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An Interview with Jean-Claude Piris

Introduction

Jean-Claude Piris served as Director-General of the Legal Service of the Council of the European Union from 1988 until November 30, 2010. This interview was conducted in November shortly before he retired from that position to become a Joint Straus/Senior Emile Noel Fellow at New York University, where he will, until June 2011, be researching his next book on the future of the European Union. All views in this interview are solely those of Mr. Piris, not those of his former or current employer. The Harvard International Law Journal wishes to thank Mr. Piris for his time and willingness to answer our questions.

Q: Tell us about your career—what brought you to where you are today, what were some of the major highlights, and what has been most rewarding?

I began by studying law, economics, and political science at university and then at the École nationale d'administration for senior civil servants. When I finished my postgraduate studies, I became a member of the Conseil d'État, which is the French supreme court of public law. I worked there for seven years dealing with French public and administrative law. Then I decided to work on international matters, and I

was seconded to the ministry of foreign affairs. I spent a few months in the legal service of that ministry, and then I spent more than four years as a diplomat in New York in the permanent mission of France to the United Nations (UN), where I dealt with legal matters and the Security Council. After that, I worked for the ministry of foreign affairs, negotiating international law conventions—such as amendments to the Chicago Convention on International Civil Aviation. Then, I became Director of Legal Affairs of the Organisation for Economic Co-operation and Development (OECD) in Paris, where I was for three years. I dealt with international law, but it was more economic than in the UN. This was a good preparation for the bulk of my career, which began in April 1988 in the EU. I was appointed Director-General of the Legal Service of the Council, and Legal Counsel of the European Council. Of course the EU has changed tremendously since then.

Q: Could you tell us more about the role and functions of the Legal Service of the Council?

The Council is composed of one minister per Member State and adopts legislative and other legal acts. The Council meets in different areas—such as foreign affairs, agriculture and fisheries, justice, and so forth—and of course, it needs lawyers. The European Council (composed of Prime Ministers and Heads of State) meets every three months and decides on the priorities of the EU—the main lines of policies to come. For this it needs a Legal Counsel. So I am doing this job and to help me I have about 300 people, and about half of them are lawyers from all twenty-seven member states. They are divided into directorates, working on external relations, justice and home affairs, economy and finance, agriculture and fisheries, the internal market, and so on and so forth. Half of my staff (150 people) are lawyers specialized in improving the quality of the law—and doing so in all languages. We have twenty-three official languages, and every version has an equal authentic value—so this directorate ensures that the law means the same thing in all languages.

All the legal advisors and I attend meetings. I attend the European Council personally (I have attended over 100 of its meetings and I am one of the rare civil servants in the room), and I also attend the Council of ministers of foreign affairs, of economic and finance affairs and justice and home affairs. My directors attend the other Councils, and we also attend meetings of ambassadors and the 250 committees and working groups which prepare the work of ministers. We give oral and written opinions. We have the right to demand the floor, even if the president is not keen to give it to us. But once we see they are going a road that will be against the rules of international law or Community Law, we have to intervene. And we must also try to offer solutions which are legally correct and can do the trick politically according to the aims pursued—it is why we follow current events all the time, in order to be aware of the political background so as not to give suggestions legally correct but politically impracticable.

Q: What have been the most exciting legal issues that you've had to work on during your tenure?

There have been a lot of exciting moments. In meetings of Prime Ministers it is quite rare that I take the floor. The first time I did it was in Edinburgh, Scotland, in 1992 after the negative referendum of Denmark on the Maastricht Treaty [the Treaty on the European Union]. The Danish people had refused to ratify and we tried to find a solution to allow the government of Denmark to decide to go for a second referendum. And so I sat at the table of the then twelve Prime Ministers or Heads of State, and I proposed a solution which was agreed to by all and which led to a positive second referendum, so that is memorable for me.

Another memory was when I worked with Angela Merkel much more recently, in June 2007, to draft the mandate for the Intergovernmental Conference (IGC), which was the heart of the Lisbon Treaty. At the time I was beside her, taking the floor when she asked me to do so, to answer questions asked by other Prime Ministers.

Those were exciting times—when my heart was beating; other times were when I had to say something with which I knew it would be difficult for some Prime Ministers in the European Council or Ministers in the Council to agree.

Q: When you are making proposals, do you consult law, scholars, or the political mood—what sort of research do you do?

Scholars, no. Because generally speaking we are in a new situation which is completely unexplored—you have to be innovative. Of course you have to know precedents, but you have to be creative. So you do not consult books or scholars, but political people involved in the matter. You have to follow the fight. You have to be present and know exactly the history of the problem and the positions of the twenty-seven members, because in important matters, to change the treaties or to adopt economic law, you have to have unanimous agreement of the twenty-seven. Even if it is not required, you have to aim for that. So you have to know the positions and to know, if you present something, whether it will be acceptable, difficult to accept, impossible to accept—for each and every one of them. You must know how to present a suggestion and to change it in order to make it politically acceptable while being legally correct.

Q: How do you view the relationship between the EU and the UN?

When I am talking about the UN, I mean the UN proper and not the specialized agencies. The UN is mainly, seen from our side, peace and security; the role of the Security Council and the peacekeeping operations. It is in that field that we are developing a lot of relations with the UN. We have developed since the Maastricht Treaty what we call Security & Defense, which is not a military defense—we are not a military alliance, we are not trying to defend our territory. In fact most EU members—twenty-one—are members of NATO, but others are neutral or have a

policy of neutrality. So what we're doing in our security and defense policy is organizing missions and operations in foreign countries, which are based on what we call the "Petersburg tasks" (because the first time they were defined was in a little town, Petersburg, near Bonn in Germany), which are mainly peacekeeping operations and post-conflict stabilization. We try to use all the means at our disposal, civilian and military—mostly mixed. For example, we have done twenty-four operations, but only seven of them were military operations (such as the blue helmets of the UN), while the others were mixed or civilian only—that means judges, policemen, trying to help countries to build better administration, better justice, better internal security, and so on and so forth. So our relationship with the UN has been to work on that.

Q: How has the relationship been affected by the failed resolution for the EU to have separate speaking rights at the UN?

Until recently, the speaker for the EU in the UN was always the semestrial presidency of the Council of Foreign Affairs (Sweden, Spain, Belgium, and so forth). They asked for the floor (you know how it works in the UN: the major speakers intervene during the first week), and the EU Presidency was speaking on behalf of the Union.

Now, with the Lisbon Treaty, this task is finished. The President of the EU Foreign Affairs Council is Mrs. [Catherine] Ashton, who does not represent a State—she is British, but she is not representing the UK. So we have tried to explain to the UN that maybe the EU's status of observer—it has the status of observer in the General Assembly of the UN already—should be improved a little bit in order that the EU itself may speak on its own behalf without waiting until all 191 countries finish speaking, when nobody is there anymore. We have tried that, but we have not given enough justification. So there was a vote scheduled on the resolution on September 14, but it was delayed. Maybe we will get it in the future, but it is not essential. It is very difficult to make people understand that we are not a classic international organization like others, even if of course we are not a state. If it doesn't work then maybe we will repeat our speech twenty-seven times, it is not the end of the world. But we are working on it. I recently visited the EU ambassador in New York and our people are working on it.

Q: You were involved in helping to establish the new European External Action Service (EEAS). What were some of the most interesting issues you dealt with in creating the EEAS?

The main issues, as often in the EU, were disputes between institutions. It happens in all states (disputes between ministries and within departments), but the culture of the institutions in the EU is incredibly strong after only sixty years. The culture of the Commission, the culture of the Parliament, the culture of the Council, are different—and the European Parliament and Commission tend to think that because they have "federalistic" characteristics, they are the best representatives of the EU and of its

states and citizens. However, as Angela Merkel said recently in Bruges,[1] it is not always true that the Parliament and the Commission are the good guys and the member states are the villains.

We have had disputes because, for instance, the Parliament sometimes has a right of co-decision and sometimes not. On the EEAS, the Parliament has only an opinion (simple, consultative opinion, not obligatory) on the main decision to be made (establishing the functioning and so on). But we had to modify a little bit also the general budget rules and the general staff rules. On these two texts, the Parliament has the right of co-decision. So what they did (as they often do) was to say, we have co-decision on these issues, so we will not give our green light on them. Thus, you will not have the power to decide the main decision unless you listen to us and do everything we want on it. Because of that, we have been obliged to negotiate with Parliament. The last negotiations were in Madrid with very few people, and we reached an agreement on all issues.

With the Commission it was also difficult. With the Commission it was more understandable—some powers and some services are going to be taken out of the Commission to be given to the EEAS, which will be autonomous. So there is a resistance—administrative resistance to change and the resistance of individuals who are going to lose their job. Of course, you have three sources to make a directorate on the Middle East: you have one director of the Middle East desk in the Council, one director of the Middle East desk in the Commission, and also diplomats of member states have the right to be appointed. And you cannot appoint three directors of the Middle East, you can only appoint one.

Q: Turning to some recent cases, Professor de Burca has argued that the Kadi case,[2] decided by the European Court of Justice (ECJ) in late 2008, "represents a sharp departure from the traditional embrace of international law by the European Union."[3] Yet this case has also received much praise for its protection of human rights. What concerns do you have about that decision and the General Court's recent decision in "Kadi II"?[4]

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[1] Angela Merkel, Fed. Chancellor, F.R.G., Speech at the Opening Ceremony of the 61st Academic Year of the College of Europe in Bruges (Nov. 2, 2010) (English translation of transcript available from the German Embassy in Belgium at http://www.bruessel.diplo.de/contentblob/2959854/Daten/945677/DD_RedeMerkelEuropakollegEN.pdf).

[2] Joined Cases C-402 & 415/05, Kadi v. Council of the European Union, 2008 E.C.R. I-6351, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML.

[3] Gráinne de Búrca, *The European Court of Justice and the International Legal Order After* Kadi, 51 HARV. INT'L L.J. 1, 1 (2010).

[4] Case T-85/09, Kadi v. Comm'n, 2010 E.C.R. (Sept. 30, 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009A0085:EN:HTML.

That is another aspect of our relations between the EU and the UN. There is an interesting recent paper, by Professor Mattias Kumm on the Kadi case.[5] The Kadi case is not finished. We had the first Kadi case in the Court of First Instance, and they said, "O.K., you are right, you have to implement the UN Security Council resolution—Chapter 7, it is obligatory." Then the case went to the second degree of jurisdiction, the ECJ and the Court said, "No, this is not correct; because human rights were not respected, the decision must be annulled." And they took three months to make a new decision. A new decision was made after having given to Kadi all the details we had and the possibility to defend himself.

Then the Kadi case went again to the Court of First Instance, which just made its judgment on September 30, 2010, and they said, "We implement the judgment of the ECJ even though we are not really convinced by that judgment, because it goes against the powers given by the UN Charter to the Security Council. But we are implementing loyally the case law of the Court. So we annul the decision because Kadi was not given enough information and rights of defense."

So obviously, we (the Council and the Commission) are now going to the Court of Justice again, and we will argue that the Court of First Instance has erred-in-law. We are going to argue that it is an error in law, and that the decision made the second time for Kadi was perfectly alright.

If we do not win, there will be a serious problem, and there I agree with what Mrs. De Burca has written—we have several articles of our Treaty on the European Union, which say we respect international law and the UN Charter. We have Article 103 of the UN Charter saying the Charter is superior to any other international treaty; we have an article in the EU treaty recognizing that the treaties concluded in the past have to continue; and so on. But the argument of the Court of Justice is that human rights should prevail. They do not question the primacy of the UN Security Council Chapter 7 resolutions, but when you have to implement it, you have to respect human rights and the rights of defense. On that, it is true that if you look even at what the UN has done—because after what happened in the first instance, the Security Council in New York tried to do something about that—it is not much. They have created a kind of ombudsman, but in its second judgment the Court of First Instance decided that this was not enough. I think they are probably right. But you have to choose, do you implement the Security Council resolution? Are you respecting international law? If you do not do it, you open the way to other countries saying that Security Council resolutions are not respecting their human rights, so they won't respect its resolutions. It is a very difficult case, and I am awaiting with fascination what the Court of Justice will say the second time.

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[5] Mattias Kumm, *How Does European Union Law Fit into the World of Public Law? Costa, Kadi, and Three Conceptions of Public Law*, *in* POLITICAL THEORY OF THE EUROPEAN UNION (Jurgen Neyer & Antje Wiener eds., 2010).

Q: How do political compromises interact with ECJ decisions, such as the recent cases of Commission v. Austria (2005)[6] and Bressol v. Gouvernement de la Communauté Française (2010)[7] dealing with countries' restrictions on university access to non-nationals as a way of maintaining costs for countries with free higher education and larger neighbors? Can the Court solve these problems alone? Should it?

It is very difficult when you have a small country and a big country and a lot of students of the big country come to study in the small country, and there is no possibility of making them pay for the hardship on the taxpayers of the small country. But this is the EU law and it has to be applied if it is not modified. Moreover, I think the EU has to encourage the movement of students. We don't have enough mobility in the EU, so we should push this. But we should have pragmatic mechanisms, in order to have some monetary compensation for the small countries. I think that is what the Commission should propose on this, but that is my very personal opinion.

Q: Please tell us a little bit about your new book, *The Lisbon Treaty: Legal and Political Analysis*.[8] You argue that the EU is not yet done developing, and that the EU is plagued by major imbalances. What are some of these imbalances that still remain to be tackled, especially after the Lisbon Treaty?

The major imbalance is of course the one the EU is working on now—President Van Rompuy, the Council of Ecofin (the Council of Economic and Financial Affairs) and the European Council—it is the crisis of the Euro and how we will get out of that. The EU is not a state and not a classic international organization, but we work like a state for the Euro—the Euro is managed in a federal way. We have a European Central Bank. That is the "M" (the monetary part of the Economic and Monetary Union), but the economic part (the "E" part), has been left to states. Of course, they have the democratic legitimacy, and they have the link between the voters and the decision-makers who make decisions on fiscal matters, tax matters, budget matters, and so forth. If the member states make mistakes (if they do have huge budget deficits and huge debts), the Euro has problems. That is exactly what happened.

A preliminary and provisional solution has been adopted, which is a provisional mechanism to help with money in case something happens. This mechanism is going to end in 2013 (it was provisional for 3 years). Mrs. Merkel said that she has a lot of difficulties to transform it into a permanent mechanism—political difficulties with the Bundestag, Bundesrat, and important legal difficulties with the German Constitutional

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[6] Case C-147/03, Comm'n v. Austria, 2005 E.C.R. I- 5969, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0147:EN:PDF.

[7] Case C-73/08, Bressol v. Gouvernement de la Communauté Française, 2010 E.C.R. (Apr. 13, 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0073:EN:HTML.

[8] JEAN-CLAUDE PIRIS, THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS (2010).

Court. She is convinced that she will lose the case—that she will not be able to transform the provisional mechanism into a permanent mechanism because some people think it is against the Treaty. So what she is asking for is a modification of the Treaty in order to allow establishment of this mechanism as a permanent one.

Besides that, the task force presided by Mr. Van Rompuy, composed of all the ministers of Ecofin, and also Mr. [Jean-Claude] Trichet from the Central Bank have reached final conclusions,[9] and the Commission on this basis has proposed six legislative proposals for better economic governance that will be on the table of the Council and the Parliament. Some of them require co-decision while some of them require the simple opinion of the Parliament. We might adopt these proposals in 2011, but there is also that small change in the Treaty necessary for Germany, which will be very difficult to get. So that is one of the imbalances we have and the work is in progress to try and solve it.

We have other imbalances, for example we have not finished the internal market. People think that we have finished the internal market, but that is not true. In the matter of services, for example, we are far from it. But on that we have already a report from Professor [Mario] Monti, President of Bocconi University in Milan,[10] who was a member of the Commission in the past, and now we have a series of fifty Commission proposals to improve the situation.

I think we have other imbalances too. We have not done enough to harmonize tax legislation. That is very difficult because it is subject to unanimity—as a lot of things in the EU are—and now we are twenty-seven countries. We are not six countries anymore or even twelve like when I began—twelve that were very homogenous—now the twenty-seven Member States are very heterogeneous. Interests and needs are completely different. We have very poor countries like Romania and Bulgaria, which are not well advanced in economic terms, social terms, and in protecting the environment. It is very difficult for them (I'm not criticizing them because it is normal that they defend their interests) to accept an increase in the standards—it is impossible. So the Union has a huge impediment to acting in the world as it is today. The world today is globalized, is changing at the speed of light—look at China, and so on—changing faster than ever. So we have to adapt, we have to help our member states to adapt to these changes. Our member states are small—small surface areas, small populations, awful demographic conditions (the proportion between workers and non-workers is going to be worse and worse in the future), more immigration, with lots of problems that we have already and not enough innovation, not enough

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[9] STRENGTHENING ECONOMIC GOVERNANCE IN THE EU, REPORT OF THE TASK FORCE TO THE EUROPEAN COUNCIL (Oct. 21, 2010), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117236.pdf.

[10] MARIO MONTI, A NEW STRATEGY FOR THE SINGLE MARKET, REPORT TO THE PRESIDENT OF THE EUROPEAN COMMISSION (May 9, 2010), *available at* http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf.

investment in structural reforms, not enough investment in research and development, not enough productivity improvement, not enough entrepreneurship. On all that the EU can help and improve governance of its member states, so we need the EU. But we need an EU which is able to decide quickly and make more decisions. And in the state we are in, with the rules we have, we are working in a slow manner, and in a non-ambitious manner. We cannot accommodate everybody with "one decision fits all." A lot of decisions must be taken unanimously. So it takes a long time and we have very low degrees of ambition. So that is what I mean when I say that there are imbalances.

Q: Will your next book deal with structural solutions to these imbalances? Do you have ideas for how the EU could be reorganized, or does it need to be something completely different and new?

I might have ideas, but not precise enough at this time. I will be in New York until June 2011 to think about that. For example, shall we move toward more enhanced cooperation, closer cooperation between some member states, or doing a new treaty (is it politically realistic)? But every idea has big obstacles in front of it. I do not know if I will reach any conclusion. Maybe there is no solution. But I am convinced that if we stay like we are now, the EU might decline, might be less helpful for the member states, and might become more irrelevant.

Q: Ten years from now, will the Lisbon Treaty have positive gains for the EU? Do you have much hope for that?

The Lisbon Treaty is considered by most people as a great leap forward in history. That's not my opinion. It comes from the fact that the 2003/2004 Intergovernmental Conference (starting in October 2003) established what was called the Constitutional Treaty. As it was called a "constitution," everybody thought it was a great leap forward, a major reform of the EU—which it was not. I have written a book on this as well (published in Cambridge University Press in 2006).[11] So when we took the Constitutional Treaty and changed the name in favor of "the Lisbon Treaty" and changed a few other things, most people thought because we had taken most of the reforms of the Constitutional Treaty, the Lisbon Treaty was a big reform, a big leap forward. It is not. The Lisbon Treaty does not create new powers for the EU. It does not give an answer to the questions I have put forward before. Of course it brings some reforms, but not enough—not enough to solve the problems I just spoke about. So I think you have to wait a few years to see if these reforms bring some positive results, but it will take time. The Service is not yet in place, we have just made a decision, it will take years to take shape. This is the external part, in which any decision (there are some exceptions, but they are very secondary), every decision must be made unanimously by the twenty-seven. It will be very difficult. Is there political will to make decisions?

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[11] JEAN-CLAUDE PIRIS, THE CONSTITUTION FOR EUROPE: A LEGAL ANALYSIS (2006).

Q: What parts or aspects of the Constitutional Treaty (if any) were hardest in your opinion to leave out of the Lisbon Treaty?

No—All the important reforms of the Constitutional Treaty are in the Lisbon Treaty. The main thing that has been left out are some names such as "Constitution," "Minister of Foreign Affairs," the motto, the logo, things like that. We did not use the constitutional method, which means we did not repeal all existing treaties, but we just made amendments to the former ones. New provisions here and there show the reduced trust of the member states for the institutions. We have not increased the powers of the EU, but the Constitutional Treaty did not either. The Charter of Fundamental Rights is not in the Treaty, it is outside but it has the same legal value. All things that belong to the ex-second pillar (that means CFSP—common foreign and security policy) have not been included in the Treaty on the Functioning of the European Union but in the Treaty on the EU. That is to show—to stress—that it remains a pillar separated with powers of Parliament, Court of Justice, and Commission which are very small when compared to the rest of the areas of action of the EU.

Q: Were there other Treaties that were signed during your tenure that—by contrast—have been particularly successful?

The two most important treaties since the Treaty of Rome were (according to me) the Single European Act, which was done just before I came (1986–1987), but was implemented at the time I was there. It was very simple and very short. The main thrust of it was to enhance the internal market, using qualified majority in the Council to implement it. And it worked. It was very much criticized at the beginning, but it worked.

And the second one was the 1993 Maastricht Treaty—the most important by far. There is much more substance in it than in the Lisbon Treaty. The Maastricht Treaty was a decision to establish a common currency and the economic and monetary union. The second thing that was important was that it killed a taboo not to speak about common defense and foreign policy. And the third one was about justice and home affairs. So it was an important treaty with a lot of consequences.

Q: What do you think are the biggest legal barriers to the EU becoming more effective?

The ability to make decisions quickly. That is very difficult, because in some matters, to do that, you need democratic legitimacy. The EU cannot become a federal state because the member states don't want it, the citizens don't want it, and because we are much too heterogeneous with our twenty-seven members. How can we make these decisions we need without having democratic legitimacy? It is impossible. This is the major obstacle, which is not easy to solve. I don't know any solution to that.

The easiest solution would be to create a federal state, but we cannot do that now with twenty-seven members. So we are stuck with finding small improvements—involve the national parliaments, try to use civil society, and so on and so forth.

Q: As a final question, what would you recommend for law students who are interested in working in the EU or on the international level? What should they be thinking about?

I think that more and more in the future we will work in cooperation between states or integration between states—that's the future. The world will go in that direction. I would encourage people to go and work in this field, because there is a transfer of powers from the states to this kind of organization—like the World Trade Organization or the EU. I would also say that it is not a work like any other. It is a passion. We work in an adventure, which is unique in history. We are trying to get these peoples who were fighting each other for centuries (the Germans, the Poles, and so on) together around a table and have more and more links together in order to forget about war, to try to preserve peace in the region, to have prosperity, to help each other, and to have more solidarity.