IN THE INTERNATIONAL COURT OF JUSTICE

BETWEEN

KINGDOM OF BELGIUM

- and -

SWISS CONFEDERATION

OPINION

Introduction

1. I have been asked by the Swiss Confederation ("Switzerland") to provide an opinion on certain questions of European Union ("EU") law, in connection with the proceedings brought by the Kingdom of Belgium ("Belgium") against Switzerland in the International Court of Justice on 21 December 2009.

2. As set out in Belgium's Application instituting the proceedings and its Memorial dated 23 November 2010, the dispute arises out of litigation in Belgium and Switzerland between the Belgian and Swiss shareholders in Sabena, the former Belgian airline now in bankruptcy. Belgium alleges that, in the course of the litigation in Switzerland, the Swiss courts have failed correctly to interpret and apply certain provisions of the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters ("the Lugano Convention"). It has therefore asked the International Court of Justice to make certain declarations concerning the proper interpretation and scope of the Lugano Convention.

Questions to be considered

3. In this context, the questions I have been asked to consider are as follows:

   (1) What are the common rules relating to jurisdiction and the recognition and enforcement of judgments under EU law?

   (2) What is the relationship between the common rules and the Lugano Convention 1988?

   (3) Is Belgium entitled, as a matter of EU law, to initiate proceedings concerning the Lugano Convention 1988 before the International Court of Justice?

   (4) Would it be appropriate for the International Court of Justice to request an opinion from the European Union in relation to the above questions, pursuant to Article 34(2) of the Court's Statute?

Summary of conclusions

4. For the reasons explained below, my conclusions in summary are as follows:

   (1) The common rules on jurisdiction and the recognition and enforcement of judgments, which apply in all EU Member State courts, are those contained in Council Regulation (EC) 44/2001 of 22 December 2000 ("the Regulation").

   (2) The substantive provisions of the Regulation are very similar to those of the Brussels Convention 1968 on which the Lugano Convention 1988 was also based. There is therefore an extremely close relationship between the Lugano Convention 1988 and the EU common rules as set out in the Regulation.

   (3) Under the EU Treaties, as interpreted and applied by the Court of Justice of the European Union ("ECJ"), where the European Union adopts common rules in a particular field, it acquires exclusive competence to take steps in relation to non-member States in that field which may affect the interpretation or application of

those rules. Because of the close relationship that exists between the common rules and the Lugano Convention, the present proceedings have the capacity to affect the interpretation or application of the common rules on jurisdiction and the recognition and enforcement of judgments. Consequently, Belgium is not competent to bring the proceedings. Furthermore, even it had been competent to seize the International Court of Justice, it would need to obtain the authorisation of the European Union before doing so. By pursuing its application despite its lack of competence to do so, Belgium is in breach of its obligations under the EU Treaties, and thus under international law.

(4) As the proceedings raise important questions concerning the interpretation and application of those Treaties, it would in my view be appropriate for the International Court of Justice to invite the European Union to make submissions to the Court in accordance with Article 34(2) of its Statute. The European Union would be represented for this purpose by the European Commission.

Question 1: What are the common rules relating to jurisdiction and the recognition and enforcement of judgments under EU law?

5. By way of introduction to this question, it may be useful to recall that competences in the European Union are divided between the Union and its Member States. In some areas, the Member States have chosen not to confer any powers on the European Union and therefore retain competence themselves; in some, competence is shared between the European Union and the Member States, while in others, the European Union has exclusive competence, meaning that the Member States have relinquished the right to take action on an individual basis.

6. The position in that regard is in some respects similar to that in a federal (or confederal) State. It is also the case (as in a federal system) that within the EU's fields of competence, EU law prevails over the internal laws of the Member States.[1] However, one relevant difference between the European Union and a federal state is that, unlike in a federal state, both the Union and the Member States have

[1] The supremacy of EU law over national law was confirmed by the European Court of Justice ("ECJ") in Case 6/64 *Costa v. ENEL* [1964] ECR 585.

international legal personality and are capable of concluding Treaties, taking part in international organisations and conducting international dispute settlement proceedings, subject to the relevant institutional or procedural rules. As a result, questions of competence in the European Union do not only arise in the context of determining which institutions have the capacity to legislate for and within Member States (so-called "internal competence") ,but also bear on the relations between EU Member States and non-member States. Where the legal relations between an EU Member State and a non-member State are in issue, therefore, it is often necessary to consider whether the Member State still has the necessary external competence to act in the relevant field (such as by concluding a treaty or initiating a dispute resolution procedure), or whether the competence is one which resides with the European Union.

7. The answer to this question in any given case is to be found in the European Union's founding Treaties, as variously amended and supplemented, and as interpreted by the ECJ. As will be seen below, the area of jurisdiction and the recognition of judgments is one in which the ECJ has explicitly ruled that the European Union has exclusive external competence.

8. The Treaty of Rome of 25 March 1957, which established the then European Economic Community (later the European Community, succeeded now by the European Union),[2] expressly assigned certain international competences to the Community, notably (under what became Articles 3(1)(b) and 131-134 EC) in respect of the Community's common commercial policy. The common commercial policy was intended to replace the individual commercial policies of the Member States and to create a uniform regime relating to trade with third countries. For this purpose the Community's competence had to be exclusive, with the result that the Member States agreed to cede their individual international competence to the Community.

[2] The European Economic Community became the European Community on 1 November 1993 when the Treaty on European Union ("TEU") came into force. The TEU established the European Union, which consisted of three so-called pillars of which the EC was the first (the other pillars were concerned with Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters). The pillar structure and the EC were abolished when the TFEU came into force on 1 December 2009.

9. The Treaty of Rome did not assign any competence to the Community in the field of jurisdiction or the recognition and enforcement of judgments. Consequently, when the Member States of the Community decided to adopt a uniform regime covering these areas, they did so by concluding an international convention, the Brussels Convention 1968, which was ratified by each of the Member States individually. The ECJ was later given the power to interpret the Brussels Convention under the Protocol of 3 June 1971, by the agreement of the signatories to the Convention.[3] A similar process was followed when the Brussels Convention regime was effectively extended to Switzerland, Norway and Iceland in the Lugano Convention 1988 although the ECJ has never been given the power to interpret the Lugano Convention 1988 (and neither has any other international court).

10. The Brussels Convention 1968 and the Lugano Convention 1988 had to be agreed in this way because the European Community, as it then was, did not have the external competence to conclude Treaties on behalf of its Member States in the field of jurisdiction or the recognition and enforcement of judgments. The position began to change, however, from 1 May 1999 when the Treaty of Amsterdam, signed on 2 October 1997, entered into force. This amended the EC Treaty (as the EEC Treaty had by then become), Article 65 of which now provided a basis for the EC to legislate on, inter alia, the recognition and enforcement of decisions in civil and commercial cases. Since that date, therefore, the European Community and now the European Union have enjoyed *internal* competence in relation to those matters.

11. This internal competence was duly exercised on 22 December 2000 when the Community adopted the Regulation. The Regulation lays down "common rules"[4] which, by virtue of being contained in a Regulation,[5] are directly applicable in all Member States without the need for domestic implementation. The uniform interpretation and application of the Regulation, as in the case of most EU measures, are safeguarded by the ECJ, to which all courts and tribunals of Member

[3] The Regulation has almost entirely replaced the Brussels Convention, but the Convention continues to apply in relation to certain overseas territories belonging to Member States: see Article 68(1) of the Regulation.
[4] The phrase "common rules" is used in Recitals 8 and 11 of the Regulation.
[5] Article 288 TFEU

States may, and all courts and tribunals of final appeal in Member States must, refer any disputes on questions of EU law for a definitive ruling.[6]

12. The answer to the first question is therefore that the common rules on jurisdiction and the recognition and enforcement of judgments are those contained in the Regulation. The adoption of these common (internal) rules has had significant implications for the Union's *external* competence, as I will explain below.

Question 2: What is the relationship between the common rules contained in the Regulation and the Lugano Convention 1988?

13. The provisions of the Regulation are directly based on those of the Brussels Convention 1968. The Brussels Convention also provided the basis for the Lugano Convention 1988.[7] The substantive provisions of these three instruments therefore closely resemble each other, and they are intended (and indeed to a significant extent required) to be interpreted as consistently as possible.

14. This is particularly clear from the Preamble to Protocol No. 2 to the Lugano Convention which provides in part:

> *THE HIGH CONTRACTING PARTIES,*
>
> *HAVING REGARD to Article 65 of this Convention,*
>
> *CONSIDERING the substantial link between this Convention and the Brussels Convention,*
>
> *CONSIDERING that the Court of Justice of the European Communities by virtue of the Protocol of 3 June 1971 has jurisdiction to give rulings on the interpretation of the provisions of the Brussels Convention,*
>
> *BEING AWARE of the rulings delivered by the Court of Justice of the European Communities on the interpretation of the Brussels Convention up to the time of signature of this Convention,*
>
> *CONSIDERING that the negotiations which led to the conclusion of the Convention were based on the Brussels Convention in the light of these rulings,*
>
> *DESIRING to prevent, in full deference to the independence of the courts, divergent interpretations and to arrive at as uniform an interpretation as*

[6] In the case of disputes concerning the Regulation, the reference procedure was formerly limited to courts of final appeal under Article 68 EC. However, this restriction has now been removed by Article 267 TFEU.

[7] Recital 5 to the Regulation describes the Lugano Convention as a "parallel Convention" to the Brussels Convention.

possible of the provisions of the Convention, and of these provisions and those of the Brussels Convention which are substantially reproduced in this Convention,

HAVE AGREED AS FOLLOWS:

[...]

Article 2

1. The Contracting Parties agree to set up a system of exchange of information concerning judgments delivered pursuant to this Convention as well as relevant judgments under the Brussels Convention.

15. The ECJ has stressed the importance of consistency of interpretation between the Brussels Convention and the Regulation.[8] Consequently, any rulings by national courts or by the ECJ on the interpretation of the Regulation are as relevant to the interpretation of the Lugano Convention as are decisions on the Brussels Convention (which are now likely to be rare).

16. There is therefore a very close relationship between the EU common rules and the Lugano Convention, and great importance is attached to achieving a consistent interpretation between them. Furthermore, the uniform application of the common rules themselves and the proper functioning of the system which they establish are regarded as essential in order to preserve the full effectiveness of EU law.[9] The implications of this for Belgium and its application to the International Court of Justice are considered below.

Question 3: Is Belgium entitled, as a matter of EU law, to initiate proceedings concerning the Lugano Convention 1988 before the International Court of Justice?

17. It has already been seen that the European Union has exclusive internal competence, by virtue of what is now Article 81 TFEU, in the areas of jurisdiction and the recognition and enforcement of judgments which are covered by the Lugano Convention 1988, and that it has exercised that competence by adopting the Regulation. Although no such principle is expressly spelt out in the Treaties, the ECJ (whose rulings on all issues of EU law are authoritative and final) has made

[8] Case C-167/00 *Verein für Konsumenteninformation v. Henkel* [2002] ECR I-8111, paragraph 49.
[9] Opinion 1/03 (discussed below), paragraph 128

clear in its case law that the exercise by the European Union of its internal legislative competence in this manner has the effect of giving the Union an implied exclusive *external* competence in the field covered by the resulting common rules. This was established 40 years ago in the Court's well known *ERTA* judgment, where it held that:

> *Each time the Community, with a view to implementing a common policy envisaged in the Treaty, adopts provisions laying down the common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations which affect those rules. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.*[10]

18. The central question for the purposes of this Opinion is therefore whether the institution and prosecution of the present proceedings by Belgium are liable to "affect the common rules" on jurisdiction and the recognition and enforcement of judgments, within the meaning of the ECJ's case law. If they are, then Belgium by its actions will have infringed the exclusive competence of the European Union and (as explained below) failed to fulfil its obligations under the Treaties.

19. In my view, the proceedings are indeed liable to affect the common rules, in two senses. In the first place, whilst the ECJ itself has no jurisdiction to interpret the Lugano Convention, the need to ensure consistency between the Lugano Convention and the Regulation means that decisions on the interpretation of the Lugano Convention may legitimately be taken into account by national courts when interpreting not only the Lugano Convention but also the Regulation. In principle this is true of any previous decision of a national court: however, a decision of the International Court of Justice on the meaning of the Lugano Convention would inevitably have a particularly profound influence on the interpretation by national courts of that Convention and, therefore, of the Regulation. Such a development could plainly affect the ability of the common rules to achieve the purposes for which they were created. It could also threaten the unity of the Regulation/Convention system in the event that the ECJ, whose interpretation of the

[10] Case 22/70 *ERTA Commission v. Council* [1971] ECR 263, paragraphs 17-18

Regulation is authoritative and definitive within the European Union, were later to take a different view of the questions under consideration.

20. The operation of the common rules may also be affected by the Lugano Convention in a different sense, which is less a consequence of the similarity between the two regimes than the result of the residual potential for conflict between them. This was highlighted by the ECJ in its Opinion 1/03,[11] which was delivered on 7 February 2006 in response to a request by the Council pursuant to Article 300(6) EC[12] for an opinion on the question whether the European Community had exclusive competence to sign the revised Lugano Convention.

21. In response to this question, the Court began by reiterating its previous statements to the effect that, where common rules have been adopted, the European Community has exclusive competence to conclude international agreements which affect those rules. The principal question to be determined was therefore whether the proposed new Lugano Convention was liable to affect either the common rules relating to jurisdiction, or those relating to the recognition and enforcement of judgments.

22. Following a detailed analysis, the Court concluded that both the provisions of the Convention dealing with jurisdiction and those relating to the recognition and enforcement of judgments were to be regarded as potentially affecting the common rules.[13] The presence of a disconnection clause which provided that the Convention would not prejudice the application of the Regulation[14] was not sufficient to prevent this outcome, because there were nevertheless various circumstances in which the existence of the Lugano Convention would lead to, for example, a different court having jurisdiction over a dispute than the one which would have jurisdiction under the Regulation.[15] It followed that the European Community had exclusive competence: only it, and not the Member States, could sign the Convention. The

[11] [2006] ECR I-1145
[12] Article 300(6) provides: *"The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty."* See now Article 218(11) TFEU which is in similar terms.
[13] Opinion 1/03, paragraphs 134-173
[14] Lugano Convention 2007, Article 64(1)
[15] Opinion 1/03, paragraphs 154-158.

revised Convention was duly signed by the European Community and Switzerland, Norway and Iceland on 30 October 2007. It will come into force in Switzerland on 1 January 2011.

23. Although Opinion 1/03 was only delivered in 2006, it is clear that its text is merely declaratory of the pre-existing state of the law: it follows from the ECJ's analysis that the Community must be regarded as having had exclusive competence in this area since, at the latest, the adoption of the Regulation in December 2000.[16]

24. As the Lugano Convention was adopted in 1988, before the EC acquired the competence (exclusive or otherwise) to lay down common rules in the areas which it covers, the next question that arises is: what is the position where a Member State has concluded an agreement with a non-member State in an area in which the European Union subsequently acquires exclusive competence by virtue of the existence of common rules? In particular, does the acquisition of exclusive competence by the European Union in the area to which the agreement relates restrict the ability of Member States to initiate proceedings under the agreement in an international forum?

25. Although this question finds no direct answer in the EU Treaties, the answer in my opinion must be that the competence of a Member State to take action against a non-member State is indeed restricted in these circumstances. It seems clear as a matter of principle that, once a matter falls within the competence of the European Union, the Member States are no longer competent, with effect from that time, to take unilateral action in an international forum which could affect the interest of the European Union.

[16] It could be argued that the EC's exclusive competence in this area dates from the amendment of the EC Treaty by the Treaty of Amsterdam with effect from 1 May 1999, discussed in paragraph 10 above, whereby the European Community acquired internal competence in the areas subsequently covered by the Regulation. The ECJ held in its Opinion 1/76 [1977] ECR 741 (the "*Inland Waterways*" case) that the Community could have implied exclusive competence where it had the power to implement a common internal policy in a particular area, even though it had not yet exercised that power. However, later cases have tended not to follow this ruling and to link the notion of exclusive competence to the actual, and not merely the hypothetical, exercise by the EC of its powers: see in particular Opinion 1/94 [1994] ECR I-5267 concerning the EC's competence to conclude the WTO agreements.

26. Moreover such unilateral action would clearly breach the duty to cooperate in good faith (sometimes referred to as the duty of loyal or sincere cooperation), to which Member States are subject by virtue of Article 4(3) TEU.[17] That duty is expressed in very broad terms and is very broadly understood.[18] It requires Member States to "facilitate the achievement of the Union's tasks and refrain from *any measure* which *could* jeopardise the attainment of Union's objectives" (emphasis added). For the reasons explained above, it cannot be doubted that a decision of an international tribunal on the interpretation of the Lugano Convention could jeopardise the attainment of the Union's objectives and in particular that of a uniform and consistent application of the common rules on jurisdiction and the recognition and enforcement of judgments. It follows that Article 4(3) TEU requires the Member States to refrain from instituting proceedings concerning the Lugano Convention before the International Court of Justice.

27. Support for this view can be found in Case C-459/03 *Commission v. Ireland* (the "*MOX plant*" case),[19] where the ECJ held that Ireland had infringed Article 292 EC by submitting a dispute with the United Kingdom concerning the interpretation of the United Nations Convention on the Law of the Sea to an arbitral tribunal and to the International Tribunal on the Law of the Sea. The ECJ held that the relevant provisions of the United Nations Convention had, since the approval of the Convention by the Council in 1998, formed an integral part of the Community legal order. This meant that the dispute was one which concerned the interpretation of the Treaties within the meaning of Article 292 EC,[20] and that the ECJ therefore had exclusive jurisdiction to determine it. There can be no doubt that the decision of the ECJ would have been to the same effect if Ireland had referred the dispute not to the above Tribunals but to the International Court of Justice.

28. At first sight the present case appears distinguishable from the *MOX plant* case in that, firstly, the Lugano Convention (unlike the United Nations Convention) does not itself form part of EU law, so that the ECJ has no jurisdiction to interpret it. Secondly, *MOX plant* was a dispute between two Member States which was

[17] Formerly Article 10 EC
[18] See for example Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell, London, 2nd ed, 2005), pp.115-123, and the authorities there cited.
[19] [2006] ECR I-4635
[20] Now Article 344 TFEU

specifically required to be brought before the ECJ under Article 292 EC. In fact however neither of these points amounts to a difference of real substance. As to the first, the critical question is not whether the external tribunal will be called upon to determine a question of EU law, but whether its decision will affect, or may affect, the application of EU law in practice. After all, the tribunal in *MOX plant* would not actually have been called upon to interpret any provisions of EC law from an EC perspective,[21] yet this did not prevent the ECJ from finding that:

> *"[T]he institution and pursuit of proceedings before the Arbitral Tribunal...involve a manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system may be adversely affected."*[22]

29. By the same token, whilst the International Court of Justice will not be required to opine on the interpretation of the Regulation in this case, the fact remains that a ruling on any materially identical provisions of the Lugano Convention would nevertheless affect the autonomy and consistency of the EU regime. Indeed the present case is a stronger case than the *MOX plant* case in that respect, since a ruling on the Lugano Convention will inevitably have an impact on the interpretation of the Regulation. Moreover, a ruling of the International Court of Justice will inevitably carry more weight than a ruling of any other international court or tribunal.

30. Furthermore, the decision of the ECJ in the *MOX plant* case was not based on Ireland's breach of its obligation under Article 292 EC alone. Although Ireland's conduct in commencing proceedings was in breach of Article 292, the ECJ stated that that provision was merely a specific expression of the Member States' more general duty of cooperation under Article 10 EC.[23] After all, the potential adverse implications for the EU legal order exist whenever proceedings which are liable to affect EU law are taken in a court other than the ECJ, whether against an EU Member State or against a non-member State.

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[21] Article 293 of the UN Convention on the Law of the Sea provides that *"A court or tribunal having jurisdiction under this Section shall apply this Convention and other rules of international law not incompatible with this Convention."*
[22] Case C-459/03, paragraph 154
[23] ibid, paragraph 169

31. Accordingly, the *MOX plant* case provides reasonably strong authority for the proposition that Belgium's actions in seizing the International Court of Justice without having regard to the implications for the EU legal order may be said to amount to a breach of its own duty of cooperation under Article 4(3) of the Treaty on European Union.

32. The exclusive competence of the EC also precludes other forms of unilateral action by Member States in the context of international organisations. Thus in Case C-45/07 *Commission v. Greece*[24] the Commission successfully contended before the ECJ that Greece had breached Article 10 EC by submitting a proposal to the International Maritime Organisation for monitoring the compliance of ships and port facilities with the requirements of the International Convention for the Safety of Life at Sea. The European Community was not a party to the Convention, but the Convention was in substance incorporated into EC law and the Community therefore now had exclusive competence in the area in question. The Court held that by making its proposal to the IMO, Greece had initiated a procedure which could lead to the adoption by the IMO of new rules which might, in turn, have an impact on EC rules promulgated for the attainment of the objectives of the Treaty. This was held to be a breach of its obligations under Articles 10, 71 and 80(2) EC.

33. Again, the facts of that case differ from the present case in a formal sense, as EC law had incorporated the very same international rules which Greece was seeking to alter by its proposal. In contrast, Belgium has not asked the International Court of Justice to pronounce on the interpretation of the Regulation. Nevertheless, because of the especially close connection which exists between the Regulation and the Convention, this does not in my view amount to a distinction of legal relevance. The thrust of the judgment is clearly to the effect that, once the European Union acquires exclusive competence in a particular area of law, Member States lose the capacity not merely to conclude agreements with third countries, but to take any steps at all which could compromise the uniformity, effectiveness or autonomy of the applicable EU regime. That principle is demonstrably engaged by Belgium's application in these proceedings.

[24] [2009] ECR I-701

34. The position as set out above is supported not only by the Treaties and by the case-law of the ECJ, but also by State practice. It seems that Member States of the European Union do not appear ever to have taken disputes of the present kind to the International Court of Justice. In one case brought by a Member State, Spain, against a non-member State, Canada, Spain expressly stated that, if the matters at issue had fallen within the competence of the European Community, Spain would not have been competent to refer the dispute to the International Court of Justice.[25]

35. Nor do Member States of the European Union appear to have taken disputes of the present kind, or other disputes involving EU law, to other international tribunals. The MOX case is exceptional, and is perhaps an understandable exception insofar as the International Tribunal on the Law of the Sea was set up as a specialised court for the particular purpose of interpreting provisions of the United Nations Convention on the Law of the Sea and settling disputes arising under that Convention.

36. In concluding on this question, therefore, I consider that Belgium does not have the competence under EU law to bring the present case before the International Court of Justice and that, by doing so, Belgium has failed to comply with its obligations under the TFEU. I would add that this is not merely a matter of municipal EU law, inasmuch as the TFEU as a Treaty concluded between the EU's 27 Member States is an instrument of public international law. (It would also appear that, by virtue of principles of domestic law giving primacy to EU law over all domestic law of whatever source, including domestic constitutional law, Belgium is acting in breach of its own constitutional law.[26])

37. I accept that this means that at present, no international tribunal is competent to interpret the Lugano Convention 1988 at the instance of an EU Member State. However, this does not seem to me to undermine the correctness of the conclusion. Indeed, in Protocols 2 and 3 to the Convention the framers have gone to considerable lengths to devise appropriate mechanisms for ensuring that the Convention is interpreted consistently with the Brussels Convention and, when

[25] *Spain v. Canada (Fisheries Jurisdiction)*, judgment of 4 December 1998, ICJ Reports 1998, p. 432

[26] For the principle of the primacy of EU law, see Lenaerts and Van Nuffel, op.cit. at note 18 above, p. 666 et seq. For the primacy of EU law in Belgium, see pp. 679-681.

necessary, introducing amendments. None of this would have been necessary if the parties to the Lugano Convention had intended that they should be able simply to seise the International Court of Justice in the event of a dispute over the meaning of the Convention's substantive provisions.

38. Confirmation that such disputes were intended to be resolved through consultation rather than litigation can be found in the highly authoritative Jenard-Möller Report on the Lugano Convention,[27] paragraph 110 of which states as follows:

> *"[T]he [ECJ] could not be assigned jurisdiction to interpret the Lugano Convention which is not a source of Community law. Furthermore, the EFTA Member States could not have accepted a solution according to which an institution of the Communities would, as a court of last resort, rule on the Lugano Convention. Nor was it conceivable to assign such jurisdiction to any other international court or to create a new court since inter alia the [ECJ] already had jurisdiction under the 1971 Protocol to rule on the interpretation of the Brussels Convention and conflicts of jurisdiction between international courts had at all events to be avoided."*

39. Thus it was clearly the intention of the parties to the Lugano Convention 1988 that international courts should not have jurisdiction over disputes arising under it.

40. Furthermore, the situation has now changed following the conclusion of the new Lugano Convention, which, in contrast to the 1988 Convention, is subject to interpretation by the ECJ, inter alia on references from the courts and tribunals of EU Member States. Although the courts of Switzerland, Norway and Iceland are not able to make references to the ECJ, it will always be possible, and in some cases obligatory, for the EU Member State court to refer where, as here, there is a dispute between a Member State and one of those non-member States. Moreover under Article 2 of the second Protocol of the new Lugano Convention, Switzerland, Norway and (once it has ratified the Convention) Iceland are entitled to submit observations to the ECJ.

41. I would add that, if, in the converse circumstances, there were an alleged breach of the Lugano Convention by Belgium, and a non-member State were to start

[27] OJ C 189/57, 28.7.90

proceedings before the International Court of Justice against Belgium, then Belgium would as respondent in the proceedings be required to seek the assistance of the European Commission, in order to ensure that the interests of the European Union were taken into account. It will be recalled that the European Commission ensures the external representation of the Union, in accordance with Article 17(1) of the Treaty on European Union. By parity of reasoning it would seem to follow that if (contrary to my view) Belgium was in fact competent to initiate the present proceedings, it was nevertheless incumbent on it to obtain the authorisation of the European Union before doing so.

Question 4: Would it be appropriate for the International Court of Justice to request an opinion from the European Union in relation to the above questions, pursuant to Article 34(2) of the Court's Statute?

42. The considerations outlined above lead me to conclude that before making a determination on the merits it would indeed be appropriate for the International Court of Justice to invite the European Union to submit any relevant information to the Court pursuant to Article 34(2) of its Statute. A similar practice has been followed in international arbitration, notably in a number of recent cases brought against Member States involving the interpretation of bilateral investment Treaties,[28] where the European Commission has been permitted to make submissions under Rule 37(2) of the ICSID Rules. The European Commission has also been permitted to make submissions to the European Court of Human Rights, even though the European Union is not yet a party to that Convention.[29] Similarly, the European Commission takes part in dispute settlement proceedings in the World Trade Organisation and in other bodies, even in cases where the subject-matter of the particular dispute falls within the competence of the Member States.[30]

[28] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22); *Electrabel SA v Hungary* (ICSID Case No. ARB/07/19); *Micula v. Romania* (ICSID Case No. ARB/05/20)

[29] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi. v. Ireland* (2006) 42 EHRR 1

[30] For example, in 1997 the EC became a party to the consultations in proceedings brought by the United States against Denmark and Sweden under the TRIPS Agreement: *Denmark – Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS83; *Sweden – Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86. In both these cases United States appears to have consented to the participation of the EC, so that there was no need to use the formal intervention procedure set out in Article 4.11 of the WTO Dispute Settlement Understanding. See Macrory, Appleton and Plummer (eds), *The World Trade Organization: legal, economic and political analysis, Vol 2* (Springer, 1995), pp. 1478-1480.

43. A further reason for the International Court of Justice to resort to Article 34(2) of the Statute is that the present case is closely analogous to that envisaged in Article 34(3) of the Statute, where the construction of an international convention adopted under the constituent instrument of a public international organisation is in issue. In such a case, the Registrar is to notify the organisation concerned and to send it copies of all the written proceedings.

44. There are two reasons in particular why Article 34(3) may be said to be relevant. Firstly, although the Lugano Convention has not itself been adopted within the framework of the European Union, it is clear that, for the reasons explained above, any decision on its interpretation will have profound implications for the interpretation of the Regulation, with the result that Article 34(3) is effectively engaged by analogy. Secondly, and again as I have sought to explain in this Opinion, by bringing the present proceedings Belgium must be regarded as having breached the European Union's "constituent instruments", the Treaties. In my view these considerations can be relied on insofar as necessary to support the exercise by the International Court of Justice of its powers under Article 34(2) of the Statute, and may also justify resort by the Court to Article 34(3). .

I confirm that the foregoing represents my true and complete professional opinion.

Francis Jacobs

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28 January 2011

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