European Union Law for the Twenty-First Century

VOLUME 1

CONSTITUTIONAL AND PUBLIC LAW
EXTERNAL RELATIONS

This book is based on the proceedings of the WG Hart Workshop 2003. It contains contributions by leading experts seeking to assess the state of development of EU law some fifty years after the establishment of the Communities and to contribute to the current debate on the European Constitution. The volume concentrates on the theme of European Constitutionalism and analyses the proposed Constitution dealing with, among others things, the division of competence between the EU and the Member States, Community legislation, the role of the national parliaments, democracy in the EU, the Court of Justice, and human rights. It also deals with enlargement and the external relations of the EU.

European Union Law for the Twenty-First Century

Rethinking the New Legal Order

Volume 1
Constitutional and Public Law
External Relations

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OXFORD AND PORTLAND OREGON
2004

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
5804 NE Hassalo Street
Portland, Oregon
97213-3644
USA

Hart Publishing is a specialist legal publisher based in Oxford, England. To order further copies of this book or to request a list of other publications please write to:

Hart Publishing, Salters Boatyard, Folly Bridge,
Abingdon Rd, Oxford, OX1 4LB
Telephone: +44 (0)1865 245533 Fax: +44 (0)1865 794882
email: mail@hartpub.co.uk
WEBSITE: http//:www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN 1-84113-456-2 (hardback)

Typeset by Olympus Infotech Pvt Ltd, India, Sabon 10/12pt
Printed and bound in Great Britain by
TJ International, Padstow, Cornwall

Foreword

The contributions contained in this volume are based on papers presented in the 2003 WG Hart Workshop, which took place at the Institute of Advanced Legal Studies, London. The Workshop concentrated on three themes: European constitutionalism in the 21st century, the future of the internal market, and external relations. The aim of the Workshop was to assess the state of development of EU law some fifty years after the establishment of the Communities, contribute to the current policy debate on Europe, and identify likely future trends. The proceedings of the Workshop are published in two volumes. This volume contains contributions in constitutional law and external relations. The second volume contains contributions pertaining to the internal market and Community policies.

We are grateful to Professor Barry Rider, who, as Director of the Institute of Advanced Legal Studies, initiated this project, and the administrative staff of the Institute, especially David Phillips and Belinda Crothers, who worked tirelessly to make the Workshop possible. We are very grateful to all speakers and participants who enabled the Workshop and the resulting volumes, and those who gave their time to chair sessions. We were very fortunate to be assisted by Lord Slynn of Hadley, Advocate General Francis Jacobs QC, Professor Walter van Gerven, and Sir Christopher Bellamy.

We would like to thank Richard Hart and the staff of Hart Publishing who embraced with enthusiasm this project and, as always, have been extremely helpful and efficient in preparing the publication of both volumes. Our thanks also go to Angeliki Mitsolidou for her invaluable assistance in the preparation of the list of cases.

The Workshop was organised by David O'Keeffe and Takis Tridimas. It would not have been possible without David's tireless efforts and inspiration. It is most unfortunate that, due to circumstances beyond his control, David was not able to participate in the preparation of the publications. In his absence, we have taken it upon ourselves to prepare the volumes and our only hope is that the quality of the end product has not suffered too much as a result.

Takis Tridimas
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March 2004

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Introduction

TAKIS TRIDIMAS

THE CONTRIBUTIONS CONTAINED in this volume fall into two broad categories: Constitutional law of the EU, and external relations. These areas are key components of contemporary Union law and policy and give rise to some of the most important challenges that the Union currently faces.

At the beginning of the new millennium, the Union finds itself in constitutional turmoil. Over the last twenty five years, there have been eight major constitutional revisions, which include four waves of accession and four substantive revisions of the founding treaties. In addition, the draft Treaty establishing a Constitution for Europe spearheads further reforms. There is no nation state which has had its constitution revised so frequently in such a short period of time. This constant need for revisions and adjustments reflects the quest for optimal structures, procedures, and rules to make the project of European integration workable and sustainable, but also, equally importantly, the quest for Union legitimacy.

The draft Treaty establishing a Constitution for Europe was adopted by the European Convention in June 2003 and formally submitted to the European Council in Rome on 18 July 2003. It formed the basis of negotiations in the Intergovernmental Conference, which began under the Italian Presidency on 4 October 2003, but the European Council held in Brussels on 12 December 2003 failed to reach agreement on the final text. The major stumbling block proved to be the allocation of voting rights in the Council of Ministers. There appears to be firm political commitment to re-open negotiations and it is reasonable to expect that a compromise will be reached.

The proposed Constitution represents a veritable effort to respond to the Laeken agenda. Although its primary purpose is to clarify rather than to reform, it makes important changes to the institutional structure and revisits the vertical and horizontal division of powers, ie the division of competence between the Union and the Member States and the relations between the EU institutions. The main challenges faced by the constitution, which

will ultimately determine its success, are functionality and legitimacy, ie to ensure that the EU can function as a political and economic Union of sovereign states and to engage the people of Europe with the organs of supra-national government bridging what is widely perceived to be a legitimacy gap.

The proposed constitution, however, is not the only challenge that the Union faces today. As from 1 May 2004, the Union comprises 25 States and its population increases from 375 million to 450 million, leading to the largest internal market in the world. This enlargement is unprecedented in terms of volume, diversity, and complexity. It has been hailed as a defining point in European history, ending centuries of divisions, and marks a new chapter in European integration. Linked to the enlargement and the constitutional debate are the external relations of the Union. In no other time since the establishment of the Communities has the EU been preoccupied so much with its position in the world. The Laeken Declaration itself identified the importance of the role that the Union should play in a globalised world as a force of peace, stability, economic development and democracy. The chapters contained in this volume identify and discuss key issues pertaining to constitutional law, enlargement, and the political and trade relations of the Union with the outside world.

CONSTITUTIONAL LAW

In the field of constitutional law, the authors explore issues pertaining to the relations between the Union and the Member States, the relations between the institutions of the EU, the role of the European Court of Justice, the protection of human rights, and remedies. The draft Constitutional Treaty is a primary point of reference.

Snyder identifies three challenges that the development of a true EU Constitution faces. He calls those respectively the challenge of ordinary people, the challenge of empires, and the challenge of sites. By the challenge of ordinary people, he means that the Constitution must not engage only with the concerns of the elite but also meet the aspirations of the ordinary people and be perceived by them as their fundamental law. The second challenge refers to globalisation: In our era, sovereignty has acquired new forms embracing national and supra-national entities. The EU occupies its own place in the 'pyramid of global constitution' but how does the wider economic, political and social context affect its liberal post-war values? The third challenge refers to relations between sites of governance and raises the question of how the EU should manage rules originating from other sources of power, especially the WTO.

Lenaerts and Corthaut assess the contribution of judicial review to the development of European constitutionalism and examine, in wider terms, the

role of the Community judicature in enhancing democracy and legitimacy. They provide a critical analysis of recent case law on the *locus standi* of individuals under Article 230(4) EC, and discuss the amendments proposed by the draft Constitutional Treaty. They argue in favour of a liberalisation of *locus standi*, a view which, notably, has recently been echoed by the House of Lords European Union Committee.

The division of powers between the Union and the Member States is central to the constitutional debate and closely related to the favourite themes of the Laeken declaration, namely, legitimacy, accountability, and legal certainty. Bermann assesses the provisions of the draft Constitution on competence. Their intention is primarily to explain and restate rather than to modify. The draft Constitution however enhances the role of subsidiarity and grants national parliaments political and judicial means to control the compatibility of Union law with that principle. Whatever the advantages or drawbacks of these provisions, the relative power of national governments and Union institutions cannot be assessed in isolation. It can only be evaluated by reference to the detailed provisions of Part III of the draft Constitution which serve as the bases of Union legislation and also, equally importantly, by reference to institutional, political and judicial practice. Surely, as Bermann points out, the devil is in the detail.

A criticism often levelled against the Community is that it lacks a coherent system of hierarchy of norms. The draft Constitutional Treaty takes steps to redress this by providing for new provisions on the legal acts of the Union. This is one of the most innovative parts of the draft Constitution. As Craig points out, the types of EU norm and the hierarchy between them have broader implications for the inter-institutional balance of powers within the EU and also for the vertical division of competence between the Union and the Member States. They are closely linked to the themes of legitimacy, democracy and separation of powers. The provisions of the draft Constitution may result in a shift of power in favour of the Parliament, which benefits through the extension of the co-decision procedure, and the Commission, which has ample regulatory discretion and is subject to relatively little control by the Council and the Parliament.

Arnull focuses on the protection of fundamental rights in Europe's new constitutional order. He hails the inclusion of the Charter in the draft Constitution as an important development but points out its drawbacks and limitations. There is some unnecessary or even harmful duplication between the provisions of the Charter and provisions included elsewhere in the Constitution. Arnull argues in favour of the accession of the Union to the European Convention for the Protection of Human Rights but, ultimately, the human rights culture matters as much as, if not more than, the legal instruments themselves. It is the way the government, the civil service, and the courts perceive and apply human rights that makes the difference.

Tridimas assesses the way the draft Constitution affects the function and jurisdiction of the European Court of Justice. Do its provisions owe more to a federal or to an inter-governmental model? There is no appetite for wholesale reform but the draft Constitution, countenanced by the Court's own case law on human rights, enhances its position as the Supreme Court of the Union.

Cuthbert and Willis place the role of the Commission in a historical context. They review proposals made for the reform of the Commission over the last twenty years and examine themes of democracy and good governance. Cygan reviews the role of national parliaments in the EU's constitutional order. He assesses their monitoring role over EU affairs as a form of substitute sovereignty and casts a critical eye on the Protocol on subsidiarity and proportionality which is included in the draft Constitutional Treaty. He concludes that national parliaments will have an important role to play in the EU not so much as legislators but as facilitators of democracy and accountability, ie by encouraging participation of civil society, promoting the accountability of EU institutions, and monitoring the effects of Union law at national level.

Ryan starts from the premise that, in the EU constitutional context, the Member States are the masters of the Treaties. Respect for democracy dictates that legitimacy of constitution-building at Union level lies first and foremost with the nation-states on whose consent the EU must be based. Inspired by a model based on Rawls's version of social contract, he understands consent in terms of the hypothetical outcome of idealised negotiations between Member States. Under his construct, Member States are expected to try and ensure the achievement of their common objectives whilst retaining as much of their discretion as possible. They seek to achieve this by placing limits on EU powers and ensuring that the EU does not violate their core constitutional attributes, such as respect for democracy and human rights.

Everson and Eisner view the constitutional processes of the EU from a more critical perspective. Based on empirical evidence provided by interviews with English judges and barristers, they suggest that the process of adjudication is based on a formalistic understanding of the origins and force of law which is divorced from the political processes and does not do justice to the proposed EU Constitution.

The remaining contributions in this part of the volume concentrate on remedies. Ward assesses the extent to which the draft Constitution resolves the problems associated with the effective protection of individuals before the Union courts, in particular, their capacity to challenge Union measures. Her main tenet is that *locus standi* of individuals should be linked to the procedure for the adoption of Community acts. Thus, legislative acts, owing to their democratic credentials, should remain immune from direct challenge by individuals. Regulatory acts, by

contrast, should be open to challenge before the CFI. Ward goes further and argues that, provided that they can show an interest in the outcome of the proceedings, individuals should have *locus standi* to challenge before the CFI all non-legislative measures. National courts, by contrast, should remain the primary fora for initiating challenges by individuals against the validity of legislative acts.

Hilson examines the effects of directives as instruments of legality review, ie in circumstances where a directive is not sufficiently specific to grant a right but delimits Member State choices and thus permits judicial review of the way the national authorities have exercised their discretion. Such legality review can be carried out not only in the context of enforcement proceedings under Article 226 EC but also where individuals invoke directives before national courts. The intensity of review depends on the EU measure applicable. Hilson argues that, where the Court reviews the compatibility of national measures with environmental directives, it should not rely on a *Wednesbury* — type test of unreasonableness, ie whether Member States have manifestly exceeded their discretion, but apply a stricter degree of scrutiny in view of the importance of environmental protection.

Finally, Dougan invokes the public — private law distinction to ascertain the proper scope of the *Francovich* principle. He argues that state liability in damages should remain a remedy where an authority violates its public law duties. By contrast, where an authority breaches Community law acting in a private law capacity (eg as an employer), liability should be determined on the basis of the rules of Community law which are breached *per se* or according to the fault criteria suitable to the specific private law field in question.

EXTERNAL RELATIONS

In the field of external relations, the contributions centre on the following themes: the development of the Union's common foreign, security, and defence policies, relations with the WTO, immigration and asylum policy, and the challenges of enlargement.

Denza reviews the provisions of the draft Constitutional Treaty on the common foreign and security policy and assesses the extent to which they mark a transition from the intergovernmental model to a more *communautaire* one. The draft Constitutional Treaty seems, at least in some respects, to honour the Union's aspirations of nationhood by strengthening its presence as an international actor but, in fact, the nature and effect of the Union's powers remain unclear. Those looking for a more precise delimitation of powers between the EU and the Member States as promised at Nice may find little comfort in the provisions of the draft Constitution. Denza thus questions whether this is a good basis to establish a new Treaty.

One of the main challenges that the Union faces in the external sphere is how to develop a meaningful Security and Defence Policy within the constitutional and institutional confines predicated by the Union's distinct nature and legal framework. Koutrakos argues against a maximalist approach. The constitutional constraints under which the EU operates and, most importantly, the lack of political support at Member State level, render the EU unsuitable to assume the role of a superpower. Instead of promoting a nation-state inspired model of security and defence policy, the EU should seek to assert its identity at international level by developing an inter-disciplinary approach to international issues recognising the interaction among foreign policy, development, trade, defence and international legal cooperation. Such an approach will enable the EU to utilise its existing legal panoply in diverse areas, exploit its comparative advantages, and turn its institutional weaknesses to a strength.

The issue of coherence of the various external policies of the EU is also discussed by Herrmann who reviews the challenges to governance posed by globalisation. One of the main problems in this context is the reconciliation of economic and non-economic interests. This theme is examined by Reid who compares the approach of the EC and the WTO. She concludes that the EU has made a veritable effort to reconcile economic and non-economic interests, in particular, free movement with environmental protection and human rights. She cautions however against the transposition of a strict proportionality test in assessing the compatibility of national measures with the rules of the WTO.

Antoniadis examines the provisions of the draft Constitutional Treaty on the common commercial policy and the problems surrounding the participation of the Community and the Member States in the WTO, especially their involvement as complainants or respondents in the Dispute Settlement System. The overriding duty of cooperation which governs participation in mixed agreements is not in itself sufficient to resolve the delicate issues that may arise. There may be scope for a Code of Conduct laying down a clearer division of responsibilities between the Community and the Member States within the WTO system.

One area where the draft Constitution increases significantly the powers of the EU is immigration and asylum law. Peers assesses whether the current EU law in those fields conforms to an internal market model or a human rights model. EU law seeks to achieve extensive harmonisation of the law concerning visa and border control. By contrast, with regard to asylum and immigration law, it aims to provide minimum standards allowing Member States to be more restrictive, although the appetite of the Community institutions for more comprehensive regulation should not be underestimated. But what does minimum harmonisation mean in this context? Peers suggests that whilst EU asylum legislation must always allow Member States to pursue a higher degree of protection for the individual, immigration measures

may be interpreted as permitting more restrictions, or more protection, or full harmonisation. He argues for a human rights rather than a mutual recognition model in relation to asylum and immigration.

This theme is also taken on by Lambert who examines the proposed Qualifications Directive. This measure seeks to provide minimum standards for the protection of refugees bringing together the principles of the Geneva Convention and the practice of subsidiary protection under human rights law.

Phuong focuses on the impact of the EU immigration and asylum policy on the laws of the incoming Member States and the expectations placed upon them to control migration from the East in the enlarged Union. EU policy here pursues a twofold objective: it seeks to ensure that the new Member States do not become easy targets for asylum seekers and also that they improve their asylum systems so as to facilitate burden sharing with the current Member States. Issues, however, such as visa regulations, border controls, and asylum arrangements are far from unproblematic.

Cremona reviews the Union's policy initiatives concerning relations with its near neighbours and points out the similarities and differences between the new proximity policy and the pre-accession model which led, gloriously, to the last enlargement. The proximity policy differentiates between potential candidates (the Western Balkans) and countries for whom a new neighbourhood policy is proposed (Russia, the Western NIS and the Southern Mediterranean) taking into account different geo-political parameters and historical relations with Europe. Relations with the Western Balkans are governed by the Stabilisation and Association Process, which combines the Copenhagen criteria with a conditionality model specific to the Western Balkans region. Relations with Russia, the Western NIS and the Southern Mediterranean seek to build on existing bilateral agreements and envisage cooperation on migration issues, border management and the exportation of Union regulatory patterns. Closer relations with the Union and market access are seen as the *quid pro quo* of political and economic reform and adherence to the values of the Union. The Union's proximity policy is based on pre-accession structures and instruments but, crucially, pursues diverse and less specific goals and is not necessarily accompanied by the target of EU accession. The largest problems that the EU faces are how to engage its neighbours in a process of political and economic integration where, as Cremona puts it, they become participants rather than recipients of foreign policy, and how to draw the balance between inclusiveness and differentiation.

Velluti concentrates on the social aspects of enlargement. She examines the measures adopted by the new Member States to conform with the European Employment Strategy and assesses whether that Strategy, and its implementation through the open method of coordination, is a suitable policy instrument for the new Member States whose economies are still in the process of moving from a state-dominated to a functioning market system.

Finally, Czuczai explores the challenges posed by the Charter of Fundamental Rights to the acceding States and states aspiring to join the EU in the future. Notably, he identifies the implementation of Article 21, which contains an all-embracing prohibition of discrimination, as one of the most important problems that the new Member States are likely to face. He calls for further clarification of the concept of 'minority rights' which, in the constitutions of some Central and Eastern European countries, are addressed separately from human rights.

2

Three Challenges for European Constitutionalism in the 21st Century

FRANCIS SNYDER

THE DEVELOPMENT OF a real constitution in the European Union (EU) in the 21st century faces numerous challenges. Three challenges are among the most important. We can call them 'the challenge of ordinary people', 'the challenge of empire' and 'the challenge of sites'.

THE CHALLENGE OF ORDINARY PEOPLE

The first challenge is to put into practice an EU constitution that engages with the concerns not only of the elite, but also of ordinary people. In order to do this, we need a different constitutional practice, based on a conception of the EU constitution that diverges from those which are frequently used. An adequate conception of the EU constitution cannot be imagined only in legal terms; it requires systematic attention to the social, economic, political and cultural contexts. Our thinking of the EU constitution needs to take account systematically of the various contexts that produce EU law and shape its operation in practice.

EU constitutional scholarship would do well to focus on a single (if potentially all-embracing) theoretical problem: How does a 'constitution in the material sense' become also a 'constitution in the subjective sense'? By 'constitution in the subjective sense', I refer not necessarily to deliberation by the people, but rather to people's subjective orientation: that is, to use Weber's terms, whether people are subjectively oriented to the constitution in a substantive sense as if it were their fundamental legal act.

In turn, this requires us to refocus our constitutional lens. We need to go beyond rules, institutions and other structures. Four elementary hypotheses regarding the EU will make this more concrete. First, the EU is a social

organisation. Second, 'social organization is a dynamic process'.[1] Third, 'social organization is the process of bringing order and meaning into human social life'.[2] Fourth, 'social organization is the process of merging social actors into ordered social relationships, which become infused with cultural ideas'.[3] In other words, we need to conceive of the EU constitution as a process.

From this perspective, we can distinguish three distinct but interrelated dimensions of the EU constitution. The first dimension refers to structures, namely constitutional principles. The second dimension concerns constitutionalising processes: those social processes which tend to transform (or block the transformation of) the EU constitution from a constitution in only a substantive sense to a constitution in both a substantive and a subjective sense. The third dimension consists of constitutional culture, a facet of legal culture. These three dimensions, in my view, constitute the basis for understanding the development of the EU constitution in the 21st century.

To illustrate this perspective, I focus briefly on constitutional culture. By 'constitutional culture' I mean a legal culture oriented to the legal framework of the EU as a set of fundamental norms. It is not concerned solely, or indeed primarily, with judicial review. Constitutional culture does not necessarily involve shared norms, based on common principles of justice and articulating an 'overlapping consensus'. Instead it may express conflicting moral ideas and different traditions of constitutional democracy.

The notion of a constitutional culture refers both to the actual provisions and the unwritten principles of the constitution. But it also involves the way in which the constitution is dealt with by the legislator, the administration, the judiciary and legal scholarship. My working hypotheses are two fold. On the one hand, a constitutional culture which is specific to the EU is now emerging and being created at the individual, organisational and societal levels. On the other hand, its main features are not all fixed, nor are they by any means entirely coherent and free from contradiction.

There are at least two different ways to read contemporary EU constitutional culture. One reading is historical. From this perspective, EU constitutional culture is a conjunction of two different strands. First, EU constitutional culture remains heavily influenced by the historical development of European regional integration since the 1950s. Of special importance is the fact that, until recently, European integration was oriented almost entirely toward the economy. A second strand is the historical (and continuing) legacy of the state. When thinking about the EU constitution, and trying to imagine how best to conceive of it and its future development, we find it

[1] ME Olsen *The Process of Social Organization* (New York, Holt, Rinehart and Winston, 1968) 2.
[2] *Ibid* at 2.
[3] *Ibid* at 3.

very difficult to escape the model of the state, particularly the historical model of the state in continental western Europe. While this poses a challenge to us as potential constitutional theorists, it nevertheless remains firmly anchored as a part of today's EU constitutional culture.

A second reading is based on social differentiation. There is a great divide between two domains of — or perspectives on — contemporary EU legal culture: elite or specific legal culture, and general or popular legal culture. As legal scholars or practising lawyers, we know a great deal about elite legal culture, albeit without always being conscious of it or without necessarily being able to analyse it. But we lawyers (and others) know very little about general EU legal culture. Its very existence is sometimes denied. This perception is seriously misleading, but nonetheless it indicates how little attention legal scholarship and studies of law in European society have paid to legal culture. To remedy this gap, we need the help of our colleagues in other disciplines. Only in this way can we achieve a serious understanding of EU legal culture, which in turn is essential for putting into practice an EU constitution which engages with the concerns of ordinary people. This is an indispensable element if we are to take seriously the idea of the EU constitution as a process.

THE CHALLENGE OF EMPIRE

A second challenge is to come to grips, in theory and practice, with the role of the EU in the world today: its potential and its limits. Globalisation will help to shape the features of the EU constitution in the 21st century. It partly determines what kind of EU constitution is possible in the contemporary period. For present purposes, globalisation needs to be reformulated in geopolitical terms. Not long ago the *Financial Times* published a striking editorial, which was entitled 'We must get used to a world in which America makes the rules'.[4] How can we situate the European Union in this new world?

The concept of empire[5] provides a useful perspective. It takes account of two of the most significant features of the post-Cold War, post-9/11 world, the remarkable concentration of power and its notable fragmentation and dispersion. Hardt and Negri argue that the development of the global market and global circuits of production has been accompanied by the development of a 'new logic and structure of rule' or 'a new form of sovereignty'.[6] The basic hypothesis is that 'sovereignty has taken a new

[4] Philip Stephens, 'Learning to live in a world governed by American rules' (7 Feb 2003) *Financial Times* 11.
[5] Michael Hardt and Antonio Negri, *Empire* (Cambridge MA and London, Harvard University Press, 2000) (hereinafter *Empire*).
[6] *Empire*, p xi.

form, composed of a series of national and supranational organisms united under a single logic of rule. [7] This new sovereignty is empire, 'a decentered and deterritorializing apparatus of rule that progressively incorporates the entire global realm within its open, expanding frontiers.'[8] It is not an imperialist project, though the United States occupies a 'privileged position',[9] and even though '[t]he contemporary idea of Empire is born through the global expansion of the internal US constitutional project'.[10] Instead, 'empire' is a concept the basic characteristic of which is a lack of boundaries.'[11]

Hardt and Negri identify what they call the pyramid of global constitution. They write that 'When we analyse the configurations of global power in its various bodies and organizations, we can recognise a pyramidal structure that is composed of three progressively broader tiers, each of which contains several layers'.[12] At the top of the first, unified tier is the United States, the superpower with hegemony over the global use of force. This tier also contains on a second level 'a group of nation-states [which] control the primary global monetary instruments and thus have the ability to regulate international exchanges.'[13] In my view, this group includes the most powerful Member States of the European Union, and by a possibly permissible extension, the European Union itself.

What roles does the EU play in the context of empire, and what roles might it potentially play? So far, the EU has tried to preserve the shreds of embedded liberalism, the post-World War II compromise which tried to reconcile the operation of markets with the values of social community.[14] For the European Union and its institutions, a fundamental question must now be addressed: To what extent is it possible to preserve 'embedded liberalism' in today's world? Embedded liberalism was basically a projection of the US New Deal on an international scale.[15] The projection occurred in a bipolar international setting, in which the United States and the Soviet

[7] *Empire*, p xii.
[8] *Empire*, p xii.
[9] *Empire*, pp xiii–xiv.
[10] *Empire*, p 182. Hardt and Negri argue that the US constitution is imperial, not imperialist, because '(in contrast to imperialism's project always to subsume subject countries within its sovereignty) the US constitutional project is constructed on the model of rearticulating an open space and reinventing incessantly diverse and singular relations in networks across an unbounded terrain': *Empire*, p 182.
[11] *Empire*, pp xiv–xv.
[12] *Empire*, p 309.
[13] *Empire*, p 309.
[14] J Ruggie, '*International Regimes*, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order', in S Krasner (ed) *International Regimes* (Ithaca, NY, Cornell University Press, 1983) 195–231.
[15] See A-M Slaughter-Burley 'Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State', in J Ruggie (ed) *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (New York, Columbia University Press, 1993) 125–56.

Union were the dominant powers. However, this is no longer the case today. Now we live in a different historical period. The EU's political and legal strategies have to come to grips with this fact.

This will be a major challenge for EU constitutionalism during the 21st century. Empire places serious constraints on the elaboration of the EU constitution, while simultaneously it opens up new spaces for development. As scholars of EU law, it is important for us to analyse these constraints and opportunities. We need also to try to understand the preconditions which may help to determine whether alternative constitutional strategies are more likely to be successful or to fail.

THE CHALLENGE OF SITES

A third constitutional challenge for the EU in the 21st century concerns relations between sites of governance. Today a multiplicity of sites of governance complement, supplement or compete with the State, even though the State remains powerful, if not predominant. The former is explicit in the concept of empire, while the latter is implicit in the concept's current empirical reference to the United States. The term 'global legal pluralism' refers to the totality of a multiplicity of sites of governance throughout the world. These sites can be situated in a pyramid in terms of political power, but in normative terms they are not necessarily arranged in a hierarchy. This raises the question as how the EU can and should manage rules originating from other sites, in other words how it can govern normative globalisation.

A pertinent example concerns relations between the EU and the World Trade Organisation (WT). They are two of the most significant sites governing economic globalisation today. Relations between them are always important and sometimes controversial. Article XVI of the Marrakech Agreement establishing the WTO requires each WTO Member to ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the Uruguay Round agreements. What this means in practice in the EU has so far been determined by the gatekeepers, the European courts.[16]

Up to now the European courts have followed a strategy of promoting indirect effect rather than direct effect as a way of implementing WTO law in the EU legal order. However, this leaves important gaps. The clear reference exception applies only in limited and ill-defined circumstances. The transposition exception, though clear, is also limited in scope. The principle of consistent interpretation has well-known limitations. Most

[16] See F Snyder 'The Gatekeepers: The European Courts and WTO Law', (2003) 40 *CML Rev* 313–67.

importantly, there is a real problem about the implementation of adopted panel and AB reports.

These issues resurfaced recently in the *Biret* cases.[17] Two French companies brought actions against the Council, claiming compensation for damages allegedly suffered as a result of the EC's ban on imports of hormone-treated beef. They argued that the EC had failed to implement the ruling of the WTO Dispute Settlement body in *Hormones*[18] and therefore was in breach of its WTO obligations. The Court of First Instance rejected the applicants' claims. Biret appealed to the ECJ, and on 13 May 2003, Advocate General Alber delivered his Opinion.[19] He proposed that the Council had infringed a superior rule of law for the protection of the individual, and on which an individual could rely. He concluded that, consequently, Biret was entitled to compensation. In my view, the European Court of Justice (ECJ) is unlikely to accept this conclusion.[20]

Consider also recent legislation concerning the implementation of WTO law by the European Commission and the Council. In July 2001 the Council adopted Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters (hereinafter the Enabling Regulation).[21] It provides that, whenever the DSB adopts a report concerning an EC measure taken pursuant to the basic EC anti-dumping regulation, the basic EC anti-subsidy regulation or the Enabling Regulation, the Council may repeal or amend the disputed measure or adopt any other special measures which are deemed to be appropriate in the circumstances.[22] It may also take any of these measures in order to take account of legal interpretations in a DSB report concerning a measure not in dispute, if it considers this appropriate.

[17] Case T-174/00 *Biret International SA v Council of the European Union* [2002] ECR II-17; Case T-210/00 *Etablissements Biret et Cie SA* [2002] ECR II-47; Case C-93/02P *Biret v Council*, Opinion of Advocate General Siegbert Alber of 15 May 2003. I am grateful to Candido Garcia Molyneux for this reference. See also 'Opinion of Advocate General Siegbert Alber in Cases C-93/02P and C-94/02P, *Biret International SA and Etablissements Biret et Cie. SA v Council of the European Union*', European Court of Justice, Press and Information Division, Press Release No 39/03, 15 May 2003.

[18] See DSB decision of 13 February 1998 adopting the Appellate Body Report of 16 January 1998 No WT/DS26/AB/R WT/DS48/AB/R.

[19] Opinion of the Advocate-General; see also Press Release, above n 17.

[20] See now the judgments of the ECJ in Cases C-93/02 P and C-94/02 P both delivered on 30 September 2003.

[21] OJ 26.7.2001 L201/10.

[22] The Council acts by a simple majority on a proposal from the Commission after consulting the appropriate Advisory Committee. It may take any of the measures which it considers appropriate.

The Enabling Regulation was designed to resolve a problem arising from a specific DSB ruling.[23] It was also intended to clarify the legal status of adopted WTO panel and AB reports in EC law, albeit only in specific fields. Whether it really resolves the latter, broader issue is open to question. However, one of its most interesting aspects concerns relations not between WTO and EC law, but rather between EC institutions. The underlying structure of the Enabling Regulation derives from judicially created exceptions to the (judicially created) EC law principle that WTO law cannot be used as a criterion for assessing the legality of EC law. But it goes further by allowing the legislator to adopt acts in order to take account of DSB interpretations on measures not in dispute. In both respects, it establishes a new normative role for the EC legislator in a domain which previously was left to the courts. At the same time, it preserves substantial legislative and administrative discretion.

Whether we consider the matter from the standpoint of the European courts or from that of the EU legislator, WTO law has only a relative, negotiated effectiveness in EU law. The implementation of WTO law in the EU is a form of negotiation involving relations between two sites, instead of a more or less automatic, top-down process. In this context, governance of normative globalisation is a kind of translation, by which the EU translates WTO law into its own language or vernacular. It renders a foreign text understandable, while simultaneously it serves to channel, control and preserve room for manoeuvre. The effect of WTO DSB recommendations (and perhaps WTO law more generally) in EU law is likely to remain problematic, but translation is an essential feature of relations between sites. This reinforces our conception of the EU constitution as a process.

CONCLUSION

The challenge of ordinary people, the challenge of empire and the challenge of sites are likely to occupy the energies of EU constitutional lawyers and policy-makers for much of the 21st century. This is necessary, indeed inevitable, if the EU is to put into place a real constitution in the contemporary international context. These challenges deserves sustained attention from scholars and students of EU constitutional law.

[23] *European Communities: Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Panel, 30 October 2000, WT/DS141/R, adopted 12 March 2001; Report of the Appellate Body, 1 March 2001, WT/DS141/AB/R, adopted 12 March 2001.

3

Judicial Review as a Contribution to the Development of European Constitutionalism

KOEN LENAERTS AND TIM CORTHAUT*

I. INTRODUCTION

THE COMMUNITY JUDICATURE definitely has a role to play in enhancing democracy and legitimacy of the EU institutions, by articulating norms of a constitutional nature. The case law of the ECJ and the CFI contains multiple instances where the judicature had to strike the balance between the institutions, or where it enhanced their transparency or accountability. Moreover, the Community Courts have an important role to play as protectors of fundamental rights in the EC legal order. However, before examining this body of case law, another fundamental issue must be settled: the question of access to the Community Courts. Indeed, it is logically only when institutions and individuals are able to bring their cases before the Community Courts that the latter can play their important role. It is precisely in this domain that we are currently witnessing a strong difference between the CFI and the ECJ, which forces the drafters of the Constitutional Treaty to make some tough choices. Therefore, this contribution will first review some of the latest developments in respect of the criteria for *locus standi* of individuals before the Community Courts. Next it will be demonstrated that when the Community Courts do have jurisdiction, they often make fundamental rulings on democracy, legitimacy, and transparency within the Community legal order.

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II. CARVING OUT ITS OWN CONSTITUTIONAL POSITION: RULES ON STANDING

Access to the courts — and the restrictions thereon — is an important element in determining the checks and balances inherent in any constitutional system. This goes in particular for those systems where the judiciary has been given the power to review the legality of acts of not only the executive, but also the legislator. Such power has effectively been given to the Community Courts, and the way in which the ECJ defines its own jurisdiction thus greatly affects the subtle constitutional equilibrium between Member States and the Community institutions, both *vis-à-vis* one another and in their relationship with the citizens.

A. Ensuring Checks and Balances Through *Locus Standi* …

The importance and potential constitutional impact of granting access to judicial review before the Community Courts has never been played down by the ECJ. In its well-known judgment in *Les Verts* the ECJ did not hesitate to subject any act of the institutions to the control of the Courts and to stress its own pivotal role in upholding the rule of law by checking whether Community acts are in conformity with the *constitutional charter, the Treaty.*[1] The ECJ then went on to set out a coherent division of work between the ECJ and the national courts in order to guarantee this possibility of judicial review by referring individuals to the national courts unless they are challenging an act which is addressed to them or is of direct and individual concern to them.

All this was effectively done to open the way for the Court to hear a case brought by a political party against a decision taken by the European Parliament in respect of the division of money to political groups on the occasion of the 1984 elections. In this way the Court penetrated right into the heart of the constitutional organization of democratic life in the Community. However, in order to do so the Court had to clear several hurdles. It first had to establish the legal personality and capacity of the applicant to bring the action. Then the ECJ went on to include the European Parliament in the list of potential defendants in actions for annulment. This possibility now sounds very natural, but was not foreseen under the original Treaty.[2] The ECJ basically had to fill in the gaps in the Treaty in respect of

[1] Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para 23.
[2] Compare the original version of the then Art 173 TEC with Art 230(1), *in fine* TEC. In doing so the Court went way beyond the text of the Treaty, which is all the more remarkable since a proposal by the Commission to add the acts of the European Parliament to the list of challengeable acts and the corresponding right for the European Parliament to act as

its own jurisdiction. It did so without much opposition from the Parliament itself, though the EP had asked for a *quid pro quo* in the form of a right of standing against the acts of other institutions[3] — on which the ECJ stayed silent.[4] It is clear that, if the European Economic Community is a 'community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty',[5] the European Parliament, too, cannot escape review of its acts.[6] Nonetheless, the ECJ still had to establish that this decision of the EP really produced legal effects and was of direct and individual concern to the applicants. Especially on the latter point, a classic reading of the *Plaumann* test[7] would have been disastrous for the applicants, since parties who had not been represented in the Parliament before 1984 formed a prime example of an 'open category' of applicants; namely, applicants who are clearly not affected by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and which by virtue of these factors are distinguished individually, just as in the case of the person addressed. The Court realized it had to come up with a creative solution in the light of the seriousness of the alleged infringement. The organization and financing — with public funds — of the elections for the European Parliament go to the core of the legal order and denying the possibility of review of those acts would have strongly undermined the legitimacy of the Parliament. Therefore, the ECJ side-stepped the issue by stressing the unique situation in which the closed group of parties involved in drafting the contested system decided on both their own share of public funds and the share for the open category of political groups that were not yet represented in the Parliament in a potentially unequal way, without there otherwise being a way to redress this situation so critical for democracy in the Community.[8] The Court could then finally declare the action admissible and annul the contested acts, thus restoring the equal opportunities of the various political parties on the occasion of EP elections.

an applicant had not been acted upon by the Member States; see J-P Jacqué, '*Parti Ecologiste "Les Verts" c Parlement Européen* (Aff 294/83)' (1986) 22 RTDE 500 at 503.

[3] Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para 22.
[4] See however later, Case 70/88 *European Parliament v Council* [1990] ECR I-2041 (below).
[5] Case 294/83 Parti Ecologiste '*Les Verts' v European Parliament* [1986] ECR 1339, para 23.
[6] In holding so, the ECJ followed the position defended by one of its prominent members on the occasion of the first elections for the European Parliament: see P Pescatore, 'Reconnaissance et contrôle judiciaire des actes du Parlement européen' (1978) 14 *RTDE* 581 at 585–89.
[7] Case 25/62 *Plaumann v Commission* [1963] ECR 95.
[8] Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339, paras 33–35.

The ECJ, in the famous *Chernobyl* case, subsequently awarded *locus standi* to the EP in order to protect its own prerogatives through direct actions for annulment.[9] In this case again the importance of access to the Community Courts was not played down and the constitutional framework of the Community was adapted accordingly. The former Articles 173 EEC Treaty and 146 Euratom Treaty did not provide for *locus standi* for the European Parliament. The ECJ had first refused to act on this,[10] but later filled the gap in line with the increasingly important role played by the EP in the legislative procedure. In light of the present analysis, it is important to stress that the ECJ has not eschewed fundamentally redrawing the constitutional balance[11] through its case law on *locus standi*. It is equally important to notice that the Member States, as *Herren der Verträge*, subsequently consummated this fundamental change in the constitutional balance by taking over the formula devised by the Court in the text of the Treaties on the occasion of the following IGC. The position of the European Parliament has meanwhile been strengthened even further with the entry into force of the Nice Treaty, which makes the European Parliament a fully-fledged privileged applicant.[12]

B. … But Not for Individuals

Unsurprisingly, the Court's enthusiasm for expanding the *locus standi* of the European Parliament — and the willingness of the Member States to comply with this change — provoked further calls to alter the conditions for admissibility of individuals as well. Both in legal literature,[13] in

[9] Case 70/88 *European Parliament v Council* [1990] ECR I-2041.
[10] Case 302/87 *European Parliament v Council* [1988] ECR 5615.
[11] Though the ECJ itself rather considered that it was 'ensur[ing] that the provisions of the Treaties concerning the institutional balance are fully *applied* and to see to it that the Parliament's prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy': see Case 70/88 *European Parliament v Council* [1990] ECR I-2041, para 25.
[12] Art 230(2) TEC.
[13] Among others: A Arnull, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty' (1995) 22 *CML Rev* 7 and 'Private Applicants and the Action for Annulment since *Codorníu*' (2001) 28 *CML Rev* 7; D Waelbroeck and A-M Verheyden, 'Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires: À la lumière du droit comparé et de la Convention des droits de l'homme' (1995) 31 *CDE* 399; G Vandersanden, 'Pour un élargissement du droit des particuliers d'agir en annulation contre des actes autres que les décisions qui leur sont adressées' (1995) 31 *CDE* 535; L Allkemper, *Der Rechtsschutz des einzelnen nach dem EG-Vertrag: Möglichkeiten seiner Verbesserung* (Baden Baden, Nomos, 1995), 39–40; T Heukels, 'Collectief actierecht ex artikel 173 lid 4 EG: een beperkte actieradius voor grote belangen' (1999) 5 *NTER* 16.

Opinions of Advocates General before the ECJ,[14] and with the intervening creation of the CFI,[15] the Community Courts were asked to loosen the strict *Plaumann* test. As already noted above, the interpretation given by the ECJ to the requirements of Article 230(4) TEC is highly restrictive, in spite of the Court's own initial opinion that the words and the natural meaning of this Article justify the broadest interpretation, and that provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively.[16]

The Court's subsequent response has always been rather lukewarm.[17] The strict reading of the notion of individual concern has always been upheld, especially when individuals have attempted to challenge acts of general application such as regulations. However, several minor qualifications were added to the rule. In this way private actions for annulment were declared admissible in cases concerning competition,[18] state aid,[19] and anti-dumping[20] and

[14] Opinions of Advocate General Slynn in Case 246/81 *Bethell* [1982] ECR 2277, at 2299; and of Advocate SGeneral Jacobs in Case C-358/89 *Extramet Industrie* [1991] ECR I-2501, at paras 71–74, and Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, at paras 20–23, and of Advocate General Ruiz-Jarabo Colomer in Case C-142/95 P *Associazione agricoltori della provincia di Rovigo and others* [1996] ECR I-6669, at paras 40 and 41.

[15] The CFI has the express task of improving the judicial protection of interests of individuals and allowing the ECJ to focus on the uniformity of the case law, through preliminary rulings and appeals limited to points of law against judgments of the CFI. See the recitals of Council Decision 88/591/ECSC, EEC, Euratom of 24 Oct 1988 establishing a Court of First Instance of the European Communities, [1988] OJ L319/1; Opinion of Advocate General F Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paras 91–96.

[16] Case 25/62 *Plaumann v Commission* [1963] ECR 95. The individual concern was defined as follows 'Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.' This test is moreover applied very rigidly: 'In the present case the applicant is affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of the addressee.' See for a very critical analysis of the *Plaumann* test, P Craig and G De Búrca, *EU Law, Text, Cases and Materials* (Oxford, Oxford University Press, 2002), 488–91. As they rightly observe, it is precisely this application of the test that causes most of the difficulties: the fact that others in the future may also start with importing clementines does not prevent the present day importers from having 'certain attributes which are peculiar to them' and which distinguishes them from all other potential participants on the market, for they *effectively are* already importers of clementines and, therefore, are in this capacity also clearly affected by the measure — unlike the potential, virtual market entrant the ECJ uses as its point of reference.

[17] For an in-depth analysis of the action for annulment see K Lenaerts and D Arts, *Procedural Law of the European Union* (London, Sweet & Maxwell, 1999), 139–206; HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* (Kluwer Law International, The Hague/London/New York, 2001), 406–63, § 826–927.

[18] Case 26/76 *Metro v Commission* [1977] ECR 1875; Case 210/81 *Schmidt v Commission* [1983] ECR 3045; Case 75/84 *Metro v Commission* [1986] ECR 3021.

[19] Case 169/84 *Cofaz v Commission* [1986] ECR 391.

[20] Cases C-305/86 & C-160/87 *Neotype Techmashexport v Commission and Council* [1990] ECR I-2945, para 19.

when the institutions were under a duty to take the interests of the applicant into account while adopting the act.[21]

In very exceptional circumstances the ECJ has accepted that the factual situation — including the economic impact of an anti-dumping regulation on a particular importer — may be of such a nature as to distinguish the applicant from all other market participants.[22] The ECJ has, finally, accepted that there may be situations where a regulation can be considered to be a decision in respect of an applicant because of the exceptional attributes of that applicant, while continuing to be a normal regulation in respect of others.[23]

However, the majority of the cases were declared inadmissible and the applicants were referred to alternative routes for judicial review. The most coherent approach in this respect can be found in the judgment of the CFI in *Salamander*.[24] In that case, the applicants were companies with interests in tobacco activities (either because they had a monopoly on tobacco advertisement or because they produced all kinds of products, such as shoes and clothing, using the brand names of tobacco products) who sought annulment of a directive containing a ban on tobacco advertisement and sponsoring.[25] The applicants failed in their action because they were not directly concerned by the directive and thus did not fulfil the first requirement for standing in Article 230(4) TEC. As directives have to be transposed into national legislation first, individuals can, in principle, be affected directly only by the national implementing measure and not by the directive itself.[26] Nonetheless, the CFI correctly noted that the requirement of national implementation was not an absolute bar to the satisfaction of direct concern because there was still the possibility of the so-called vertical direct effect.[27] A directive indeed binds those 'public'

[21] Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207. As G van der Wal rightly noticed, this sometimes results in very bizarre situations where actions against very similar acts are alternately declared admissible or inadmissible depending on whether the institutions were under an obligation to take the applicant's interest into account: see 'Arrest Jégo-Quéré: een zwaluw die lente maakt?' (2002) 8 *NTER* 195 at 197. See also Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477, paras 11–13, and compare with Case T-489/93 *Unifruit Hellas v Commission* [1994] ECR II-1201, paras 18–29. In its very recent judgment of 10 Apr 2003, the ECJ seems to have severelly restricted this possibility: see Case C-142/00 P *Commission v Nederlandse Antillen* [2003] ECR I-3483. The ECJ now stresses that even if such an obligation to take the interest of the applicant into account exists, the applicant still has to demonstrate that he or she was affected by those regulations by reason of a factual situation which differentiates him or her from all other persons (at paras 71–76).

[22] Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501.

[23] Case C-309/89 *Codorníu v Council* [1994] ECR I-1853, paras 19–22.

[24] Cases T-172/98, T-175/98, & T-177/98 *Salamander v European Parliament and Council* [2000] ECR II-2487, paras 52–71.

[25] Directive 98/43/EC of 6 July 1998 [1998] OJ L213/9.

[26] Cases T-172/98, T-175/98, & T-177/98 *Salamander v European Parliament and Council* [2000] ECR II-2487, paras 52–71.

[27] *Ibid*, paras 55–69. See earlier Case C-298/89 *Gibraltar v Council* [1993] ECR I-3605 and the accompanying Opinion of Advocate General Lenz.

bodies that meet the so-called *Foster* criteria,[28] even if there are no national implementing measures. Applicants that can prove that they are such bodies can argue that a directive may directly concern them after all. However, none of the applicants in *Salamander* was in that category and their respective applications were rightfully rejected. However, they had claimed that such a rejection would amount to a violation of their right to an effective remedy. Referring explicitly to its ruling in *Unión de Pequeños Agricultores*,[29] the CFI confirmed the classic position of the Court of Justice that the division of tasks between the Community Courts and the national courts as set out by the Treaties results in a coherent and complete system of judicial protection.[30] The CFI reiterated that the fact that particular Member States have failed to provide for sufficient legal remedies could not be a ground for departing from the system of legal remedies established by the Treaties.[31] Member States have an obligation under Article 10 TEC to help to ensure that the system of legal remedies and procedures established by the EC Treaty and designed to permit the Community judicature to review the lawfulness of acts of the Community institutions is comprehensive.[32] If Member States fail to fulfil their obligation to provide for efficient remedies, then the national system, rather than the rules on direct access to the CFI, must be adapted. Moreover, the CFI pointed out that alternative national remedies were available in some cases, *at least in certain Member States*. For example, while the *Salamander* case was being tried, another tobacco company had managed to go to the High Court of England and Wales, which had then asked the ECJ for a preliminary ruling on the validity of the same directive.[33] Yet, it may be extremely difficult in practice for companies, like the applicants in *Salamander*, that operate in other Member States — where no such court actions are possible — to convince their national courts to *create* a new national remedy which would allow them to challenge such a directive at an early stage as well. The CFI concluded its reasoning in *Salamander* with a reference to the action for damages.[34] By doing so, the

[28] Case C-188/89 *Foster* [1990] ECR I-3313, para 20.
[29] Case T-173/98 *Unión de Pequeños Agricultores v Council* [1999] ECR II-3357.
[30] Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para 23.
[31] Case C-87/95 P *CNPAAP v Council* [1996] ECR I-2003, para 38.
[32] Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para 23, and the order in Case T-173/98 *Unión de Pequeños Agricultores v Council* [1999] ECR II-3357, para 62.
[33] Cases T-172/98, T-175/98, & T-177/98 *Salamander v European Parliament and Council* [2000] ECR II-2487, para 76. See Case C-74/99 *Imperial Tobacco Ltd* [2000] ECR I-8599. However, the questions were not answered, because the ECJ had annulled the directive in its entirety at the request of Germany in a judgment of the same day: see Case C-376/98 *Germany v Council* [2000] ECR I-8419.
[34] Cases T-172/98, T-175/98, & T-177/98 *Salamander v European Parliament and Council* [2000] ECR II-2487, para 78.

CFI seemed to make of this procedure the tailpiece of the system of judicial protection, somehow suggesting that possible compensation for the damage caused by the act could be a valid alternative for annulment.

All this was called into question by the Court of First Instance in its judgment in *Jégo-Quéré*,[35] delivered shortly after[36] an opinion to similar effect given by Advocate General Jacobs.[37] The facts in *Jégo-Quéré* were simple. The Commission had enacted a regulation prohibiting the use of certain types of fishing nets in order to protect the stock of hake in certain Community waters.[38] A French fishing company, the only company that regularly catches hake in the waters south of Ireland while fishing for whiting, sought annulment of this regulation — which was basically an administrative measure significantly affecting the operating costs of the fishing company.

The CFI first applied the *Plaumann* test. Based on this test,[39] the Court found that the applicant was directly, but not individually, concerned by the regulation. The regulation was of general application and the Jégo-Quéré company was not able to differentiate itself from any other entity that might have been affected by the regulation.[40] The CFI was correct in holding that Jégo-Quéré ostensibly lacked individual concern since, at any given time, there might be someone else who wanted to fish in the designated areas and who would be equally prohibited from doing so.

[35] Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365.

[36] Several authors have commented on the way the CFI expedited the procedure in *Jégo-Quéré*, noting that it looked as if the CFI wanted to make sure that its voice, too, was heard on such a sensitive issue by the ECJ before it rendered its judgment in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 and, ultimately, by the Convention on the Future of Europe. See in this sense: R Barents, 'Een midzomernachtdroom op de Kirchberg' (2003) 51 *SEW* 2 at 9; P Cassia, 'Continuité et rupture dans le contentieux de la recevabilité du recours en annulation des particuliers. A propos de l'arrêt *Jégo-Quéré* du 3 mai 2002 du Tribunal de première instance des Communautés européennes (Aff T-177/01)' (2002) 44 *RMCUE* 547 at 548; T Corthaut, 'Case CFI May 3, 2002, *Jégo-Quéré v Commission*, T-177/01 and C-50/00 P ECJ July 25, 2002, *Unión de Pequeños Agricultores v Council*' (2002) 9 *Columbia J of European L* 141 at 157; P Nihoul, 'Individus, entreprises et recours en annulation. Quelques soubresauts' (2002) 9 *JTDE* 199 at 200; L Parret, 'Zaak T-177/01, Jégo-Quéré et Cie SA/Commissie van de Europese Gemeenschappen' (2002) 50 *SEW* 296 at 296; G van der Wal, 'Arrest Unión de Pequeños Agricultores: de ontvankelijkheid van particulieren weer beperkt' (2002) 8 *NTER* 288 at 290 with several references to reports in *Agence Europe*. The present authors consider this case as a prime case of interaction between the CFI and the ECJ in the development of the law; for more on this see K Lenaerts, 'The European Court of First Instance: Ten Years of Interaction with the Court of Justice' in D O'Keeffe (ed), *Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International, The Hague/London/Boston, 2000), i, 97-116.

[37] Opinion of Advocate General F Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

[38] Commission Regulation (EC) No 1162/2001 of 14 June 2001 [2001] OJ L159/4.

[39] Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, paras 22–38.

[40] Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, paras 28–37.