CURRENT DEVELOPMENTS

EUROPEAN UNION LAW

Edited by Joe McMahon

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I. EXTERNAL RELATIONS

A. Introduction

It has been almost five years since the last update on the external relations of the European Union.[1] To argue that, during this period, this area of law has attracted considerable attention would be an understatement. Its international role has been at the centre of the long and painful process of group therapy which the Union underwent since the establishment of the Convention for the Future of Europe, marked by the genesis and death of the Constitutional Treaty, and the suspense leading to the entry into force of the Lisbon Treaty on 1 December 2009. The latter has been seen as crucial to the ability of the Union to act on the international scene. Indeed, the mandate of the 2007 Intergovernmental Conference refers to the objective of enhancing the coherence of the external action of the Union in its very first paragraph.[2]

All this makes a detailed analysis of the recent developments in EU external relations within the confines of this article impossible. Therefore, a highly selective outline will be provided instead,[3] aiming to provide an overview of developments which, in the view of this author, illustrate some interesting threads emerging in the area.

B. Competence in External Economic Relations

One of the most vexed questions about the international role of the Union (and, prior to the entry into force of the Lisbon Treaty, the Community) is the scope of its competence and the assessment of which sets of rules laid down in primary law should apply in different cases of international action. In the context of external economic relations and the competence to negotiate and conclude international agreements, the Court of Justice was asked to revisit the relationship between external trade and

[1] 'Current Developments: European Union Law' (2005) 54 ICLQ 995.
[2] Council SG/11218/07, POLGEN74, para.1.
[3] This article will not cover the judgments of the European Courts in the various smart sanctions cases (see, for instance, Joined Cases C402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351), as they have been analysed extensively elsewhere: see, for instance, T Tridimas, 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order' (2009) 34 ELRev 103, and D Halberstam and E Stein, 'The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009) 46 CMLR 13.

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environmental policies in relation to the Rotterdam Convention on Prior Informed Consent for certain hazardous chemicals and pesticides in international trade. It held that it pursued both environmental and commercial objectives, and therefore should have been adopted by the Community under both articles 133 EC and 175 EC (now 207 TFEU and 192 TFEU).[4]

The line of reasoning followed in the judgment renders the choice of the appropriate legal basis for the conclusion of agreements with trade and environmental dimensions even less predictable than before: it is recalled that the Energy Star Agreement had been deemed to be mainly a trade agreement with environmental implications,[5] and the Cartagena Protocol on Biodiversity a mainly environmental agreement with trade implications.[6]

The Court also had the opportunity to revisit the principles governing implied external competence in *Opinion 1/03* in which it ruled on the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[7] Largely reproducing the provisions of the Brussels Regulation,[8] and providing for their application between EU Member States and the EFTA countries, the Convention was held to fall within the Community's exclusive competence.

The ruling is significant for a number of reasons. First, it clarifies the main principles underpinning implied external competence: in contrast to the earlier case law, the questions of the existence and nature of implied competence are treated separately and the Court makes it clear that the Community's implied competence may exist whilst not being exclusive; the need to preserve the effectiveness of Community law is stressed; a finding of exclusivity should depend on a very detailed and comprehensive analysis, not only of the area covered by the Community rules in question and the provisions of the agreement envisaged, but also of the nature and content of those rules and provisions.

Second, it provides a bold acknowledgment of the role of exclusivity for the uniformity and consistency of the application of EC rules—it also refers to the proper functioning 'of the system which [these rules] establish in order to preserve the full effectiveness of EC law'.[9]

Third, it affirms the dynamic nature of the Community's implied competence. The Court points out that 'it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully. Where the test of 'an area which is already covered to a large extent by Community rules' (Opinion 2/91, paragraphs 25 and 26) is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, in so far as that is foreseeable at the time of that analysis'.[10] This renders the determination of the nature of the Union's competence even more difficult to assess. The implications are, on the one hand, to increase the likelihood

[4] Case C-94/03 *Commission v Council* [2006] ECR I-1

[5] Case C-281/01 *Commission v Council (re: Energy Star Agreement)* [2002] ECR I-12049.

[6] *Opinion 2/00 (re: Cartagena Protocol)* [2001] ECR I-9713.

[7] [2006] ECR I-1145.

[8] Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([2001] OJ L 12/1.

[9] See (n 7) para 131.

[10] ibid para 126.

of legal basis disputes, and, on the other hand, to render the role of the Court of Justice in the area of external relations even more pronounced. This is a point raised in areas of law examined below.

C. Competence in External Political Relations

Another context within which considerable inter-institutional disputes have arisen is the relationship between development, governed by article 208 TFEU (ex 177 EC), and foreign and security policy, governed by Title V TEU. The different legal characteristics of these sets of rules, and the distinct intergovernmental features of the latter, rendered this issue of acute significance. This was particularly the case in the light of the distinction which ex article 47 TEU drew between EC and CFSP law: nothing in the latter should affect the former.[11] This relationship was tested in *ECOWAS*[12] which was about the EU's contribution to the Economic Community of West African States (ECOWAS). In two CFSP measures,[13] the Council provided for a financial contribution and technical assistance in order to set up a Light Weapons Unit within the ECOWAS structure and to convert the Moratorium of Small Arms and Light Weapons into a binding Convention between the ECOWAS Member States. However, the Court concluded that such measures served both security and development objectives. As neither of these was subordinate to the other, it ruled, without any further explanation, that a joint legal basis was ruled out under ex article 47 TEU, and therefore, the relevant measure should have been adopted under development policy: 'a measure having legal effects adopted under Title V of the EU Treaty affects the provisions of the EC Treaty within the meaning of [ex] article 47 TEU whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competences'.[14]

The *ECOWAS* judgment appears to construe development policy in very broad terms, and establishes a difficult relationship between this and foreign and security policy. More generally, in various strategic documents, the Union construes its external relations as a system of increasingly interconnected policies pursuing a variety of objectives (economic, political, security).[15] The determination of the prevailing objective and the ensuing choice of the appropriate legal basis is a task fraught with difficulties, and the judgment in *ECOWAS* does not make it any easier. This has the potential of whetting the appetite of the Commission for construing the external economic and social policies too broadly, and increasing the likelihood of inter-institutional disputes. The other side of this coin would be the increasingly central role which the Court would be called upon to assume.

[11] The Lisbon Treaty has amended this provision in art 40 TEU which now places the EU and CFSP sets of rules on equal footing.

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

[13] Council Decision 2004/833/CFSP implementing Joint Action 2002/589/CFSP [2004] OJ L359/65.

[14] See (n 12) para 60.

[15] See, for instance, *A secure Europe in a better world— European Security Strategy* (Brussels, 12 December 2003), as well as *Report on the Implementation of the European Security Strategy* (Brussels, 11 December 2008). See also *European Consensus on Development* [2006] C 46/01.

The relationship between development and security policy, albeit in a different context, was the subject matter of the earlier *Philippines Borders* case.[16] This concerned a Commission decision financing a project relating to the security of the borders of the Philippines. That Decision was adopted in implementation of Council Regulation 443/93 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America.[17] Its aim was to contribute to the fight against terrorism and international crime and enhance the internal security and stability of the Philippines. However, the Parliament argued that these objectives were beyond the scope of economic co-operation provided for by the Council Regulation and, in pursuing them, the Commission did not have the authority to approve the financing of that project. The Court accepted that conclusion and annulled the Commission decision. Although it acknowledged the broad objectives of development policy as laid down in ex articles 177–81 EC (now articles 208–211 TFEU), it ruled that the Council Regulation, which the contested Decision implemented, made no reference either to the fight against terrorism and international crime, or to the internal stability and security of the Philippines. The Court did not show much sympathy for the argument that, by enhancing border security, the project would improve the economic, legal and social environment in the Philippines, hence making the country more conducive to investment and economic development, which was one of the objectives of the Regulation. It pointed out that there was nothing in the contested measure to indicate how the objective pursued by the project could contribute effectively to making the environment more conducive to investment and economic development.

Does the judgment in the *Philippines Borders* case suggest a restrictive interpretation of development policy in practical terms? In fact, it is too wide an interpretation of development policy which the Court rejects. Indeed, the conduct of development policy has such implications for the economic, legislative, administrative and social environment of the developing countries that, if interpreted too widely, it could become an all-encompassing framework covering most external relations activities. Instead, the Court appears to require a specific link between the external relations activity and development objectives in order to justify the conduct of the former within the framework set out by the latter. How does this judgment, then, compare with the *ECOWAS* ruling? In assessing the *Philippines Borders* judgment, one should be aware of the specific legal context within which reliance upon development policy was challenged: it was the scope of the implementing powers of the Commission which was contested, an issue which is clearly distinct from the broader question of the relationship between development and security policy which the EU legislature faced in the *ECOWAS* case.

D. Monitoring the External Action of the Member States

There have been two significant instances where the external action by Member States has been examined in the light of EU law and found to be problematic. The first is in the controversial *Mox Plant* case.[18] This concerned Ireland's decision to institute

[16] Case C-403/05 *Parliament v Commission* [2007] ECR I-9045.
[17] [1992] OJ L52/1.
[18] Case C-459/03 *Commission v Ireland* [2006] ECR I-4635.

dispute settlement proceedings against the United Kingdom before the Arbitral Tribunal provided for in the United Nations Convention on the Law of the Sea (UNCLOS). The Irish Government had argued that, by constructing a number of facilities, including the MOX Plant, on a site on the coast of the Irish Sea, the United Kingdom had violated UNCLOS provisions about the protection and preservation of the marine environment. However, UNCLOS is a mixed agreement, and parts of it fall within the Community's competence. Is the initiation of dispute-settlement proceedings between two Member States beyond the EC legal framework contrary to ex article 292 EC (now article 344 TFEU) which describes the jurisdiction of the Court as exclusive in areas covered by EC law?

The Court answered this question in the affirmative. It pointed out the existence of secondary Community legislation covering a significant part of the dispute, and noticed that Ireland's action had invited a transnational body to interpret these rules, and ascertain the scope of obligations they imposed on Member States. It also noticed that article 282 UNCLOS enabled Ireland to rely upon the Community enforcement procedures for its dispute with the United Kingdom. The *Mox Plant* judgment provides a tangible manifestation of the significance of the duty of cooperation in the area of external relations.[19] Developed as a means to manage the shared competence of the Community and Member States,[20] it was construed by the Court in this case as imposing a duty on Ireland to inform and consult the competent Union institutions prior to relying upon non-Community mechanisms against another Member State.

Another interesting feature of the judgment is the focus of its reasoning on ascertaining the Community's competence in the area covered by the dispute. In doing so, the Court sought to determine whether this competence had, in fact, been exercised, and relied heavily upon the Declaration of Competence annexed to UNCLOS. However, this emphasis on competence was both unnecessary and unhelpful: on the one hand, Declarations of Competence submitted by the Community to mixed agreements are notoriously vague;[21] on the other hand, an alternative approach would have been to examine the Irish conduct in terms of its impact on Community law, a matter which could have been determined independently of the inherently problematic enquiry of whether the Community's competence had in fact been exercised. After all, even in areas beyond the Community legal order, the Member States are prevented from violating their Community law obligations.[22] In an interesting coda, the conduct of Member States under mixed agreements is again under the Court's scrutiny in an action brought by the Commission against Sweden regarding the Stockholm Convention on Persistent Organic Pollutants.[23]

Another example of the rigour with which national external conduct is reviewed in the light of EU law is provided by three recent actions against Member States for agreements they concluded prior to their accession to the Union. Article 307 EC (now

[19] For other examples, see Case C-25/94 *Commission v Council (FAO)* [1996] ECR I-1469, and Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805.

[20] See *Opinion 2/91 (Convention No 170 ILO)* [1993] ECR I-1061, *Opinion 1/94 (WTO)* [1994] ECR I-5267, *Opinion 2/00 (Cartagena Protocol)* [2001] ECR I-9713.

[21] See, for instance, the Declaration to the Hague Convention on Private International Law in Annex II to Council Dec. 2006/719/EC [2006] OJ L/297/1, 5.

[22] See, for instance, Case C-124/95 *Centro-Com* [1997] ECR I-81.

[23] Case C-246/07 *Commission v Sweden*, currently pending (AG Maduro delivered his Opinion on 1 October 2009).

article 351 TFEU) acknowledges the application of the principle of *pacta sund servanda* to obligations assumed under such agreements. However, it requires that Member States take all the appropriate measures to eliminate any incompatibilities between such obligations and EU law. In three enforcement proceedings, this provision has come to the fore. In actions against Sweden,[24] Austria,[25] and Finland,[26] the Commission challenged a series of Bilateral Investment Treaties (BITs) concluded by these States prior to their accession to the Union as incompatible with the Treaty provisions of movement of capital.

It was the transfer clause of these Agreements which was problematic: this guarantees to the investors of each party the free transfer, without undue delay, of payments connected with an investment. Is such a clause contrary to the Treaty provisions which enable the Community to restrict the movement of capital from or to a third country in relation to direct investment (ex article 57(2) EC, now article 64(2) TFEU), as a safeguard measure (ex article 59 EC, now article 66 TFEU), and in order to implement economic sanctions decided within the context of Common Foreign and Security Policy (ex article 60(1) EC, now article 75 TFEU)?

The Court's response was affirmative. It held that the effectiveness of any restrictive measures which the Union may be required to impose under the above provisions would depend on whether they would be capable of being applied immediately. The transfer clause in the contested BITs would undermine such an objective. The Court also noted that the Agreements provided no other clause which would enable the Member States to apply EU restrictive measures immediately (the insertion of a regional economic integration organisation clause, whilst mentioned by Austria, had not actually been followed up). It also concluded, albeit without further elaboration, that no international law mechanism would allow the Member States to fulfill their EU obligations and deviate from the BITs.

The *BITs* judgments may be viewed as an unwarranted restriction on the ability of the Member States to act as fully sovereign subjects of international law: the mere possibility of future EU law action prevents them from maintaining an international agreement which is not inconsistent with current EU law and which was concluded prior to their accession to the Union. However, this reading would not be accurate. The judgments should be understood as confined to the very specific legal context within which they were rendered: it is the specific nature of the restrictive measures which the Council may be called upon to adopt under the specific EC Treaty legal bases, namely ex articles 57(2) EC, 59 EC and 60(1) EC, (now articles 64(2) TFEU, 66 TFEU, and 75 TFEU) which renders the transfer clause problematic. As any delay in their implementation would deprive them of any purpose, it is their effectiveness in this context which renders the transfer clause of the relevant BITs incompatible with EU law. Therefore, a temptation to substantiate wider propositions about the duties of Member States under Article 351 TFEU should be resisted.

[24] Case C-249/06, *Commission v Sweden*, judgment of 3 March 2009, not yet reported.
[25] Case C-205/06, *Commission v Austria*, judgment of 3 March 2009, not yet reported.
[26] Case C-118/07 *Commission v Finland*, judgment of 19 November 2009, not yet reported.

E. Common Foreign and Security Policy

The entry into force of the Lisbon Treaty has removed the pillar structure which had dominated the EU constitutional architecture since Maastricht. Supported by the endowment of the Union with express legal personality,[27] the new set-up is unitary in appearance, and brings the Community legal order, the Common Foreign and Security Policy and the Police and Judicial Cooperation in Criminal Matters within a single framework. However, 'appearance' is the key word. Whilst the third pillar has indeed been integrated in the overall Union structure, the second pillar (CFSP) has retained its distinct position within the new architecture.

The competence conferred upon the Union is qualitatively different from the competences covering the other areas of Union activity, and the legal mechanisms provided for its exercise, management, and enforcement are similarly distinct. This is apparent by the context of the CFSP rules (they are set out in the Treaty on European Union, and not on the Treaty on the Functioning of the European Union), the nature of the Union's competence (listed separately from these laid down in article 2 TFEU), the decision-making which is still carried out mainly by unanimity, the distinct sets of instruments set out in Title V TEU, the exclusion of its scope from the jurisdiction of the Court of Justice,[28] and the provision of Article 40 TEU which suggests that the implementation of neither the CFSP nor the other policies covered by the Union's other competences should affect each other.

In other words, whilst the Lisbon Treaty was praised on the basis of a rhetoric of unity for the Union's structure and the integration of foreign, security and defence policy in its constitutional architecture, in legal terms it has only been the appearance of unity which has been achieved. The CFSP framework retains its distinct characteristics, albeit within a constitutional context which lacks obvious signs of division. This suggests that our focus should shift on the practice of the CFSP rules.

Two developments are noteworthy. The first is the appointment of the posts created by the Lisbon Treaty specifically in order to improve the coherence of the Union's external action. The first President of the European Council[29] is Herman Van Rompuy who had been the Prime Minister of Belgium for nine moths. The first High Representative of the Union for Foreign Affairs and Security Policy is Baroness Ashton, who had been Trade Commissioner for a year and had started her political career in the United Kingdom as the Head of a regional Health Authority. As the Lisbon Treaty is strikingly vague as to their precise function, and their relationship with each other, along with the Commission President and the rotating Presidency, has the potential of endless overlaps, their performance will be pivotal for the actual significance of Lisbon's institutional innovations.

Second, in December 2008 the first Report on the Implementation of the European Security Strategy was published, five years after the European Security Strategy was adopted by the European Council.[30] A number of its features are noteworthy. First, it reinforces the broad understanding of security which was put forward in the original Strategy, and which covers areas as diverse as the proliferation of weapons of mass

[27] Art 47 TEU.
[28] With the exception laid down in art 275 TFEU.
[29] His role is set out in art 15(6) TEU.
[30] S407/08 *Report on the Implementation of the European Security Strategy—Providing Security in a Changing World* (Brussels, 11 December 2008).

destruction, terrorism and organized crime, cyber security, energy security and climate change. Second, it stresses the ability of the Union to rely upon a combination of instruments straddling a range of policies which is generally viewed as the added value of its contribution to international security. Third, it underlines the link between security and development, already apparent in other policy documents;[31] viewed along with the broad understanding of security and the case-law of the Court outlined above, this pragmatic realization makes one think of the wide scope for inter-institutional disputes about policy-making. Finally, the 2008 Report points out the need to focus on enhancing regional integration, an objective already apparent in the Union's policies towards its Eastern, Western Balkan and Mediterranean neighbours.

F. Common Security and Defence Policy

In the new constitutional landscape shaped by the entry into force of the Lisbon Treaty, the Union's security and defence policy takes centre stage. At least this appears to be the case: the policy is renamed (Common Security and Defence Policy, CSDP), the scope of its activities is broader (referring, for the first time, to joint disarmament operations, military advice and assistance tasks, conflict prevention and post-conflict stabilisation),[32] a special body is established to promote greater cooperation in the area of armaments (European Defence Agency, EDA),[33] a permanent structured cooperation mechanism is set out,[34] and a mutual assistance clause is laid down.[35]

However, these 'innovations' merely give the appearance of progress. In reality, it is what happens beyond the confines of these legal provisions which determines the effectiveness and progress of the Union's security and defence policy. And it is interesting that the considerable developments since the last update on EU External Relations should have taken place even though the above provisions had not entered into force.

This section will confine itself to the developments in the area of defence industries. Two parallel trends emerge. The first is apparent at the intergovernmental level and is about the EDA which had been established before the Lisbon Treaty had even been drawn up.[36] Over the years, and despite the considerable problems it has faced, not least about funding, it has worked considerably towards opening up the national defence markets, promoting the need for closer cooperation between national defence industries, and identifying specific operational needs. A tangible example of its work is the voluntary code of conduct on defence procurement which it drew up and entered into force on 1 July 2006.[37] This is applicable to contracts worth more than €1 million which are covered by the wholly exceptional clause of Article 296 EC (now article 346 TFEU), and operates on the basis of a single online portal provided for by the EDA itself. The Code introduces objective award criteria based on the most economically advantageous solution for the particular requirement and provides for debriefing,

[31] See *European Consensus on Development* [2006] C 46/01.
[32] Art 43(1) TEU.
[33] Art 45 TEU.
[34] Art 42(6) TEU and the accompanying Protocol.
[35] Art 42(7) TEU.
[36] Council Joint Action 2004/551/CFSP [2004] OJ L245/17.
[37] http://www.eda.europa.eu/genericitem.aspx?area=Organisation&id=154 (last accessed on November 24, 2009).

whereby all unsuccessful bidders who so request are given feedback after the contract is awarded. All Member States, except Denmark (which has an opt-out in the area of defence policy) and Romania, and Norway participate in this regime.

The second parallel trend is apparent in what was, under the previous dispensation, the Community legal order and has to do with the applicability of common rules to defence industries. Article 296 EC (now article 346 TFEU) is relevant: this enables Member States to deviate from the entire body of EC law in order to protect certain arms, munitions, and war material in cases where this is necessary for the essential interests of national security. For a long time, this had been interpreted by the Member States as exempting them from EU law altogether, an approach largely tolerated by the Union institutions. However, after a number of initiatives by the Commission in the 1990s[38] and mid 2000s,[39] this approach changed. On the one hand, the Commission made it clear that it would bring enforcement actions against Member States in cases where the strict criteria for the application of article 296 EC were not met.[40] Indeed, the Court of Justice adopted recently a rigorous approach to the application of this provision.[41] On the other hand, two sets of common rules have been adopted which will apply specifically to defence products, namely Directive 2009/43 on intra-EU transfers of defence products,[42] and Directive 2009/81 on public procurement.[43] These aim to bring the benefits of the internal market to this sensitive area without compromising its unique security characteristics.

What we see here is a gradual shift towards the normalisation of the status of national defence industries within the multilayered EU system. Concerted action at intergovernmental and supranational level has created a momentum which is a welcome addition to the grand rhetoric about the Union's role in the international security architecture which emerges from EU statements and policy documents.

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II. COMPETITION

A. The Lisbon Treaty

The single most important event in the life of the Union during the three year period (January 2007–January 2010) under review, and long before, is of course the Lisbon

[38] *The Challenges facing the European Defence-Related Industry. A Contribution for Action at European Level* COM(96) 10 final; *Implementing European Union Strategy on Defence Related Industries* COM(97) 583 final, adopted on November 12, 1997.

[39] *European Defence—Industrial and Market Issues. Towards an EU Defence Equipment Policy* COM(2003) 113 final, adopted on March 11, 2003; *Toward a programme to advance European security through Research and Technology* COM(2004) 72 final, adopted on February 3, 2004; *Security Research: The Next Step* COM(2004) 590 final, adopted on September 7, 2004.

[40] COM(2006) 779 final, adopted on December 7, 2006.

[41] Case C-337/05 *Commission v Italy* [2008] ECR I-2173, and Case C-157/06 *Commission v Italy* [2008] ECR I-7313.

[42] [2009] OJ L 146/1.

[43] [2009] OJ L 216/76.

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