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LEGAL BASIS AND DELIMITATION OF COMPETENCE

Panos Koutrakos

The main parameters of the choice of legal basis

The implications of the choice of the appropriate legal basis are not only practical, that is to determine the procedures whereby secondary measures are adopted and the input of the Union institutions in decision-making. As the Court of Justice pointed out in *Opinion 2/00*, ‘the choice of the appropriate legal basis has constitutional significance’.¹ It indicates compliance with the principle of limited powers and determines the nature and extent of Community competence. In the words of the Court of Justice, ‘to proceed on an incorrect legal basis is ... liable to invalidate the act concluding the agreement and so vitiate the Community's consent to be bound by the agreement it has signed. That is so in particular where the Treaty does not confer on the Community sufficient competence to ratify the agreement in its entirety, a situation which entails examining the allocation as between the Community and the Member States of the powers to conclude the agreement that is envisaged with non-member countries, or where the appropriate legal basis for the measure concluding the agreement lays down a legislative procedure different from that which has in fact been followed by the Community institutions’.² In the case of an agreement deemed to be concluded by the Community pursuant to an incorrect legal basis, the Community measure concluding the Agreement would be invalidated whilst the Agreement would be binding on the Community.³ This would necessitate not only the adoption of a new Decision but also, where appropriate, the submission of an amended declaration of competence.⁴

The significance of the choice of the appropriate legal basis in EC external relations is illustrated by the special procedure set out in Article 300(6) EC which enables the Community institutions and the Member States to obtain the opinion of the Court as to whether an agreement envisaged is compatible with the provisions of this Treaty’.

¹ Para. 5.

² *Ibid.*

³ Case C-327/91 *France v Commission*, para. 25.

⁴ See, for instance, Council Dec. 2006/730/EC on the conclusion on behalf of the Community of the Rotterdam Convention [2006] OJ L 299/23.

The *raison d'être* of this provision is deemed by the Court to forestall complications which would result from legal disputes stemming from agreements incompatible with EC law (*Opinion 1/75*, pp. 1360 and 1361, *Opinion 3/94*, para. 16, *Opinion 2/94*, paras 3 to 6, *Opinion 2/00*, para. 6). In this respect, it is noteworthy that the Court has construed its jurisdiction under Article 308(6) EC in wide terms.⁵

Flowing from its constitutional function, another significant aspect of the choice of legal basis is its objective nature. According to the standard formulation put forward by the Court of Justice, 'the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review'.⁶ It is in the light of this principle that 'the fact that an institution wishes to participate more fully in the adoption of a given measure, the work carried out in other respects in the sphere of action covered by the measure and the context in which the measure was adopted are irrelevant'.⁷

In the case of international agreements concluded by the EC, this objective nature takes on another dimension in so far as the choice of legal basis is relied upon by Community institutions or Member states as a way of addressing various practical concerns about the international posture of the Community. For instance, when the Commission argued that the conclusion of GATS and TRIPS fell within the exclusive competence of the Community either pursuant to Article 133 EC or the AETR principle or the so-called 'necessity' principle or Articles 95 and 308, it sought to rely upon the practical problems which would arise in relation to the administration of the Agreements if the Community and the Member States were to be found to share competence. Such problems, about the long discussions necessary as to whether a given matter falls within the Community or national competence and the right of the Member States to express their views individually on matters falling within their competence in cases where no consensus would be found, were viewed as undermining the Community's unity of action *vis-à-vis* the rest of the world and weakening its negotiating power. Whilst viewing the above concerns as legitimate, the Court rejected the inferences made by the Commission. It was pointed out that

⁵ Koutrakos, *EU International Relations Law* 186-191.

⁶ Case C-300/89 *Titanium Dioxide*

⁷ Case C-269/97 *Commission v Council (re: beef products regulation)* [2000] ECR I-2257, para 44.

‘any problems which may arise in implementation of the WTO Agreements and its annexes as regards the coordination necessary to ensure unity of action where the Community and the Member States participate jointly cannot modify the answer to the question of competence, that being a prior issue’.⁸ This approach has also been adopted more recently. In *Opinion 2/00* where it was pointed out that ‘whatever their scale, the practical difficulties associated with the implementation of mixed agreements, which are relied on by the Commission to justify recourse to Article 133 EC - conferring exclusive competence on the Community so far as concerns common commercial policy - cannot be accepted as relevant when selecting the legal basis for a Community measure’.⁹

Instead, the link between the choice of the appropriate legal basis and the delimitation of competence and all the practical problems that this may raise is sought to be addressed by the principle of close cooperation. Having been introduced in the late 1970s,¹⁰ the duty of cooperation became increasingly prominent in the Court’s rulings on external competence.¹¹ It is beyond the scope of this paper to examine the duty of close cooperation. Suffice it to point out that its scope has been interpreted widely, covering both the Community institutions and the Member States in the process of negotiation, conclusion and application of international agreements. It has also been applied to the relationship between the Court of Justice and national courts in the process of the interpretation of international agreements.¹²

Separate from, but related to, the objective nature of the choice of legal basis is the latter’s internal function in the Community legal order. As the Court pointed out in the late 1970s, ‘it is not necessary to set out and determine, as regards other parties to the Convention, the division of powers ... between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the

⁸ *Opinion 1/94*, para. 107.

⁹ Para. 41.

¹⁰ *Ruling 1/78*, paras 34-36.

¹¹ *Opinion 2/91*, paras 36-38, *Opinion 1/94*, paras 108-109, *Opinion 2/00*, para 18. For applications of the duty, see Case C-25/94 *Commission v Council (FAO)* and, more recently, Case C-459/03 *Commission v Ireland (re: MOX Plant)*.

¹² Case C-300/98 *Dior and Others*, paras 36-38.

Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene'.¹³

The above indicates the wide scope and multifarious ramifications of legal basis disputes. The aim of this paper is much more limited: first, to highlight the special problems raised by disputes about the choice of Article 133 EC as the appropriate legal basis; second, to discuss problems underpinning the delineation of EC competence in relation to Article 308 EC; third, to explore some of the issues which the management of the inter-pillar relations raise. In all three sections, for which a point of reference will be the parameters outlined in this introduction, some recent developments will provide the starting point for exploring these perspectives.

The delineation of CCP

The Common Commercial Policy is one of the very few legal bases conferring express external competence which has been part of the EC Treaty since the establishment of the Community. The Court of Justice laid down its main characteristics in the 1970s. However, reliance upon it has been shrouded in uncertainty whereas its relationship with other legal bases has been somewhat ambiguous.

This became apparent, once more, when, earlier this year, the Court of Justice ruled on the conclusion of the Rotterdam Convention on the Prior Informed Consent Procedure (PIC) for certain hazardous chemicals and pesticides in international trade.¹⁴ Following an annulment action brought by the Commission, it held that the Convention had been wrongly concluded on behalf of the Community under Article 175(1) EC. Instead, it should have been concluded under both Articles 133 and 175(1) EC, as it 'includes, both as regards the aims pursued and its contents, two indissociably linked components, neither of which can be regarded as secondary or indirect as compared with the other, one falling within the scope of the common

¹³ *Ruling 1/78 (re: Draft Convention of the International Atomic Energy on the Physical Protection of Nuclear Materials, Facilities and Transports)*, para. 35.

¹⁴ Case C-94/03 *Commission v Council*, judgment of 10 January 2006, nyr.

commercial policy and the other within that of protection of human health and the environment'.¹⁵

The judgment in *Rotterdam Convention* followed a number of cases in the recent years where the Court of Justice was called upon to rule on the legal basis of international agreements with a trade and environmental law dimensions. In *Opinion 2/00*, it was held that the Cartagena Protocol on Biosafety, adopted within the framework of the Convention on Biological Diversity, pursued an environmental objective. The Court ruled, in no uncertain terms, that the Protocol, aimed at regulating the transboundary movement of any living modified organisms resulting from modern biotechnology, was an environmental measure which affected trade with non-member countries only incidentally. A year later, the Court held that the Energy Star Agreement with the United States on the coordination of energy-efficient labelling programs for office equipment was a trade measure which ought to have been adopted under Article 133 EC.¹⁶

The *Rotterdam Convention* judgment sits uncomfortably with the above judgments. In Article 1, its objective is described as follows: 'to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use'. This objective is to be achieved 'by facilitating information exchange about [the] characteristics [of those chemicals], by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties'. At the very core of the Convention is the application of the PIC procedure to exports and imports of certain hazardous chemicals and pesticides. This procedure applies to products listed in an annex to the Convention as well as other 'banned or severely restricted chemicals' and 'severely hazardous pesticide formulations'. A system of information is established whereby the parties communicate, through a Secretariat, their decision to ban or severely restrict trade in hazardous chemicals and pesticides and the importing parties

¹⁵ Para. 51. Following the Court's judgment, the Rotterdam Convention was concluded under Council Dec. 2006/730/EC [2006] OJ L 299/23 where reference to the judgment (preamble, paras 2 and 3).

¹⁶ Case C-281/03 *Commission v Council*.

communicate their decision as to whether to consent to future imports of such products.

In its judgment, the Second Chamber of the Court acknowledged that the protection of human health and the environment was ‘the most important concern in the mind of the signatories of the Convention’, a fact which was ‘clearly apparent’ and ‘unequivocally confirm[ed]’ in the preamble and the wording of the Convention (para. 37). However, it went on to point out that its provisions ‘also contained rules governing trade in hazardous chemicals and having direct and immediate effects on such trade’ (para. 42). The Court pointed out the reference to ‘trade’ in the title of the Convention and observed that, whilst typically an instrument of environmental policy, the PIC procedure would be applicable to products subject to trade. Deemed to establish ‘a specific link between trade and the environment’ (para. 44), the Convention was viewed by the Court as providing for a number of measures “‘governing’ or ‘regulating’ international trade ... and therefore fall[ing] within the scope of the common commercial policy’ (para. 46).

In its judgment, the Court is not consistent with its approach in *Opinion 2/00*. In particular, the judgment lays itself open to criticism on three main grounds. First, it engages in a quite selective reading of the Rotterdam Convention. It refers, for instance, to the preamble to the Convention, according to which ‘trade and environmental policies should be mutually supportive with a view to achieving sustainable development’. However, it ignores the identically expressed provision in the preamble to the Cartagena Protocol.¹⁷ This omission is all the more regrettable in the light of the fact that the relevant preambular paragraphs of the Cartagena Protocol, which, in *Opinion 2/00*, was ruled by the Court to fall squarely within the scope of environmental protection policy, had been agreed upon by the parties precisely pursuant to the relevant provisions of the Rotterdam Convention, the latter having been concluded five months prior to the initiation of the negotiations for the conclusion of the Cartagena Protocol. For instance, in its fourth preambular paragraph, the Convention refers to ‘the circumstances and particular requirements of the developing countries and countries with economies in transition in particular the

¹⁷ See ninth preambular paragraph.

need to strengthen national capabilities and capacities for the management of chemicals, including transfer of technology, providing financial and technical assistance and promoting cooperation among the Parties'. Furthermore, it is also recognised in the preamble 'that good management practices for chemicals should be promoted in all countries, taking into account, *inter alia*, the voluntary standards laid down in the International Code of Conduct and the UNEP Code of Ethics on the International Trade in Chemicals'. In addition, the Parties express their 'desir[e]' to ensure that hazardous chemicals that are exported from their territory are packaged and labelled in a manner that is adequately protective of human health and the environment, consistent with the principles of the Amended London Guidelines and the International Code of Conduct'. Whilst describing the main principles underpinning the policy function of the Convention, these statements are ignored by the Court.

Second, the judgment puts forward a narrow reading of the Rotterdam Convention. It does so by seeking to distinguish it from the Cartagena Protocol. It points out that, contrary to the latter, the former is characterised by 'an explicit link between trade and the environment'.¹⁸ It is correct that the Rotterdam Convention is applicable to imports and exports of chemicals; it is also correct that the advance informed agreement procedure set out in the Cartagena Protocol is applicable to transboundary movement of living modified organisms in general, that is including, in the Court's own words, 'illegal and 'unintentional transboundary movements, movements for charitable or scientific purposes and movements serving the public interest'. However, by focusing on the need for this 'explicit link', the Court appears to adopt a quite formalistic approach. The application of the Convention to products whose movement is subject to export and import rules does not necessarily render its provisions of a trade nature. The Convention sets out a procedural framework aiming at enabling the importing countries to make an informed choice as to the harmful effects that the import and export of certain chemicals and pesticides would have on human health and the environment. This point is analysed by Advocate General Kokott who points out that 'international trade in certain chemicals which the Contracting Parties have agreed as hazardous is thus merely the external point of

¹⁸ Para. 44 of the judgment.

reference of the PIC procedure'.¹⁹ In her Opinion, she argues that the PIC procedure can only have indirect effects on trade, either by facilitating trade in hazardous chemicals by increasing transparency of the relevant rules or by making trade more expensive for an exporter. However, she argues, 'no commercial policy rules' fall within the scope of the Convention:²⁰ no common rules are laid down on whether and on what conditions the import of hazardous chemicals may or must be permitted or refused, no rules are laid down on the mutual recognition of products.

Third, in its judgment, the Court ignores both the origins the Rotterdam Convention and the policy context within which it developed. Rio and 2002 Johannesburg Conferences, the judgment does not take into account the environmental protection objective which is at the very core of its inception and development. Indeed, in terms of the main scheme it seeks to establish and its substantive content, the Rotterdam Convention did not appear in a vacuum. The legal regulation of chemicals in terms of their impact for the environment and public health had been the subject of international initiatives since the 1970s. UNEP set up the International Register for Potentially Toxic Chemicals in 1976 which was entrusted with the compilation and circulation of information about chemical hazards. The UN General Assembly had regularly referred to the need for more effective information exchange on hazardous chemicals.

In the 1980s, there were two international frameworks dealing with chemicals. The first was the Code of Conduct on the Distribution and Use of Pesticides which was developed under the auspices of the Food and Agriculture Organisation (FAO) and adopted by the latter's Conference in 1985.²¹ Developed in close cooperation with the plant science industry, international organisations and NGOs, the FAO Code of Conduct includes provisions of wide scope, covering the management and testing of pesticides, measures to reduce health hazards, availability, use, distribution of and trade in pesticides, information exchange, labelling, packaging, storage and disposal.

¹⁹ Para. 36 of her Opinion where she goes on to point out that '[t]he real subject-matter of the Convention is not primarily the promotion, facilitation or even the regulation of trade in hazardous chemicals, but only the exchange of information by the Contracting Parties on their import practices ... combined with the onward transmission of the information thus obtained to the economic operators concerned'

²⁰ Ibid, para. 39.

²¹ 23 FAP Conf Res 10/85, amended by Dec. 1989, FAO Doc M/U0610E/I/9.90.

The second framework consisted of the London Guidelines for the Exchange of Information on Chemicals in International Trade which was adopted by the Governing Council of the United Nations Environment Programme (UNEP).²² The London Guidelines include provisions about the establishment of national authorities through which states would communicate information about banned or severely restricted chemicals. This would establish a channel of communication which would enable countries to make informed choices when confronted with the prospect of imports of such chemicals. In addition, a number of provisions were laid down on chemicals management, classification, packaging and labelling

The PIC procedure had become central to the discussion about the development of the above sets of recommendations and principles. As early as in 1983, the UN General Assembly pointed out that ‘products that have been banned from domestic consumption and/or sale because they have been judged to endanger health and the environment should be sold abroad by companies, corporations or individuals only when a request for such products is received from an importing country or when the consumption of such products is officially permitted in the importing country’.²³ The PIC procedure was incorporated in both the FAO Code of Conduct and the London Guidelines in 1989 when they were amended for that purpose. Applicable to banned or severely restricted substances, this incorporated a formalised system whereby the UNEP or FAO respectively would communicate the position of participating countries regarding the import of the above substances. The procedure under the two documents was managed by a joint secretariat.

Therefore, the Convention owes its existence and its rules to an incrementally developed and solid body of principles and procedures which were firmly established within the sphere of environmental policy. Indeed, it was in the light of the above initiatives and on the basis of the arrangements laid down thereunder that the Rotterdam Convention was negotiated under the responsibility of both UNEP and FAO. In other words, there is a distinct thread which links the FAO Code and the London Guidelines to the subject matter of the judgment in the *Rotterdam Convention* case. The former had been adopted in response to the then increasing movement to the

²² UNEP GC/DEC/15/30, UN Doc. UNEP/PIC.WG.2/4 (1989).

²³ UNGA Res. 37/137, *Protection against products harmful to health and the environment*, para. 1.

South of pesticides banned in the North and the ensuing environmental problems in the developing countries.²⁴ And the compulsory PIC system set out in the Rotterdam Convention was applied pursuant to interim arrangements prior to the latter's entry into force.²⁵

Finally, there is another point for which the judgment in the *Rotterdam Convention* is subject to criticism. This is the reasoning behind the decision to annul the Decision concluding the Agreement on behalf of the Community. We know that recourse to the inappropriate legal basis vitiates the procedure for adopting the measure in question when the legislative procedure actually followed satisfies the requirements of the legislative procedure which ought to have been applied under the correct legal basis. In Case C-491/01 *BAT* and Case C-2190/03 *Swedish Match* the Court ruled that Directive 2001/37 on the approximation of national rules concerning the manufacture, presentation and sale of tobacco products should have been adopted under Article 95 EC alone rather than Articles 95 and 133 EC. However, this was held not to necessitate the annulment of the Directive because 'such an error in the legal basis relied on for a Community measure is no more than a purely formal defect':²⁶ both provisions required majority voting in the Council and, under the correct legal basis, the Parliament had been involved under the codecision procedure.

In the light of this, one would have thought that the Court would reach the same conclusion in the *Rotterdam Convention* judgment. This was suggested by Advocate General Kokott who had pointed that, in accordance with Article 175 EC, the Council had adopted the Decision in question by qualified majority voting and the Parliament had been consulted. Whilst the Court refers to both points, it reaches the conclusion that the Decision should be annulled following a reference to a third, additional point. In para. 55, the Court points out the following:

²⁴ P. Barrios, 'The Rotterdam Convention on Hazardous Chemicals: A Meaningful Step Toward Environmental Protection?', (2004) 16 *Geo. Int'l Env'tl L Rev* 679 at 710.

²⁵ To that effect, a Resolution on Interim Arrangements was adopted by the parties in 1998. See T.L.McDorman, 'The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade: Some Legal Notes, (2004) 13 *RECIEL* 187 at 197 *et seq.*

²⁶ para. 98).

... it is important to note that, by basing the decision approving the Convention on the dual legal basis of Article 133 EC and Article 175(1) EC, the Community is also giving indications to the other parties to the Convention both with regard to the extent of Community competence in relation to that Convention which ... falls both within the scope of the common commercial policy and within that of the Community environmental policy, and with regard to the division of competences between the Community and its Member States, a division which must also be taken into account at the stage of implementation of the agreement at Community level.

The arguments put forward in this part of the judgment are badly drafted. The Court justifies the need to annul the Decision 'having regard to all the foregoing',²⁷ namely the procedural compatibility between Articles 133 and 175 EC and the external-point-of-view argument quoted above. The former clearly do not justify the annulment – in fact, the contrary is the case. However, the most important point is that the annulment of the Decision is justified on the basis of its external significance. Arguably, the subject-matter of the *Rotterdam Convention* judgment is distinct from that in the *BAT* and *Swedish Match* cases, both of which were about the legality of unilateral measures adopted by the Community institutions. Does the Court mean to say that it is the conclusion of the international agreement which renders the annulment of the Decision in question necessary? If so, this rationale appears to be at variance with one of the main tenets of EC external relations, namely the internal aspect of the choice of the appropriate legal basis, which follows from the constitutional function of such choice. This was articulated clearly in the late 1970s, where the Court pointed out that

'it is not necessary to set out and determine, as regards other parties to the Convention, the division of powers ... between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene'.²⁸

²⁷ Para. 56.

²⁸ *Ruling 1/78 (re: Draft Convention of the International Atomic Energy on the Physical Protection of Nuclear Materials, Facilities and Transports)*, para. 35.

This was later reaffirmed in *Opinion 2/00*.²⁹ Therefore, the Courts' conclusion appears to be at variance with established case-law. The Court's conclusion, and the emphasis on implementation in its rationale, may be understood in two ways. First, an explanation may lie in another judgment delivered in the same date with the *Rotterdam Convention* one, namely Case C-178/03 *Commission v Parliament and Council* where the Court held that Regulation 304/2003 implementing the Rotterdam Convention should also have been based on Article 133 EC along with Article 175(1) EC and, for that reason, it was necessary to be annulled. However, the conclusion of an international agreement and the adoption of the implementing measure are two acts which may well be adopted on different legal bases.³⁰

Second, the annulment of the Decision, and the submission of a new declaration of competence, might be seen to suggest that more attention should be paid to the uncertainty that third parties often face when dealing with the Community and its Member States in the context of multilateral international agreements. This state of uncertainty may appear more significant as it is linked to the question of responsibility for the implementation of such agreements. However, it should be pointed out that, in fact, declaration of competence, to which the Court appears to be paying considerable attention (eg *MOX Plant*) do not always assist third countries in their understanding of who does what and who is responsible for what under EC law. For instance, the declaration of competence submitted by the Community on its accession to the Hague Conference on Private International Law (once the amendments to its Statute allowing the accession of a regional economic integration organisation has entered into force) is not only very long but also contains statements outlining the existence and dynamic nature of the EC external competence following *AETR* and *Opinion 1/76*.³¹ Considering that it has taken the Community more than thirty years to clarify the precise scope, effects and repercussions of those principles – and there is still some way to go – it is rather curious that the Community's international partners should be expected to decipher them on the basis of broadly worded declarations. The second point is made by Cremona who points out, 'there is a danger, if decisions as to legal base are seen as a signal to third countries, that the

²⁹ Para. 17.

³⁰ *Opinion 1/94*, para 29 re: agricultural products.

³¹ See Annex II to Council Dec. 2006/719/EC [2006] OJ L 297/1 at 5.

issue of choice of legal base will become even more politicised than it is already, making it more difficult to base that choice purely on “objective factors which are amenable to judicial review”.³²

In the light of all the above (and not merely because the judgment was delivered by a Chamber), to what extent, if at all, does the judgment in the *Rotterdam Convention* case signify a shift in the Court’s position? And where do we stand, in relation to the delineation of competence in the CCP area? Marise Cremona writes that ‘we now have three cases deciding respectively that an environmental legal base was appropriate (*Opinion 2/2000*), that the CCP base was appropriate (Case C-281/01 *Commission v Council (Energy Star Agreement)*) and that a dual legal base should have been used (Case 94/03 *Commission v Council*); it does not however, seem any easier to predict the outcome of a future case on the same issue’.³³ This is undoubtedly correct. In fact, the standard formulation that ‘the choice of the legal basis for a Community measure must rest on objective factors’ is only partly accurate: whilst the choice of legal base is not to be dependent upon ‘an institution’s conviction as to the objective pursued’,³⁴ it becomes apparent from the Court’s case-law that this may not be determined on the basis of specific, easily identifiable criteria either.

A degree of uncertainty is inevitable in the process underpinning the choice of legal basis. In a legal order where the institutional balance is ill-defined and, at times, incrementally redefined, the choice of legal basis is a potentially politicised matter.³⁵ However, the position of Article 133 EC in the spectrum of potential legal bases has been distinctly uneasy, shrouded in factual and normative uncertainty. The starting point for this was the typically unhelpful wording of Article 133(1) EC and its procedural dimension (QMV) which rendered this provision both too difficult for the Commission to resist as a legal basis and too unattractive to the Council and a number of Member States.

³² p330.

³³ *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law* (EUI Working Papers, Law No 206/22) n50.

³⁴ Case 45/86 *GSP*, para. 11.

³⁵ See H. Cullen and A. Charlesworth, ‘Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States’, (1999) 36 *CMLRev* 1243.

Things were not helped by the expansive interpretation of the scope of Article 133 EC adopted by the Court of Justice in the early days of the CCP. In the early 1970s, it was held that the concept of commercial policy has the same content whether it is applied in the context of the international action of a State or to that of the Community'.³⁶ Three years later, it was pointed out that 'it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down, for Article [133 EC], an interpretation the effect of which would be to restrict the common commercial [policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged. A "common commercial policy" understood in that sense would be destined to become nugatory in the course of time'.³⁷ In a similar vein, the notion of CCP was given a wide meaning in the Generalised Tariff Preferences case where it was pointed out that '[t]he link between trade and development has become progressively stronger in modern international relations' (para. 17).

Another development linked to the wide definition of the scope of CCP is the articulation of the exclusivity that Community's competence has been held to enjoy. In the mid-1970s, it was held that conceived ... in the context of the operation of the Common Market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other', the CCP 'quite clearly, is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community'.³⁸ This entailed that Member States could only act within the scope of CCP pursuant to a specific authorization granted under Community law.³⁹

³⁶ *Opinion 1/75*, 1362.

³⁷ *Opinion 1/78*, para. 44.

³⁸ *Opinion 1/75*, p1364.

³⁹ Case 41/76 *Criël, née Donckerwolke et al. v Procureur de la République au Tribunal de Grande Instance, Lille et al.* [1976] ECR 1921, Case 174/84 *Bulk Oil* [1986] ECR 559

The apparently severe implications of exclusivity, coupled with the very wide formulation of the scope of CCP and the provision for QMV, appeared to define a policy which ‘represents the EC at the height of its legal powers, control and supremacy over the member states’.⁴⁰ However, a number of factors indicated, even at that early stage of the development of the CCP, that that perception was not quite as accurate as it might have appeared. Its broad pronouncements notwithstanding, the Court adopted a distinctly pragmatic approach to their application in practice. For instance, the exclusive nature of Community competence did not always exclude the Member States from concluding an agreement falling within the scope of CCP. In *Opinion 1/78*, the financing of the International Agreement on Natural Rubber was deemed essential to the determination of whether the Member States could conclude it. In a similar vein, the Court sanctioned the disuniform application of CCP rules in the 1980s, acknowledging the incomplete nature of the policy as it then stood.⁴¹ As a matter of fact, that lack of uniformity was sanctioned by the Community institutions too.⁴² Finally, in relation to trade measures with foreign policy implications, the Member States are granted wide discretion in determining whether a deviation from a CCP measure is necessary in order to protect their security.⁴³

Another indication of the somewhat flexible nature of Article 133 EC was provided by the way it was instrumentalised in the 1980s and early 1990s for the imposition of sanctions against third countries.⁴⁴ In order to address the practical and legal problems that the imposition of sanctions pursuant to unilateral measures had raised, the Member States decided to rely upon Article 133 EC in order to set up sanctions regime following a political decision to that effect adopted by the representatives of the Member States within the European Political Cooperation framework. This formula, first employed against the Soviet Union in 1982, was abandoned when Article 301 EC was inserted in the EC Treaty at Maastricht, hence providing an express link between the first and second pillars. It is interesting in this respect that the material scope of the latter provision is broader than that of Article 133 EC.

⁴⁰ D. McGoldrick, *International Relations Law of the European Union* (1997) 70.

⁴¹ M. Cremona, ‘The Completion of the Internal Market and the Incomplete Commercial Policy of the European Community’, (1990) 15 *ELRev* 283.

⁴² See Koutrakos, 21-32.

⁴³ Case C-367/89 *Richardt*, C-70/94 *Werner* and C-83/94 *Leifer*.

⁴⁴ See Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (2001) 60-65.

Therefore, even early on, the reality of the application of Article 133 EC was considerably more subtle than some of the sweeping pronouncements of the Court had suggested. In fact, the definition of its scope and the construction of its normative implications defined a policy which was attuned to the legal and political context within which it emerged. This became apparent in the 1990s, when the CCP was interpreted in more restrictive terms in *Opinion 1/94*. In its ruling, the Court consistently rejected the Commission's invitation to construe Article 133 EC as an all-encompassing economic relations legal basis. Instead, whilst not negating the principle of a widely understood CCP,⁴⁵ it went on to make it clear that that policy could not be construed in too wide terms. The ruling in *Opinion 1/94* is permeated by a concern to ensure that the definition of CCP would not encroach upon other EC Treaty provisions. In relation to IP rights, for instance, it was pointed out that 'if the Community were to be recognized as having exclusive competence to enter into agreements with non-member countries to harmonize the protection of intellectual property and, at the same time, to achieve harmonization at Community level, the Community institutions would be able to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting'.⁴⁶

This line of reasoning suggests a shift of emphasis from safeguarding the effectiveness of CCP on to safeguarding the characteristics of other parts of the institutional structure of the Community legal order. An aspect of this shift became apparent in the *Opinion 2/00* when the Court was asked to determine the appropriate legal basis for the conclusion of the Rotterdam Convention. To the invitation of the Commission to uphold its earlier statements about a widely construed CCP, the Court responded as follows:⁴⁷

'the fact that numerous international trade agreements pursue multiple objectives and the broad interpretation of the concept of common commercial policy under the Court's case-law are not such as to call into question the finding that the Protocol is an instrument falling principally within environmental policy, even if the preventive measures are liable to affect trade relating to LMOs. The Commission's interpretation, if accepted, would effectively

⁴⁵ For instance, it was pointed out that 'trade in services cannot immediately, and as a matter of principle, be excluded from the scope of Article [133]' (para. 41).

⁴⁶ Para. 60.

⁴⁷ Para. 40.

render the specific provisions of the Treaty concerning environmental protection policy largely nugatory, since, as soon as it was established that Community action was liable to have repercussions on trade, the envisaged agreement would have to be placed in the category of agreements which fall within commercial policy. It should be noted that environmental policy is expressly referred to in Article 3(1)(1) EC, in the same way as the common commercial policy, to which reference is made in Article 3(1)(b)'.

What is interesting about this extract is that the wording of the ruling is identical to that used twenty three years earlier when the Court sought to enhance the effectiveness of Article 133 EC. In essence, what had been deemed worthy of protection became subject to manipulation in order to undermine the effectiveness of other legal bases for external action. This is indicative of a shift of emphasis rather than one of policy. In the 1970s, a period of articulation of the main tenets of EC external action, it was sensible that the normative foundation and effectiveness of the then emerging CCP should have been protected. This approach was also consistent with other strands of EC external relations case-law, such as the definition of the foundation for and implications of implied competence. On the other hand, in the 1990s, not only had the mechanics of the exercise of the EC external competence accepted as part of our mainstream Community vocabulary but a number of specific legal bases had been inserted in the EC Treaty.

The delineation of EC competence - Article 308 EC

Article 308 EC reads as follows:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Otherwise known as the flexibility clause or *la petite revision*,⁴⁸ Article 308 EC appears to be quite broad in its scope, and has certainly been invoked by the Community institutions, with the Member States' agreement, quite widely in the past. It was famously instrumentalised by the Member States in areas such as environment, where, in 1972, the Conference of Heads of State and Government, held in Paris, resolved to establish a specific policy in the area, with the suggestion that use should be made of the legal basis afforded by Articles 94 and 308 EC. The applicability of Article 308 EC in the area of external relations having been asserted in the *AETR* judgment,⁴⁹ it was then used for the conclusion of a number of environmental agreements, too.⁵⁰ In addition, prior to the introduction of Article 181 EC, the Community granted emergency food aid to non-associated states in the 1980s under Article 308 EC.

Whilst politically expedient, this use of Article 308 EC has been criticised.⁵¹ Weiler argued, 'tongue in cheek, that, on this reading defence would also be a permissible usage of Art. [308], since the common market could hardly function with the territories of the Member States under occupation.'⁵² However, the wording of Article 308 EC makes it clear that reliance upon it is dependent upon three conditions: Community action should prove necessary for the attainment of one of the objectives of the Community; this should be the case in the course of the operation of the common market; there should be no other provision of the EC Treaty providing the necessary powers.

I argue that these conditions should be interpreted strictly. As Advocate General Tizzano pointed out in his Opinion in the *Open Skies* cases, 'that article does not

⁴⁸ See R. Schütze, 'Organized Change towards an "Ever Closer Union": Article 308 EC and the Limits to the Community' Legislative Competence', (2003) 22 YEL 79.

⁴⁹ Para. 95.

⁵⁰ For instance, the Paris Convention on the Prevention of Marine Pollution from Land-Based Sources [1975] OJ L 194/5, the Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution [1977] OJ L 240/5, and the Bonn Convention for the Protection of the Rhine against Chemical Pollution [1977] OJ L 240/92. It was also used, along with Article 133 EC, for the conclusion of cooperation agreements. Since the entry into force of the TEU, such agreements with developing countries have been concluded under Articles 308 and 181 EC.

⁵¹ Weiler argues that 'only a truly radical and "creative" reading of that article could explain and justify its usage' by the Community institutions at various instances and points out that 'this wide reading ... meant that it would become virtually impossible to find an activity which could not be brought within the "objectives of the Treaty": *The Constitution of Europe*, p54. He refers to the provision of emergency food aid to non-associated states.

⁵² *Ibid*, p54, n119.

confine itself to requiring a measure to be “necessary if Community competence is to be justified, but lays down precise conditions and procedures for the determination of that necessity and, hence, whether it is capable of founding such competence’.⁵³

At various instances, the Court has sought to clarify the relationship between Article 308 EC and other general legislative clauses, such as Articles 94 and 95 and held that the latter serve as the legal basis for the harmonisation of existing provisions and the coordination of the basic provisions of future laws, whereas Article 308 EC provides the legal basis for any new act or the introduction of a new legal form. For instance, in *Opinion 1/94* it was held that the Community is competent, in the field of intellectual property, to harmonise national laws pursuant to Articles 94 EC and 95 EC and may use Article 308 EC as the basis for creating new rights superimposed on national rights such as the Community trademark.⁵⁴ In addition, the Court has enforced the residual nature of Article 308 EC at various instances.⁵⁵

However, the Court has been much more reticent in elucidating the other conditions for its application. In terms of its scope, it was held in *Opinion 2/04* that Article 308 ‘cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community’.⁵⁶ However, this by no means clarifies the conditions under which this provision may be relied upon – in its ruling, the Court opined that the constitutional ramifications of

⁵³ Para. 53. In terms of the use of Art. 308 EC for the exercise of external competence, it is interesting to note that Advocate General Tizzano, in his Opinion in the *Open Skies* cases, drew a parallelism between the logic underpinning Article 308 EC and the necessity doctrine first articulated in *Opinion 1/76*. He stated that, in cases where an agreement is ‘necessary to attain one of [the Community’s] objectives’ and the corresponding internal competence is ... lacking, the same result can be achieved ... by resorting directly to Article [308] at the time of concluding the agreement’ (para. 48).

⁵⁴ This also applied to the creation of a supplementary protection certificate for medicinal products (Council Regulation (EEC) No 1768/92), as the Court pointed out in the judgment in Case C-350/92 *Spain v Council*. For a recent restatement of this position, see Case C-436/03 *European Parliament v Council (re: European Cooperative Society)*, of 2 May 2006, nyr.

⁵⁵ For instance, Joined Cases C-51/89, C-90/89, and C-94/89 *UK v Council* [1991] ECR I-2757, para. 6, *Opinion 2/92 (re: OECD)* [1995] ECR I-525, para. 36. Recently in Case C-436/03 *Parliament v Council (re: European Cooperative Society)*, judgment of 2 May 2006, para. 36.

⁵⁶ Para. 30. The Court went on to point out that ‘[o]n any view, Article [308] cannot be used as a basis 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’.

accession by the Community to the ECHR would be such as to render reliance upon Article 308 EC impossible.⁵⁷

In terms of endowing the Community with external competence, the Court ruled in *Opinion 1/94* that it ‘cannot in itself vest exclusive competence in the Community at international level’, save for the principle of necessity under *Opinion 1/76*.⁵⁸

The competence of the Community to impose sanctions on third countries tested the limits of the CCP up until the adoption of the Maastricht Treaty and the provision for a specific legal basis. However, the scope of sanctions imposed under that legal basis, along with Article 308 EC, has recently tested the limits of Community competence and the jurisdiction of the Community judiciary.

The burning question is now the use of Article 308 EC by the CFI in *Yusuf* and *Kadi*.⁵⁹ This provision was interpreted both in strict and wide terms, in that order. First, the CFI focused on the requirement that reliance upon Article 308 EC was necessary for the attainment of one of the Community objectives. The CFI examined a number of objectives, namely the establishment of CCP (Art. 3(1)(b)EC), the establishment of a system which would ensure that competition is not distorted (Art. 3(1)(g) EC), and the abolition of obstacles to intra-Community movement of capital (Art. 3(1)(c) EC). All were deemed incapable of being attained by the sanctions regime freezing up funds.

As the judgments are much discussed,⁶⁰ rather than reciting all the arguments made by the Court, I shall focus on the following points.

⁵⁷ In the words of Weiler and Alston, ‘[a]t no point in that Opinion did the Court suggest that the protection of human rights was not an objective of the Community, nor did it say that the Community lacked competence to legislate in the field of human rights’: P. Alston and J.H.H. Weiler, ‘An “Ever-Closer Union” in Need of a Human Rights Policy’ in P. Alston et al. (eds), *The EU and Human Rights* (Oxford: OUP, 1999) 24-5.

⁵⁸ Para. 89.

⁵⁹ Followed up, more recently, in Case T-253/02 *Ayadi* and Case T-94/04 *Hassan*, delivered on 12 July 2006, nyr.

⁶⁰ See C. Tomuschat, Annotation in (2006) 43 CMLRev 537, N. Lavranos, ‘Judicial Review of UN Sanctions by the Court of First Instance’, (2006) 11 EFA Rev 471, W. Vlcek, ‘Acts to Combat the Financing of Terrorism: Common Foreign and Security Policy at the European Court of Justice’, (2006) 11 EFA Rv 491. For an interesting account of the issues raised, see T. Andersson, I. Cameron and K. Nordback, ‘EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale’, (2003) 14 EBLR 111.

The EC objectives in Art. 3 EC

First, the judgment reads like an effort to produce an outline of the law of EU external relations. At times, this gives it a rather sweeping tone. For instance, in ruling that the measure in question did not serve the establishment of the CCP, the CFI pointed out that the Community's commercial relations with a third country were not at issue and went on to state that, in relation to CCP, the EC had the competence to impose sanctions under Article 133 EC. Even if the relations between the EC and a third country would have been at issue, it would have been Article 301 EC rather than Article 133 EC which would have been relevant. Not much weight should be attached to this statement.

Second, the part of the judgment dealing with Article 308 EC is underpinned by a strict approach to compliance with the conditions laid down in that provision. For instance, in relation to targeting distortions of competition, the CFI observed that no argument had been made about how freezing up assets of natural and legal persons, either at Community or national level, would have affected competition between undertakings (para. 144). It becomes apparent that no general statement about the function of a measure in the context of the law of the internal market would be deemed sufficient to justify recourse to Article 308 EC. It added that 'a mere finding that there was a danger of disparities between the various national rules and an abstract risk of obstacles to the free movement of capital or payments or of distortions of competition liable to result therefrom' would not be sufficient to justify recourse to Art. 308 EC for two reasons: on the one hand, the primary rules on competition and approximation of laws would be rendered ineffective and, on the other hand, judicial review would be rendered 'quite nugatory' (para. 147).

The rulings suggest that a detailed assessment of the specific function and implications of an Art. 308 EC is the yardstick against which reliance upon that provision would be sanctioned. Viewed from this angle, it follows the line first put forward by the Court of Justice in *Tobacco Advertising* where such a test was applied in relation to the suitability of another difficult-to-delineate legal basis, namely Art. 95 EC.

In fact, the CFI goes further and casts doubt on the necessity on the function of the measure in question and its purported aim to ensure the abolition of impediments to intra-Community movement of capital. It states that the Member States enjoy the right to impose restrictions on such movement, provided that these are necessary and proportionate in order to protect public policy or public security (para. 146). This would seem to suggest that the Community institutions would have an even more serious task in convincing the Community judiciary of the necessity for Community intervention. To that effect, the implementation of the sanctions regime, as set out in the UNSC Resolutions, by the Member States themselves, rather than the Community, is deemed as perfectly innocent, in terms of possible discrepancies. To that effect, the CFI relies upon what it views as the clear, precise and detailed content of the Resolutions and the relatively minor measures for which they are calling.

The position of the fight against international terrorism within the spectrum of the Community objectives permeates the entire ruling. However, once again, at times this appears to undermine the clarity of the ruling. For instance, the fight against international terrorism and the imposition of economic and financial sanctions, such as the freezing of funds, are viewed interchangeably in the Court's effort to link them to the objectives laid down in Arts 2 and 3 EC. However, the former is the main objective which is the latter, the instrument, purports to serve. This is merely another indication of the somewhat 'confused' line of reasoning.

EC and EU objectives

The Court, then deals with the possibility of viewing the fight against international terrorism as a more general objective which the Community has to ensure. It is recalled that this type of argument had already put forward by the Commission in *Opinion 2/94* where it described respect for human rights 'as a transverse objective forming an integral part of the Community's objective' (V.2 of the ruling). The Commission had also referred to the preamble to the SEA and its reference to respect for human rights and to the Convention.

The CFI rejects this argument on the basis of a textual approach: ‘nowhere in the preamble to the EC Treaty is it stated that that act pursues a wider object of safeguarding international peace and security’ and there is no ‘reference whatsoever to the implementation of a common foreign and security policy’, the latter falling exclusively within the EU objectives. Whilst this might appear too positivist an interpretation of primary law, the judgment is actually a little bit more nuanced in so far as it does acknowledge a degree of interaction between the EC and EU objectives: ‘admittedly, it may be asserted that that objective of the Union must inspire action by the Community in the sphere of its own competence, such as the common commercial policy’ (para. 155). This suggests that there is a link between the first and second pillar, albeit one which is limited in its effect: ‘[that objective of the Union] is not ... a sufficient basis for the adoption of measures under Article 308 EC, above all in spheres in which Community competence is marginal and exhaustively defined in the Treaty’ (ibid).

This statement acknowledges that the EC external policies may not be adopted and carried out in a legal and economic vacuum, completely devoid from any other policy considerations. This is consistent with the construction of trade measures with foreign policy implications adopted by the Court of Justice. It is also consistent, and this is more relevant in practical terms, with the Court’s construction of development policy. The statement in *Yusuf* mentioned above is reminiscent of the tenor of the judgment in the *India Cooperation Agreement* case where the Court sanctioned the inclusion of a human rights clause as an essential element of the Agreement. In that case, the Court dealt with the other side of the argument with which the CFI dealt in *Yusuf*: it had been argued that the inclusion of the human rights clause and its characterisation as an essential element of the Agreement necessitated recourse to Article 308 EC. Whilst the Court rejected this approach by relying upon the reference to ‘the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms’ in Article 170(2), it also highlighted the very specific function of the clause in the Agreement with India: no specific field of cooperation between the EC and India was provided in the

Agreement as a result of this clause. This approach was applied to the clause relating to energy.⁶¹

The CFI, then, goes on to articulate its view on the extent to which the EU objectives may inform EC actions. The relevant extract is worth-citing in full:

... the coexistence of Union and Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force, authorise neither the institutions nor the Member States to rely on the ‘flexibility clause’ of Article 308 EC in order to mitigate the fact that the Community lacks the competence necessary for achievement of one of the Union’s objectives. To decided otherwise would amount, in the end, to making that provision applicable to all measures falling within the CFSP and police and judicial cooperation in criminal matters (PIJ), so that the Community could always take action to attain the objectives of those policies, Such an outcome would deprive many provisions of the Treaty on European Union of their ambit and would be inconsistent with the introduction of instruments specific to the CFSP (common strategies, joint actions, common positions) and to the PJC (common positions, decisions, framework decisions) (para. 156).

This is an interesting paragraph. So far, in the few cases where the relationship between the pillars was at issue, the emphasis was distinctly on the protection of the integrity of the Community legal order. In the *Airport Transit Visa* case, for instance, the Court made it clear that policing the dividing line between the EC and the other pillars was essential in order to ensure that action adopted under the latter would not impinge upon the former: ‘[i]t is ... the task of the Court to ensure that acts which, according to the Council, fall within the scope of [the Title VI TEU provision] do not encroach upon the powers conferred by the EC Treaty on the Community’ (para. 16). Similar concerns underpinned the judgment in *Centro-Com* where the right of Member States to carry out their foreign policy beyond the Community legal order was acknowledged, albeit in compliance with Community law. In the judgments in *Yusuf* and *Kadi*, the Community judiciary appears prepared to assume the role of the guardian of CFSP rules, that is a set of rules excluded from its jurisdiction, whose integrity it seeks to protect against an expansive interpretation of Article 308 EC.

⁶¹ Koutrakos, *EU International Relations Law*, 153-7.

Therefore, by highlighting the limits of Community competence, the Community judiciary appears to become not only the ultimate arbiter of constitutionality in the Community legal order but also the guardian of the Union architecture. It is interesting that in the highly politicised case of the Agreement with USA on processing of personal data, the Court ruled that Decision 2004/496 should not have been adopted under Article 95 EC, albeit without engaging in the internal market-oriented enquiry suggested by AG Léger.⁶² The Agreement has now been concluded on behalf of the European Union under Articles 24 and 38 TEU.⁶³

It is a sign a maturity of Community law and confidence of its institutions that the ambit of its policies, as set out in some of its open-ended provisions, is defined with due regard for other external policies. Indeed, it is recalled that the ruling in *Opinion 2/00* was underpinned by a clear effort to prevent the scope of Article 174 EC from being impinged upon by an expansive interpretation of Article 133 EC. Interestingly enough, the Court did so by using language similar to that used twenty five years earlier when it had deemed it necessary to protect the scope of the then emerging CCP: ‘if accepted, [the Commission’s interpretation] would effectively render the specific provisions of the Treaty concerning environmental protection policy largely nugatory’ (para. 40).

However, the CFI suggested a more dynamic view of the interacting pillars: the sanctions provisions, Articles 301 and 60 EC are ‘quite special provisions of the EC Treaty’ (para. 160) aimed to achieve EU objectives, hence rendering ‘action by the Community ... in actual fact action by the Union’ (para. 161). This is the reason why Art. 308 EC comes into play: ‘the powers to impose economic and financial sanctions provided for by Articles 60 EC and 301 EC, ..., may be proved insufficient to allow the institutions to attain the objective of the CFSP, under the Treaty on European union, in view of which those provisions were specifically introduced into the EC Treaty’ (para. 163).

⁶² Joined Cases C-317/04 and C-318/04, judgment of 30 May 2006, nyr.

⁶³ Council Dec. 2006/729/CFSP/JHA [2006] OJ L 298/27.

This formula has been viewed as ‘intelligent’.⁶⁴ Indeed, it may appear to enhance the ability of the Union to impose sanctions, in conformity with the emerging international practice, whilst avoiding the pitfalls of interpreting Article 308 EC unduly widely. In other words, the effectiveness of the contested measure is sanctioned, albeit pursuant to an apparently textual reading of two exceptional EC Treaty provisions rather than a teleological interpretation of the ‘flexibility clause’. This seems consistent with the paramount significance that the Court of Justice attaches to the effectiveness of sanctions regimes imposed by the Union in implementing UNSC resolutions (*Bosphorus, Ebony Maritime*).

In this respect, three points are worth-making. First, this approach leads to a paradox: whilst seeking to interpret Article 308 EC strictly and reject recourse to it in order to safeguard the integrity of CFSP, the CFI ends up interpreting Title V TEU. Indeed, it rules that ‘the fight against international terrorism and its funding is unarguably one of the Union’s objectives under the CFSP, as they are defined in Article 11 EU, even where it does not apply specifically to third countries or their rulers’ (para. 167). Furthermore, in order to justify recourse to Article 308 EC, the CFI refers to the requirement of consistency laid down in Article 3 TEU, that is another TEU provision excluded from its jurisdiction pursuant to Article 46 TEU.

Second, what would have been the alternative formula for the imposition of sanctions, had the Community been deemed to lack the competence either pursuant to Article 308 EC or Articles 301 and 60 EC or all three provisions put together? The measures in question would have had to be implemented by Member States. Any problems raised in the free movement of capital would be assessed against the exceptional clause of Article 58(3) EC. This was referred to by the CFI in its rulings. And indeed, should this have been the case, the *Centro-Com* requirement of compliance with Community law would have been met. In fact, the CFI appears to entertain this possibility as it refers to the straight-forward content of the Security Council Resolutions. One should wonder about this possibility. After all, it would have hardly been the only case of sanctions agreed at CFSP level and then implemented by

⁶⁴ Tomuschat, 537 at 540.

Member States at national level (eg prohibition on entry into, or transit through, the territory of Member States of certain officials of Belarus, arms embargo etc).

Third, in order to further justify recourse to Article 308 EC, the CFI relies upon Common Position 2002/402, recalls its unanimous adoption by the Council in relation to the fight against international terrorism and points out that ‘it *prescribes* the imposition by the Community of economic and financial sanctions’ of the type laid down in the contested measure (para. 168, emphasis added). This point raises the question of the relationship between the measures adopted under the inter-pillar formula envisaged in Articles 301 and 60 EC. In fact, what the Common Position states is that

the European Community, acting within the limits of the powers conferred on it by the Treaty establishing the European Community:

- shall order the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in Article 1,

- shall ensure that funds, financial assets or economic resources will not be made available, directly or indirectly, to or for the benefit of the individuals, groups, undertakings and entities referred to in Article 1.

Furthermore, in the last recital of the preamble to the Common Position, it is stated that

Action by the Community is needed in order to implement certain measures.

Article 95 EC

Article 95 EC reads as follows:

By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

In *Opinion 1/94*, it was pointed out that ‘it is undeniable that, where harmonizing powers have been exercised, the harmonization measures thus adopted may limit, or even remove, the freedom of the Member states to negotiate with non-member countries. However, an internal power to harmonize which has not been exercised in a specific field cannot confer exclusive external competence in that field on the Community’.⁶⁵

The residual nature of Article 95 EC has been underlined by the Court.⁶⁶ Furthermore, the conditions for reliance upon Article 95 EC have been interpreted strictly by the Court in *Tobacco Advertising* and *BAT*. It was held that measures adopted under that provision must genuinely have the object of improving the conditions for the establishment and functioning of the internal market, they must actually contribute to the elimination of obstacles to the economic freedoms guaranteed by the EC Treaty, including the removal of distortions of competition. It was also held that, although reliance upon Article 95 EC is possible if the aim of the measure is to prevent the emergence of future obstacles to trade resulting from divergent development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.

Recourse to Article 95 EC has recently become the centre of attention following the judgment of the Court in *PNR* case. In the *PNR* case, the Court avoided this issue. It focused on the link between the Agreement and the Commission Decision on adequacy adopted under Directive 95/46: as the latter excludes from its scope the processing of personal data in the course of an activity which falls outside the scope of EC law, and in any case processing operations concerning public security, defence State security and the activities of the State in areas of criminal law’ (para. 54) and the former concerned processing operations concerning public security and the activities of the state in areas of criminal law (para. 56), Article 95 ‘read in conjunction with Article 25 of the Directive, cannot justify Community competence to conclude the Agreement’ (para. 67).

⁶⁵ Para. 88.

⁶⁶ See, for instance, Case C-338/01 *Commission v Council (re: Recovery of indirect taxes)* [2004] ECR I-4829, paras 59 et seq.

Advocate General Léger, on the other hand, did examine that issue. He refers to the aim of the Agreement as defined in its preamble, according to which two objectives are pursued. The first was preventing and combating terrorism and related crimes and other serious crimes that are transnational in nature, including organised crime; pursuit of this objective was attested to by the reference in the second recital of the preamble to the US legislation adopted after 9/11. The second objective was respecting fundamental rights and freedoms, notably privacy, the pursuit of which was manifested through the reference to Dir. 95/46. He then went on to point out that these two objectives must be pursued simultaneously, a conclusion substantiated on the basis of the content of the Agreement.

He then went on to ascertain whether the conditions for the application of Article 95 were met. Whilst he accepted that, in the absence of Community intervention, a risk of uncertainty would arise (some Member States would legislate in order to prevent their airlines from being sanctioned by the US authorities, whilst some others might not) and this could have financial implications for certain airlines and, therefore, give rise to distortions of competition, he concluded as follows:

... the fact remains that such an objective of preventing distortions of competition, to the extent that it is actually pursued by the Council, is *incidental in character* to the two main objectives of combating terrorism and other serious crimes and protecting passengers' personal data, which ... are expressly mentioned and actually implemented in the provisions of the agreement.

He then relied upon the *Tobacco Advertising* judgment which made it clear that 'the mere fact that an act may affect the establishment or functioning of the internal market is not sufficient to justify using that provision as the basis for that act'.

As for the urgent need for the agreement to be concluded and the reference to it in its preamble, he argued that this was deemed necessary for procedural reasons, that is to get the Parliament's Opinion as soon as possible, rather than substantive reasons relating to the aim and content of the Agreement.

It is interesting that Advocate General Léger also addresses the issue of the appropriate legal basis, one which he characterises as ‘tricky’ (para. 157) and which he does not consider it necessary for the Court to address. What he does is to make some general observations, in essence viewing the measure in question as an act of cooperation between public authorities and alluding that the Community legal framework would not be the appropriate legal framework for its adoption.

Sure enough, after quite intense negotiations with USA, a new Agreement was concluded by the Union under Articles 24 and 38 TEU.⁶⁷

There are two points to make. First, in relation to the specific subject matter of the PNR Agreement, it is understandable that the Court should have chosen not to address the issue of interpretation of Article 95 EC. In any case, it is very difficult to see quite how could Article 95 EC provide the legal basis for the adoption of such an Agreement when its effects on the functioning of the internal market would be, at most, only incidental. Second, on a more general point, it is suggested that Article 95 EC should be interpreted in its very specific context which does require the adoption of internal rules.⁶⁸

Managing cross-pillar relations

The recent case-law of the Court of First Instance on smart sanctions suggests that the regulation of the relationship between the EC and CFSP frameworks is bound to arise in the context of legal basis disputes.⁶⁹ Furthermore, the issues of delineation of competence that such disputes raise give rise to questions of jurisdiction of the Community judiciary. Such issues have arisen in Case C-354/04 P *Gestoras Pro Amnistia v Council* and C-355/04P *Segi v Council*. It is recalled that in the actions for

⁶⁷ Council decision 2006/729/CFSP/JHA [2006] OJ L 298/27’.

⁶⁸ As Dashwood puts it, “‘approximation of the provisions laid down by law, regulation or administration by Member States’ has the ring of strictly internal business, on which the Community legislator should have his say, before nay power to act externally arise”: Dashwood, ‘The Attribution of External Relations Competence’ in Dashwood and Hillion, *The General Law of E.C. External Relations* (London: Sweet and Maxwell, 2000) 115 at 131. See also D. O’Keefe, ‘Exclusive, Concurrent and Shared Competence’ in *ibid*, 179 at 191-2.

⁶⁹ See Case C-91/05 *Commission v Council* (pending) about the EU contribution to the Economic Community of West African States in the framework of the Moratorium on Small Arms and Light Weapons by means of CFSP measures and Case C-403/05 *European Parliament v Commission* (pending) about financing a project on the security of the borders of the Philippines.

damages before the Court of First Instance, Segi had argued that the Council had chosen Articles 15 and 34 TEU as the legal basis for a common position referring to them as involved in terrorist acts, fraudulently in order to avoid all democratic and judicial control. Whilst acknowledging that ‘indeed probably no effective remedy is available to [the applicants]’, the CFI rejected their claim and stated that ‘the absence of a judicial remedy cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 EU’.⁷⁰ This was the case despite the relevant provision of the Common Position, which required that the Member States rely upon all available legal means to facilitate police and judicial cooperation regarding enquiries and proceedings conducted by their authorities in respect of, amongst others, the applicant was deemed to fall within the scope of Title VI TEU.

On appeal, Advocate General Mengozzi delivered his Opinion on 26 October 2006. He agreed with the conclusion of the Court of First Instance, namely that the Community judiciary had no jurisdiction over the matter. However, he argued in detail that it would be unacceptable for the Union to legislate beyond the Community legal framework without enabling its citizens to have access to appropriate channels of judicial review. To that effect, he urged the Court to conclude that, as a matter of EU law, individuals would enjoy the right to compensation in the national courts for possible infringement of their rights caused by a common position.

The following two points made by AG Mengozzi are interesting. First, he emphasises the external dimension of the state of the European Union if the CFI statement about the absence of judicial remedy was accurate. He underlines ‘the primary importance which the versions of the EU and EC Treaties ... give to the principle of the rule of law and the protection of fundamental rights’ (para. 75), points out that ‘where judicial remedy is absent, the action of the union may in fact infringe with impunity all the other rights and fundamental freedoms which the Union professes to respect’ (para. 82) and states that

⁷⁰ [2004] ECR II-1647, para. 38.

85. If in a case such as that of the appellants there is genuinely no effective judicial remedy, this would not only be an extremely serious and flagrant inconsistency of the system within the Union, but also a situation which, from an external point of view, exposes the Member States of the Union to censure by the European Court of Human Rights and not only impairs the image and identity of the Union on the international plane but also weakens its negotiating position vis-à-vis third countries, creating a theoretical risk that they will activate clauses on the respect of human rights (so-called 'conditionality clauses'), which the Union itself ever more frequently requires to be included in the international agreements it signs.

86. In particular, from the point of view of observance of the obligations undertaken by the Member States when they signed the ECHR, it is entirely improbable that the European Court of Human Rights would extend to the third pillar of the Union the presumption of equivalence in the protection of the fundamental rights that it has established between the ECHR and Community law, or the 'first pillar' of the Union, and which leads that Court to carry out only a 'marginal' review of the compatibility of acts adopted by the Community institutions with the ECHR. On the other hand, it is highly likely that, in the course of a full examination of the compatibility of acts adopted by the institutions under Title VI of the EU Treaty with the ECHR, the European Court of Human Rights will in future rule that the Member States of the Union have infringed the provisions of that Convention, or at least Articles 6(1) and/or 13.

Second, his focus on the role of national courts as Union courts in this sensitive area is tied in with the increasing significance of the role that national courts are called upon to assume in the context of EC external relations.

In addition to the above two points, I would like to explore the following interrelated points: (a) the issues which the 'objective nature' of the choice of appropriate legal basis may raise when applied across the pillars; (b) whether it is defensible any longer to prevent the Community judiciary from reviewing the relevant second and third pillars measures completely and whether it is time a system of (differentiated) jurisdiction was introduced.