

# Does Europe's Constitution Stop at the Water's Edge?

Law and Policy in the EU's External Relations

Piet Eeckhout



# Walter van Gerven Lectures (5)

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Fifth Walter van Gerven Lecture  
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Piet Eeckhout\*

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## Ladies and Gentlemen,

My interest in the topic of determining the boundaries between law and policy in the EU's external relations was raised when I was working in the European Court of Justice (ECJ), where I had the privilege of being involved in a number of cases in this area, and later on when writing my book on external relations law.<sup>1</sup> The book obliged me to look into the Common Foreign and Security Policy (CFSP), which I attempted to analyse from a legal and constitutional perspective. When doing so I was particularly struck by the degree of executive dominance of the CFSP, by the ill-defined content of that policy, and by the uncertain legal nature and effects of CFSP measures. These characteristics of the CFSP give rise to questions about constitutional precepts such as democracy, accountability, and respect for the rule of law. Most commentators, however, appear to deal with such questions only in passing, if at all, on the ground that the CFSP deals with foreign policy, that the conduct of foreign policy is inherently in the hands of the executive, and that Western democracies and constitutional systems traditionally conceive of foreign-policy issues as "political questions" which are not within law's province or the courts' jurisdiction.<sup>2</sup>

Such conceptions are open to challenge on the basis of general constitutional principle. In this regard there is hardly any better guide, in the context of the EU, than Walter van Gerven's book on *The European Union – A Polity of States and People*.<sup>3</sup> The scope of this lecture does not permit an exhaustive analysis of all the constitutional questions to which the fledgling CFSP gives rise. I will therefore discuss a number of salient issues, which I none the less hope will do more than illustrate; my intention is rather to convince my audience and readership that there is a case to be answered, and that further serious reflection aiming at constitutional rearrangement is required. Such constitutional rearrangement emphatically includes the comatose Constitution for Europe, which in this respect is hardly less defective – less unconstitutional I dare say – than the current set-up of the CFSP. But there are three further points to be made before presenting some of the more detailed argument.

(i) My thesis is that the constitutional defects of the CFSP are exacerbated because we are looking at the European Union, and not at foreign policy at a national level. The EU is not a sovereign State with a fixed constitutional settlement. It cannot claim to be a sovereign of its own in international relations (even if the traditional sovereignty concept is relative and contestable).<sup>4</sup> It generally struggles with questions of democracy and accountability, as the current constitutional crisis again demonstrates. The EU therefore requires even stronger doses of constitutionalism than does the nation State. And there is more. When one looks at the kind of external policies ("external action" as the Constitution for Europe calls it) which the EU aspires to pursue, one notices an enormous gap between objectives and process. Article III-292(1) of the Constitution provides that



*“[t]he Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”.*

It is a great ambition to project these values to remote corners of the globe. There are however huge questions about the level of democracy, respect for the rule of law, and even protection of human rights in the internal EU processes of forging external policies, in particular in the framework of the CFSP.

(ii) The second point is that, in analysing the constitutionality of the EU’s foreign policy, a holistic approach is called for. The dichotomy and dividing line between First Pillar (EC) external policies and the Second Pillar CFSP are accidents of the EU’s history, rather than a principled categorization of external policies. To mention just one example, the conclusion of a trade agreement with a third country may have stronger foreign-policy than economic objectives. A full charting of the boundary between law and policy in EU external relations therefore requires us to go beyond the CFSP, into First and indeed Third Pillar territory. Whilst this lecture comes nowhere near such a full charting, the features and illustrations which it discusses are taken from the entire spectrum of the EU’s foreign affairs.

(iii) The third point concerns the internal and the external. The case for a greater dose of constitutionalism in the conduct of foreign affairs becomes ever stronger with the deepening of globalization. The term globalization is often used to denote a shrinking world, where through the increased movement of products, capital, and foremost people the distinctions between home and abroad, the near and the far-flung, the internal and the external lose much of their significance.<sup>5</sup> We are affected ever more by events and developments in ever more places around the globe. Globalization significantly affects the development of EU external policies, some of which are established and some fledgling. One of its effects is that the distinction between the “internal” and the “external” becomes ever more diffuse, to the point of losing all significance. Examples abound. The trade field is increasingly characterized by the questioning of what are essentially internal policies, such as the ban on hormones and the regulation of GMOs. Decisions by the WTO dispute settlement bodies lead to trade sanctions by other WTO members (the US in particular) affecting European producers of wholly unrelated products. The removal of textiles and clothing quotas may turn China into the world’s main supplier, to the detriment of producers in Europe and other developed regions, but also of producers in developing countries. But importers, traders and consumers benefit, and are increasingly vocal in the defence of their interests. Foreign policy, on the other

hand, has been increasingly devoted to the war on terror, where there is no clear line between the internal and the external.<sup>6</sup> Immigration and asylum policies offer further examples.

It is against this backdrop that I should like to examine a number of issues concerning the boundaries between law and policy, and to question whether some of the current boundaries are appropriate from a constitutionalism perspective. Thomas Franck speaks of water's-edge constitutionalism in his book which analyses and criticizes the political-question doctrine in US constitutional law.<sup>7</sup> Europe often prides itself on having a different approach towards foreign affairs,<sup>8</sup> but does not our young and fledgling constitution also tend to stop at the water's edge? The question may seem provocative, but I hope to show that there is cause for concern.

In this lecture I am unable to review all constitutional questions surrounding the EU's external policies. I have chosen to concentrate on the judicial dimension of EU law, to which Walter van Gerven has so much contributed. In the next section I examine whether the EU courts have developed something like a political-question doctrine in their case-law, which is of course largely confined to EC law. I then turn to issues of jurisdiction; not only the Treaty-based exclusion of jurisdiction for CFSP matters, but also some worrying trends in the case-law of the Court of First Instance (CFI) and of the European Court of Human Rights (ECtHR).

## EC case-law and political questions

### (a) Sanctions cases

In which cases do the EU Courts develop language to the effect that the issues involved are political and not legal in nature, and are thus not justiciable? Where do the Courts, the ECJ in particular, locate the boundary between law and policy? Is the boundary in the right spot, or should it be moved to conform to general precepts of constitutionalism, such as the rule of law?

The Luxembourg judicial text which offers the fullest discussion of political-question type issues is the Opinion of Advocate General Jacobs in *Commission v Greece* (the FYROM case).<sup>9</sup> The break-up of Yugoslavia in the early nineties led to the formation of a number of new States, including the former Yugoslav Republic of Macedonia (FYROM). Greece strongly objected against the use of the name Macedonia, which it regards as part of its own cultural patrimony, and complained that FYROM promoted the idea of a unified Macedonia. In February 1994 it unilaterally prohibited trade with FYROM. It was clear that the embargo was in breach of the applicable EC law trade instruments. Greece relied on (current) Article 297 EC, which provides that

*“Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take 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 security”.*

The Commission immediately brought an action under Article 298 EC. The Court never ruled on the Commission's action because the case was withdrawn after Advocate General Jacobs delivered his Opinion, which therefore represents the only judicial authority.

The Advocate General examined whether Greece could invoke the notions of war or serious international tension constituting a threat of war. He considered that this question was complex and raised the fundamental issue of the Court's power to exercise judicial review in such cases. Whilst it was plain that the Court had power to review the legality of action taken by a Member State under this heading, the scope and intensity of such review was severely limited on account of the nature of the issues raised. There was a paucity of judicially applicable criteria, he argued, that would permit the Court, or any other court, to determine whether serious international tension existed and whether such tension constituted a threat of war.<sup>10</sup> That is a theme which runs through the whole Opinion. The Advocate General reiterated it when he looked at the Commission's argument that the action taken by Greece was likely to increase tension and thus adversely affect the internal and external security of Greece: that was very much a political assessment of an eminently political question, and there simply were no juridical tools of analysis for approaching such problems.<sup>11</sup> He also returned to the point when he examined whether Greece had made “improper use” (see Article 298) of the powers provided for in Article 297. Again, if a Member State considered, rightly or wrongly, that the attitude of a third State threatened its vital interest, its territorial integrity, or its very existence, it was for the Member State and not for the Court of Justice to determine how to respond to that perceived threat, and there were no judicial criteria by which such matters could be measured. It was difficult to identify a precise legal test for determining whether a trade embargo was a suitable means of pursuing a political dispute between a Member State and a third country.<sup>12</sup>

Another theme which runs through the Opinion is that the question whether there was international tension constituting a threat of war had to be looked at, not from some outside objective perspective, but from the subjective point of view of the Member State concerned. War was by nature an unpredictable occurrence and the transition from sabre-rattling to armed conflict could be swift and dramatic.<sup>13</sup> If the matter was looked at from Greece's subjective point of view and if due weight was attached to the geopolitical environment and the history of ethnic strife, border disputes, and general instability that had characterized the Balkans for centuries, then it could not be said that Greece was

acting wholly unreasonably by taking the view that the tension between itself and FYROM bore within it the treat – even if it was long-term and remote – of war.<sup>14</sup> The Advocate General also referred to case-law of the ECtHR according to which issues of national security are primarily a matter for the appraisal of the authorities of the State concerned.<sup>15</sup>

The Opinion of Advocate General Jacobs in the FYROM case is the EU judicial text which comes closest to establishing some kind of political-question doctrine in the framework of EU constitutional law. The emphasis on severely limited judicial review, on the paucity of judicially applicable criteria, and on the eminently political character of the issues involved may create an impression of judicial abdication in the face of a Member State's claims under Article 297 EC. The Advocate General also referred to similar approaches under German, United Kingdom and ECHR law in support of judicial deference. However, the general language used does not perhaps completely match the type of review actually undertaken. The Advocate General was surely right to point out that wars may flare up rather unexpectedly, and that a lot if not everything depends on the perception in the countries involved. The serious tension between Greece and FYROM was undeniable, as was the history of ethnic violence and conflict in the Balkans. On the facts, therefore, judicial deference and acceptance was clearly warranted, and the Advocate General took great care in examining and reflecting about those facts. His Opinion to some degree involves what Franck has called double-entry bookkeeping by the courts: the general test purportedly applied is strongly deferential, but closer analysis shows that there is substantial judicial review.

The FYROM case concerned review of a Member State's foreign policy decision where there was no directly pertinent EC legislation. One year later the Court examined a UK foreign policy measure in a more strongly EC-regulated context. *Centro-Com* was about trade sanctions against Serbia and Montenegro, laid down in an EC regulation implementing a UN Security Council resolution.<sup>16</sup> Exports of medical products and foodstuffs notified to the UN Sanctions Committee were exempted from the trade embargo. *Centro-Com*, an Italian company, had exported pharmaceutical products to Montenegro after having received the necessary approvals. However, when it sought payment from a bank account with Barclays in London a new UK Treasury policy intervened. Under that policy, developed in response to reports about the abuse of the exceptions to the embargo, payment from a UK bank was to be permitted only where the exports were made from the UK.

Before the Court the UK defended its new policy as constituting the exercise of national competence in the field of foreign and security policy. It argued that performance of its obligations under the UN Charter and Security Council resolutions fell within that competence. The Court accepted that the Member States retained competence in the field of foreign and security policy, but also emphasized that national competences had to be exercised in a manner consistent with Community law. It therefore looked at the common commercial policy and at the

sanctions regulation in issue, and emphasized that the Member States could not treat national measures whose effect was to prevent or restrict exports of certain products as falling outside the scope of the common commercial policy on the ground that they had foreign and security policy objectives.<sup>17</sup>

In the end the case hinged on the interpretation of Article 11 of the EC's general export regulation, which allows the Member States to restrict exports on grounds of public security.<sup>18</sup> The UK argued that, having regard to the difficulties involved in applying the system of authorizations issued by the Sanctions Committee, its new policy was necessary in order to ensure that the sanctions imposed by the UN resolution were applied effectively, since it allowed the UK authorities themselves to check the nature of goods exported to Serbia and Montenegro. The Court, however, noted that the concept of public security within the meaning of Article 11 of the export regulation covered both a Member State's internal security and its external security and that the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations could affect the external security of a Member State. Therefore, a measure intended to apply sanctions imposed by a resolution of the UN Security Council in order to achieve a peaceful solution to the situation in Bosnia-Herzegovina, which formed a threat to international peace and security, fell within the exception provided for by Article 11 of the export regulation. However, a Member State's recourse to Article 11 ceased to be justified if Community rules provided for the necessary measures to ensure protection of the interests enumerated in that article. The sanctions regulation, which was designed to implement, uniformly throughout the Community, certain aspects of the sanctions imposed by the UN Security Council, laid down the conditions under which exports of medical products to Serbia and Montenegro were to be authorized (i.e. notification to the Sanctions Committee and export authorization by a Member State). In those circumstances, measures regarding the release of funds such as those adopted by the United Kingdom could not be justified, since effective application of the sanctions could be ensured by other Member States' authorization procedures, as provided for in the sanctions regulation, in particular the procedure of the Member State of exportation. The Member States had to place trust in each other as far as concerned the check made by the competent authorities of the Member State from which the products in question were dispatched. There was nothing in the case to suggest that the system of export authorizations had not functioned properly. Finally, it had to be borne in mind that, since Article 11 of the export regulation formed an exception to the principle of freedom to export, it had, on any view, to be interpreted in a way which did not extend its effects beyond what was necessary for the protection of the interests which it was intended to guarantee. Less restrictive measures were possible here, such as resorting to administrative collaboration with the authorities of other Member States. The Court therefore concluded that the United Kingdom policy was contrary to the combined provisions of the sanctions regulation and of the export regulation.<sup>19</sup>

The Court's decision in *Centro-Com* was courageous. The Court did not take the easy path of emphasizing the political nature of the sanctions and national competence in matters of foreign policy. It strictly interpreted the public-security exception, and did so in a, from the perspective of national sovereignty, most sensitive area. Notwithstanding the fact that the Member States are required, under international law, to abide by the UN Charter and by Security Council resolutions, and that they retain competence in the area of foreign and security policy, they can no longer act outside the EC law framework once a comprehensive sanctions regulation has been adopted. Advocate General Jacobs summed up the position in stark terms, which are perhaps in contrast with his more deferential Opinion in the FYROM case. He considered that the United Kingdom's argument on national competence in the field of foreign and security policy appeared to suggest that the Member States had more leeway in interpreting, applying, or supplementing Community acts which had a foreign or security policy dimension than they had in respect of other Community acts. He rejected that view. The interpretation of a Community act depended on its objectives, its terms, and its context. The fact that it had a foreign or security policy dimension could therefore have an impact on its interpretation, but it did not in principle mean that the Member States had more leeway.<sup>20</sup>

Both the FYROM case and *Centro-Com* concerned review of measures adopted by Member States. But the Court was also faced, in the same period and context of sanctions against Serbia and Montenegro, with a challenge to EC legislation. *Bosphorus* was the first case in which the Court had to interpret an EC sanctions regulation.<sup>21</sup> In implementation of UN Security Council resolutions the Council had adopted Regulation 990/93 concerning trade between the EEC and the Federal Republic of Yugoslavia (Serbia and Montenegro).<sup>22</sup> The sanctions extended to means of transport: Article 8 of the regulation provided that all vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest was held by a person or undertaking in or operating from the FRY had to be impounded by the competent authorities of the Member States. That wording was in substance identical to the relevant passage in the Security Council resolution.<sup>23</sup> Bosphorus Airways was a Turkish air charter company, which in 1992 had leased two Boeing aircraft from Yugoslav Airlines (JAT). The leases were themselves not in breach of the sanctions, the agreement between Bosphorus Airways and JAT was entirely *bona fide*, and Bosphorus Airways operated the aircraft for its charter operations, flying between Turkey and various EU Member States as well as Switzerland. JAT had no further involvement whatsoever with the use of the aircraft or the management and direction of Bosphorus Airways. In April 1993 one of the aircraft was flown to Dublin Airport for the purpose of maintenance. At that point the Irish authorities impounded the aircraft, in implementation of Article 8 of the sanctions regulation. They acted after having consulted the UN Yugoslavia Sanctions Committee, which took the view that the aircraft came within the scope of the resolution and therefore had to be impounded. Bosphorus Airways then applied

to the High Court in Dublin for judicial review, and upon appeal the case ended up in the ECJ.

Advocate General Jacobs took the text of Article 8 as a starting-point, and considered that it left little room for doubt. The term “interest” was very broad, encompassing all types of property interest, and most other language versions of the regulation referred to the notion of property, instead of interest. There is no need to reiterate his interpretative analysis, but it may be worth pointing out that the Advocate General also examined the weight of the opinion of the UN Yugoslavia Sanctions Committee, which had led to the impounding of the aircraft. He considered that due regard should be given to that opinion, but that it could not be regarded as binding, if only because such an effect was not provided for in the resolution, at least not as regards the issue in question.<sup>24</sup>

The Court largely adopted the reasoning of Advocate General Jacobs. Nothing in the wording of the regulation suggested a distinction between ownership and control. The regulation had to be interpreted in light of its context and aims, which included the UN resolutions. The wording of the resolution confirmed its application to any aircraft which was property of a person or undertaking in the FRY, and confirmed that actual control was not required. The word “interest” could not, on any view, exclude ownership as a determining criterion; the conjunction with the word “majority” moreover clearly implied the concept of ownership. Other language versions of the regulation confirmed this. The Court also stated that the impounding contributed to restricting the exercise by the FRY and its nationals of their property rights, and was thus consistent with the aim of the sanctions, namely to put pressure on the FRY. By contrast, the use of day-to-day operation and control as the decisive criterion could jeopardize the effectiveness of the strengthening of the sanctions, as it would allow the FRY or its nationals to evade application of those sanctions through the mere transfer of day-to-day operation and control of means of transport.<sup>25</sup>

The interpretative effort in the *Bosphorus* case put the legal status of Security Council resolutions and of opinions of Sanctions Committees established by such resolutions in the spotlight, but neither the Court nor the Advocate General felt compelled fully to clarify that legal status. As we will see the Court of First Instance (CFI) has meanwhile made some important statements on the legal status of UN resolutions.

*Bosphorus* did not however concern interpretation only. Economic sanctions are measures which do not simply affect countries or regimes. They have immediate effects, often of a stark nature, on people's or companies' economic activities. Those effects may be such that people's very lives are disrupted or even jeopardized. It is therefore not surprising that economic sanctions are often challenged from a human-rights perspective. Moreover, in recent years we have seen a shift towards sanctions against individuals within the framework of the fight against terrorism. Human-rights challenges are not confined to the level of policy-making. They may also take the form of legal action. EC sanctions, too, are not immune from attack on grounds of human rights violations,

as the *Bosphorus* case showed. Such human rights challenges to sanctions raise complex issues. Fundamental rights are protected as general principles of EC law, they are binding on the EU institutions, and the Court strikes down legal acts which violate such rights. In the case of sanctions, however, there is usually a strong political dimension, particularly where the sanctions implement Security Council resolutions. Challenges to EC sanctions may in effect be challenges to Security Council decisions, as private parties are not in a position to bring legal actions against Security Council decisions as such. At the level of international law it is not so clear whether there is a hierarchical relationship between human rights law and action by the Security Council to maintain peace and international security, in the sense that the former would trump the latter. The discussion is in any event fairly theoretical, as there are no effective means for challenging Security Council decisions.<sup>26</sup> The issue therefore becomes as it were decentralized. Within a municipal legal order giving effect to Security Council resolutions, decisions need to be taken as to the relationship between fundamental rights protection and economic sanctions.

In *Bosphorus* the Turkish charter company argued that the impounding of its aircraft was contrary to legal certainty, proportionality and respect for fundamental rights. Advocate General Jacobs considered that this part of *Bosphorus Airways'* claim raised an important issue, which led him to examine it in some detail. He extensively analysed the right to property as protected under Article 1 of the First Protocol to the ECHR and as guaranteed by EC law. The Advocate General recognized that the impounding of the aircraft was a severe restriction on the exercise by *Bosphorus Airways* of its property rights, a restriction difficult to distinguish, in its effects, from a temporary deprivation. On the other hand it was also obvious that there was a particularly strong interest in enforcing embargo measures decided by the UN Security Council. Indeed it was difficult to think of any stronger type of public interest than that of stopping a civil war as devastating as the one which engulfed the former Yugoslavia, and in particular Bosnia-Herzegovina. Unavoidably, the sanctions decided by the international community to put pressure on the FRY affected property rights, including those of innocent economic operators. In that respect *Bosphorus Airways* was in no way in a unique position, as many others were likely to have suffered severe losses from the embargo measures. That did not mean that any type of interference with the right to property should be tolerated. In the case in issue, however, the Advocate General considered that the decision to impound the aircraft on the ground that it was owned by an undertaking in the FRY could not be regarded as unreasonable, in the light of the aims of the sanctions regulation.<sup>27</sup>

The Court of Justice concurred with the reasoning of its Advocate General. It referred to settled case-law that the fundamental rights invoked by *Bosphorus Airways* were not absolute and their exercise could be subject to restrictions justified by objectives of general interest pursued by the Community. It then pointed out that any measure imposing sanctions had, by definition, conse-



quences which affected the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who were in no way responsible for the situation which led to the adoption of sanctions. Moreover, the importance of the aims pursued by the regulation at issue was such as to justify negative consequences, even of a substantial nature, for some operators. The Court then sketched the aims and justifications of the sanctions. It concluded that, as compared with an objective of general interest so fundamental for the international community, which consisted in putting an end to the state of war in the region and to massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which was owned by an undertaking based in or operating from the FRY, could not be regarded as inappropriate or disproportionate.<sup>28</sup>

In *Bosphorus* the Court showed some measure of deference to the policy-makers, essentially at the UN level. There was no significant review of the policy calculation that the sanctions had to extend to all means of transport owned or controlled by Yugoslav nationals. But the judgment does not amount to judicial abdication. The Court had no qualms with examining the sanctions regulation, which effectively copied a UN resolution, on the basis of general principles of EC law. That review went to the heart of the regulation, and therefore the resolution. The occasion of course was a particular act of implementation by a Member State, Ireland, but the review transcended that act, as the Court itself laid down a general interpretation of the regulation, an interpretation in line with the position of the UN Sanctions Committee. And yet the Court had the courage to subject that interpretation to human-rights review. It did not of course strike down the regulation, but I would submit that its examination was meaningful, and essentially correct.<sup>29</sup> The judgment struck the right kind of balance between law and policy. It stands in fairly sharp contrast with the recent terrorism judgments by the CFI, discussed below.

### (b) Competence cases

A recurring constitutional task for the ECJ in EC external relations law is to determine the scope and nature of the EC's competences. This is, again, a politically sensitive endeavour, mainly because it is so closely linked with national sovereignty. The Member States are much more reluctant to relinquish sovereignty on the international plane than over internal policies. There is therefore strong pressure on the ECJ to recognise national competences, and not to push for the widening of the EC's external powers.

It is not possible within the scope of this lecture to review the entire case-law on external competence.<sup>30</sup> Let me simply refer to two high-profile rulings, which I think were crucial in the development of this area of the law.

In Opinion 1/94 the Court famously limited the scope of the common commercial policy, in the sense that it did not cover the entire spectrum of WTO law, which includes trade in services and the commercial aspects of intellec-

tual property rights.<sup>31</sup> Most commentators regard the ruling as embodying a greater reluctance to confirm external competence, heralding a new phase of judicial retrenchment.<sup>32</sup> This assessment is dependent however on looking at the common commercial policy as an ever-expanding universe. It is clear that when the EEC Treaty was drafted its authors could not envisage the development of international trade policy from GATT to the much wider remit of the WTO. The Opinion was delivered a couple of years after the Commission had failed to persuade the Maastricht IGC to rewrite (current) Article 133 EC.<sup>33</sup> The ECJ may well have been reluctant to effect, through judicial pronouncement rather than political consensus, what it perhaps perceived as a significant transfer of powers from the Member States to the Community, particularly in light of the exclusive nature of the EC's trade policy powers. In that sense the Opinion constitutes deference to the political authorities who are responsible for drafting the EC Treaty, the Community's constitutional charter. Such deference is appropriate. Determining the federal-type division of powers between the EC and its Member States is best decided at political level. The Court of course has a role to play, but it should not be expected to take truly fundamental decisions effectively constituting an expansion of EC competence.

In Opinion 1/94 the Court was also confronted with multiple references by the Commission to EC legal acts which purportedly confirmed the extension of the common commercial policy to, in particular, transport<sup>34</sup> and intellectual property.<sup>35</sup> The Court's general reply was to point out that a mere practice of the Council cannot derogate from the rules laid down in the Treaty and cannot, therefore, create a precedent binding on Community institutions with regard to the correct legal basis.<sup>36</sup> This is a principled constitutional approach which shows no trace of deference to the political authorities. As formulated by the Court it could even be criticised for failing to give due weight to institutional praxis. One must however immediately add that, here too, some double-entry bookkeeping appears to be going on. The Court did examine most carefully the legal acts to which the Commission had referred, and came to the conclusion that in fact they did not support the broad argument which the Commission derived from them.

The second competence case I would like to refer to is Opinion 2/94, on accession to the ECHR.<sup>37</sup> In constitutional terms this is a hugely important decision, which cannot be fully examined here. The point on which I would like to concentrate is the final obstacle which the Court saw to recognising that the EC had competence to join the ECHR. After having analysed the lack of implied powers in the human-rights field, the Court turned to Article 308 EC. It then immediately pointed out that this provision cannot be used for the adoption of provisions whose effect would in substance be to amend the Treaty without following the procedure which it provides for that purpose.<sup>38</sup> The Court considered that EC accession would constitute such amendment, for reasons which we do not need to review (but which are not terribly convincing). However, what is interesting is that in this respect Opinion 2/94 and 1/94 appear very similar.

The Court leaves the decision of accession to the political authorities responsible for amending the treaties. It does so in the face of long-standing and (at the time at least) inconclusive political debate about the desirability of the Community's joining the ECHR. Here again is a case in which the Court defers to the political authorities.

The competence rulings clearly do not constitute judicial abdication in the realm of foreign affairs. The Court shows some measure of deference, but this area of the case-law is also characterised by dense legal argument and analysis. There are rulings, such as the air transport cases, where the Court does make significant inroads into national competence.<sup>39</sup>

### (c) The effect of WTO law

Another important area of EC external relations law is concerned with the legal effect of international law. Again it is not possible to review this whole area. What I would briefly like to focus on is the case-law on the lack of direct effect of WTO law. Here too there are references to the political nature of the issues.

In *Portugal v Council* the ECJ decided that, with some exceptions, WTO law could not serve as a basis for the review of the legality of Community measures.<sup>40</sup> It did so on the basis of, first, an analysis of WTO law, in particular its dispute settlement provisions. From that analysis the Court concluded that WTO law does not require direct effect (to use that shorthand). It then went on to consider whether there was a basis in Community law itself for recognising direct effect. The Court opened this second part by indicating that it concerned, "more particularly", the application of the WTO agreements in the Community legal order. It noted that the WTO was still founded, like GATT 1947, on the principle of negotiations with a view to "entering into reciprocal and mutually advantageous arrangements" (see the preamble), and was thus distinguished, from the viewpoint of the Community, from agreements concluded between the Community and non-member countries which introduced a certain asymmetry of obligations, or created special relations of integration with the Community, such as the agreement which the Court was required to interpret in *Kupferberg*.<sup>41</sup> The Court pointed out in particular that it was common ground that some of the contracting parties, which were among the most important commercial partners of the Community, had concluded from the subject-matter and purpose of the WTO agreements that they were not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law. The Court considered that in the case of the WTO agreements, based as they were on reciprocity, lack of reciprocity as regards judicial application could lead to disuniform application of the WTO rules. It added that, to accept that the role of ensuring that Community law complied with those rules devolved directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.

I have argued before that the core meaning of *Portugal v Council* goes beyond the reciprocity argument.<sup>42</sup> Reciprocity is indeed the cornerstone, but ultimately it is not reciprocity as such which leads the Court to deny WTO law direct effect. Rather, it is the impact of direct effect on the EU's political institutions. If direct effect were granted, those institutions would lose the scope for manoeuvre which they currently have as regards implementation of WTO law, particularly in case of disputes with other WTO Members. The hands of those institutions would be much more tied than the hands of their US, Japanese, and other counterparts. Ultimately, the Court is unwilling to take that step of tying the hands of the EU's legislative and executive organs. This is the clear constitutional dimension of *Portugal v Council*, and it goes beyond the issue of reciprocity in international trade relations. The Court defers to the EC legislature. It does so in terms of respecting any specific policies, now or in the future, which may cause WTO friction. But it also does so in light of the statement which the Council inserted in the preamble to Decision 94/800 concerning the conclusion of the WTO Agreement.<sup>43</sup> According to that statement the WTO Agreement is not susceptible to being directly invoked in Community or Member State courts. The Court did not base its argument on that statement, but referred to it as an element confirming its analysis.

In political-question terms *Portugal v Council* comes fairly close to judicial abdication. That the Court is in the driving-seat here is mere appearance. If one disentangles the judicial argument one can see that the Court shows great deference to the political institutions. The Court does not really say why those institutions need room for manoeuvre in the WTO, other than to refer to the reciprocity issue. But it is no secret that that is the exact issue which the Commission and the Council regard as a crucial reason for their opposition to the judicial application of WTO law. The reference to major trading-partners is of course primarily code for the United States, where Congress has ensured that the courts have virtually no role in the enforcement of WTO law.<sup>44</sup> Since for the EU one of the primary functions of the WTO is to deal with (trade) negotiations and disputes with the US, the position of the Commission and the Council is understandable, if rather mercantilist. The Court in *Portugal v Council* largely acquiesced.

I have in the past defended the lack of direct effect of WTO law, on a number of grounds which need not be reiterated here.<sup>45</sup> It is none the less to be noted that this strand of case-law sits uneasily with the general body of case-law on the effects of international law and international agreements. WTO law is still a lone exception here. The WTO case-law also does not chime with the image which the EU seeks to project of itself in the wider world. That image is encapsulated in Article I-3(4) of the Constitution for Europe, which describes "strict observance of international law" as one of the core EU objectives.

The judicial abdication has reached its peak in the recent *Van Parys and Chiquita* rulings.<sup>46</sup>

What was in issue here was not the general lack of direct effect of WTO law. Both cases concerned the effect of WTO dispute rulings. In 1997 the WTO ruled against the EC's banana regime. When such rulings are given there is a "reasonable period" for achieving compliance (Article 21.3 DSU). In 1998 the Community amended its regime, clearly with a view to rendering it consistent with WTO law. In 1999, however, the WTO established that the new regime continued to fall foul of certain provisions of WTO law. Is it possible, in such circumstances, for a private party to rely on those decisions, against the unsuccessfully amended regime? Can a private party claim damages for the period after the reasonable period of time? Can it ask for the annulment of the regulations in issue?

In both cases the parties couched their arguments in terms of the so-called *Nakajima* principle.<sup>47</sup> This is an established exception to the lack of direct effect of WTO law: where an EC act expressly refers to WTO law, or where the EC intended to implement a particular WTO obligation, there can be judicial review on the basis of WTO law. The precise contours of this principle cannot easily be discerned; nor can its rationale. I would prefer not to speak about it at all here, but need to for a proper understanding of *Chiquita* and *Van Parys*. In both cases the argument was made that, as in 1998 the EC clearly intended to comply with the DSB decision on bananas, the *Nakajima* principle applied. The issue, however, is obviously broader: are the EU courts inclined to accept that there is only so much time for EC manoeuvre in the WTO? Are they inclined to accept that, ultimately, WTO dispute settlement decisions are binding and can be judicially enforced?

Judging from *Chiquita* and *Van Parys*, it looks like they are not. These are I think the crucial elements in the reasoning. Both courts consider that the negotiating room of the EC institutions, in the WTO, cannot be interfered with, even after the end of the reasonable period for compliance. They do not base this on pure policy arguments. Both courts emphasise provisions in the WTO Dispute Settlement Understanding (DSU) such as Articles 21.6 and 22.8 which state, in essence, that the issue of compliance remains on the DSB's agenda as long as there is no agreement about compliance.<sup>48</sup> The CFI even goes so far as to say that the effectiveness of Article 21.6 would be undermined by judicial intervention in Luxemburg. It also states that WTO dispute settlement is not a mechanism for judicial resolution by means of decisions with binding effects comparable with those of a court decision in domestic legal systems.<sup>49</sup> The ECJ emphasizes the train of events after the failed 1998 implementation attempt, up to the 2001 final resolution of the bananas dispute (but whether that was truly final remains to be seen). It considers that this outcome could be compromised if there was something like direct effect of DSB decisions, and that the negotiation possibilities were not exhausted at the end of the reasonable period.<sup>50</sup>

The *Chiquita* and *Van Parys* decisions are not convincing. I continue to think that WTO dispute rulings justify an exception to the lack of direct effect of WTO law.<sup>51</sup> Not only is there, as Jackson has argued, an international law obligation to

comply with these rulings.<sup>52</sup> It is interesting to reflect a little further about the nature of that obligation. It is often said that panels and the Appellate Body have a judicial function, and as such simply interpret WTO law and do not add to the rights and obligations of the Members. In fact, they cannot add to those rights and obligations (Art 3.2 DSU). There is however the other dimension, which is that panels and Appellate Body do establish, authoritatively – pursuant to the authority conferred on them by the DSU – that a WTO Member has breached WTO law. The Dispute Settlement Body (DSB), which is a political body, then confirms the ruling. If a Member does not comply with the ruling, there is more to this than a mere violation of, say, Article III GATT. There is, in addition, a violation of the DSU provisions requiring compliance. There is a failure to respect the decision of the DSB. All this is quite serious. The obligation to comply with WTO dispute settlement rulings is at its core nothing less than a specific manifestation of one of the most important international law rules, namely *pacta sunt servanda* – international treaty obligations are binding. The obligation to comply with a Geneva ruling is in my view qualitatively different from the obligation generally to comply with all substantive WTO obligations. If the EU Courts are unwilling to give domestic legal effect to such rulings, one can indeed ask questions about the EC's respect for international law.

## The rule of law and issues of jurisdiction

### (a) Exclusion of jurisdiction in CFSP matters

In his book on the EU Walter van Gerven lists as two of the three major components of the rule of law: (1) submission of all public authority to judicial review by an independent judge, and (2) respect for human rights and fundamental freedoms.<sup>53</sup> In this section of the lecture I should like to examine to what extent the EU's foreign policy complies with such demands made by the rule of law.

When we turn to the CFSP, the first thing to note of course is the exclusion of jurisdiction in Article 46 TEU. The TEU provisions on the CFSP are not subject to the EC Treaty provisions concerning the powers of the Court of Justice and the exercise of those powers. The Court does have jurisdiction to interpret and apply Article 47 TEU, which provides that the TEU does not affect the EC Treaty. The Court showed its readiness to arbitrate the delimitation of the pillars in the airport transit visa case.<sup>54</sup> But that issue is not further examined here.

According to Denza there were essentially two reasons for the exclusion. The first related to the nature of CFSP instruments, which are short-term in character, potentially both wide-ranging and sensitive, and which are not designed to establish a permanent framework of mutual legal obligations. Measures to enforce compliance were not envisaged. The insistence on the continuation of ultimately sovereign policies, together with the need for speed in the resolu-

tion of differences, meant that the conditions for judicial resolution of disputes did not exist. The second reason concerned the nature and record of the Court, whose doctrines in the sphere of external relations lay much more emphasis on the integrationist purpose of the Treaties and less on presuming a minimum derogation from individual sovereign powers. There was concern that doctrines such as that of exclusive external powers might find their way into the CFSP.<sup>55</sup>

Many commentators appear to accept these justifications as inherent in the intergovernmental nature of the CFSP. There was however debate in the Convention for the Future of Europe on extending the Court's jurisdiction over CFSP matters, which resulted in Article III-376, according to which the Court is to have jurisdiction for judicial review of decisions providing for restrictive measures against natural or legal persons, adopted within the framework of CFSP. This extension was inspired by concerns over the protection of fundamental rights. It was felt that such an extension realised an appropriate balance between the non-justiciable nature of the CFSP and the protection of individual rights. The provision also reflects the fast expanding practice of individual sanctions in the context of the fight against terrorism and of so-called smart sanctions against the members of undesirable regimes.

Article III-376 would definitely constitute progress. But the fate of the Constitution for Europe is most uncertain. And even if the Constitution were to enter into force, would the carve-out of Article III-376 be sufficient? I would argue that it is patently insufficient from the perspective of the rule of law. The reasons and justifications for the exclusion of the Court of Justice's jurisdiction are defective, essentially because there is a lot more going on in the CFSP than the mere adoption of foreign-policy positions and the making of diplomatic *démarches*.

The main instruments of the CFPS are joint actions and common positions. As part of the research for my book I have analysed the substantive content of all joint actions and common positions adopted between the start of the CFSP and 2003. Such research throws up some remarkable findings.<sup>56</sup> Joint actions provide for financial expenditure and transfers. They involve sending missions, from election observers to military personnel, consisting mostly of persons seconded by the Member States. They provide for diplomacy, consultations, *démarches*, representation, and conferences. Joint actions instruct the Member States to take various forms of action, up to the adoption of legislation (including sanctions) and the ratification of international conventions. They may set up institutions and centres with legal personality. The range of subjects addressed through common positions, on the other hand, is as wide, and many subjects are similar if not identical. There are however a number of differences in the content of the respective measures. Common positions do not appear to involve financial expenditure and transfers, the sending of missions, or the establishment of institutes or centres. Common positions do contain wide-ranging policy statements and instructions for action by the Member States. Both joint actions and common positions are non-legislative because they do not directly regulate

rights and obligations of citizens; at least that is the prevailing opinion, since no court appears to have ultimate authority to settle this issue. Indirectly, however, and in a material sense, many CFSP measures do have a legislative character. Many common positions, in particular, concern various forms of sanctions and restrictions, which acquire binding force through implementation either by the Community, where the measures come within Articles 301 or 60 EC, or by the Member States (mostly visa and travel bans, and restrictions on trade in military material and technologies).

A good example of a common position with strong legislative purpose is the common position on combating terrorism.<sup>57</sup> Under Article 1 the wilful provision or collection of funds for terrorist purposes shall be criminalized. Article 2 concerns the freezing of funds held by terrorists. Article 8 provides that terrorists shall be brought to justice and that terrorist acts shall be established as serious criminal offences. Pursuant to Article 9 Member States must afford one another and third States assistance in connection with criminal investigations or proceedings. Article 10 requires that the movement of terrorists or terrorist groups be prevented by effective border controls. Article 14 provides that the Member States shall become parties as soon as possible to the relevant international conventions and protocols. These are some examples of the kind of provisions a common position may contain. The ill-defined nature of joint actions and common positions therefore appears to permit virtually any type of government activity, with the exception, as mentioned, of general normative action creating rights and obligations for citizens. It may be added that international agreements can also be concluded within the framework of the CFSP.

Is it acceptable that measures involving financial expenditure, measures creating institutes with legal personality, measures appointing persons to certain positions, measures with legislative scope, for example ordering the Member States to define terrorism in a certain way, measures imposing sanctions on individuals, measures, lastly, which set up EU military missions and define them, is it acceptable that all such measures are outside the jurisdiction of the EU courts? Is it acceptable that no court at the central EU level is able to review such measures? Review at the level of the Member States does not appear to offer a satisfactory alternative. Even if a court in one or other Member State had the courage to intervene, it could only declare a particular CFSP measure inapplicable in a national context. This is no alternative to review at a European level. Can the EU continue to claim that it is based on the rule of law, if the kind of foreign policy measures by public authorities, outlined above, are not submitted to judicial review by an independent judge?

Matters are made worse by the democratic deficit in CFSP decision-making. The European Parliament has no powers in this field, other than its involvement in budgetary matters. The Commission plays but a strictly limited role. The CFSP is almost entirely defined and conducted by the executive. As again Walter van Gerven has explained, there is a link between democracy and judicial review, in the sense that where there is a democratic deficit judicial review



becomes all the more indispensable.<sup>58</sup> In CFSP matters there is both a democratic and a judicial deficit. This is simply not acceptable, no matter how activist the ECJ risks to be in this area. And if the analysis in the previous section is correct, the Court thus far is clearly not over-activist where sensitive issues of foreign policy or external relations are involved. The current no-man's land in which the CFSP finds itself, between EC and international law, is not sustainable.

### (b) Case-law on lack of jurisdiction

In the face of such “unconstitutional” features one would expect the courts to make a stand, and to adopt a broad interpretation of their own jurisdiction. However, the opposite appears to be taking place hitherto. I will discuss three decisions, one by the ECtHR, and two by the CFI, each of which adopt a narrow view of what courts can do about questions of jurisdiction – and indeed about the protection of fundamental rights. It is true that all three decisions are in the sphere of the fight against terrorism. This fight may well call for special measures, but it does not justify judicial abdication. Yet such abdication appears to be taking place.

In *Segi and Gestoras Pro-Amnistía v Germany and Others* the ECtHR was asked to review the listing of both groups as terrorist organisations in Common Position 2001/931 on the application of specific measures to combat terrorism.<sup>59</sup> The ECtHR is of course not an EU court, but its decision in this case is significant as an indicator of the problems of judicial review of EU (as opposed to EC) measures. The complainants are Basque associations, the first a youth movement, the second an NGO for the protection of human rights in the Basque lands. They were listed in the Common Position as subject to Article 4 only. This article essentially provides that the Member States shall assist each other in third-pillar cooperation concerning the prevention and combating of terrorist acts by the persons, groups or entities listed. The Common Position did not therefore impose actual sanctions on Segi and Gestoras Pro-Amnistía; it “merely” branded them as terrorist organisations. The groups claimed that this violated several of their human rights and fundamental freedoms under the ECHR, such as the right to presumption of innocence; freedom of expression; right to a hearing and a fair trial.

The ECtHR, however, declared the actions inadmissible. It referred to its established case-law according to which it is not possible to complain against a law *in abstracto* or against a potential violation of one's rights. Such a potential violation can only be challenged if the victim produces reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur. The Court then pointed to the intergovernmental character of the CFSP, and of the challenged provisions of the common positions. It focused on the terms of Article 4 of Common Position 2001/931, which it considered advocated cooperation very similar to that provided for in numerous other international

instruments adopted in the field of judicial cooperation. This article might be used as a legal basis for concrete measures, but did not add any new powers which could be exercised against the applicants. Any future concrete measures would be subject to judicial review at national or international level. The mere fact of listing the applicants' names as groups or entities involved in terrorist acts might be "embarrassing" (sic), but the link was much too tenuous to justify application of the Convention. The listing did not amount to an indictment and still less to establishment of guilt.

The decision of the ECtHR in this case was not courageous. EU common positions are binding on the Member States,<sup>60</sup> and some commentators even argue that the rule of primacy applies to them.<sup>61</sup> If a person is expressly listed as a terrorist in such an act, it is difficult to see how this person would not be affected by this in the sense of the rights guaranteed by the Convention. True, it may well be possible for the applicants to challenge the national application of this common position. But such a challenge could only concern that application. It would leave intact the European-level branding of the two groups as organisations involved with terrorism. Shifting judicial review to the national level may turn it into some kind of Sisyphus job: no matter how often national implementing measures are challenged, even successfully, the European listing would remain, because national courts would in all likelihood be reluctant to review it. Imagine for one moment that I am tomorrow listed as a terrorist in an EU common position, wholly erroneously I hasten to add. Does this not affect my human rights and fundamental freedoms in European contemporary society?

Segi did not leave it at that. It also brought an action in damages against its listing before the CFI.<sup>62</sup> Again, however, the action was not admitted. The CFI analysed the common position, and like the ECtHR focused on Article 4. It concentrated on the fact that the common position had in fact been adopted on the basis of both Articles 15 and 34 TEU (Second and Third Pillar). It accordingly considered that Article 4 was in fact a Third Pillar measure, purely involving cooperation in criminal matters. The CFI then looked at the TEU provisions on remedies, in particular Article 35 TEU, pointing out that those provisions did not provide for an action in damages. That conclusion was not affected by Article 6(2) TEU on respect for fundamental rights, which is expressly listed in Article 46(d) TEU as coming within the EU courts' jurisdiction, for the simple reason that Article 46(d) confirms that this does not involve an extension of jurisdiction.

The Court then turned to the applicants' argument that they had no effective remedy. It admitted that this was probably correct, in the sense that there was no judicial remedy at national or EU level against the listing of Segi as a terrorist organisation. Challenging implementing acts would not repair the potential damage by the EU listing. Challenging at national level each Member State's participation in the adoption of the common position hardly appeared effective. Preliminary references on validity were not possible as the act was a common position. In the end, however, the Court considered that the lack of an effective

remedy could not in itself establish a jurisdictional competence, because of the fundamental principle of limited or conferred powers (Article 5 EC). As a possible last resort, the CFI examined whether the common position disregarded Community competences, which could be a basis for awarding damages under the EC Treaty. It concluded, however, that Article 4 of the common position was correctly adopted on the basis of Article 34 TEU.

The CFI decision in *Segi* clearly exposes a significant and unacceptable gap in the EU system of remedies. The Court points it out in so many words. One can even detect a sense of frustration in the Court's persistent but, in the end, unsuccessful attempts at finding a basis for its jurisdiction. However, the CFI does shy away from creating its own jurisdiction on the basis of the effective-remedy imperative. This of course would have been an enormous step to take, but not an unheard one: see the *Les Verts* and *Chernobyl* rulings.<sup>63</sup> In present times the EU Courts appear much less inclined to travel down such routes, as also the famous, or should I say infamous, *UPA* judgment illustrates.<sup>64</sup> Perhaps, however, the collapse of the Constitutional Treaty offers an opportunity to reconsider.

Whilst the CFI decision in *Segi* is difficult to criticise in the face of the EU Treaty's express limitation of the Courts' jurisdiction in Second and Third Pillar matters, the very recent judgments in a couple of other terrorism cases are fundamentally flawed. I am referring to *Yusuf v Council and Commission* and *Kadi v Council and Commission*.<sup>65</sup> Those cases were brought by alleged terrorists listed, not only in an EU Common Position, but also in EC Regulations freezing their assets.<sup>66</sup> The Common Position and the Regulations reflected UN Security Council resolutions. The names of the persons involved were listed by the Sanctions Committee set up by those resolutions. The EC Regulations faithfully (or perhaps rudderlessly) followed the ebb and flow of the listing of persons and entities by the UN Committee. The Regulations were adopted on the basis, not only of Articles 301 and 60 EC, which provide for sanctions, but also of Article 308 EC. The apparent reason for the recourse to the latter provision is that Articles 301 and 60 only speak of reducing economic relations with third countries, and do not mention sanctions against individuals.

The applicants sought the annulment of those regulations on grounds of lack of competence and of breach of fundamental rights. The judgments are groundbreaking in all respects. I will not however focus on the competence issue here, even if here too the Court's analysis calls for substantial comment. Instead I would like to limit the analysis to those parts of the judgments where the Court looks into the applicants' human-rights arguments. I will not set out the Court's full argument, which is lengthy, but will concentrate on some of the crucial elements in the reasoning.

It is perhaps best to start with the CFI's conclusion on the question of judicial review on grounds of violation of fundamental rights. The Court considers that the challenged regulations fall outside the ambit of its judicial review powers, and that it has no authority to call in question, even indirectly, their

lawfulness in the light of Community law.<sup>67</sup> This is remarkable of course, since we are dealing, not with EU common positions, but with EC regulations, clearly acts of the institutions in the sense of Article 230 EC. That is indeed not the issue. The issue is rather, in the Court's conception, that the regulations implement and apply, in a Community context, resolutions of the Security Council.

In order to come to this remarkable conclusion the Court starts off by considering the relationship between the international legal order under the United Nations and the domestic or Community legal order. It opens that analysis by stating that, from the standpoint of international law, the obligations of the EU *Member States* under the UN Charter clearly prevail over every other obligation of domestic law or of international treaty law, including their obligations under the EC Treaty.<sup>68</sup> The Member States will surely be interested to hear this. That the Charter prevails over other international treaties is of course spelled out by the Charter itself (Article 103), but I think it is relatively new to learn that it also prevails over domestic law. The CFI explains why this is the case: it simply follows from Article 27 Vienna Convention on the Law of Treaties (VCLT), according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This is customary international law, but it clearly does not mean, and has never been interpreted as meaning, that international treaties automatically prevail over domestic law, at least not as a matter of domestic law. As a matter of international law it is of course uncontested that *pacta sunt servanda*, but surely not every EU Member State is monist in the sense that as a matter of domestic law international treaties automatically prevail!

The CFI then points out that this "primacy" as it calls it extends to Security Council resolutions. It subsequently draws attention to Articles 307 EC and 224 EC. Under the first Member States are permitted to give precedence to pre-EC treaty obligations; the second recognises that a Member State may be called upon to take measures in order to carry out obligations it has accepted for the purpose of maintaining peace and international security. The Court concludes that, pursuant both to the rules of general international law and *to the specific provisions of the Treaty*, Member States may, *and indeed must*, leave unapplied any provision of Community law that raises any impediment to the proper performance of their obligations under the UN Charter.<sup>69</sup>

Again the CFI is really focusing on the obligations of the EU Member States, rather than those of the EC. I do not agree with the statement that the specific provisions of the EC Treaty *require* the Member States to give effect to their obligations under the UN Charter. Articles 307 and 224 EC *permit* the Member States to derogate from Community law obligations, but they do not in terms state that Member States are required to do so.

The CFI then admits that the Community, not being a member of the UN, is not directly bound by the Charter as a matter of international law. However, the Court does hold that the Community is bound, in the same way as its Member States, by virtue of the EC Treaty. It develops a sophisticated reasoning, referring

to the analogy with the *International Fruit Company* judgment were the ECJ held that GATT was binding on the EEC,<sup>70</sup> to come to the conclusion that the Charter is binding. This is groundbreaking, but the arguments have merit. The conclusion is that, first, the Community may not infringe the obligations imposed on its Member States by the Charter or impede their performance and, second, that in the exercise of its powers it is bound to adopt all the measures necessary to enable its Member States to fulfil those obligations. This conclusion is again heavily directed towards avoiding Community interference with the Member States' UN obligations.

Let us pause here for a moment. As we will see all these points lead up to the conclusion that the CFI is not allowed to review the EC sanctions regulations. But if the Court were to strike down those regulations, why would that impede the performance by the Member States of their UN obligations? Those obligations would remain intact, and surely every Member State could itself decide to take the action (freezing of assets) which is required by the relevant resolutions. The freezing measures are in place any way, one assumes, and every Member State could under its domestic law take the action it considers is required. Surely there might be some Member States where it would be possible to have review of the domestic measures on human-rights grounds in domestic constitutional law. But that cannot be of concern to the CFI.

And yet the CFI considers that it results from all the preceding that there are structural limits on its judicial-review capacity. It considers that the institutions, when adopting the regulations, acted under "circumscribed powers", with the result that they had no autonomous discretion. Now come the vital paragraphs:

*"Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions. In that hypothetical situation, in fact, the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions [...].*

*In particular, if the Court were to annul the contested regulation [...], although that regulation seems to be imposed by international law, on the ground that that act infringes their fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicants ask the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order"<sup>71</sup>*

This, the CFI is not willing to do. It does not have the jurisdiction to review the regulations on grounds of general principles of Community law. However, the Court does appear to realise that, if it were to leave it at that, there would be no

remedy whatsoever. And it does find some room for judicial review. “None the less”, it states, “the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible”.<sup>72</sup> What is the basis for this jurisdictional competence? Simply the nature of *jus cogens* or peremptory norms under international law. If Security Council resolutions failed to respect *jus cogens*, however improbable that may be, they would bind neither the Member States of the UN nor, in consequence, the Community. The CFI then reviews the applicants’ arguments concerning the right to property, the right to be heard, and the right to an effective remedy. I will not analyse this section of the judgments. The conclusion from the review is that there is no violation of *jus cogens*, but it has to be said that the CFI carefully examines the various arguments. This somewhat sweetens the pill of denial of jurisdiction. It is however obvious that *jus cogens* does not offer the same standard of review as do general principles of Community law.<sup>73</sup>

Notwithstanding the review on grounds of *jus cogens* the judgments in *Yusuf* and *Kadi* amount in my opinion to judicial abdication. There are four points which I should like to develop at this stage.

(i) It is important to realise the effects of the rulings. The sanctions against these suspected terrorists are laid down in EC regulations. Those regulations prevail over the domestic law of the Member States, including their constitutions. The direct effect and primacy of the regulations mean that no national court may review them in the light of human-rights protection offered by national constitutional law. We all know that constitutional courts in the Member States grudgingly accept this, principally on the basis that human rights are protected at EC level. But in the case of regulations implementing UN resolutions there is no such protection. The *jus cogens* review comes nowhere near the level of human-rights protection under EC law. By considering that its jurisdiction is circumscribed, the CFI in effect proclaims a rule of primacy to the benefit of the UN Security Council, whose resolutions become supreme legislation. It is well-known that, at the international level, there is no effective judicial remedy against UN resolutions. The judicial abdication by the CFI means that, insofar as the resolutions are implemented by EC regulations, there can be no review by either the EU Courts or national courts.

(ii) All of this is based, essentially, on the binding nature of the resolutions. But, even if one accepts that the resolutions bind the Community, it simply does not follow that this limits jurisdiction to review a Community regulation. In the *Bosphorus* judgment, discussed above, the Court of Justice also looked at a regulation faithfully implementing a UN resolution; a regulation which was applied consistently with the opinion of the UN sanctions committee. The

Court confirmed the correct interpretation of the regulation, in line with this opinion, but none the less went on to examine whether it was in conformity with fundamental rights as general principles of Community law. In other cases, outside the sphere of sanctions, the ECJ has reviewed the constitutionality of international agreements concluded by the Community, agreements which are of course equally binding. In *Germany v Council (II)*, on bananas, the Court effectively struck down a small part of the WTO Agreement, namely the Framework Agreement on Bananas, part of the EC's tariff schedule, for violation of the principle of non-discrimination.<sup>74</sup> In *France v Commission* the Court annulled the act by which the Commission concluded an agreement with the US Justice Department regarding cooperation in the anti-trust field.<sup>75</sup> In such cases the ECJ maintains the distinction between the international legal order and the Community legal order. It cannot of course annul an international agreement as such, but it can strike down the internal act of conclusion. The CFI, by contrast, collapses the distinction between the international and the Community legal order. Community law is a mere vassal of the UN Security Council. It is being commandeered by the UN and by the CFSP, and becomes an instrument for turning UN resolutions into supreme law, a supreme law offering virtually no guarantees of judicial review, at any level.

(iii) Even if the CFI is unwilling indirectly to review the UN Security Council resolutions, there is a middle way offering protection of human rights. The UN resolutions do not, I think, preclude the members of the UN to install mechanisms for the protection of those rights. There may not be a direct right to be heard by the Security Council, but surely an EC Regulation implementing a resolution could provide for such a right, even if retroactively. It could organise an internal review process, perhaps even including some kind of judicial intervention, to guarantee that the freezing measures are consistent with fundamental rights. Community law could be interpreted as imposing further requirements on the EC legislature when implementing a UN resolution. A balance could thereby be struck between respect for the resolution and respect for fundamental rights.

(iv) The terrorism decisions offer a remarkable contrast with the CFI's ruling in *Chiquita*, discussed above. What was in issue in *Chiquita* was the effect of decisions by the WTO dispute settlement organs – clearly binding under international law. There the CFI concluded that such decisions have no internal legal effect, and stated that WTO dispute settlement is not a mechanism for judicial review by means of decisions with binding effects comparable to those of a court decision in domestic legal systems (see above). A private party cannot rely on those decisions against an EC regulation. But does not Article 27 VCLT apply here equally? Surely WTO law is international law too, and the fact that it binds the Community is beyond doubt for the Community has itself concluded the agreement, in contrast with the UN Charter. Is one allowed to remark that

the difference between the two cases – terrorism and WTO dispute decisions – is that in the first international law is used to uphold an EC regulation, and in the second it is used to challenge such a regulation? The crude outcome of both cases is that EC regulations are not judicially reviewed. This, in my view, constitutes judicial abdication wholly inconsistent with the precepts of European constitutionalism.

## Conclusions

In this lecture I have attempted to review a sample of issues and developments relating to the boundary between law and policy in the conduct of the EU's external relations. The review reveals cause for concern. Despite the EU's attempts at profiling itself as a champion of democracy, human rights, and the rule of law, its own internal processes fail some basic constitutionalism tests. The lecture has focused on judicial intervention and the rule of law. The ECJ has on the whole struck an appropriate balance between law and policy, and has located the boundary between them in such a way that a core constitutional territory is judicially maintained and protected. There is clearly no overarching political-question doctrine. There are however border areas which should be revisited, such as the denial of all effect to WTO dispute decisions. But it is in CFSP-related matters that no such constitutional territory is safeguarded. The lack of jurisdiction of the EU courts is wholly unjustified in the light of the developing content of the Union's foreign policy. It constitutes a substantial breach in the rule of law. Unfortunately, both the ECtHR and the CFI are compounding the breach, the former by refusing to review EU measures branding individuals and groups as terrorists, and the latter by declining to review the legality of EC regulations on the ground of their origin in UN resolutions and CFSP decisions. The *Yusuf* and *Kadi* decisions are particularly worrying. Here judicial abdication is cloaked in respect for international law. The CFI's coronation of the Security Council as the world's supreme legislature constitutes a dangerous development. The Member States of the EU accept the primacy of EC law in light of the constitutional guarantees which EC law offers. But this type of primacy cannot as a matter of course be extended to the international level. No such guarantees are present at the UN level. Respect for international law cannot mean that core precepts of constitutionalism are abandoned. The approach by the CFI confirms the worrying rise of executive dominance, and risks further contributing to fundamental doubts about the legitimacy of international organisations. What appears to be based on respect for those organisations effectively does them a disfavour.



## Notes

- <sup>1</sup> P. Eeckhout, *External Relations of the European Union – Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2004).
- <sup>2</sup> E.g. K. Lenaerts, “Structurelementen van de Unie volgens de Grondwet voor Europa” (2004) SEW, p. 401.
- <sup>3</sup> W. van Gerven, *The European Union – A Polity of States and People* (Oxford: Hart Publishing, 2005).
- <sup>4</sup> J.H. Jackson, “Sovereignty-Modern: A New Approach to an Outdated Concept” (2003) AJIL, pp. 782-802.
- <sup>5</sup> J. Stiglitz, *Globalization and its Discontents* (Melbourne: Allen Lane, 2002) pp. 9-10.
- <sup>6</sup> As illustrated by the EU's Common Positions 2001/930/CFSP and 2001/931/CFSP on terrorism [2001] OJ L 344/90 and 93, adopted on the basis of the EU Treaty's Second and Third Pillar provisions.
- <sup>7</sup> T. Franck, *Political Questions/Judicial Answers* (Princeton: Princeton University Press, 1992).
- <sup>8</sup> R. Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New-York: Alfred Knopf, 2003).
- <sup>9</sup> Case C-120/94 *Commission v Greece* [1996] ECR I-1513.
- <sup>10</sup> *Idem*, paras 50-51.
- <sup>11</sup> *Idem*, para 59.
- <sup>12</sup> *Idem*, para 65.
- <sup>13</sup> *Idem*, paras 54 and 52.
- <sup>14</sup> *Idem*, para 56.
- <sup>15</sup> *Idem*, para 55.
- <sup>16</sup> Case C-124/95 *Centro-Com v HM Treasury and Bank of England* [1997] ECR I-81; Council Regulation 1432/92 prohibiting trade between the EEC and the Republics of Serbia and Montenegro [1992] OJ L 151/4.
- <sup>17</sup> *Centro-Com*, paras 21-30.
- <sup>18</sup> Council Regulation 2603/69 establishing common rules for exports [1969] OJ Spec. Ed. (II) 950.
- <sup>19</sup> *Centro-Com* (cf. supra: note 16) paras 44-53.
- <sup>20</sup> *Idem*, para 43.
- <sup>21</sup> Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953.
- <sup>22</sup> Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L 102/14.
- <sup>23</sup> Resolution 820 (1993), para 24.
- <sup>24</sup> *Bosphorus* (cf. supra: note 21) paras 31-47 Opinion Jacobs AG.
- <sup>25</sup> *Idem*, paras 8-18 of the judgment.
- <sup>26</sup> N. Angelet, “Protest against Security Council Decisions”, in: K. Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy* (The Hague/Boston/London: Martinus Nijhoff, 1998) p. 277; E. Dewet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004).
- <sup>27</sup> *Bosphorus* (cf. supra: note 21) paras 49-66 Opinion Jacobs AG.
- <sup>28</sup> *Idem*, paras 21-26 of the judgment.
- <sup>29</sup> For a different view 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 CMLRev, pp. 172-173. But see ECtHR, *Bosphorus v Ireland*, Application No 45036/98, judgment of 30 June 2005, where the Court does not find a manifest violation of the Convention.

- <sup>30</sup> P. Eeckhout, *External Relations of the European Union* (cf. supra: note 1) chapters 2-4.
- <sup>31</sup> Opinion 1/94 [1994] ECR I-5267 re the competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228 (6) of the EC Treaty.
- <sup>32</sup> J. de la Rochère, “L’ère des compétences partagées” (1995) RMCUE 390, pp. 466-468; J.H.J. Bourgeois, “The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession” (1995) 32 CMLRev, pp. 780-782; M. Hilf, “The ECJ’s Opinion 1/94 on the WTO – No Surprise, but Wise?” (1995) 6 EJIL, p. 254 and p. 258.
- <sup>33</sup> M. Maresceau, “The Concept ‘Common Commercial Policy’ and the Difficult Road to Maastricht”, in: M. Maresceau (ed.), *The European Community’s Commercial Policy after 1992: The Legal Dimension* (Dordrecht/Boston: Martinus Nijhoff, 1993) pp. 6-10.
- <sup>34</sup> Opinion 1/94 (cf. supra: note 31) para 51.
- <sup>35</sup> *Idem*, paras 62-70.
- <sup>36</sup> *Idem*, para 52.
- <sup>37</sup> Opinion 2/94 [1996] ECR I-1759 re the accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- <sup>38</sup> *Idem*, paras 27-30.
- <sup>39</sup> E.g. Case C-467/98 *Commission v Denmark* [2002] ECR I-9519.
- <sup>40</sup> Case C-149/96 *Portugal v Council* [1999] ECR I-8395, paras 34-52.
- <sup>41</sup> Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641.
- <sup>42</sup> P. Eeckhout, “Judicial Enforcement of WTO Law in the European Union” (2002) 5 JIEL, pp. 91-110.
- <sup>43</sup> Council Decision EC No 800/94 of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [1994] OJ L 336/1.
- <sup>44</sup> See D. Leebron, “Implementation of the Uruguay Round Results in the United States”, in: J.H. Jackson and A.O. Sykes (eds.), *Implementing the Uruguay Round* (Oxford: Oxford University Press, 1997) pp. 209-218.
- <sup>45</sup> P. Eeckhout, *External Relations of the European Union* (cf. supra: note 1) pp. 303-314.
- <sup>46</sup> Case C-377/02 *Van Parys*, judgment of 1 March 2005; Case T-19/01 *Chiquita*, judgment of 3 February 2005.
- <sup>47</sup> Case C-69/89 *Nakajima v Council* [1991] ECR I-2069.
- <sup>48</sup> *Van Parys* (cf. supra: note 46) paras 44-47; *Chiquita* (cf. supra: note 46) paras 164-166.
- <sup>49</sup> *Chiquita*, para 162.
- <sup>50</sup> *Van Parys*, paras 49-50.
- <sup>51</sup> P. Eeckhout, “The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems” (1997) 34 CMLRev, p. 48.
- <sup>52</sup> J.H. Jackson, “International Law Status of WTO Dispute Settlement Reports” (2004) 98 AJIL, pp. 109-125.
- <sup>53</sup> W. van Gerven, *The European Union – A Polity of States and People* (cf. supra: note 3) 104.
- <sup>54</sup> Case C-170/96 *Commission v Council* [1998] ECR I-2763.

- <sup>55</sup> E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford: Oxford University Press, 2002) p. 312.
- <sup>56</sup> P. Eeckhout, *External Relations of the European Union* (cf. supra: note 1).
- <sup>57</sup> Common Position 2001/930/CFSP (cf. supra: note 6).
- <sup>58</sup> W. van Gerven, *The European Union – A Polity of States and People* (cf. supra: note 1) p. 63.
- <sup>59</sup> ECtHR, Application No 6422/02, decision of 23 May 2002.
- <sup>60</sup> Article 15 TEU.
- <sup>61</sup> C.W.A. Timmermans, "The Constitutionalization of the European Union" (2002) 21 YEL, pp. 9-11.
- <sup>62</sup> Case T-338/02 *Segi v Council*, Order of 7 June 2004.
- <sup>63</sup> Case 249/83 *Les Verts v European Parliament* [1986] ECR I339 and Case C-70/88 *European Parliament v Council* [1990] ECR I-2041.
- <sup>64</sup> Case C-50/00 P *UPA v Council* [2002] ECR I-6677.
- <sup>65</sup> Respectively Case T-306/01 *Yusuf v Council and Commission* and Case T-315/01 *Kadi v Council and Commission*, judgments of 21 September 2005.
- <sup>66</sup> Council Regulation EC No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 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 [2002] OJ L 139/9.
- <sup>67</sup> *Yusuf* (cf. supra: note 65) para 276.
- <sup>68</sup> *Idem*, para 231.
- <sup>69</sup> *Idem*, paras 234-240.
- <sup>70</sup> Joined Cases 21-24/72 *International Fruit Company* [1972] ECR 1219.
- <sup>71</sup> *Yusuf* (cf. supra: note 65) paras 266-7.
- <sup>72</sup> *Idem*, para 277.
- <sup>73</sup> See e.g. the discussion on the right to a fair hearing.
- <sup>74</sup> Case C-122/95 *Germany v Council* [1996] ECR I-973.
- <sup>75</sup> Case C-327/91 *France v Commission* [1989] ECR 1781.

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**The Leuven Centre for a Common Law of Europe**

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Extensive information on Leuven CCLE – including an overview of research projects and publications as well as of past and forthcoming conferences and lectures – is available at:

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- What is the role of the law in theory (policy) and practice of international processes of integration and to what extent is transnational integration of legal systems dependent of the commonalities among the national legal systems (ius commune)?
- What positive or negative effects may transnational integration have upon the commonalities among the national legal systems and the autonomy of national legal cultures?
- To what extent can the principles of democracy and *Rechtsstaat* (constitutional state) serve as a guide in the process of transnational integration? It is tried to answer this question from both a public law perspective (democracy and *Rechtsstaat* (constitutional state) as foundations of a ius commune) and a private law perspective (the impact of human rights on private law).

The van Gerven Lectures are organised by the Leuven Centre for a Common Law of Europe of the Katholieke Universiteit Leuven in honour of Walter van Gerven, emeritus professor at that university and former Advocate-General at the Court of Justice of the European Communities. Each year, the Centre invites a prominent European legal scholar to share perceptions and ideas about the existence or emergence of a common law of Europe.

The fifth van Gerven Lecture has been delivered by Prof. Dr. Piet Eeckhout on 7 October 2005. Piet Eeckhout is Professor of European Law at King's College London since 1998, and directs the Centre of European Law. He is an associate academic member of Matrix Chambers, London. Before joining King's he held academic positions at the Universities of Ghent and Brussels, and worked in the Chambers of Advocate General Jacobs, European Court of Justice (1994-1998). His academic interests and activities cover many different areas of EU law, including external relations, the internal market, state aid, judicial protection, the constitutionalization process, and fundamental rights protection. He is also very active in the field of international economic law. He is editor of the *Yearbook of European Law* and is the author of *External Relations of the European Union – Legal and Constitutional Foundations* and of *The European Internal Market and International Trade – A Legal Analysis*.

The lecture examines the external policies of the EU from a perspective of European constitutionalism. It offers an inquiry into the boundaries between law and policy in the diverse and ever expanding field of EU external relations. The main thesis is that, in a globalised world, EU external policies should be strongly predicated on constitutional orthodoxy, as the distinctions between the internal and the external are further collapsing. What is required is democratic and accountable government, subject to the rule of law, and doctrines such as political-question, act-of-state, or *acte du gouvernement* are out of place in a changing world and in the forward-looking polity which the EU aspires to be.

The fifth van Gerven Lecture was organised in cooperation with the Ius Commune Research School. The Lecture closed a one day conference on "European Constitutionalism Beyond the EU Constitution". The Research School unites scholars from the law faculties of Leuven, Maastricht, Utrecht and Amsterdam.



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