CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

VOL. 14 NO. 1

SPRING 2006

JUSTICE & FOREIGN AFFAIRS: TAKING THE EUROPEAN NEIGHBOURHOOD PARTNER COUNTRIES TO THE EUROPEAN COURT OF JUSTICE

Lior Zemer
Sharon Pardo

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

ARTICLES

JUSTICE & FOREIGN AFFAIRS: TAKING THE EUROPEAN NEIGHBOURHOOD PARTNER COUNTRIES TO THE EUROPEAN COURT OF JUSTICE

Lior Zemer and Sharon Pardo***

I. Introduction

A. *Institutional Identity-Building*

Institutional identity-building is a process in which the European Union ("EU") is constantly involved. The essence of EU political culture is currently in a state of transition. The emergence of European constitutionalism, in the guise of the *Treaty Establishing a Constitution for Europe*,[1] is a primary representation of this transition. Constitutions provide a process of identity-building enshrined in the bundle of values which they prescribe. This process involves the emerging system as a whole, its institutions, organizations, and individual members. Europe's Constitution also defines the boundaries of cooperation with other countries as part of its commitment to preserve wide-scale political stability. The EU opted to include solid external relations and the preservation of peace among its primary constitutional objectives. The EU is currently at a crucial constitutional juncture - this juncture is the starting point of the present debate.

* Visiting Assistant Professor, Boston University, School of Law; Lecturer in Law, University of Leicester.

** Lecturer in European Studies, Ben-Gurion University of the Negev; Executive Director of the Centre for the Study of European Politics and Society at Ben-Gurion University, and a Senior fellow at the International and European Research Unit, University of Ghent.

This paper greatly benefited from early discussions with Judge John D. Cooke and Judge Koen Lenaerts of the Court of Justice of the European Communities. We would also like to thank Mark Cogen for his invaluable comments. Earlier versions of this Article were presented at the EUSA Ninth Biennial International Conference, Austin, 2005, and at the UACES 35th Annual Conference and 10th Research Conference, Zagreb, 2005.

1 Treaty Establishing a Constitution for Europe, Dec. 16, 2004, O.J. C. 310 [hereinafter European Constitution]. Full text of the European Constitution is available at http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML.

The enlarged EU prides itself on a tradition of social and economic solidarity grounded in various legal documents, dating back to the inception of the European project. This tradition includes a firm, albeit divided, opinion about world political affairs. The EU is a party (alongside its individual Member States) to various international conventions and protocols. More importantly, it has entered into bilateral Association Agreements and Partnership and Cooperation Agreements with Neighborhood Partner Countries ("NPC"), also known as third countries.[2] Title V, Part III of "The Policies and Functioning of the Union" of the European Constitution refers to "The Union's External Action" ("Title V"). This reference not only "conveys an optimistic sense of dynamism,"[3] but also attests to the argument that the constitutional importance of external relations was recognized by the framers of the European Constitution.

Article III-292 reads:

> 1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Article III-292 continues:

> The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems. . .
>
> 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
>
> (a) safeguard its values . . . ;
>
> (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
>
> (c) preserve peace, prevent conflicts and strengthen international security . . . ;

---

[2] In this inquiry, the term "Neighbourhood Partner Country" [hereinafter NPC] is applicable to the term "third country."

[3] M. Cremona, *The Draft Constitutional Treaty: External Relations and External Action*, 40 COMMON MKT. L. REV. 1347, 1366 (2003).

> (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
> (h) promote an international system based on stronger multilateral cooperation and good global governance.

Article I-57, Title VIII of Part I of the European Constitution, entitled "The Union and Its Neighbours" ("Title VIII") further provides:

> 1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.
> 2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

How does the EU attempt to meet all these objectives? How can cooperation and the consolidation of economic stability be maintained? Does the constitutional mandate necessitate a legal mechanism to interpret, enforce, and where applicable, provide judicial remedies for foreseeable disputes emerging from agreements signed between the EU and its NPC? Should the jurisdiction of the European Court of Justice ("ECJ")[4] be extended to cover such situations? These questions motivate our present inquiry.

B. *The Argument*

We argue that ECJ jurisdiction should extend to encompass the ambitions of the EU as stipulated in Titles V and VIII. For the importance of external relations, the main theme of the discussion is to challenge the lack of clear *locus standi* of third countries and in particular, NPC, at the ECJ. This issue relates to foreign policy and the success of any attempt to further the spirit of the European Constitution and the ideology underlying Titles V and VIII.

Presently, the standing of NPC and third countries at the courts in Luxembourg is unclear. However, if the pending version of the European Constitution enters into force, the possibility of granting standing will cease to exist. Article III-376 explicitly ex-

[4] For purposes of the present account, the ECJ includes the Court of First Instance ("CFI"). However, it must also be noted that jurisdictional differences exist.

cludes "Common Foreign and Security Policy" ("CFSP") issues from the jurisdiction of the Courts. Rather, this Article provides that "the Court of Justice of the European Union shall not have jurisdiction with respect to Articles I-40 and I-41 and the provisions of Chapter II of Title V concerning the common foreign and security policy and Article III-293, insofar as it concerns the common foreign and security policy. . .".

We criticize this proposed exclusion of CFSP issues from the agenda of the ECJ. In order to keep the analysis as close as possible to the law as it stands today, the discussion primarily examines currently applicable rules. The discussion focuses on the European Neighbourhood Policy ("ENP")[5] as a test case. It considers the role of the EU in the European Neighbourhood Space[6] as one that the EU is eager to develop.

Section II of our discussion introduces the vision and possible structure of the ENP. Section III discusses the judicial organ most suitable for the ENP by advocating that the ECJ, rather than a new judicial body, should be chosen. Section IV, drawing on the discussion presented in the previous sections, argues that European NPC should be given *locus standi* in the ECJ. Furthermore, Brussels has not yet paid sufficient attention to the legal intricacies and necessary remedies that may emerge from the agreements and Action Plans the EU signed and adopted with its NPC. We aim to highlight some of the errors that can be avoided once the European Neighbourhood Policy is activated in full force.

II. The European Neighbourhood Policy

A. *A New Policy Design*

The European Neighbourhood Policy outlines a new framework for relations with the EU's Eastern and Southern NPC[7] ("ENP Partners") over the coming decade. Currently, these coun-

---

[5] Among the most useful documents on the ENP, see *Communication from the Commission to the Council and the European Parliament. Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003) 104 final, (Mar. 11, 2003); *Communication from the Commission European Neighbourhood Policy: Strategy Paper*, COM (2004) 373 final, (May 12, 2004). The official ENP website is http://europa.eu.int/comm/world/enp/index_en.htm.

[6] The European Neighbourhood Space covers the European Union's immediate Eastern and Southern NPC.

[7] The ENP Partner Countries are Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestinian Authority, Syria, Tunisia, and Ukraine.

tries do not have prospects for EU membership, but subsequent to the May 2004 EU enlargement and expected future rounds of EU enlargement, they may share borders with EU countries in the near future.[8]

Europe is convinced that deeper integration between the EU and the NPC will propel political, economic, and cultural dynamics towards mutual partnership and development. The ENP, therefore, proposes that the EU endeavor to develop a zone of prosperity and cooperation – a "ring of friends" from Ukraine to Morocco.

B. *Significance of the Bargain*

The European Neighbourhood Policy suggests that, in exchange for concrete progress in implementing political, economic, and institutional reforms, the NPC should be offered a stake in the EU internal market. The European Neighbourhood Policy aims at moving towards an arrangement whereby the relationship between the EU and the NPC resembles "membership-minus," and at the

---

[8] For the ENP founding documents, see *supra* note 5. For an in-depth discussion and analysis regarding the European Neighbourhood Policy, see J. Kelley, *New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhhod Policy*, 44(1) J. COMMON MKT. STUDIES 29 (2006); C. Marise, *The European Neighbourhood Policy: Legal and Institutional Issues*, 25 CDDRL Working Papers (November 2004); A. Marcetti, *The European Neighbourhood Policy: Foreign Policy at the EU's Periphery*, C158 ZEI Discussion Paper (2006); S. Pardo, *Europe of Many Circles: European Neighbourhood Policy*, 9(3) GEOPOLITICS 731, (2004); R. Aliboni, *The Geopolitical Implications of the European Neighbourhood Policy*, 10(1) EUR. FOREIGN AFF. REV. 1 (2005); R.A. Del Sarto & T. Schumacher, *From EMP to ENP: What's at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?* 10(1) EUR. FOREIGN AFF. REV. 17 (2005); R. Balfour & A. Rotta, *Beyond Enlargement. The European Neighbourhood Policy and its Tools* XL (1) THE INT'L SPECTATOR 7 (2005); N. Tocci, *Does the ENP Respond to the EU Post Enlargement Challenges?* XL (1) THE INT'L SPECTATOR 21 (2005); D. Lynch, *The Security Dimension of the European Neighbourhood Policy* XL (1) THE INT'L SPECTATOR 33 (2005); M. Emerson, *The Wider Europe Matrix* (Centre for European Policy Studies, Brussels, 2004); F. ATTINÁ & R. ROSSI (eds.), EUROPEAN NEIGHBOURHOOD POLICY: POLITICAL, ECONOMIC AND SOCIAL ISSUES (The Jean Monnet Centre, Catania, 2004); M. Emerson et al., *Reluctant Debutante: The European Union as Promoter of Democracy in its Neighbourhood*, 223 CEPS WORKING DOCUMENT (July 2005); M. Emerson & G. Noutcheva, *From Barcelona Process to Neighbourhood Policy*, 220 CEPS WORKING DOCUMENT (March 2005); M. Emerson, *European Neighbourhood Policy: Strategy or Placebo?* 215 CEPS WORKING DOCUMENT (November 2004); W. Wallace, *Looking After the Neighbourhood: Responsibilities for the EU-25*, 4 NOTRE EUR. POL'Y PAPERS (July 2003). For an on-line updated list of academic and other research publications, conferences, workshops and seminars regarding the European Neighbourhood Policy, see the ENP website, http://europa.eu.int/comm/world/enp/pdf/background_material.pdf.

same time foresees a policy process that emulates the method of formal accession."[9]

Differentiation between the NPC lies at the foundation of the ENP. The principle of differentiation applies to the means, conditions, and time needed to achieve the final objectives of the Policy. The EU works with each NPC individually to deepen political and economic integration and achieves objectives of a privileged relationship based on shared values endorsed by the Association Agreements and Partnership and Cooperation Agreements.

The ENP progresses via country-specific strategic Action Plans developed by the European Commission in partnership with the NPC. The Action Plan is a program of political and economic reforms designed to enfranchise the designated neighbour by giving it ownership over the Plan's contours, substance, and implementation. The Plans are designed to reinforce current cooperation and add value to the existing frameworks by imparting new potential benefits to the NPC.[10] Thus, the achievements of bilateral and sub-regional cooperation should feed into the existing multilateral processes and vice versa.

The Policy does not supersede existing bilateral and multilateral ties between the EU and its neighbours. Rather, it endeavors to enhance, supplement, and build on them. In other words, the European Neighbourhood Policy is an attempt to inject a new dynamic into existing relations with the NPC.

In the near future, decisions may also be made on the next step in the development of relations, including the possibility of new contractual links between the EU and the NPC. These could take the form of "European Neighbourhood Agreements" whose scope would be defined in accordance with progress in meeting the priorities set out in the Action Plan.

The adoption of Neighbourhood Agreements would inevitably entail new legal obligations. Both the timing of their introduction and their content would depend on the particular status and political will of the NPC in question. Accordingly, the enhancement of intra-regional integration and liberalization should be viewed as a gradual and progressive process.

---

[9] Tocci, *supra* note 8, at 24.

[10] The first Action Plans for Israel, Jordan, Moldova, Morocco, the Palestinian Authority, Tunisia and Ukraine were adopted in December 2004. *See* http://europa.eu.int/comm/external_relations/news/ferrero/2004/sp04_529.htm. It is hoped that the Action Plans for Egypt, Lebanon, and the three South Caucasus countries will be adopted by 2006.

There is one additional matter to express here. It is possible to argue that there should be a separate governing body for the European Neighbourhood Space[11] and that this should include a court with jurisdiction over the agreements signed between the EU and the NPC. For the time being, however, the European Commission maintains the position that new institutions are not a necessity. Presently, to advance and monitor implementation of the Action Plan, the ENP does not establish new bodies, but rather makes use of the "old" institutional structure of the Association Agreements and the Partnership and Cooperation Agreements.[12]

In our opinion, it is necessary to obtain the best judicial venue for disputes that may arise between the EU and a given NPC. Because the European Neighbourhood Policy is in its initial stages and has yet to mature, it is useful to draw from benefits of existing patterns. The following section examines the Policy and the manner in which disputes between the EU and countries with which it has signed an Association Agreement, Partnership and Cooperation Agreements, and other types of agreements are currently addressed.

III. The ENP: Choosing the Judicial Forum

A. *Route I: The European Economic Area Model*

Bearing in mind that the ENP is not intended to supersede the existing EU framework for relations with its neighbors, we hold that the European Economic Area (EEA) model may constitute a workable scenario for a wider, geo-politically coherent neighbourhood. On May 2, 1992, the EEA Agreement was signed by the European Community Member States[13] and the European Free Trade Area (EFTA) Member States.[14]

---

11 For a novel perspective on the institutionalisation of the European Neighbourhood Space, see S. Pardo & L. Zemer, *Towards a New Euro-Mediterranean Neighbourhood Space*, 10(1) Eur. Foreign Aff. Rev. 39 (2005).

12 In the words of Michael Leigh, Director General European Commission DG Enlargement, "I see no reason why there is a need to establish new institutions for the 'Wider Europe Policy' (predecessor of the ENP)." Dir. Michael Leigh, Address at Hebrew University, Jerusalem, Dec. 16, 2003.

13 The Agreement came into force on January 1, 1994.

14 The European Free Trade Area was founded by the following seven countries: Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the UK. Finland joined in 1961, Iceland in 1970, and Liechtenstein in 1991. In 1973, the UK and Denmark left EFTA to join the EC. They were followed by Portugal in 1986 and by Austria, Finland and Swe-

The prime aim of the EEA is to promote a continuous and balanced strengthening of trade and economic relations between the contracting parties. The fundamental provisions of the EEA Agreement replicate the provisions of the EC Treaty[15] with respect to the four freedoms. The Agreement also covers other policies such as social policy, consumer protection, the environment, statistics, and company law. It establishes equitable conditions of competition and abolishes discrimination based on nationality in all twenty-eight EEA States.[16] The Agreement also includes much of the EC secondary legislation such as Regulations and Directives and incorporates the decisions of the ECJ. By removing barriers to trade and opening new opportunities for EU nationals, the largest trading bloc in the world, the EEA stimulates economic growth and contributes to the international competitiveness of the EEA States. This corresponds with the long-term objective of the European Neighbourhood Policy of "membership-minus," i.e. moving towards an arrangement whereby EU relations with NPC resemble the political and economic links currently enjoyed by the EEA.

Although many features of the EEA Agreement and the EC Treaty are identical in nature, their application differs. The ECJ has already presented its view on the possible tension between the judicial mechanisms of the EEA Court and the EC Treaty. The ECJ highlighted the distinction between the two, holding that identical provisions do not necessarily mean identical interpretation. While both frameworks aim at economic integration, EFTA does not state the formation of a single market as one of its goals, whereas the EC Treaty does.[17]

---

den in 1995. Today, Iceland, Liechtenstein, Norway and Switzerland are the remaining EFTA Member States.

15 Treaty Establishing the European Community, Dec. 24, 2002, O.J. C. 325 [hereinafter EC TREATY]. The text of the EC Treaty is available at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf.

16 Namely, EU-25 and 3 out of the 4 EFTA Member States: Iceland, Liechtenstein, and Norway. The EEA Agreement was rejected in Switzerland by a referendum.

17 *See* Opinion 1/91 [1991] E.C.R. I-6079; [1992] C.M.L.R. 245. A similar example is when the EFTA Court held that although Article 7(1) of Council Directive 89/104/EEC (Trademark Directive) was incorporated into the EEA Agreement as *acquis communautaire*, it should be interpreted as leaving it up to the EFTA States to determine how to address the principle of exhaustion of rights conferred by a trademark. *See* E-2/97 *MAG Instruments v California Trading Company* [1998] E.T.M.R. 86; [1998] 1 C.M.L.R. 331. In contrast, the ECJ did not leave it up to the EC Member States to decide on similar matter. *See* C-355/96 *Silhouette v Hartlauer* [1998] E.C.R. I-4799.

The division of jurisdiction between the ECJ and the EFTA Court is also important to note. It was originally proposed to have an EEA Court composed of judges comprised of ECJ and EFTA Member States. The former ECJ rejected the proposition, arguing that the EEA Agreement and the EC Treaty cannot be interpreted in a similar way and that mixed representation on the EEA Court will have a polluting effect.[18] To this end, a two-pillar structure has also been devised with respect to judicial review: the EFTA Court has jurisdiction on EFTA issues and the ECJ on the EC side.[19]

An additional word on competence is necessary.[20] The jurisdiction of the EFTA Court is limited relative to that of its counterpart, the ECJ. It has jurisdiction *inter alia* (i) to hear cases relating to an EFTA Member State's failure to fulfill obligations under the EEA Agreement;[21] (ii) to provide advisory opinions on the interpretation of provisions of the Agreement;[22] (iii) to hear proceedings brought by an EFTA Member State against a decision of the EFTA Surveillance Authority (ESA — analogous to the European Commission and ensures fulfillment of Member States' obligations under the Agreement) on grounds of lack of competence, breach of an essential requirement, infringement of the Agreement, or any rule of law relating to misuse of powers;[23] (iv) to hear proceedings brought by an individual member against a decision of the EFTA Surveillance Authority where the latter is either addressed to an individual or the individual is directly or individually concerned;[24] and (v) to hear proceedings brought by an EFTA Member State where the EFTA Surveillance Authority fails to act on infringements of the Agreement.[25] Similar provisions, with a broader scope of application, can be found at the EC level. Both systems thrive to ensure uniform implementation and application of the rules common to all members.

---

18 *See* Opinion 1/91 [1991] E.C.R. I-6079; [1992] 1 C.M.L.R. 245.

19 The ECJ approved this arrangement. *See* Opinion 1/92 [1992] E.C.R. I-282; [1992]2 C.M.L.R. 217.

20 It is not necessary to enter into an elaborate disquisition on the very structure of the Court. The discussion is confined to the competence of the Court and on this alone the criticism is based.

21 ESA/Court Agreement, art. 32.

22 *Id.* at art. 34.

23 *Id.* at art. 36.

24 *Id.* at art. 36.

25 *Id.* at art. 37.

"Route I — The EEA Model" addresses the possibility of creating a similar system to the European Neighbourhood Policy. The EEA-EFTA-EC triangle has created institutional complication. Based on past European enlargements, one could argue that membership in EFTA or the EEA is a springboard to membership in the EU. As a result, it is possible that the EFTA/EEA system might cease to exist. Any end to the system is contingent on a public vote, and therefore predictions about the future of the system should be taken with a certain degree of caution.

With respect to establishing a similar Court for the European Neighbourhood Policy, the authors of this paper believe that problems relating to competing jurisdictions are likely to emerge. Ironically, if the European Constitution abolishes the three-pillar system because of its difficulties, Europe might end up with a three-pillar judicial system. If one still insists on using the EFTA judicial infrastructure, provided that the EFTA Member States join the EU for its European Neighbourhood Policy, one might conclude that the extension of the jurisdiction of the EFTA Court to deal with issues relating to the ENP is a viable solution. Interestingly, in addition to the regular judges at the EFTA Court, a system of *ad hoc* judges (two *ad hoc* judges from each EFTA Member State) is established according to Article 30(4) of the ESA/Court Agreement for situations where a regular judge cannot act in a particular case. An *ad hoc* chamber with an additional judge from a relevant NPC can be considered a suitable forum for ruling on specific ENP issues.

With respect to the European Neighbourhood Policy, a judge from the relevant NPC could be invited to join the EU-ENP Court. However, the European Neighbourhood Policy is not between EFTA and the formers prospective members, but between the EU and its NPC. If EFTA does not join the EU in its European Neighbourhood Policy, an EU-ENP judicial organ will address the interest of the EU.

The legitimacy of these possibilities - a new judicial organ or tacking the European Neighbourhood Space to EFTA - is open to severe criticism, primarily since the European Neighbourhood Policy is not a collective project. These possibilities might be realistic only after the geopolitical status of the European Neighbourhood Space has changed. Given the spirit of the European Constitution, this is something that may be on the EU agenda.

B. *Route II: The European Court of Justice*

The alternative to creating an external judicial framework for the ENP, be it independent or linked in some manner to EFTA, is to extend the jurisdiction of the ECJ. The identity of the EU as a legitimate political entity lies at the heart of the European Constitution. Some political theorists argue that the Court is silent and passive and its judgments therefore lack a sufficient degree of judicial activism. Although this is not the forum to discuss judicial activism, the reader must be reminded that the ECJ stamped the constitutional identity of the Community. In the *Van Gend* case,[26] the Court announced that the "Community constitutes a new legal order."[27] A post-*Van Gend* decision that extends the competence of the Court to matters of the Union's external activities is vital if the EU wants to fulfill its aspiration of playing "a new role in a globalised world,"[28] and realize the objectives stipulated in Titles V and VIII of the Constitution. Current world affairs have created a new international order. Without a new "legal order" at EU level, the legal order envisioned by the Court in the 1960s will become obsolete.

The vibrant yet subtle structure of the ECJ is advantageous in this regard. We believe that amongst the judicial organs currently in operation in the Western World, the ECJ is unique in many different aspects. Indeed, after the May 2004 enlargement, the ECJ's new diversity is reflected in the appointment of judges whose countries recently broke with Communist tradition, as well as judges of Mediterranean/Middle Eastern origin. The emerging post-state European polity seems to encompass an identity of many colours that leaves no space to question whether the ECJ, as an institution, has limited identity, or as the Union's motto states, "united in diversity,"[29] or whether its members will lack the wisdom to see beyond the concerns of the EU itself.

---

26 Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

27 *Id.*

28 At the Laeken Summit of December 2001 the European Convention was instructed by the European Council to present its draft proposal on the basis of the above order. The "Draft Treaty Establishing a Constitution for Europe" was submitted to the President of the European Council on July 18, 2003.

29 EUROPEAN CONST., art. I-8.

The European judicial architecture is in a state of transition.[30] At the same time, given the enlargement process and the EU constitutional crisis, the European political framework is in its most crucial stage of formation. While it is outside the scope of this paper to discuss these issues at length, this paper contributes to the discourse on European Federalism by focusing on how the extension of judicial jurisdiction to foreign relations contributes to the consolidation of the EU political and legal identity.

After mapping the EU constitutional mandate with respect to external relations, such as the European Neighbourhood Policy, this paper concludes that judicial review is imperative for the attainment of the ambitions outlined in the Constitution. The discussion continues to debate two possible judicial forums: one that is either an extension of, or modelled after, EFTA and one that extends the jurisdiction of the ECJ. The authors of this paper conclude that the ECJ, rather than an independent body, is the most suitable judicial forum, as it contributes more effectively to the process of EU capacity building.

In the following section, this paper will examine the possible standing of third countries at the ECJ in general and NPC in particular. If one accepts the idea that the ECJ is the appropriate forum to resolve potential disputes between the EU and NPC, one is invited to experience the current tensions between the EU and NPC.

IV. Rationalising Locus Standi for the New European Impulse

A. *Principles*

Farnleiter argues, "[A] new Constitution for the Union, which expressly confers rights on individuals, but which does not provide for effective judicial remedies to protect these rights, will fall behind citizen's expectations."[31] This remark was made with respect to the *locus standi* of individuals at the ECJ. The authors of this paper proclaim that a document that declares the importance of

30 On the jurisdiction of the European Courts, see P. Craig, *The Jurisdiction of the Community Courts Reconsidered*, *in* THE EUROPEAN COURT OF JUSTICE 177-214 (G. de Burca & J.H.H. Weiler eds., 2001). *See also*, A. ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 538-565 (Oxford University Press 1999).

31 "Letter from M.M. Farnleiter and Michel concerning the discussion circle on the Court of Justice," *cited in* M. Varju, *The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention*, 10 EUR. PUB. L. 43 (2004).

external relations, without recognizing an adequate system of judicial remedies for disputes between non-Member States and the EU premised on agreements signed between the two, will render Titles V and VIII redundant.[32]

Disputes with NPC are subject to many variations. A good example is the "rules of origin" saga between the EU and the State of Israel. In this dispute, the EU claimed that Israel's occupied territories, the West Bank, Gaza Strip, East Jerusalem and the Golan Heights, or the "Disputed Territories," are not part of the "recognised area of the State of Israel" to which the EU-Israeli Association Agreement applies.[33] Therefore, goods which are exported to EU markets that originate in the Disputed Territories cannot enjoy the customs benefits stipulated in the Association Agreement.[34]

Examples of when EU Member States may take the EC to the ECJ under Article 232 of the EC Treaty on matters pertaining to third countries include: (1) when the EC initiates a Directive to ban imports of certain products; (2) when an EU member fails to respect certain clauses of an enforceable agreement; (3) when individual importers impose fines on certain products coming from outside the EU; and (4) when the EC fails to take steps against infringement of an agreement clause by an NPC or a third country with whom the EU signed a trade agreement.[35] In those cases, the NPC is directly affected by both the EC's decision and the Court's ruling.

As the law stands today, in the absence of explicit competence to hear disputes between the EU and NPC or third countries, there are several possibilities to "qualify a dispute" in order for it to enter the Court in Luxembourg. First, under the fourth paragraph of Article 230 EC Treaty: "Any natural or legal person may, under the same conditions, institute proceedings against a decision ad-

---

32 We briefly discussed this issue elsewhere. *See* L. Zemer & S. Pardo, *The Qualified Zones in Transition: Navigating the Dynamics of the Euro-Israeli Customs Disputes*, 8 EUR. FOREIGN AFF. REV. 51 (2002). *See also,* Jean Monnet, *Working Papers on International and Comparative Politics*, 49 (2) (2003).

33 *Id.*

34 *See* L. Zemer & S. Pardo, *supra* note 32. *See also* L. Zemer, *On a Different Triangle: The European Union, Israel, and 'Rules of Origin' Saga*, 16 (1) ISRAEL TAX L. REV. 87 (2002) (in Hebrew); M. Hirsch, *Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip*, 26 FORDHAM INT'L L.J. 572 (2003).

35 EC TREATY, art. 232.

dressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."[36] The Article differentiates between privileged and non-privileged applicants. EU Member States and institutions are of the first category, while others, including non-Member States, are in the second category. The latter have to establish that the given measure is of "direct and individual concern."[37]

In *Chris International v. Commission*,[38] the ECJ was required to rule whether the Dominican Republic had *locus standi* before it. The legal matter before the ECJ was a resolution of the EC relating to the protection of the local banana market in England. The Court held that the Dominican Republic had *locus standi* under Article 230.[39] This case provides a useful tool for any NPC or third country that qualifies under Article 230 to institute proceedings before the ECJ. However, it is likely that the ECJ will refuse to rule on such matters unless they are clear-cut and confined to very specific economic issues, rejecting them on grounds of inadmissibility.[40]

The second possibility for *locus standi* is the right to intervene pursuant to Article 40 of the Statute of the Court of Justice.[41] Article 40 stipulates that:

> Member States and institutions of the Communities may intervene in cases before the Court. The same shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Communities, or between Member States and institutions of the Communalities.[42]

There is good reason to argue that Article 40 excludes non-Member States, as the third paragraph reads:

---

36 EC TREATY, art. 230, para. 4.

37 *Id.*

38 Joined Cases 91 and 200/82, Chris International v Commission, Order of February 23, 1983.

39 *Id.*

40 For the procedural aspects of application under Article 230 see K. LENAERTS & D. ARTS, PROCEDURAL LAW OF THE EUROPEAN UNION, 139-206 (Sweet & Maxwell, London, 1999).

41 Statute on the Court of Justice, Art. 40, Dec. 24, 2002, O.J.C. 325/167, http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.016701.html.

42 *Id.*

> Without prejudice to the second paragraph, the states, other than member states, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application that Agreement is concerned.[43]

Despite this direct reference only to EEA or EFTA Member States, the Court's wide interpretation of Article 230 in *Chris International* leaves little reason to question the *locus standi* of NPC or third countries and include them in the second paragraph, while the third one is exclusively reserved for EEA or EFTA Member States.

Another possibility for establishing NPC or third country standing involves the indirect use of Article 234 of the EC Treaty.[44] Article 234 is the primary legal instrument at the disposal of the ECJ to interpret the Treaty, rule on the validity of acts of institutions and the Community, and raise concerns that have yet to be addressed by legislation.

Assume, for instance, that a dispute between a Danish importer and a non-Member State reached the court in Copenhagen. If the latter had standing according to Danish law, use of Article 234 could be made. The third country could request the Danish court to refer the question to the ECJ for interpretation, if the legal question deserves the intervention of the ECJ.[45]

In general, according to Article 234, only a court of last resort is obliged to refer a question.[46] Thus, if the dispute appears before a lower court, the latter *may* refer the case. Finally, if the EU and the NPC enter an arbitration clause that places the ECJ as the final

---

[43] *Id.*

[44] EC TREATY, art. 234.

[45] *See, e.g.*, Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol, Case C-265/03 (Apr. 12, 2005). In this case the reference for a preliminary ruling concerns the interpretation of Article 23(1) of the Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, 1994 ([1997] OJ L 327,1; ("The Communities-Russia Partnership Agreement").The reference has been submitted in the context of a dispute between Mr. Simutenkov, a Russian national, on the one hand, and the Spanish Ministry of Education and Culture and the Royal Spanish Football Federation on the other, concerning sporting rules which limit the number of players from non-member countries who may be fielded in national competitions. Among other issues the ECJ also examined whether the principle of non-discrimination laid down in the EC-Russia Partnership Agreement can be relied on by individuals before the courts of a Member State. It replied to that question in the affirmative.

[46] *Supra* note 44.

arbitrator, then the ECJ has competence regardless of the above conditions.

If constitutional principles override previous Court rulings, the future is not promising. On the one hand, Article III-374 of the European Constitution provides, "The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law."[47] On the other hand, the first paragraph of Article III-376 disqualifies disputes relating to Title V of the European Constitution.[48] However, the second paragraph of Article III-376 provides that "the Court shall have jurisdiction . . . to rule on *proceedings*, brought in accordance with the conditions laid down in Article III-365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V."[49] Article III-322 provides:

> 1. Where a European decision, adopted in accordance with Chapter II, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the Union Minister for Foreign Affairs and the Commission, shall adopt the necessary European regulations or decisions. It shall inform the European Parliament thereof. . . .[50]

Article III-376 refers to the legality of "proceedings." This may raise difficulty for NPC and third countries, as the Article does not refer to them directly but to the proceedings in which a decision, by which they might be affected, was reached. Although Article III-376 mentions Article III-365(4), which resembles the wording of Article 230(4) of the EC Treaty, qualifying a third party for *locus standi* on the *Chris International* decision is difficult.

The current situation provides options for non-Member States to institute either proceedings before the ECJ or intervene in exiting proceedings. However, that is mitigated by two considerations which render the future of *locus standi* less certain. The first consideration is the expressed intention of the framers of the EC to

---

[47] EUROPEAN CONST., art. III-374.
[48] *Id.* at art. III-376.
[49] *Id.*
[50] EUROPEAN CONST., art. III-322.

leave external relations outside the competence of the ECJ. The second is situations in which stipulations of a given agreement exclude the ECJ's jurisdiction.

There are ways to overcome these barriers. First, an arbitration clause may specify the ECJ as the sole judicial authority in cases between the EU and NPC or other third countries. Arbitration may also provide redress in transitional periods – a common feature in Association/Partnership and Cooperation Agreements. Second, the ECJ's competence in its capacity as an appellate court for such cases may be extended, and judges from the relevant NPC or third country may be invited to sit on the case. However, the qualification of a non-Member State for standing at the ECJ appears to be difficult to meet.

The ECJ recently discussed the notion of standing. It has generated ample academic debate.[51] In *Commission v. Jego-quere et Cie SA*[52] the ECJ held that:

> It should be noted that individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the ECHR (see, in particular, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case C-50/00 P *Union de Pequenos Agricultores* v *Council* [2002] ECR I-6677, paragraph 39). . .[53].

The court continued, "[i]t is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection,"[54] and therefore:

> [a]lthough the condition that a natural or legal person can bring an action challenging a regulation only if he is concerned both directly and individually must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting

[51] *See, e.g.*, A. Cygan, *Protecting the Interests of Civil Society in Community Decision-Making – The Limits of Article 230 EC*, 52 INT'L & COMP. L.Q. 995 (2003); M. Varju, *The Debate on the Future of the Standing under Article 234 (4) TEC in the European Convention* 10 EUR. PUB. L. 43 (2004).

[52] Commission of the European Communities v. Jego-Quere & CIE SA, Case C-263/02 (Apr. 1, 2004).

[53] *Id.*

[54] *Id.*

aside the condition in question, expressly laid down in the Treaty. The Community Courts would otherwise go beyond the jurisdiction conferred by the Treaty.[55]

The ECJ's lack of sensitivity towards the standing of individuals affected by European measures causes great concern. Advocate General Jacobs remarked in his opinion in *Union de Pequenos Agricultores v. Council* that "*locus standi* must indeed be determined independently and that moreover the only solution which provides adequate judicial protection is to change the case-law on individual concern."[56] The question of why an entity affected by acts of European institutions will be barred from challenging a decision still requires clarification by the Court in Luxembourg. With regard to NPC and third countries, the EU runs the risk that it will not only leave a party with no remedy but will also create absurd situations in which judicial review is alien. If the EU can design a specialized Patent Court,[57] then the EU is capable of constructing an appropriate judicial mechanism for the age of the European Neighbourhood Policy. The best mechanism is the ECJ.

V. Conclusion

The ultimate interplay between justice and policy demonstrates that constitutional ambitions cannot forsake two important elements residing at the heart of the proposed EU constitution: judicial review and subsequent remedies. The process of identity-building does not operate in a vacuum. Its development is contingent on the attainment of constitutional objectives and principles, which in the case of the EU include external frontiers as well as internal affairs. The EU role in reaching regional and global peace and stability is part and parcel of its constitutional agenda and core to its identity. The EU has promoted its global political influence in many ways. For instance, one is the bundle of Association Agreements and Partnership and Cooperation Agreements signed with the NPC. These agreements are premised on recognition of mutual commitments and responsibilities. If the EU claims to "develop into a stabilising factor and a model in the new, multi-polar

---

55 *Id.*

56 Union de Pequenos Agricultores v Council, Case C-50/00 (Mar. 21, 2002).

57 *See* European Commission, *Proposal for a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance*, COM(2003) 828 final, EU Brussels (Dec. 23, 2003).

world,"[58] there is a need to formalize external policies. The European Neighbourhood Policy is envisioned by the EU not merely as a one-way political move, but as a step to ground some dominance in global affairs in general and in the European Neighbourhood Space in particular.

For the EU to realize its constitutional ambitions, judicial protection is a fundamental necessity. The EU has to realize the capacity of the ECJ to act as a constitutional court, which includes arbitration over disputes arising from bilateral agreements. If a court of law can deliver judgments for twenty-five Member States, impose its decisions on 456 million nationals of the largest trading bloc in the world, manage to function with members with diverse legal identities, and create a "new legal order," then it should be competent to rule on Association, Partnership and Cooperation Agreements, on Titles V and VIII, and on the European Neighbourhood Space matters.

The enlarged EU fulfills the vision of a unified continent, one that has political (not only economic) power in the immediate neighborhood. If trans-European networks are to cover the European Neighbourhood Space in the future, Euro-justice should not remain a monopoly in Brussels or the other twenty four capitals of the EU Member States. The ECJ should claim the role of "a far more pro-active patroller of government through its grant of extensive powers of judicial review."[59] In *Van Gend* the Court announced that the "Community constitutes a new legal order."[60] As mentioned above, a post-*Van Gend*[61] decision that includes the competence of the Court to judge the above matter is fundamental to the success of the evolving European project. A "new legal order" neither starts nor ends with justice for internal frontiers.

---

58 European Council, *Declaration on the Future of the European Union,* EU Laeken, at 14-15 (Dec. 2001).

59 Editorial Comment, *The European Transformation of National Government*, 29 EUR. L. REV. 151 (2004).

60 *Van Gend, supra* note 26.

61 Craig, *supra* note 30. The European Court should claim itself a more pro-active role such as the one it took in the *Van Gend en Loos* decision and recently in the *Kobler* decision. *Kobler v. Austrian Republic*, Case C-224/01, 3 CMLR 28 (2003). In this case the ECJ created a new environment for state liability answering in the affirmative that Member States could be held liable for misapplication and breaches of Community law committed by national courts adjudicating at last instance. *See* M. Breuer, *State Liability for Judicial Wrongs and Community Law: The Case of Gerhard Kobler v Austria,* 29 EUR. L. REV. 243 (2004).