Feb 2001, Case C-173/99, *BECTU* [2001] ECR I-4881/4883, para 28); Misho (20 Sept 2001, Joint Cases C-20/00 and C-64/00, *Booker Aquaculture & Hydro Seafood* [2003] ECR I-741, para 126); Poiares Maduro (29 June 2004, Case C-181/03 P, *Nardore*, not yet reported, para 51); Kokott (14 Oct 2004, Joint Cases C-387/02, C-391/02 and C-403/02, *Berlusconi*, not yet reported).

[165] See the Decisions of 10 Mar 2004, Application 56672/00, *Senator Lines v the Fifteen Member States of the European Union*, ECHR 2004-IV and of 13 Jan 2005, Application 62023/00, *Emesa Sugar v The Netherlands* (not yet reported).

distinction between the measures which may be reviewed and those which require the exercise of discretionary powers more appropriately belonging to the executive. The recent practice of national courts shows that, as the category of 'acts of State' gradually narrows, restrictions on judicial review of such acts are becoming increasingly rare.[166] It is submitted that, when considering Union acts which are pervaded with relevant discretionary powers of a political nature, the ECJ should be allowed to create its own policy of judicial self-restraint.

The Constitutional Treaty stops short of giving a clear and coherent answer to the many complexities involved in the search for a sensible balance between the needs for certainty and respect of the rule of law, and the discretionary powers and political interests inherent in the governance of foreign affairs. However, the fact that CFSP is no longer *a priori* beyond the remit of the jurisdiction of the Court, together with the extension of the doctrine of primacy to the entire range of Union law, signal the start of a significant shift in the perception of, and approach to, the action of the Union in foreign policy and security matters. At least in this respect, it would be regrettable if the Constitutional Treaty were not to be put into effect. But then perhaps the opportunity might be seized to finally provide a satisfactory solution to the wide range of legal issues raised by the role of the European Union as an international actor.

[166] As noted by Louis and Dony (n 119) 594, '[e]mpêcher le juge de connâitre des actes relevant d'un secteur capital de l'action de la puissance publique est d'une autre époque: cette attitude est fondée sur une distinction surannée entre actes de haute politique et relations économiques internationales et elle cadre mal avec les principes et valeurs par ailleurs affichés.'