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THE LEGAL PERSONALITY OF THE EU

I. Introduction: The Union's legal system

The pillar-structure of the European Union, emphasizing the differences between the three issue-areas, has prevented many observers from taking the single legal system underlying the EU as a basis of their analyses. The EC and EU Treaties were deemed to form two separate legal orders, a view supplemented by the description of the EU as a temple-like construction, with the EU as a roof resting on three pillars. The existence of largely isolated European Communities, Common Foreign and Security Policy (CFSP) and Police and Judicial Cooperation in Criminal Matters (PJCC) research communities mainly stresses the differences between the pillars while neglecting the overall context of the EU legal system.[1]

The semantic differentiation between the "European Communities" and the "policies and forms of cooperation" was giving the basis for the dichotomy of the supranational EC law and the intergovernmental EU law. The organizational character of the European Union was perceived as a permanent intergovernmental conference. Consequently, acts adopted under the second or third pillar were described as agreements between the Member States, i.e. as traditional public international treaty law. [2] However, the norms in the Treaty on EU were not simply perceived as a loose set, but they indeed formed a system with mutual dependencies.

The Court has consistently held that the EU Treaties have established a new legal order with its own institutions, decision-making mechanisms and enforcement powers "for the benefit of which the Member States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only the Member States but also their nationals". In Case 6/64, *Costa v.ENEL,* the ECJ stated:

> "By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and, more particularly, real powers stemming from limitations of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their individuals and themselves."

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[1] See on this topic: R. A. Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations', CML Rev. (2000), pp. 1135–1171.

[2] Christoph Herrmann, 'Much Ado about Pluto? The Unity of the Legal Order of the European Union Revisited', in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford, Hart Publishing, 2008, pp. 19-51.

Therefore, the EU law constituted an autonomous legal system, imposing obligations and rights on both individuals and Member States, and limiting the sovereignity of Member States. This legal system is further developed and straightened with enacting the Treaty of Lisbon. There are two main pillars to this legal system: direct effect[3] and primacy of the EU law over national law.

The question, however, is whether the existence of this legal system implies the enjoyment of legal personality by the EU. In the past, the key argument put forward was that the EU does not have legal personality, since the TEU lacks an explicit provision, or provision from which the legal personality can be derived under the implied powers doctrine. The ability of the EC and EU to act externally was very much dependent not only on the existence of specific competences granted by the Treaties explicitly or impliedly, but also on the capacity to act internationally, the attribute of international legal personality. A fundamental legal weakness in building the Union's role in the world was the ambiguity surrounding the legal personality of the Union itself, together with the complication of retaining a separate international legal personality for the EC. The situation has changed noticeably after the ratification of the Treaty of Lisbon. However, in order to be able to answer the question of whether the EU has legal personality, one must be willing to take a closer look at the concept of international legal personality.

II. The concept of international legal personality

In public international law, the majority of scholars consider the international legal personality to be vital because it normally constitutes the *conditio sine qua non* of an international organisation's capacity to act.[4] It enables the organisation's organs to interact with other subjects of international law, allows for international law actions against the organisation, and determines the organisation's consequential liability.[5]

Whenever a treaty claims to establish a new entity under international law, this entity will be regarded as a "legal person". Since the Advisory opinion of the International Court of Justice in the *Reparations for Injuries Suffered in the Service of the United Nations Case*[6], it is commonly accepted that international organisations may

[3] This term, which is sometimes called direct applicability, refers to the principle whereby certain provisions of the EU law may confer rights and impose obligations on individuals that national courts are bound to recognize and enforce.

[4] J.E. Nijman, *The Concept of International Legal Personality: An inquiry into the history and theory of international law*, T.M.C. Asser Press, 2004; J. Klabbers (ed) *International Organisations*, Ashgate Aldershot, 2005; N.D. White, *The Law of International Organisations*, 2nd ed., Manchester University Press, Manchester, 2005; Henry R. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, Martinus Nijhoff Publishers, The Netherlands, 1995.

[5] Armin Von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organisation with a Single Legal System' (1999) 36th Common Market Law Review, Kluwer Law International, p. 892.

[6] *Reparations for Injuries Suffered in the Service of the United Nations* Case, I.C.J. Reports (1949). The ICJ was asked for an advisory opinion on the capacity of the UN, as an organisation, to bring an international claim against a non-Member State in respect of injury to its personnel, on the lines of diplomatic protection, and in respect of injury to

obtain their international legal personality implicitly. In particular, the capacity to bind Member States by majority vote, to conclude international treaties or to send diplomatic missions give strong evidence for an implicit international legal personality of that organisation. In other words, the capacity of an international organisation to bear rights and duties under international law can be justified on grounds of factual and legal circumstances.[7] The International Court of Justice stated: "… the organisation is an international person … it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".[8] Personality in international law necessitates the consideration of the interrelationship between rights and duties afforded under the international system and capacity to enforce claims. Legal personality may be defined as the potential ability to exercise certain rights and to fulfill certain obligations towards other subjects of the international law.[9]

Furthermore, the distinction between legal personality and legal capacity has to be made, in order to emphasize the difference between a quality and an asset. While the international personality is just a quality, which means not much more than being a subject of public international law, the legal capacity refers to what the entity is potentially entitled to do. Therefore, it is not so interesting to decide only on an entity's legal personality. The practical value of the possession of legal personality can be found in the fact that the entity has the required status to have certain categories of rights that enable it to manifest itself on the international plane and to enter into relationships with other subjects of international law.[10] Accordingly, international legal persons may have a capacity to bring international claims; they may have international procedural capacity, treaty making capacity, the right to establish diplomatic relations or the right to recognize other subjects of international law. International capacities are thus to be seen as general competences of an international entity. However, the international legal capacity of entities other than states is never comprehensive. It can only exist in relation to the specific competences attributed to them by the founding states. These specific competences are concerned with what a given international organisation, being a subject of law endowed with the potential capacity to act, is specifically empowered to do. It is subject to the organisation's specific functions and purposes.[11]

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the UN caused by the injury of its agents. The Court found it necessary to affirm the international legal personality of the UN, before going on to consider whether the organisation had the capacity to bring an international claim.

[7] Kirsten Schmalenbach, 'International Organisations or Institutions, General Aspects', *The Max Planck Encyclopedia of Public International Law*, online edition, www.mpepil.com, visited on 24.05.2010.

[8] *Reparations for Injuries Suffered in the Service of the United Nations* Case, I.C.J. Reports (1949), at 174.

[9] More on this in: P.H.F. Bekker, *The Legal Position of Intergovernmental Organisations: A Functional Necessity Analysis of Their Legal Status and Immunities*, Martinus Nijhoff, Dordrecht, 1994, p. 53, and M.N. Shaw, *International law*, Cambridge University Press, UK, 2008, pp. 195-197.

[10] Ramses A. Wessel, 'Revisiting the International Legal Status of the EU' (2000) 5th European Foreign Affairs Review, Kluwer Law International, pp. 510 - 511.

[11] Ibid.

A legal person is conceived as an entity that is, in principle, capable of acting both vis-à-vis its own Member States and vis-à-vis other international legal persons, such as third states. The concept of legal personality is used very often to explain the relationship between the organisation and its own Member States. Legal personality in international institutional law does not find its primary value in the explanation of what international organisations may do on the international scene, but rather in the possibility of demarcating them from their Member States.[12] The distinction between international legal personality vis-à-vis member and vis-à-vis non-Member States should be strictly observed.

II. 1. International legal personality vis-à-vis Member States

If we take into account the definition of an intergovernmental organisation[13], the criteria constitutive act governed by international law and distinct will of its own imply the organisation's international legal personality, at least vis-à-vis its Member States. Whereas the international organisation is under the legal obligation to fulfill its attributed international functions, its Member States are under the legal obligation to respect the autonomous performance of these functions. Legal personality is implicitly obtained if the organisation is equipped with at least one right vis-à-vis its members, independently performed under international law and as such accepted by all members. Even if the international legal personality of an organisation vis-à-vis its Member States has to be identified by means of interpretation, the status is not objective, i.e. independent of the members' will. On the contrary: the interpretation serves to verify the member's intention. This intention is often hidden behind purposes, functions and powers of the organisation, implied in its constituent instruments or developed in practice.[14] The international legal personality is derived from its members and therefore dependent on their will.

II. 2. International legal personality vis-à-vis non-Member States

The capacity to conclude international treaties, to send or to receive diplomatic missions or to enter into other kinds of external relations gives strong evidence for an implicit legal personality of that organisation vis-à-vis its members. Nevertheless, the mere legal capacity to enter into external relations is not sufficient to constitute international

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[12] Ramses A. Wessel, 'Revisiting the International Legal Status of the EU' (2000) 5th European Foreign Affairs Review, Kluwer Law International, p. 510.

[13] According to Kirsten Schmalenbach, 'International Organisations or Institutions, General Aspects', *The Max Planck Encyclopedia of Public International Law*, online edition, www.mpepil.com, visited on 24.05.2010: International organisations can be understood as entities *a)* established by a treaty or other instruments governed by international law, and *b)* capable of generating through its organs an autonomous will distinct from the will of *c)* its members.

[14] *Reparations for Injuries Suffered in the Service of the United Nations* Case, I.C.J. Reports (1949), at 179.

legal personality vis-à-vis non-members. Based on the rule that the constituent treaty of an international organisation constitutes a *res inter alios acta* to third parties, external legal personality requires an explicit or implicit recognition by non-members. However, international organisations such as the UN provide a variety of occasions for implicit recognition due to their extensive field of international activities. The same is valid for closed organisations such as the African Union (AU) or the Organisation of American States (OAS). Therefore, in cases of universally active international organisations, non-members have to express their will of non-recognition explicitly in order to avoid implicit recognition.[15]

II. 3. Domestic legal personality

In order to perform its functions and to attain its objectives, an international organisation has to have the capacity to operate under the national legal system of its Member States and third states, in particular in the state in which the headquarters are situated. The organisation may need for example to acquire movable or immovable property or to conclude employment contracts and therefore it needs to have domestic legal personality. It is generally accepted that an international organisation has domestic legal personality, irrespective whether there is a specific provision in its treaty. Domestic legal personality is not inevitably attributed only to the international legal persons, it can be separately granted to the organs of such legal persons.

Domestic legal personality enables international organisations to be subject to rights and duties governed by domestic law. Whereas the constituent treaties regularly remain silent on international legal personality, provisions on domestic legal personality are less rare.[16] Some of these provisions deal summarily with the issue; while others enumerate the most important capacities to act within the national legal order. Such clauses commonly mention the capacity to contract, to acquire and to dispose of immovable and movable property and to institute legal proceedings.

But even without any domestic personality clauses, an international organisation has the implied power to act within its Member States' legal systems, given that the domestic legal personality is indispensable for the effective fulfillment of the organisation's functions. The domestic legal personality is implicitly or explicitly derived from international law but has to be put into effect by domestic law.[17]

Occasionally, international organisations have to fulfill their mandate on the territory of non-Member States. Due to the principle that constituent instruments constitute a *res inter alios acta* for third parties, the latter have to recognize the organisation's domestic legal personality.

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[15] Kirsten Schmalenbach, 'International Organisations or Institutions, General Aspects', *The Max Planck Encyclopedia of Public International Law*, online edition, www.mpepil.com, visited on 24.05.2010.

[16] See for eg Art. 104 UN Charter; Art. XII Constitution of the United Nations Educational, Scientific, and Cultural Organisation "UNESCO Constitution".

[17] See more on this issue in: Kirsten Schmalenbach, 'International Organisations or Institutions, General Aspects', *The Max Planck Encyclopedia of Public International Law*, online edition, www.mpepil.com, visited on 24.05.2010.

This can be done by means of international status agreements.[18] Some national legal systems authorize the government to confer domestic personality upon foreign international organisations by decree. In addition, non-Member States might recognize the domestic legal personality implicitly by tolerating economic activities of the relevant organisation.

While recognizing the international legal personality of the UN, the ICJ stressed that its legal personality differs from that of States. Whereas the latter possess the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the UN must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.[19] This most fundamental distinction has to be substantiated to the effect that international organisations do not possess a set of basic rights and duties on the mere ground of their existence. On the contrary: the extent and content of an organisation's international rights and duties are defined by the will of members, by the acceptance of non-members and by the requirements of international law.

III. The legal personality of the EC

From several provisions in the EC Treaty, it is evident that the Member States intended to attribute legal personality to the Community, both at the level of national law and international law. There are two provisions within the Treaty of Rome that explicitly grant legal personality to the Community: Articles 210 and 211.

Article 211 EC granted the Community domestic legal personality under the legal orders of the Member States and defined the extent of this legal personality:

> "In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable or immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the Commission."

In accordance with the general spirit of the Treaty there was a need for uniformity of the rules concerning the domestic legal personality of the Community inside the territories of the Member States. Therefore, the stress within the Article 211 was put on the most extensive legal capacity, meaning that the Community should not be subject to limitative national rules on the capacity of certain types of legal persons.[20] Furthermore, the Article 211 did not apply to the third states or international organisations. The third parties could recognize the

[18] See Interim Arrangement on Privileges and Immunities of the United Nations, signed 11 June and 1 July 1946, entered into force 1 July 1946, 1 UNTS 165.
[19] *Reparations for Injuries Suffered in the Service of the United Nations* Case, I.C.J. Reports (1949), at 180.
[20] A. Parry and J. Dinnage, *EEC law*, 2nd edition, London, 1981, p.62.

domestic legal personality of the Community erga omnes with an international agreement or internal law. When the third party recognized the international legal personality of the Community, legal personality under private law followed from this recognition.[21]

Furthermore, the Article 210 stipulated that "The Community shall have legal personality". This general Treaty provision was assumed to refer to the international legal personality of the Community, since the Article 211 explicitly dealt with its domestic legal personality. Although the international legal personality of the European Community was not clearly provided within the Treaty, this kind of personality of the Community was functional. The European Court of Justice confirmed the previous notion in the AETR judgment in which indicated that Article 210 EEC: "… means that in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty, which Part Six supplements...".[22] The legal personality of the Community operated vis-à-vis the Member States since they have concluded the Treaty in which it was conferred to the Community. By concluding the constitutive treaties which govern the relations between the Community and themselves, the Member States have clearly accepted the international legal personality of the Community.[23]

The question of whether the third parties would recognize the relation between the Community and themselves was raised. Since the Treaty of Rome conferred the international legal personality to the Community, that issue was a matter for the contracting parties only (*res inter alios acta*). Mainly, the recognition of the Community by third states depended on whether the Community is able to supply them with juridical securities equivalent to those usually supplied when directly dealing with the Member States themselves. According to the treaties and the case law of the European Court of Justice, the Community was indeed able to fulfill the juridical requirements in fields when powers were transferred to it from the Member States.[24]

IV. The EU as a legal person

Before the Treaty of Lisbon came into force, the Union's legal personality was not laid down in an explicit treaty provision. However, over the past years, a separate line of literature has pointed to the Union's objective status as a legal person.[25] Besides all these

[21] Henry R. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, Martinus Nijhoff Publishers, The Netherlands, 1995, p.995.
[22] Case 22/70 *Commission* v. *Council (AETR)* [1971] ECR 263, at p.274.
[23] See more on this in: Rachel Frid, *The relations between the EC and international organisations: legal theory and practice*, Kluwer Law International, The Hague, 1995, p.24.
[24] Ibid, pp.25-27.
[25] See for examples: B. De Witte, 'The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?', in T. Heukels, N. Blokker and M. Brus (eds.), *The European Union afterAmsterdam: A Legal Analysis*, Kluwer Law International, The Hague, 1998, pp. 51–68; D. M. Curtin and I. F. Dekker, 'The European Union as a "Layered" International Organisation: Institutional Unity in

interpretations by the experts in European law, the subjective dimension – the conclusion that the organisation was intended to have rights, duties, powers and liabilities on the international plane – was more difficult to reach, since some states (and their constitutional courts) have explicitly stated at the time of the ratification of the Treaty on EU, that the Union is not to be regarded as a legal person with individual legal capacities. As a matter of fact, the travaux préparatoires of the Maastricht negotiations seem to indicate an explicit unwillingness of the Member States to confer on the Union independent rights and duties, despite some attempts by the Commission to endow the Union with explicit treaty making capacity. The reasons were not the same for each and every individual member state. Some states (e.g. Belgium, the Netherlands, Luxembourg and Italy) were afraid of an "intergovernmentalization" of the external competences of the Community; others (e.g. the UK) were of the opinion that failing legal personality would make the Union "weaker" and less able to affect the sovereignty of the Member States.[26] The discussion was repeated during the Intergovernmental Conference on the Treaty of Amsterdam. In 1995 the Report of the Reflection Group mirrored the continuing difference of opinion: "A majority of members point to the advantage of international legal personality for the Union so that it can conclude international agreements on the subject matter of Titles V and VI concerning the CFSP and the external dimension of Justice and Home Affairs. For them, the fact that the Union does not legally exist is a source of confusion outside and diminishes its external role. Others considered that the creation of international personality for the Union could risk confusion with the legal prerogatives of Member States".[27]

The mainstream view before the Treaty of Lisbon was enacted, was that the EU, when seen as a legal institution, is to be concerned of as a "personal legal relation" between the participating states.[28] In this view, the Union merely reflected traditional mechanisms of intergovernmental cooperation under international law, in which the European Council, for instance, is to be qualified as a conference of governments, rather than as an organ of an international organisation. The same holds true for the Council of Ministers once it acts under common foreign and security policy (CFSP) or police and judicial cooperation (PJCC). While not denying the legal nature of the relations between the actors and the existence of rules on delimitation and coherence, this view rejected the idea of a new entity standing separately from the High Contracting Parties that established it. The decisions taken on the basis of the CFSP

Disguise', in P. Craig and G. De Búrca (eds.), *European Union Law: An Evolutionary Perspective*, Oxford University Press, 1999, pp. 83–136.

[26] See more on this in: Ramses A. Wessel, 'Revisiting the International Legal Status of the EU' (2000) 5th European Foreign Affairs Review, Kluwer Law International, p. 520.

[27] Report of the Reflection Group on the IGC, December 1995, at p. 40.

[28] See for examples: D.W.P. Ruiter, 'A Basic Classification of Legal Institutions' (1997) 10 *Ratio Juris* 357-71; Müller-Graff, 'The Legal Basis of the Third Pillar and its Position in the Framework of the Union Treaty', CML Rev. (1994), pp. 507–510; U. Everling, 'Reflections on the Structure of the European Union', CML Rev. (1992), pp. 1053–1077; N. Neuwahl, 'A Partner with a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam', EFA Rev. (1998), pp. 177–196; H. J. Schermers and N. M. Blokker, *International Institutional Law*, Kluwer Law International, The Hague, 1995 at p. 709.

or PJCC provisions were not regarded as legal acts of the Union, but as multilateral agreements among governments.

Despite the fact that the Member States during the Intergovernmental Conferences could not reach an agreement on an explicit reference to legal personality in the treaty cannot conceal the fact that they were ready to accept several implicit references. By the end of 2009 there were numerous treaties to which the European Union as such was a party[29], and therefore, it was increasingly difficult to hold on to the view that the Union is not a legal person.

IV. 1. European Union after the Treaty of Lisbon

The Treaty of Lisbon, which was signed on 13 December 2007, and entered into force on 1 December 2009, has adopted one of the key innovations: the "depillarization" of the European Union. Despite the many open questions it leaves, there are many positive reforms contained within the Treaty. The Treaty of Lisbon grants legal personality to the Union in Article 47 TEU revised. The separate legal identity of the EC disappears, and it is provided that the Union will replace and succeed the EC.[30]

Legal capacity in each of the Member States is granted to the Union. The Article 335 TFEU provides:

> "In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation."

Furthermore, the Treaty of Lisbon contains provision for contractual and non-contractual liability of the Union.[31] The Treaty does not specify the international legal capacity of the Union, but there is every reason to suppose that Article 47 TEU revised would be interpreted to this effect by the ECJ, following the reasoning in *AETR case*. Not only would this change remove the legal uncertainties over the extent of the Union's international capacity, the international identity of the Union would be clearer, more transparent and more visible to third countries, as well as its citizens. The gap between a legally correct adherence to the distinction between EC and EU action, and everyday speech – in which

[29] As an example, on 30 September 2002, the Council decided to approve the text of the Agreement between the European Union and Bosnia and Herzegovina on the establishment of the EU Police Mission (Decision 2002/845/CFSP, OJ EC, L 293, 29.10.2002). In 2001 we could already witness agreements between the EU and Yugoslavia and Macedonia on the activities of the EU Monitoring Mission (resp. OJ EC L 125 and L 241).
[30] Article 1 TEU revised.
[31] Article 340 TFEU.

all foreign policy action is "Union action" – disappears, enhancing clarity.

V. Conclusion

The evolution of the European Union's legal order resulted in a new institutional and normative situation in which the Union's pillars could no longer be approached in isolation. It has been possible to point to an evolution of the Union's legal order which has led to a new institutional and normative setting in which the role of the institutions, the decision-making procedures, the legal nature of the instruments, and the application of key principles (in particular direct effect, primacy and loyalty) had an effect which went beyond the strict legal regime to which they originally belonged. The European Union was not just an umbrella to provide shelter to distinct supranational and intergovernmental policies; it had developed into an interpretative framework which has made it impossible for each pillar to be approached in isolation. The Union's pillars were distinct but inseparable. Whatever happened in either one of them had an impact on developments and on the interpretation of norms in the other.

The past years not only revealed a clear interaction between the different Union policies, but also showed that the nature of the pillars can best be understood when their mutual relation is taken into account. Although at the time of the formation of the European Union it was quite common to view the non- Community parts of the Union as a legal framework based on international law, these days a reference to international law as the basis for the internal co-operation sounds less familiar to EU lawyers and the term is mainly reserved to play a role in the Union's external relations. The Union's legal order over the past years paved the way for uniting the Union and the Community as foreseen by the Lisbon Treaty.

The Treaty of Lisbon aims at a merger between the European Community and the European Union into one single European Union, on which the Member States confer competences to attain objectives they have in common. The entry into force of the Lisbon Treaty will free us from the difficult task to explain the difference between the Community and the Union as well as their complex connection.

Abstract

The theme of this paper is the development of the European Community and the European Union through the concept of international legal personality. The international legal personality is vital in the international law because it normally constitutes the *conditio sine qua non* of an international organisation's capacity to act. Furthermore, the text elaborates the enjoyment of legal personality by the EU. In the past, the key argument put forward was that the EU does not have legal personality, since the TEU lacks an explicit provision, or provision from which the legal personality can be derived under the implied powers doctrine. The ability of the EC and EU to act externally was very much dependent not only on the existence of specific competences granted by the Treaties explicitly or impliedly, but also on the capacity to act internationally, the attribute of international legal personality. A fundamental legal weakness in building the Union's role in the world was the ambiguity surrounding the legal personality of the Union itself, together with the complication of retaining a separate international legal personality for the EC. The situation has changed noticeably after the ratification of the Treaty of Lisbon.

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