INTRODUCTION

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Part of the fascination of specialising in the law of the European Union (EU) is the sense of firing at a constantly moving target, and nowhere is this more obviously true than in the external relations field. European Union activity on the international scene is expanding rapidly, and there has been correspondingly rapid development of the legal concepts, principles and rules that are needed to organise it. Moreover, external relations law is bound to be affected by all that has been going on domestically within the EU. During the period of the conception, implementation and finalisation of the present volume, the EU has been involved in a gigantic enlargement operation; a Treaty establishing a Constitution for Europe ('the Constitutional Treaty') has been negotiated and signed, and then failed to secure ratification; and a debate has taken place, culminating in the signature on 13 December 2007 of a reforming Treaty, christened 'Treaty of Lisbon' (TL). This will incorporate most of the institutional and substantive reforms envisaged by the failed instrument, while eschewing its constitution-making pretensions.

There seemed to be a real need, therefore, for a volume taking stock of recent developments in the external relations law of the EC and in the law of the Common Foreign and Security Policy (CFSP) that results from Title V TEU, while also investigating the increasing interaction between these different fields of EU competence. Given the pace of change, fast footwork on the part of both editors and authors has been necessary, with adjustments and reorientations right up to the last minute; and we were always conscious that we might be caught out by some event, such as a surprise ruling by the European Court of Justice. However, should that prove to be the case, we trust our readers will find plenty in this volume that is of continuing relevance and interest.

Even in a collection of essays that are focused on legal issues, the political and economic perspectives of external relations can never be far

away. Different authors bring different degrees of interdisciplinarity to their work in this area, as well as strongly contrasting views as to the constitutional nature, and ultimate political destiny, of the EU. There are also aspects of external relations law that remain deeply controversial, both technically and in terms of underlying political values, and our contributors have felt no inhibition about taking a clear stand on such matters. This is as it should be, and it hardly needs saying that, apart from their own contributions, the views expressed in these pages by no means necessarily reflect those of the editors.

The range of topics covered in this volume can only be explained historically. The authors are at the forefront of research on the law and practice of EU external relations, and their chosen themes are the result of expert judgment as to the most significant developments in the field, though others would doubtless have chosen differently. Any attempt to impose an artificial framework on such a collection would have been futile. However, the group of contributions seemed to fall naturally into three sections of unequal extent.

The first, and largest, section comprises papers addressing issues that are broadly constitutional or institutional in character: nuances in the application, within the sphere of external relations law, of organising concepts of the legal order such as direct effect; the scope of the respective external competences of the Community, the Union and the Member States, and the interaction between such competences; how to reconcile the EU's sincere commitment to upholding fundamental rights at home and abroad with the need for an effective response to the threat posed by international terrorism; the internal effect of international agreements and the jurisdiction of the European Courts to interpret and apply them; finally, the reforms and potential problems that the Constitutional Treaty would have brought, and how these have been addressed by the Lisbon Treaty. Those various issues are intricately woven into the themes treated by the different contributors. The order in which papers are presented is designed to highlight parallels and contrasts in the approaches adopted.

Francis Jacobs brings his great authority to bear on the fundamental issues of the direct effect of international agreements concluded by the Community, and of the jurisdiction of the European Court of Justice to interpret such agreements; he describes the latter as 'questionable in terms of law, but arguably desirable in the interest of maintaining the rule of law

and in the development of a coherent system of law'. Analysis of the more recent case law leads him to conclude, though with caution, that the ECJ's approach may be evolving: as to direct effect, through less emphasis being placed on the nature of the agreement in which the provision in question is found, the focus being rather on the need for the substantive provision itself to be clear, precise and unconditional; and as to interpretation, through increased readiness to construe the language found in international agreements in a similar sense to that of corresponding language in the EC Treaty.

Marise Cremona revisits issues going to the external relations competence of the EU, seeking to draw lessons from the Treaty of Lisbon (TL), in terms of both a better *definition* of competences, express and implied, and a better *division* of competences between the EU, the EC and the Member States. She points out that the difficulty of determining the appropriate legal basis for external action is liable to be exacerbated by the adoption of a single set of objectives, those specific to the CFSP no longer being identified. She is also critical of various provisions of the TL where attempts by the draftsman to formulate principles derived from existing case law fail to reflect its complexity and subtlety. Her insightful analysis of the virtues and vices of the relevant provisions of the failed Treaty have taken on fresh immediacy, since these are largely to be maintained by the TL.

Alan Dashwood explores the function of the present Article 47 TEU in managing the relationship between the Community's external relations competence under the EC Treaty and the CFSP competence of the Union under Title V TEU – an issue that will remain no less alive under the amended Treaties. It is his contention that the protection afforded by Article 47 to the external Community *acquis* does not go so far as to preclude the adoption of a second pillar measure specifically designed to serve one or more of the objectives of the CFSP, merely because the activity to which it relates might conceivably have been the subject of a measure adopted in furtherance of a different objective, under one of the legal bases in the EC Treaty; and such an interpretation of the new Article 40 TEU, which is to replace Article 47, seems even more readily sustainable. This was an instance where the risk we have referred to, of a surprise ruling by the ECJ, materialised. However, thanks to our publisher's flexibility, it proved possible briefly to comment on the judgment in Case 91/05 in an Epilogue.

Piet Eeckhout offers a critique of the position taken by the Court of First Instance (CFI) in the *Yusuf* and *Kadi* cases (at the time of writing on appeal to the ECJ), that it had no jurisdiction to review the legality of Community legislation on human rights grounds, where this could lead, in effect, to the disapplication of a resolution of the UN Security Council adopted under Chapter VII of the Charter. He argues that the CFI's approach is not required by international law itself, and that it does not fit the existing rules, principles and decisions governing fundamental rights protection in the EU. He proposes, instead, a '*solange*' approach, according to which constitutional review of implementing acts should continue to be undertaken at the municipal level, until a satisfactory system of independent human rights review is established at the level of the United Nations.

Eleanor Spaventa raises concerns about the effectiveness of the judicial protection of fundamental rights in the context of EU counter-terrorism measures. She focuses on Common Position 2001/93, which established a list of individuals and organisations believed to be associated with terrorist activities (unlike the situation in *Yusuf* and *Kadi*, the list of those affected had not been drawn up by the UN). As the author explains, Common Position 2001/931 was adopted using mixed second and third pillar competences, to cover, respectively, persons whose alleged activity was external to the EU, and those whose alleged activity was wholly internal. She goes on to analyse the consequences, in terms of the human rights protection available, of being included in the category of 'foreign' or of 'domestic' terrorists. In neither case is the protection found to be sufficient at EU level (though, curiously perhaps, the situation of the domestic terrorist is worse, owing to the absence of a cross-pillar mechanism equivalent to Article 301 EC, which could provide a basis for a challengeable Community act). That being so, it is strongly argued that responsibility should fall upon the national courts, *as a matter of EU law*, to ensure an appropriate measure of fundamental rights review in such cases.

Ramses Wessel addresses issues of competence and responsibility, as between the EU and its Member States, that arise from the developing practice of concluding international agreements in the name of the EU, under the procedure laid down by Article 24 TEU for the purposes of both the CFSP and police and judicial cooperation in criminal matters (PJCCM). While the Member States are not to be regarded as parties to such agreements, there have been attempts to engage their responsibility, for instance, through explicit language in certain PJCCM agreements

establishing a connection with obligations arising under existing bilateral agreements with the third country concerned; oddly, though, the expedient of mixity – familiar in agreements to which the Community is party – has not been resorted to. The author goes on to consider the possible internal effect of EU agreements, in the light of the *Pupino* decision of the ECJ on the existence of a duty of loyal cooperation under the TEU, and of recent CFI authority on the duty of national courts to ensure the protection of fundamental rights in situations arising from the EU activity under the second and third pillars.

Pieter-Christian Muller-Graff asks whether the TL enhances the potential for achieving a legitimate and effective Common Commercial Policy (CCP) within a globalised economy. His answer is organised round three particular issues: the enlarged scope of EU competence pursuant to Article 207(1) and (4) of the TFEU, and the corresponding reduction, as compared with the present Article 133(5) and (6) EC, of limitations on the exclusivity of such competence; new features of the overarching primary law context that would promote consistency between the CCP and other aspects of the EU's external action; and projected changes to the rules governing the exercise of competences, notably the enhanced role of the European Parliament in this field, and greater possibilities for the Council to act by qualified majority voting.

Jacques Bourgeois and **Orla Lynskey** set out to answer the question how seriously substantive WTO obligations are taken by the institutions that collectively exercise the Community's legislative powers. In the light of a group of case studies, they reach the conclusion that increasing attention is being paid to WTO concerns, but that the trend towards compliance is much more evident in the Council than in the European Parliament, where there has been a robust insistence on prioritising Community interests and values. The authors', at first sight, surprising explanation for this is the intergovernmental character of the Council; whereas the Parliament, unlike the Member States, does not have an explicit 'sovereignty shield' to protect Community interests against WTO interference.

The second part of this volume deals with various aspects of substantive external relations considered in a geographical or geo-political perspective. In the EU's bilateral, as well as regional, approaches important evolutions have taken place, illustrating certain new tendencies that are deserving of analysis in depth. It should be stressed that EU enlargement,

which might be seen as a very special form of external relations, has been deliberately excluded from the scope of this book. It may seem a pity that no specific contributions deal with relations between the EU and Turkey or between the EU and the Western Balkans, but the inclusion of these topics would have skewed the volume too much towards enlargement, something the editors wished to avoid. Having said that, the decision not to include specific contributions on EU enlargement does not mean that this phenomenon has been, or could have been, swept under the carpet. In various contributions it is a starting point for analytical reflection or it may appear in the background of an analytical comment; and in some cases it is even intrinsically interconnected with the subject examined.

One of the main difficulties with the EU's substantive external relations is that these are often difficult to place in precise and accurate legal frameworks. Such difficulty is particularly true for the relations that have been developed with countries in the EU's proximity. This explains why contributors in this section of the book cover topics such as the EU's relations with its 'old neighbours', in particular Switzerland and the European micro-States; also the EU's European Neighbourhood Policy; EU–Russia relations; and relations between the EU and Mediterranean countries. However, the analysis of the substantive bilateral and regional approaches is not limited to the EU's proximity; already covering the Mediterranean dimension proved difficult, if not impossible, without including 'the Wider Middle East'; and, especially, in a volume like this one, the relations between the EU and the US could not be ignored, even if they are, apart perhaps from the relations falling within the WTO scope, first and foremost policy and security oriented.

Christine Kaddous examines in detail how the bilateral relations EU–Switzerland, after the many ad hoc initiatives and the 1992 Swiss rejection of the EEA, led to the conclusion of the series of cluster-type bilateral agreements known as the *Bilaterals I* and the *Bilaterals II*. These approaches allowed the inclusion of topics that were particularly sensitive for one or both of the parties within the scope of the respective batches of the agreements but which could nevertheless be agreed upon as part of a larger package. Of course, one of the remaining fundamental questions in the sophisticated network of relations EU–Switzerland is how long sectoral bilateralisation between the two parties, coupled with a considerable unilateral alignment of Swiss law with the Internal Market *acquis communautaire*

and beyond, can continue to prevail without reactivating the Swiss application for EU membership, which has been frozen since 1992.

Marc Maresceau has devoted a study on the, at first sight, curious and perhaps even exotic topic of the relations between the EU and the micro-States of Andorra, San Marino and Monaco on which very little has been written. All these micro-States constitute *sui generis* cases in their relations with the EU. One of the many reasons for this specificity is the historical relationship of these States with their direct neighbour or neighbours which happen to be EU Member States. A second reason for the complexity is the almost exclusively ad hoc basis on which the relations with the EU have been developed. Lastly, neither the enlarged EU nor the micro-States themselves have a clear and well-defined vision of how their mutual relations should evolve in the future. Occasionally, micro-States have been subjected to a particular EU policy as a group, as was the case concerning certain aspects of fiscal law, although so far this remains very exceptional.

Christophe Hillion concentrates on the ENP as it emerged on the eve of the 2004 enlargement and how it developed afterwards. Generally, ENP can be seen as an expression of (very) late awareness that EU enlargement, having as its main objective the enhancement of peace, security and prosperity on the European continent, could also lead to new and sharp divisions in Europe. If this were indeed to be the case then enlargement would not necessarily be helpful to achieve the mentioned political objectives. Although ENP is now largely in place, and not forgetting that it both complements and implements the Partnership and Cooperation Agreements which have been signed with the countries from the former USSR, it is difficult and perhaps still even too premature to assess the concrete results and added value of this new policy.

Peter Van Elsuwege analyses the prospects of the possible signature of the grand Strategic Partnership Agreement between the EU and Russia, which is due to replace the outdated Partnership and Cooperation Agreement. The current prevailing feeling of discontent, if not of mistrust, is not very propitious for such a move. Back in 2004, a bilateral political agreement had been reached between the EU and Russia on the latter's terms of accession to WTO, while a year later the road maps for the gradual establishment of the four Common Spaces have also been agreed upon (economic space, external security, internal security and justice; and research and development, education and culture), and this constitutes

the main focus of Van Elsuwege's contribution. Certainly, a lot of what has been achieved, in particular regarding the four Common Spaces, lacks any solid legal framework. This *soft law* engenders documents that by their very nature set out programmes needing further implementation through legal acts. But at least it has an important reference function. Moreover, and this is perhaps the most important point, Russia's present economic strength is largely dependent on its exports to the EU. In other words, Russia needs the EU, just as the EU needs Russia; both are forced to work together.

Erwan Lannon's contribution goes beyond the classical question of the EU's Mediterranean policy and adds the Middle East dimension, including the so-called 'East of Jordan Track' or 'Wider Middle East', for which, of course, no ENP applies. He has good reason to do so, not only because of the Iraq War but also because EU policies towards the countries concerned cannot easily be disconnected from those included in the EU–Mediterranean relations. The core of Lannon's analysis focuses on the EU's overall *Strategic Partnership with the Mediterranean and the Middle East* and highlights this fact. The creation of the *Strategic Partnership* cannot simply be considered as a mere extension of ENP or of the Euro-Mediterranean Partnership. It is, in the author's approach, a new umbrella framework linking two regions that have been artificially disconnected under previous EU policies. Within this new Strategic Framework the 'East of Jordan Track', that embraces Yemen, the Gulf Cooperation Council, Iran and Iraq, is certainly the most challenging.

Günter Burghardt, the EU Ambassador to the US in Washington for five years, has seen it all: from the election of President George Bush Jr., September 11 to the Iraq War and its aftermath. His contribution provides the reader not only with a first-hand account of how all this was perceived in the context of the EU–US relations, but it also offers a sharp analytical insight by someone who was uniquely placed both to observe events as they unfolded and who, at the same time, played his own special role in the seemingly unfathomable and complex game that is EU–US transatlantic relations. A weakened US, after the evident failures of unilateralism, and a weakened EU, digesting with difficulty its enlargement and coping with an institutional crisis, may perhaps, paradoxically, lead to a renewed and stronger bilateral relationship.

The third part of this book selects two specific substantive law areas – intellectual property law and environment law – as examples where important developments have taken place and which tend to illustrate the specific relationship between domestic policy and external relations.

Inge Govaere's contribution illustrates how the EU has attempted to elaborate an intellectual property enforcement strategy in its relations with third countries. The objectives and means of this strategy are set out in an exhaustive manner. In this regard, the increased use of substantive and institutional arrangements in agreements concluded by the EC deserves special mentioning. The paper examines not only the EC's competence in this respect but also the possible delicate interferences of the EC's strategy with public policy choices. The author explains, among other things, how in the area of trade of certain pharmaceutical products with certain third countries with public health problems this has led the EC to adopt trade measures facilitating or even stimulating intellectual property holders to engage in tiered pricing or compulsory licensing of patents.

Kirstyn Inglis concentrates on the EU's external actions in the field of environmental protection. After a short stocktaking of the success and failures of that policy, the author highlights recent trends. Out of the various aspects examined, two merit special attention. First, the effects of EU enlargement on compliance with the environment *acquis*. While in the long run these are expected to be positive, many questions still remain on how the new Member States in reality will be able to adapt to the *acquis* and the long transitional periods in the accession agreements do remain a worrying factor. Another aspect focuses on the role of the ECJ in balancing environmental concerns with trade. The author, while acknowledging that the ECJ raised the profile of the environment dimension in the context of external trade, also sees in the ECJ's approach the potential for increasing conflicts between environmental standards and CCP.

A series of brief summaries cannot do justice to the rich variety of our contributors' reflections. It is our earnest hope and modest expectation that the collection will advance understanding, and provoke further research and writing, in this important field of EU law.

PART I

Constitutional and institutional questions