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New conferral or old confusion? – The perils of making implied competences explicit and the example of the external competence for environmental policy

Marcus Klamert



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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**NEW CONFERRAL OR OLD CONFUSION? – THE PERILS
OF MAKING IMPLIED COMPETENCES EXPLICIT AND
THE EXAMPLE OF THE EXTERNAL COMPETENCE FOR
ENVIRONMENTAL POLICY**

MARCUS KLAMERT*

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ABSTRACT

Articles 3(2) and 216(1) TFEU on the external competences of the Union adopt highly complex and partly controversial case law of the European Court of Justice. This paper argues that these provisions do not give a complete and clear picture of external competences of the Union. When clarity, conferral and containment are considered major forces having driven the reform process resulting in the mentioned Treaty provisions, this paper will show that the Lisbon Treaty failed on all these counts. Neither will the new provisions remove the need to resort to pre-Lisbon case law for guidance on key principles of external exclusive competence, nor do these provisions answer the question on the scope and the conditions of shared external powers of the Union. This paper argues that competence does not only exist 'where the Treaties so provide', as it is put by Article 216(1) TFEU, which instead should be interpreted to reflect the case law of the Court before Lisbon on implied shared external competence, requiring a test of facilitation for their exercise. The relationship between Articles 191 and 192 TFEU on environmental policy is discussed to illustrate the mystification bedevilling the regime on external competences in Union law. While the Court in recent case law claims that there is an explicit conferral of shared external power in Article 192 TFEU and the Union legislature regularly relies on this provision as the basis for concluding international agreements in the field of environment, nowhere in Article 192 TFEU is there any mention of international agreements or a reference to the procedure under Article 218 TFEU. It is argued that this further confirms the continued existence of implied shared competences in Union law. This, however, also shows that key issues on the distribution of competences between the Union and the Member States have not been addressed by the Lisbon Treaty.

1. INTRODUCTION

With the Lisbon Treaty and its important changes to the field of external relations in particular, we are facing a novelty in European Union law. For the first time, case law by the European Court of Justice in a matter of utmost complexity, with key cases dating back to the 1960s, has been 'codified' in the Treaty.¹ This effort is the result of a long debate about the order of competences in the European Union occasioned by the Draft Constitutional Treaty.² This codification begs the fundamental question on how to deal with the novel situation when assessing the new provisions on competences in the Lisbon Treaty. Do we consider them the new 'law of the land' and accept that they are perhaps not meant to reflect faithfully and in every detail the case law regime applicable before the entry into force of the Lisbon Treaty,³ but that these provisions are, crucially, meant to be complete? Alternatively, is it apposite to examine and interpret the new Treaty provisions on competences in light of (pre-Lisbon) case law and review them by the same standards that have been applied to this case law previously?

The intention behind the codification in the Lisbon Treaty clearly was to provide a conclusive, complete rendition of the order of competences. The Treaty reform was meant to make 'explicit the jurisprudence of the Court to facilitate the action of the Union in a globalised world, in particular when dealing with the external dimension of internal policies and action'.⁴ Recourse to the *travaux préparatoires* for the Constitutional Treaty, which are also relevant for the Lisbon Treaty, thus supports considering Articles 3(2) and 216(1) TFEU as providing the full and complete picture after Lisbon. In the same vein we would have to understand the statement in Article 216(1) TFEU that the Union, among other things, possesses treaty-making power 'where the Treaties so

¹ On the external dimension of the Lisbon Treaty see, among many others, M. Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process', in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press 2008), 34-69; J. Wouters, D. Coppens and B. De Meester, 'The European Union's External Relations after the Lisbon Treaty', in J. Griller and S. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (Wien: Springer 2008), 143-203.

² See, among many others, P. Craig, 'Competence: Clarity, Conferral, Containment and Consideration', 29 *European Law Review* (2004) 323; A. Hable, 'The European Constitution: Changes in the Reform of Competences with a Particular Focus on the External Dimension', 67 *Working Paper of the Research Institute for European Affairs* (2005); B. De Witte, 'Clarifying the Delimitation of Powers', and I. Pernice, 'Rethinking the Methods of Dividing and Controlling the Competencies of the Union', both in *Europe 2000 – Le Grand Debat*, available at <http://ec.europa.eu/governance/whats_new/europe2004_en.pdf>.

³ See P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford: Oxford University Press 2010), at 167: 'The translation of highly complex case law into the form of a Treaty article is always difficult. The almost inevitable tendency is to shed certain of the nuances from that jurisprudence in order to be able to put something down on paper in manageable form.'

⁴ Final Report of Working Group VII on External Action, CONV 459/02, 16 December 2002.

provide'. This can be read as a specific declaration of the principle of conferral with regard to the external capacity of the Union. This principle of conferral, though already expressly provided under the Nice Treaty, has arguably been further emphasised by adopting not only Article 5 TEU from the Nice Treaty, but by also adding a new provision in Article 4(1) TEU stating that competences not conferred upon the Union remain with the Member States.

To assume competence only 'where the Treaties so provide' rules out any (implied) external competences not expressly provided by the Treaties. There is, however, a problem with such a strict view of conferral and the meaning of codification. It will be argued in the following that the new competence provisions must still be read in light of (pre-Lisbon) case law, for three reasons. First, the codification is quite patently flawed on key principles such as *ERTA*, unless we assume that the Lisbon Treaty should radically modify the case law regime by way of codification.⁵ Second, resort to case law is necessary because of the striking mismatch between the complexities of the Court's case law and the terseness of the 'new' Treaty provisions, such as concerning the 'ILO principle' on exclusive competence for areas largely covered by common rules. The third reason why the 'old' case law regime will remain valid is that the important and fairly recent ECJ Opinion on the Lugano Convention, in particular, could not possibly have been considered when planning to make all the implied competences explicit.

I will thus argue below that there are good reasons to assume that what the Lisbon Treaty expressly provides is not all there is with regard to Union competences. This will be illustrated by example of the case law and treaty-making practice pertinent to the legal bases for environmental policy. We will see that the discussion in the literature on external competence allocation in this policy field is a showcase for the complexity and inconsistency that bedevilled external relations law before Lisbon. And we shall also find that the Lisbon Treaty has not remedied this situation. To start with, however, I will provide a brief summary of the order of (explicit) Union competences following the Lisbon Treaty.

2. THREE CATEGORIES OF COMPETENCES

Under the Lisbon Treaty, there are now only the categories of exclusive, shared and supporting competences.⁶ For all of them the Treaty foresees a general definition on the one hand and a list of pertinent policy areas, on the other hand. This is meant as a categorisation, but not as a substitute for referring to the

⁵ Codification does not necessarily mean the one-to-one provision of elements of case law without being allowed to alter some aspects in this process. I doubt, however, whether we can still speak of codification when a key tenet of case law is simply turned on its head, as discussed *infra*.

⁶ In the German version of the Lisbon Treaty, these are called *ausschließliche Zuständigkeiten*, *geteilte Zuständigkeiten* and competences for the *Unterstützung, Koordinierung* or *Ergänzung* of national measures.

detailed provisions in the respective title of the TFEU for assessing their scope and nature.⁷

Article 2(1) TFEU defines *exclusive* Union competence as an area where ‘only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts’. In other words, Member States cannot regulate in areas that fall under the exclusive competence of the Community unless they are specifically authorised to do so.⁸ Article 3(1) TFEU lists the areas of this *a priori* exclusive competence of the Union.⁹ In some of these areas, the Lisbon Treaty has brought about some significant clarifications and extensions, such as concerning the scope of the Common Commercial Policy in particular.¹⁰

Article 3(2) TFEU contains a codification of what has previously been known as *implied* exclusive external competences. It distinguishes exclusivity for treaty-making when the conclusion of an international agreement ‘is provided for in a legislative act of the Union’, when it ‘is necessary to enable the Union to exercise its internal competence’, or to the extent a Member State measure ‘may affect common rules or alter their scope’. I will return to this definition in the discussion on external competences below.

Article 2(2) TFEU is about *shared* competence, which is defined as follows:

‘The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.’

Also for this category of competences, the Treaty now provides a list of pertinent matters in Article 4 TFEU, which includes, among others, environmental policy.¹¹ Article 4 TFEU, moreover, distinguishes from these ‘regular’ shared

⁷ See P. Craig, *op. cit. supra* note 2, at 335, occasioned by the Draft Constitutional Treaty. Cf. P. Craig, *op. cit. supra* note 3, at 169, on account of the provisions for social policy.

⁸ Case 41/76 *Donckerwolcke and Schou* [1976] ECR 1921; Case 174/84 *Bulk Oil* [1986] ECR 559; Case C-70/94 *Werner* [1995] ECR I-3189; and Case C-83/94 *Leifer and Others* [1995] ECR I-3231.

⁹ Customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; common commercial policy. See, on this list of exclusive competences, R. Schütze, ‘Lisbon and the Federal Order of Competences: a Prospective Analysis’, 33 *European Law Review* (2008) 709-722, at 712, where he also discusses the inclusion of competition policy in this list, thus an area, which before Lisbon had rather been called a parallel competence. On competition policy, see also P. Craig, *op. cit. supra* note 3, at 160-161.

¹⁰ See M. Cremona, *op. cit. supra* note 1, at 46 *et seq.*; P.C. Müller-Graff, ‘The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?’, in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press 2008), 188-201.

¹¹ Internal market; social policy, for the aspects defined in this Treaty; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health matters, for the aspects defined in this Treaty. The CFSP would also have to fall under this category, despite it being not

competences two matters, which do not apply the rule of Article 2(2) TFEU, in the following terms.

'In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.¹²

We shall see that the provisions on the 'irregular' shared competence for development policy foresee external powers nearly identical to those provided with respect to the 'regular' shared competence for environmental policy. Nonetheless, as we will discuss below, the external powers of the Union in the latter field are widely considered much stronger than the powers in the field of development policy.

Article 2(5) TFEU introduces a third category of competences. It states that 'the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas'. In matters falling under this category, the Union is allowed to pass legally binding acts. These however 'shall not entail harmonisation of Member States' laws or regulations'. Article 6 TFEU lists the following policy areas as *supporting* competences: the protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection and administrative cooperation.

All matters not mentioned in the Treaty are sometimes called reserved competences or retained powers of the Member States.¹³ In these the Member States are in principle free to act, but must respect and must not be in breach of Union law.¹⁴

3. THE GENERAL SYSTEM OF EXTERNAL POWERS OF THE UNION AFTER LISBON

Article 216(1) TFEU, as mentioned, provides on the one hand that the Union possesses treaty-making power 'where the Treaties so provide'.¹⁵ It continues that the Union is also competent to enter into an agreement:

meant to preclude the Member States. See, on this discrepancy, M. Cremona, op. cit. *supra* note 1, at 63 *et seq.*

¹² Art. 4(4)-(5) TFEU.

¹³ See C. Hillion, 'Mixity and coherence in EU external relations: The significance of the 'duty of cooperation'', 2 *CLEER Working Papers* (2009) 21; I. MacLeod, I.D. Hendry and S. Hyett, *The External Relations of the European Communities* (Oxford: Clarendon 1996), at 149.

¹⁴ Case C-124/95 *Centro-Com* [1997] ECR I-81, paras. 25 and 27.

¹⁵ See P. Eeckhout, *EU External Relations Law*, second edition (Oxford: Oxford University Press 2011), at 122, for a list of Treaty provisions referring to the conclusion of international agreements.

- (1) 'where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties;
- (2) or is provided for in a legally binding Union act;
- (3) or is likely to affect common rules or alter their scope'.

Note that this is a general statement and does not tell us about the exclusive or shared nature of external powers so conferred.

There is, as also mentioned, a specific provision on *exclusive* external competence in Article 3(2) TFEU:

'The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.'

Article 3(2) TFEU, thus, is essentially a copy of the major part of Article 216(1) TFEU quoted above, with one exception: there is a curious mismatch between the wording of Article 216(1) TFEU conferring competence when it is necessary for the Union to conclude an international agreement to achieve Union 'objectives' on the one hand, and the wording of Article 3(2) TFEU which links such necessity with the exercise of the Union's 'internal competence'. Is this difference significant in view of the fact that Article 216 TFEU does not specify the kind of competence it is concerned with, whereas Article 3(1) TFEU is only about exclusive competence?

In the following, I will explore this issue and the problems identified in the introduction first with regard to external *exclusive* competence and, second, concerning external *non-exclusive* competence. I will focus on exclusive competence conferred in Article 3(2) TFEU and in Article 216(1) TFEU, thus on powers that have been referred to as implied external powers before the Lisbon Treaty.¹⁶

4. EXCLUSIVE COMPETENCES AS CODIFIED IN THE TREATY

4.1 The *ERTA* principle

4.1.1 *The codification of the ERTA principle*

Exclusive Union competence applies to the extent a Member State measure 'may affect common rules or alter their scope'.¹⁷ This is the adaptation of the classic *ERTA* doctrine as establishing exclusivity whenever common rules are

¹⁶ I will thus also not discuss Art. 352 TFEU (ex-Art. 308 EC). See on this, among others, M. Cremona, op. cit. *supra* note 1, at 53 *et seq.*

¹⁷ Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263. See R. Schütze, op. cit. *supra* note 9, at 714.

likely to be affected or their scope altered. The rationale is that Member States should not undermine and contradict these rules by entering into conflicting obligations with third states. *ERTA* thus protects the integrity and uniformity of Union action.

Note that the wording in the Treaty is different and states that it is the conclusion of a Union agreement (*sic!*) which must not affect common rules.¹⁸ This makes little sense, since contradictions between external Union measures and internal Union measures are not a matter of competence, nor does it reflect the *ERTA* jurisprudence, which prohibits Member State agreements from impairing common rules.¹⁹ This provision demonstrates that the codification is partly but patently flawed, undermining any claim that the Court's pre-Lisbon jurisprudence should not be relevant for interpreting Article 3(2) TFEU.

4.1.2 *The nature of common rules*

In the *Open Skies* cases, the Court refers to 'common rules, whatever form these may take'.²⁰ This definition is a broad one and includes any kind of secondary law, even when it cannot safely be qualified as harmonisation measure.²¹

In lack of clear pronouncements by the Court, it is more difficult to argue that international agreements concluded by the Union equally constitute common rules in the sense of the *ERTA* judgment. This, however, has important practical implications for the Member States, among others in the context of mixed agreements. In the literature, reference in support of considering international agreements as common rules is made to statements by the ECJ in Opinion 1/76 discussed below,²² and to the application of Opinion 1/76 to the GATS in the WTO Opinion.²³ The principle established by Opinion 1/76, however, grants exclusivity due to necessity, and not as the consequence of an international agreement by the Union, as explained below. The relevant wording in the WTO Opinion, on the other hand, is ambiguous.²⁴ Nevertheless, it is apposite to

¹⁸ Art. 3(2) TFEU: 'The Union shall also have exclusive competence for the conclusion of an international agreement ... in so far as its conclusion may affect common rules or alter their scope.'

¹⁹ See R. Schütze, *op. cit. supra* note 9, at 715; M. Cremona, *op. cit. supra* note 1, at 58.

²⁰ Case C-467/98 *Commission v Denmark (Open Skies)* [2002] ECR I-9519, para. 77: '... with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take.'

²¹ See my discussion on the nature of the Services Directive, M. Klamert, 'Of Empty Glasses and Double Burdens: Approaches to Regulating the Services Market à propos the Implementation of the Services Directive', 37 *Legal Issues of Economic Integration* (2010) 111-132.

²² P. Gilsdorf, 'Die Außenkompetenzen der EG im Wandel', 31 *Europarecht* (1996) 145, at 149.

²³ See J. Heliskoski, *Mixed Agreements as Technique for Organizing the International Relations of the European Community and its Member States* (The Hague: Kluwer 2001), at 43.

²⁴ Opinion 1/94 *WTO* [1994] ECR I-5267, para. 85: 'It is understandable, therefore, that external powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted.' Cf. N. Neuwahl, 'The WTO Opinion and Implied External Powers of the Community: a Hidden Agenda?', in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (London: Sweet & Maxwell 2000), at 144, on the general ambiguity of this statement.

qualify international agreements by the Union in an area of shared competence²⁵ as common rules within the meaning of *ERTA*. Any Union agreement forms an integral part of Union law,²⁶ and thus reverberates on the internal side by affecting national laws and regulations. At the same time, any international agreement concluded by the Union forestalls treaty-making by the Member States to the extent the Union is competent to enter into obligations and chooses to exercise such competence. Thus, there is no difference between directives and regulations as regards their effects on Member State law-making on the one hand, and treaty-making on the other hand.

There is however one important difference between 'internal' common rules and Union agreements owed to the possibility of concluding treaties bilaterally or multilaterally.²⁷ If the Union enters into a multilateral treaty by exercising its shared external competence, it should be clear that Member States are precluded from undertaking commitments within the same forum, which would undermine or affect the Union commitments. If we apply this *ERTA* non-affectation standard however to a bilateral Union agreement with third state X, it will be difficult to argue that the effect of such agreement is impaired by Member State agreements with states other than X, even when these Member State agreements concern the same subject matter as the Union agreement with X.

4.2 The WTO principle

According to Article 3(2) TFEU, the Union alone is competent when the conclusion of an international agreement 'is provided for in a legislative act of the Union'. This is the so-called WTO principle, since in this Opinion the Court decided that the Union acquires exclusive external competence whenever 'the Community has concluded in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on the institutions powers to negotiate with non-member countries'.²⁸ This part in particular has given rise, among others, to the claim that 'the Lisbon Treaty would opt against the theory of legislative pre-emption and in favour of subsequent constitutional exclusivity in the external sphere'.²⁹ This is based on the idea that there is an important difference between powers the Union acquires as the result of the passing of legislative acts (the above-mentioned common rules) and powers conferred in the Treaty itself. It is claimed that the WTO principle undermines the constitutional division of powers since the Union can empower itself with exclusive competences.³⁰ Indeed, the WTO principle is a peculiar way for the Union to acquire exclusive external competence. The

²⁵ Only here a pre-emptive effect would be relevant since under exclusive competence Member States would be precluded from entering into international agreements *a priori*.

²⁶ Case 181/73 *Haegeman* [1974] ECR 449; Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641.

²⁷ I am grateful to Andreas Kumin for pointing this out to me.

²⁸ Opinion 1/94 *WTO* [1994] ECR I-5267, para. 95.

²⁹ R. Schütze, *op. cit. supra* note 9, at 713.

³⁰ *Ibid.*, at 713.

implications of this principle, however, largely depend on how we choose to interpret it. For this, two approaches are conceivable.

If we read this provision narrowly, it can be seen as a variation of the *ERTA* principle. If the Union, *qua* the *ERTA* principle, may acquire exclusive competence by virtue of *any* form of internal legislation, this should apply *a fortiori* when Union instruments are more specific on the external mandate of the Union institutions, or when they already contain an ‘international’ element regarding the treatment of third-country nationals. The proviso here is that these specific rules on external capacities are connected to the subject matter of the legislative act. A good example is the *ERTA* case itself, where a Regulation had provided for a treaty-making negotiating mandate, but only for the scope of the international agreements in question.³¹ By such a view, therefore, I see no fundamental difference between the *ERTA* principle and the WTO principle, provided there is a substantive relation between the ‘internal’ content and the ‘external’ content of common rules. This then is no threat to the constitutional division of powers, and it should not be compared to external competences expressly conferred by the Treaty itself.³²

If, on the other hand, we consider that Article 3(2) TFEU now speaks, very tersely, of exclusive competence when this ‘is provided for in a legislative act of the Union’, this may be taken to mean, in theory, that in a Union regulation on matter X the Union could empower itself to negotiate with third states on matter Y. As far as I can see, there is no case law on the precise meaning of the WTO principle before the Lisbon Treaty. Yet, if in doubt, I submit that Article 3(2) TFEU should be construed narrowly on this. Anything else would, in a fundamental manner, run counter to the principle of conferral, the importance of which, as mentioned, is further emphasised in the Lisbon Treaty.³³ The wording such as chosen in the Lisbon Treaty, however, cannot really give rise to the concerns referred to above. While terser, it is not different in substance from what the Court has already held to apply before the Lisbon Treaty.³⁴ I do not see how the codification of this, besides prolonging the legal uncertainty on the precise criteria for the application of the principle, should fundamentally change the manner in which the division of competences between the Union and the Member States is devised.

³¹ Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263, paras. 28-29: ‘Although it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force, on 25 March 1969, of Regulation No 543/69 of the Council on the harmonisation of certain social legislation relating to road transport (...) necessarily vested in the Community power to enter into any agreements with third countries relating to the subject-matter governed by that Regulation. This grant of power is moreover expressly recognised by Article 3 of the said Regulation which prescribes that: “The Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this Regulation”.’

³² But see R. Schütze, *op. cit. supra* note 9, at 713.

³³ See also M. Cremona, *op. cit. supra* note 1, at 57; A. Hable, *op. cit. supra* note 2, at 21-22.

³⁴ See *supra* note 28.

4.3 The Opinion 1/76 principle

According to Article 3(2) TFEU, exclusivity is established when an international agreement 'is necessary to enable the Union to exercise its internal competence'. This codifies the controversial Opinion 1/76 principle that the Union possesses exclusive competence to conclude international agreements if its powers for passing internal measures cannot be exercised without such international action.³⁵ Such exclusive competence has only been assumed once by the Court, but has been raised as argument repeatedly especially by the Commission.³⁶ Article 216(1) TFEU, as mentioned, puts this somewhat differently by referring instead to the necessity of achieving one of the Treaty objectives.³⁷ Leaving this discrepancy aside for the moment, this part of Article 3(2) TFEU demonstrates that the codification does not dispose of the need to resort to the pre-Lisbon jurisprudence of the Court. In recent case law, the Court has reinforced the conditions for this kind of exclusivity, requiring an inextricable link between internal policy objectives and an international agreement.³⁸ It is submitted that there is no reason why this specification of the necessity standard of the Opinion 1/76 principle should not continue to apply also under the Lisbon Treaty.

When it is argued that the mentioned codification is flawed because it borrows wording from the European Union's general 'residual competence' under Article 352 TFEU (ex Article 308 EC),³⁹ this is an argument, which is difficult to

³⁵ Opinion 1/76 *European Laying-up Fund* [1977] ECR 741, para. 2: 'In this case, however, it is impossible fully to attain the objective pursued by means of the establishment of common rules pursuant to Article 75 of the Treaty, because of the traditional participation of vessels from a third state, Switzerland, in navigation by the principal waterways in question, which are subject to the system of freedom of navigation established by international agreements of long standing.' Critical of the characterisation of this Opinion as concerning exclusive competence, P. Eeckhout, op. cit. *supra* note 15, at 102-105, 118.

³⁶ Opinion 1/94 *WTO* [1994] ECR I-5267, para. 86 on GATS and TRIPS: 'That is not the situation in the sphere of services: attainment of freedom of establishment and freedom to provide services for nationals of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community.' See also Case C-467/98 *Commission v Denmark (Open Skies)* [2002] ECR I-9519 (*pars pro toto*), on air transport. Cf. K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union*, second edition (London: Sweet & Maxwell 2005), at 858 (fn. 152).

³⁷ See M. Cremona, op. cit. *supra* note 1, at 56-57, who makes the valid argument that referring to Treaty objectives in general instead of to internal (market) competence could possibly greatly extend the scope of this kind of external competence. See M. Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, second edition (Oxford: Oxford University Press 2011), at 225.

³⁸ Opinion 1/94 *WTO* [1994] ECR I-5267, para. 87; Case C-467/98 *Commission v Denmark (Open Skies)* [2002] ECR I-9519, para. 56 et seq. Cf. P. Koutrakos, *EU International Relations Law* (Oxford: Hart 2006), at 113 and 125. Critical J.H.J. Bourgeois, 'The EC in the WTO and Advisory Opinion 1/94: An Echernach Procession', 32 *Common Market Law Review* (1995) 763-787, at 780.

³⁹ Art. 352(1) TFEU: 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers the Council, acting unanimously on a proposal

follow.⁴⁰ What is found in Article 3(2) TFEU is language the Court has often used in the past, most importantly in Opinion 1/76 itself. Such argument only makes sense in relation to, indeed, similar and broader wording found in Article 216(1) TFEU. Article 216(1) TFEU however does not necessarily concern exclusive external competence; a difference which is important, as argued below.

4.4 The ILO principle

Article 3(2) TFEU raises the question of what happened to the so-called ILO principle. According to Opinion 2/91 on the authority of the Community to enter into Convention No. 170 of the International Labour Organization concerning safety in the use of chemicals at work, the Union possesses exclusive competence where an international agreement falls 'within an area which is already largely covered by such [common] rules'.⁴¹ This test has also been applied in more recent judgements by the Court, such as the *Open Skies* cases.⁴² If we assume that the omission of this ILO principle in Article 3(2) TFEU is deliberate, this would mean either that this rule no longer applies under the Lisbon Treaty, or that it must be read into the *ERTA* principle mentioned above. The latter approach however would further discredit the claim that the Lisbon Treaty has made fully explicit the regime on implied competences in Union law. The former approach, in contrast, would arguably restrain the Union in its external powers, since the Union could acquire exclusive external competence only to the extent of the scope of the internal measure actually passed, instead of for a whole policy area based on measures largely covering such area.⁴³

I have already explained above that with *ERTA*, the scope of the Union measure concerned (directive, regulation, 'common rule') is decisive. The scope of such measure determines the extent of the ensuing duty of abstention. *ERTA* locks the assignment of exclusive external competence to the test whether common rules are affected or whether their scope is altered by an international agreement of the Member States. Thus, the *ERTA* effect requires a conflict between Union rules and a Member State measure.

This is different with the ILO principle. That the Court distinguishes the *ERTA* effect from the ILO principle is illustrated by the *Open Skies* cases, even if this could arguably be done in a clearer manner. Following the finding that ex Article 84(2) EC confers power to the Council to decide on matters of air transport,

from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.'

⁴⁰ But see R. Schütze, op. cit. *supra* note 9, at 713.

⁴¹ Opinion 2/91 *ILO* [1993] *ECR* I-1061, para. 25. This ILO standard, to my knowledge, has never actually been deemed fulfilled for establishing exclusive competence. Instead, the Court has repeatedly relied on this tenet to establish its jurisdiction for interpreting mixed agreements. See *infra* note 76.

⁴² Case C-467/98 *Commission v Denmark (Open Skies)* [2002] *ECR* I-9519, para. 82; Opinion 1/03 *Lugano Convention* [2006] *ECR* I-1145, para. 126.

⁴³ But see R. Schütze, op. cit. *supra* note 9, at 714, who considers the (so understood) codification on this point an 'expansion of the European Union's sphere of exclusive competences'.

the Court proceeded to determine the circumstances under which the Community acquires external competence because of the exercise of its internal competence. The judgment continues as follows:

'According to the Court's case-law, that is the case where the international commitments fall within the scope of the common rules (ERTA judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26).'⁴⁴

Thus, the *ERTA* effect is distinguished from the *ILO* effect by the fact that in the latter case, exclusivity is established on the grounds of Union measures even if there is no contradiction (i.e. conflict) between these rules and Member State commitments.⁴⁵ This is consistent with the way the Court very carefully and over more than 20 paragraphs assessed the existence of such conflict with regard to certain regulations adopted by the Council in the *Open Skies* cases.⁴⁶ Unfortunately, this difference is often neglected in the literature when the *ILO* principle is merely seen as a subcategory of the *ERTA* principle.⁴⁷ I have argued elsewhere that, if the Court is taken at its word here, the Services Directive⁴⁸ would have precluded Member State action externally in the *whole* services field and not merely in those matters regulated by the Directive itself.⁴⁹ The Services Directive, therefore, would have shifted the right to exercise external competence from the domain of the Member States to the Union for the full scope of the GATS already before this shift has been achieved by the amendments to Article 207 TFEU on the Common Commercial Policy by the Lisbon Treaty. It is revealing about the ambiguity of this principle that this consequence has apparently gone largely unnoticed in the otherwise highly controversial debates on the Services Directive.⁵⁰

⁴⁴ Case C-467/98 *Commission v Denmark (Open Skies)* [2002] ECR I-9519, para. 82.

⁴⁵ See also M. Klamert and N. Maydell, 'Rechtsfragen der impliziten Außenkompetenz der EG illustriert am Beispiel der Dienstleistungsrichtlinie und der Minimum Platform on Investment', 43 *Europarecht* (2008) 589-602. The Court, however, did not examine whether the *ILO* standard for establishing exclusive external competence was satisfied in this case.

⁴⁶ See Case C-467/98 *Commission v Denmark (Open Skies)* [2002] ECR I-9519, paras. 90-122.

⁴⁷ See P. Craig, op. cit. *supra* note 3, at 164.

⁴⁸ Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ 2006 L 376/36.

⁴⁹ M. Klamert and N. Maydell, op. cit. *supra* note 45, at 593, *et seq.*

⁵⁰ But see Recital 16 of the Services Directive which states: 'This Directive concerns only providers established in a Member State and does not cover external aspects. It does not concern negotiations within international organisations on trade in services, in particular in the framework of the General Agreement on Trade in Services (GATS).' This, apparently, should not be taken as referring to matters of competence, nonetheless.

4.5 Conclusion

The codification of formerly implied exclusive competences has failed to provide for a clear and self-explanatory regime. While the rendition of the *ERTA* doctrine is not faithful to the case law and is nonsensical, the Opinion 1/76 principle has been codified in too broad terms. The part codifying the WTO principle must be interpreted narrowly in light of the principle of conferral so as not to be read as a redistribution of competences or an expansion of exclusive external powers of the Union. The ILO principle, finally, has not been explicitly codified. If it should come under the general *ERTA* tenet, this would ignore that the ILO principle does not require a contradiction between a common rule and an agreement a Member State wants to conclude in order to prevent the Member State from acting.

In the following, I will therefore continue to refer to the principles stated in Article 3(2) TFEU as the *ERTA* doctrine, the WTO principle and Opinion 1/76 exclusivity. I will also continue to refer to the ILO principle, despite its absence from Article 3(2) TFEU.

5. NON-EXCLUSIVE COMPETENCES

5.1 Introduction

As mentioned, Article 216(1) TFEU does not elaborate on the non-exclusive side of external competences, in contrast to Article 3(2) TFEU which expressly pertains to exclusive competence. In its first part, Article 216(1) TFEU merely states that external competences exist 'where the Treaties so provide'. In addition, the general provisions in the TFEU on shared and supporting competences discussed above do not specifically mention any external dimension. If specific Treaty provisions were explicitly to confer a shared external power for the Union, Member States would be prevented from acting to the extent this power is exercised. The Union, in this case, could enter into international agreements without further conditions apart from requirements stated in the legal basis itself. As already explained, such international Union agreement does have an effect on Member State autonomy that is not much different from the import of the passing of common rules internally.⁵¹

While this concerns the case where external shared competence is *explicitly* conferred by the Treaty, it does not answer the question whether there may also be shared external powers of the Union when this is not expressly provided for in the Treaty. In the following, I will distinguish between the status quo before the entry into force of the Lisbon Treaty and the present situation.

⁵¹ This, of course, only holds true if such pre-emptive effect is not ruled out by the Treaty itself, which is the case in policy areas such as, among others, environment and development cooperation discussed further below.

5.2 The situation before Lisbon

Before the Lisbon Treaty there was a debate about whether the Union possesses unconditional (shared) treaty-making power in *all* areas and on the extent the Treaty confers to the Union powers for internal law-making. The position arguing in favour of such unfettered treaty-making competence for the Union is referred to as parallelism of internal and external powers of the Union, or as *in foro interno in foro externo*.⁵² The opposing theory posited that there is an implied non-exclusive external competence of the Union only when external action of the Community would further the attainment of an objective of the Treaty in respect of the exercise of an internal competence.⁵³ In support of this latter, more sovereignty-friendly view, I would point to the Opinion of the Court on the conclusion of the Lugano Convention, which can be seen as a confirmation of the need to apply such a test of facilitation for the exercise of implied shared competence.⁵⁴ It has also been submitted that the test of facilitation is most likely fulfilled with internal competences comprising a strong 'international element', such as Article 79(4) TFEU on the free movement of persons, and with provisions which extend to relationships with third countries, such as Article 64(2) TFEU on the movement of capital.⁵⁵

5.3 The situation after Lisbon

Three different positions are conceivable as to what the Lisbon Treaty has changed concerning the pertinent issue.

First, it could be argued that shared external competences no longer exist, since the Lisbon Treaty means to codify the competences of the Union and has not adopted shared external competences unless specifically provided for in individual matters. This, however, would imply that shared competences do not exist either under a test of facilitation or by any other rule.⁵⁶ This, notably,

⁵² See, for example, R. Schütze, 'Parallel External Powers in the European Community: from "Cubist" Perspectives towards "Naturalist" Constitutional Principles?', 23 *Yearbook of European Law* (2004) 225-274, at 235; T. Tridimas, 'The WTO and OECD Opinions', in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (London: Sweet & Maxwell 2000), 48-60, at 57.

⁵³ A. Dashwood, 'The Attribution of External Relations Competence', in A. Dashwood and C. Hillion, *The General Law of EC External Relations* (London: Sweet & Maxwell 2000), 115-138, at 134; S. Griller and K. Gamharter, 'External Trade: Is There a Path Through the Maze of Competences?', in S. Griller and B. Weidel (eds.), *External Economic Relations and Foreign Policy in the European Union* (Wien: Springer 2002), 65-112, at 79-80; M. Klamert and N. Maydell, 'Lost in Exclusivity: Implied Non-exclusive External Competences in Community Law', 13 *European Foreign Affairs Review* (2008) 502-508.

⁵⁴ Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

⁵⁵ M. Klamert and N. Maydell, op. cit. *supra* note 53, at 508.

⁵⁶ See R. Schütze, op. cit. *supra* note 9, at 714; M. Cremona, 'A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty', 30 *European University Institute Working Paper* (2006) at 10-11.

would also undermine the position of those who claimed, before Lisbon, that the principle *in foro interno in foro externo* applies beyond doubt in Union law.⁵⁷

Second, it could be argued based on the provisions of the Lisbon Treaty that a general shared external competence exists. This is where the mentioned difference in wording between Article 3(2) TFEU and Article 216(1) TFEU becomes relevant. Recall that the latter provision does not specify the exclusive or non-exclusive nature of the competences it confers. While the close similarity in wording with Article 3(2) TFEU on exclusivity suggests, at first reading, that the corresponding parts of Article 216(1) TFEU are equally about exclusive competence, this understanding of Article 216(1) TFEU is not the only one possible. When external competence is conferred where the conclusion of an agreement is 'necessary' to fulfil objectives of the Treaties, this could relate both to exclusive *and* to shared external competence.⁵⁸ In this case, we could read this as codifying the double necessity standard applying to either exclusive competence or non-exclusive competence. After all, case law invoked in support of implied shared competence before the Lisbon Treaty, such as the Lugano Opinion, has also only referred to 'necessity' and not to facilitation. Nonetheless, as explained, there are good reasons to argue also for a facilitation standard on its basis. However, if we have no difficulty reading this kind of conditional shared competence into the pre-Lisbon case law where it is only stated in a very circumscribed manner, we could also read it into the analogous wording of Article 216(1) TFEU. This is also supported by the fact that, as argued, other parts on external competence in the Lisbon Treaty have to rely equally on interpretation in light of the case law before Lisbon in order not to be nonsensical (the *ERTA* principle) or overly broad (the Opinion 1/76 principle).

There is a third possible way of approaching this issue, which is to argue that in this specific case the intention of the drafters to make all implied competences explicit should not guide us in our interpretation of Article 216(1) TFEU. At the time of the Convention on the Future of Europe, the Lugano Opinion had not yet been handed down by the Court. The case law on this issue before the Lugano Opinion was not conclusive, and even after this Opinion it would have been difficult for the drafters to codify this kind of implied competence, because little could (and can) be said on it with certainty.⁵⁹ This, therefore, might be a reason to continue to fully resort to the (pre-Lisbon) case law to establish competence.

5.4 Conclusion

I submit that the assessment above weighs in favour of the continued existence of a conditional shared external competence based either on Article 216(1) TFEU, or based on pre-Lisbon case law. As already argued with regard to the

⁵⁷ See the references by M. Klamert and N. Maydell, op. cit. *supra* note 53, at 495.

⁵⁸ See P. Eeckhout, op. cit. *supra* note 15, at 112. But see P. Craig, op. cit. *supra* note 3, at 400, who seems to confine Art. 216(1) TFEU to exclusive competence.

⁵⁹ Cf. M. Klamert and N. Maydell, op. cit. *supra* note 53.

situation before the Lisbon Treaty, the necessity/facilitation standard for implied shared external competence must require more than political expediency, but must involve a fully reviewable assessment of whether the internal competence would be furthered by external action.⁶⁰ This includes the compliance with all substantive issues pertaining to the internal legal basis, including consideration of subsidiarity. In any case, apart from all the other ambiguities in the present context left unresolved by the Lisbon Treaty and apart from the new ambiguities created by it, it is deplorable that an opportunity for enhancing clarity on the important issue of shared external competences was missed.

6. THE CASE OF ENVIRONMENTAL POLICY

6.1 The Treaty provisions and legislative practice

Article 191(1) TFEU provides for the objectives of Union environmental policy. Among others, it lists 'promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change'.⁶¹ Article 192 TFEU refers to the ordinary legislative procedure for passing measures in this field in three different places, also including with respect to measures to achieve the mentioned objectives. Nowhere in Article 192 TFEU is there any mention of international agreements or a reference to Article 218 TFEU on the procedure applicable to the conclusion of such agreements.⁶² Article 192(1) TFEU is the basis of numerous directives and regulations harmonising matters ranging from water and air quality to chemicals and waste.⁶³ Article 193 TFEU, finally, allows Member States to maintain or introduce 'more stringent protective measures'.

The only provision with a clear external dimension in the Treaty regime on environmental policy is Article 191(4) TFEU. It provides for the external powers of the Union and the Member States in the following words:⁶⁴

'Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisa-

⁶⁰ C.f. M. Klamert and N. Maydell, *op. cit. supra* note 53, at 507-508. But see P. Eeckhout, *op. cit. supra* note 15, at 123, who argues that review by the Court of the necessity test under Art. 216(1) TFEU should be confined to issues of substantive competence, leaving the decision whether the conclusion of an international agreement is 'necessary' to the legislature. It is submitted that there is no indication in the Treaty or in case law to assume such fundamental distinction between the necessity test for exclusive competence in Art. 3(2) TFEU and the 'necessity' test for implied shared external competence in Art. 216(1) TFEU.

⁶¹ Art. 191(2)-(3) TFEU set up a number of principles that should guide measures in this area, which shall not concern us further for the present purpose.

⁶² Compare this to Art. 207(2)-(3) TFEU.

⁶³ See C. Calliess, 'Art. 192 AEUV', in C. Calliess and M. Ruffert (eds.), *EUV/AEUV*, fourth edition (Munich: Beck 2011), paras. 4-15.

⁶⁴ This is a provision of precisely the same nature as Art. 209(2) TFEU on development cooperation. The wording here, however, is more a reminiscence of the corresponding provision in the Nice Treaty.

tions. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.'

In spite of the conferral of external competence in Article 191(4) TFEU, and the ostensibly non-conferring Article 192 TFEU, international agreements concluded on the basis of Article 191(4) TFEU (ex Article 174(4) EC) are the exception.⁶⁵ In contrast, more than thirty international agreements have been concluded based on Article 192 TFEU (ex Article 175 EC).⁶⁶ Because of the abovementioned right granted to the Member States in Article 193 TFEU, most of these international agreements are mixed.⁶⁷

Hence, in practice, external power of the Union in the pertinent field is mainly inferred from Article 192 TFEU, and not from Article 191 TFEU. There seems to be a common understanding by the Union lawmakers that Article 192 TFEU confers shared external competence. Evidence of this can be found in the declaration of competence annexed to the Stockholm Convention on Persistent Organic Pollutants, which has been concluded based on Article 192 TFEU.⁶⁸ The Union therein declares plainly that it is competent to conclude international environmental agreements which contribute to the pursuit of the objectives stated in Article 191(1) TFEU.⁶⁹

In the following, I will examine whether this approach by the Union lawmakers finds support in case law.

⁶⁵ See Council Decision 98/216/EC of 9 March 1998 on the conclusion, on behalf of the European Community, of the United Nations Convention to combat desertification in countries seriously affected by drought and/or desertification, particularly in Africa, *OJ* 1998 L 83/1. Another agreement based on former Art. 174 EC is the mixed Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, signed on 7 October 1992, not published in *OJ*.

⁶⁶ Among others: the International Treaty on Plant Genetic Resources for Food and Agriculture; the Protocol concerning cooperation in preventing pollution from ships and, in cases of emergency, combating pollution of the Mediterranean Sea; the Amendment to the Montreal Protocol on substances that deplete the ozone layer; the Convention on the Protection of the Rhine; the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade; the Kyoto Protocol to the UN Framework Convention on Climate Change; the Amendment to the Montreal Protocol on substances that deplete the ozone layer, adopted at the ninth meeting of the Parties. Cf. G. De Baere, 'International negotiations post Lisbon: a case study of the Union's external environmental policy', 3 *CLEER Working Papers* (2011) 97-112, at 99, on the graduation from using ex-Art. 174(4) EC to relying on Art. 175 EC as the legal basis in treaty-making practice.

⁶⁷ Since Art. 193 TFEU, as mentioned, allows Union measures only to stipulate minimum standards leaving room for Member States to adopt stricter protection measures, this regularly allows for participation of the Member States in international agreements. Cf. A. Käller, 'Art. 175 EGV', in J. Schwarze (ed.), *EU-Kommentar* (Baden-Baden: Nomos 2009), para. 51. See Case C-459/03 *Commission v Ireland (MOX plant at Sellafield)* [2006] *ECR* I-4635, para. 92.

⁶⁸ Council Decision 2006/507/EC of 14 October 2004 concerning the conclusion, on behalf of the European Community, of the Stockholm Convention on Persistent Organic Pollutants, *OJ* 2006 L 209/1.

⁶⁹ Quoted in Case C-246/07 *Commission v Sweden (Stockholm Convention)* [2010] *ECR* I-3317, para. 17.

6.2 The case law on the competence question

The decision by the Court in *Peralta* has been interpreted as affirming *external* competence based on ex Article 130s EC (now Article 192 TFEU).⁷⁰ In this case the Court held that ‘Article 130r [now Article 191 TFEU] is confined to defining the general objectives of the Community in the matter of the environment. Responsibility for deciding what action is to be taken is conferred on the Council by Article 130s [now Article 192 TFEU].’⁷¹ Note that this case does not concern international agreements by the Union based on either provisions. The Court only answers the question of the referring court on whether ‘the principle of prevention laid down in ex Article 130r et seq.’ precludes the Italian law at issue.⁷²

This pronouncement is repeated in *Safety Hi-Tech*.⁷³ This case, however, also concerns the powers of the Union to adopt *internal* measures on the environment. The Court concluded in a general vein that ex Article 130r (1) EC (now Article 191(1) TFEU) ‘authorises the adoption of measures relating solely to certain specified aspects of the environment, provided that such measures contribute to the preservation, protection and improvement of the quality of the environment’. I would argue therefore that nothing specific can be gained from either *Peralta* or *Safety Hi-Tech* on the scope of external competences of the Union in this field.

Equally unconvincing are references to the *Étang de Berre* case in the present context. In this case, the Court had to assess its jurisdiction over the Convention for the Protection of the Mediterranean Sea against Pollution, and a protocol to it.⁷⁴ The Court here affirmed its jurisdiction over the entire international agreement despite the fact that ‘discharges of fresh water and alluvia into the marine environment, which are at issue in the present action, have not yet been the subject of Community legislation (...)’.⁷⁵ The reason given by the Court is that ‘environmental protection, which is the subject-matter of the Convention and the Protocol, is in very large measure regulated by Community legislation, (...)’,⁷⁶ and that for this reason ‘there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments’.⁷⁷ This seems to be an application of the ILO principle discussed above, and thus the application of a test to establish exclusive competence. This parallel was also noted by prominent voices in the field when the judgment was handed down.⁷⁸ Whether *Étang de*

⁷⁰ See M. Nettesheim, ‘Art.191 AEUV EGV’, in E. Grabitz, M. Hilfand M. Nettesheim (eds.), *Das Recht der Europäischen Union-Kommentar, Vol. II* (Munich: Beck 2011), para. 156.

⁷¹ Case C-379/92 *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453, para. 57.

⁷² See *ibid.*, para. 7.

⁷³ Case C-284/95 *Safety Hi-Tech Srl* [1998] ECR I-4301, para. 43.

⁷⁴ Case C-239/03 *Commission v France (Étang de Berre)* [2004] ECR I-9325.

⁷⁵ *Ibid.*, para. 30.

⁷⁶ *Ibid.*, para. 28.

⁷⁷ *Ibid.*, para. 29.

⁷⁸ P.J. Kuijper, ‘Annotation to Case C-239/03, *Commission v France*’, 42 *Common Market Law Review* (2005) 1491-1500, at 1495. Cf. M. Cremona, ‘Defending the Community Interest: the Duties of Cooperation and Compliance’, in M. Cremona and B. De Witte (eds.), *EU Foreign Rela-*

Berre, therefore, concerns exclusive external powers of the Union,⁷⁹ or the scope of jurisdiction of the Court, I would argue that this case is not a convincing authority for a shared competence based on Article 192 TFEU.

More apposite in the present context is the ECJ Opinion on the *Cartagena Convention*, which is often invoked in support of the view that Article 192 TFEU confers external competence.⁸⁰ In this Opinion, the Court held as follows:

'It is true that Article 174(4) EC [now Article 191(4) TFEU] specifically provides that the arrangements for Community cooperation with non-member countries and international organisations may be the subject of agreements ... negotiated and concluded in accordance with Article 300 [now Article 218 TFEU]. However, in the present case, the Protocol does not merely establish arrangements for cooperation regarding environmental protection, but lays down, in particular, precise rules on control procedures relating to transboundary movements, risk assessment and management, handling, transport, packaging and identification of LMOs.'⁸¹

Consequently, the Court opined, ex Article 175(1) EC (now Article 192 TFEU) 'is the appropriate legal basis' for conclusion of the Cartagena Protocol and it proceeded to examine whether the Community had acquired exclusive competence on the basis of secondary law.⁸²

Thus, unlike the other cases examined above, which are more concerned with the conferral of competence as such, or about the exclusiveness of such competence, the Court in the *Cartagena Opinion* suggested that there is a basis for *shared* external competence in what is now Article 192 TFEU. This is done by a sequential reasoning. In a first step, it established the existence of external competence beyond the limited scope of ex Article 174(4) EC (now Article 191(4) TFEU). In a second step, the Court asked whether the right to exercise such competence has become exclusive because of secondary law.

This reasoning is repeated by the Court in the important *MOX Plant* judgment, adding that it had 'interpreted' ex Article 175(1) EC as being the appropriate legal basis in the *Cartagena Opinion*, and reinforcing this conclusion by referring to ex Article 174(1) EC, which, as mentioned above, includes 'promoting measures at international level to deal with regional or worldwide environmental problems' among the objectives to be pursued within the framework of policy on the environment.⁸³ The Court in *MOX Plant* proceeded to speak of Union competence not being contingent on secondary law 'covering the area in question and liable to be affected' by Member State treaties, and of matters 'not yet' or 'only very partially' regulated by the Union. This supposedly meant

tions Law: Constitutional Fundamentals (Oxford: Hart 2008), 125-169, at 148, with further references.

⁷⁹ Note that this must not be confused with the question of whether the agreement concerned must be concluded also by the Member States. It only means that for a specific matter under a convention there is exclusive Union competence.

⁸⁰ Opinion 2/00 *Cartagena Protocol* [2001] ECR I-9713.

⁸¹ *Ibid.*, para. 43.

⁸² *Ibid.*, paras. 45-47.

⁸³ Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635, paras. 90-91.

that the Union does not only have competence when it possesses *exclusive* competence by virtue of *ERTA* and/or the ILO principle.⁸⁴

MOX Plant, in turn, has been invoked in the *Lesoochranárske* case on the jurisdiction to interpret the Aarhus Convention to support the claim that ‘in the field of environmental protection, the European Union has explicit external competence pursuant to Article 175 EC, read in conjunction with Article 174(2) EC’.⁸⁵ Two questions can be raised with respect to this statement. First, why is external competence deemed explicit in ex Article 175 EC (now Article 192 TFEU), when the Court had professed to interpret ex Article 175 in the *MOX Plant* case in order to establish shared external competence? Second, why is ex Article 175 EC read in conjunction with ex Article 174(2) EC, when the Court had invoked ex Article 174(1) EC as supporting legal basis in the *MOX Plant* case? While there are good reasons to refer to Article 174(1) EC in this context, as I will argue below, the reference to the second paragraph of this provision, which deals with the required level of protection and the precautionary principle, arguably makes little sense in this context.

Thus, in at least three cases the Court has assumed a shared external competence of the Union based on (now) Article 192 TFEU. It does, however, not explain why this should be the case, when nothing in the words of Article 192 TFEU expressly confers a shared external competence (or any other external competence for that matter). The statement in *Lesoochranárske* suggests such explicit conferral, but is at odds with the way the Court had reasoned in its previous case law.

In the following, I will take a closer look at the Treaty provisions concerned, explaining why the continued existence of implied competences is the only logical way to make sense of the case law, of treaty-making practice, and of the wording of the Treaty provisions. Note that the relevant Treaty provisions regarding environmental policy have not changed substantially with the Lisbon Treaty. Thus, I will analyse the current regime in light of the case law described above. What did change however, and we should keep this in mind, is that the principle of conferral has been reinforced by the Lisbon Treaty, as already explained above.

6.3 The meaning of Article 191(4) TFEU

I would argue that the explicit reference in the *Cartagena* Opinion to ex Article 174(4) EC (now Article 191(4) TFEU) confirms that the Court does *not* consider this provision to be irrelevant.⁸⁶ Indeed, it is difficult to see why the only provision clearly conferring treaty-making powers in this area should not be understood as specifically conferring competence, but as presupposing the

⁸⁴ But see A. Källér, *op. cit. supra* note 67, para. 48, who uses these latter terms to describe the alleged shared competence in ex-Art. 175. EC.

⁸⁵ Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] nyr, para. 35.

⁸⁶ But see C. Calliess, *op. cit. supra* note 63, para. 51, who considers Art. 191(4) TFEU as essentially superfluous and ambiguous both on account of terminology and substance.

existence of competence conferred by other means.⁸⁷ Had ex Article 171(4) EC really been dispensable, why has it been adopted by the Lisbon Treaty? It makes more sense to assume that Article 191(4) TFEU confers the (supporting kind of) power for the Union to foster especially the aim of ‘promoting measures at international level to deal with regional or worldwide environmental problems’ mentioned in Article 191(1) TFEU by cooperating with third states.⁸⁸ Thus, the explicit external power conferred in Article 191(4) TFEU allows for the conclusion of cooperation agreements with third countries not precluding the rights of the Member States to take action.⁸⁹ The reference in this provision to the ‘respective spheres of competence’ of Union and Member States locks this competence to the objectives stated in Article 191(1) TFEU further curtailing the scope of Union actions.⁹⁰

Thus, without convincing reasons and in view of the, in this respect, clear case law by the ECJ, Article 191(4) TFEU cannot be interpreted as being redundant.

6.4 Explicit competence in Article 192 TFEU?

It seems peculiar that the Treaty expressly provides for a mere supporting external competence in Article 191(4) TFEU, and yet is silent when conferring a truly shared external competence in Article 192 TFEU. Nevertheless, the literature often claims the existence of this shared competence without further explanation.⁹¹ One way to rationalise this is to read both provisions in combination. As such, the scope of external competence conferred in the former provision would be extended to provide for external powers within the realm of Article 192 TFEU also. Since Article 192 TFEU provides for shared competence internally, by this understanding, it would also provide for shared powers externally. It has been argued in a similar vein that ex Article 175 EC determines the competent organ and the relevant subject matter (*Organ- und Sachkompetenz*), while ex Article 174(4) EC determines the legal form for exercising competence (*Handlungsformkompetenz*).⁹² Against this, it could be argued that the Court in the *Cartagena* Opinion clearly distinguishes between these two provisions and does not indicate that they should apply in conjunction. This

⁸⁷ But see A. Källér, op. cit. *supra* note 67, paras. 47-48. This has nothing to do with the fact that the *ERTA* principle applies in this area, and that Union directives or regulations based on the provision of Art. 192 TFEU affect the Member States in their external capacity.

⁸⁸ See AG Alber in Case C-281/01 *Commission v Council (Energy Star)* [2002] ECR I-12049, para. 88; G. De Baere, op. cit. *supra* note 66, at 98.

⁸⁹ But see AG Maduro in Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-4635, para. 23 (fn. 22), who refers to former Art. 174(4) EC as providing for shared (pre-emptive) competence: ‘The competence of the Community to conclude agreements with third parties is expressly recognised in Article 174(4) EC.’

⁹⁰ But see A. Källér, op. cit. *supra* note 87, paras. 47-48.

⁹¹ See M. Cremona, op. cit. *supra* note 1, at 64; E. Vranes, ‘Gemischte Abkommen und die Zuständigkeit des EuGH – Grundfragen und neuere Entwicklungen in den EU-Außenbeziehungen’, 44 *Europarecht* (2009) 44-79, at 66.

⁹² M. Nettesheim, op. cit. *supra* note 70, para. 155.

view would moreover discard Article 192 TFEU as the distinct basis for competence invoked habitually by the Council. Finally, this 'combined' view would also have to overcome the wording of the last sentence of Article 191(4) TFEU quoted further above, prescribing that Member State competence shall not be prejudiced.

However, if we do not find explicit shared competence in Article 191(4) or Article 192 TFEU, or in a combination of them, there are only two other options remaining. We might either conclude that there is no shared external competence in the area of environmental protection, qualifying Article 191(4) TFEU as the only legitimate basis for external action of the Union. This would challenge the *Cartagena* Opinion and the judgments in *MOX Plant* and *Lesoochránárske*, as well years of Union treaty-making practice. Moreover, it would sharply curtail the external capacity of the Union in the environmental field.⁹³

Alternatively, we must consider the (continued) existence of implied shared external competence. I will examine this option in the following.

6.5 Implied shared competence in Article 192 TFEU?

If we want to defend the *Cartagena* Opinion and its reference to a legal basis in Article 192 TFEU, and at the same time acknowledge the fact that there is no explicit conferral of external powers in this provision, we need to resort to implied competences for explanation. Advocating thus the parallelism of internal and external powers in this field⁹⁴ calls for a position on whether this parallelism is conditional or unconditional.⁹⁵ If conditional, Article 192 TFEU applies the facilitation test as proposed above. The 'international' element which supports the right to activate such implied legal basis can be found in the mentioned objective listed in Article 191(1) TFEU, as well as in the border-defying nature of effective environmental protection as such. If parallelism, on the other hand,

⁹³ Similar M. Cremona, op. cit. *supra* 1, at 62: 'Given the ECJ's clear affirmation that implied powers may be either shared or exclusive, it is a wholly undesirable departure from the case law to insist that, except where the Treaty expressly provides for shared competence (for example, environmental policy or development cooperation), the Union must have either no competence at all or exclusive competence.' Note however the reference to environmental policy as conferring a shared competence.

⁹⁴ M. Nettesheim, op. cit. *supra* note 70, para. 155, refers to *ERTA* and to Opinion 1/76 in support of his claim that it is settled case law of the Court that a certain subject-matter competence confers not only the power to enact secondary law, but also confers the right to choose to act by means of an international agreement. ('Der Gerichtshof geht in ständiger Rechtsprechung davon aus, dass eine gemeinschaftliche Sachkompetenz nicht nur die Befugnis zum Erlass von gemeinschaftlichen Rechtsakten, sondern auch die Befugnis zur Wahl der Handlungsform des internationalen Vertrages beinhaltet.'). See also AG Maduro in Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-4635, para. 23: 'It will be recalled that, in an area such as environmental policy, where the Treaty provides for concurrent competence, both the Community and the Member States are allowed to undertake obligations themselves with third countries.'

⁹⁵ Neither AG Maduro or M. Nettesheim, *ibid.*, elaborate on this. Cf. P. Eeckhout, op. cit. *supra* note 15, at 143, who does qualify Art. 192 TFEU as conferring implied external competence. As a representative of the parallelism theory, however, this means for him that there is no further condition attached to its exercise. See *supra* note 60.

were unconditional, there would be unfettered treaty-making powers of the Union, though within the limits of the objectives stated in Article 191(1) TFEU.

We cannot gain any firm guidance on this from any of the cases discussed above. In *MOX Plant*, the Court merely established the existence of shared Union competence based on ex Article 175 EC, but did not examine whether it had in fact been exercised, nor under which conditions.⁹⁶ The same is true for the Opinion on the *Cartagena Protocol*. Some support for the conditional view and its reliance on 'international legal bases' however can be seen in the way the Court in *MOX Plant* has reinforced an interpretation of ex Article 175(1) EC by reading it in conjunction with the environmental policy objective of promoting measures at the international level provided in ex Article 174(1) EC.⁹⁷

Coupled with the approach advocated above that parallelism of internal and external competences must be conditional, however, this means that the Council cannot, as it did in the Declaration of Competence for the Stockholm Convention mentioned above, claim that it has unfettered shared external competence within the realm of Article 192 TFEU. Although the international element in the objectives provided in Article 191(1) TFEU will furnish a strong argument in this case, there can be no automatic application, especially when the principle of conferred powers has been so much reinforced by the Lisbon Treaty.

7. CONCLUSION

In terms of substantive achievements, the Lisbon Treaty must be considered a disappointment when we consider clarity, conferral, containment and consideration as the four major forces driving the reform process resulting in the Treaty provisions discussed in this paper.⁹⁸ Clarity must be deemed a failure since the new provisions of Article 3(2) and Article 216(1) TFEU will not remove the need to resort to pre-Lisbon case law for guidance on key principles. As regards conferral, the Lisbon Treaty has not answered the question on the scope and the conditions of shared external powers of the Union. This creates the risk that the old confusion will keep the Court at the forefront of delimiting external powers in the Union, with results that might well nullify the newly affirmed principle of conferral.⁹⁹ Containment has therefore also probably failed bearing in mind that the amendments were meant to get a firm hold on the implied competences regime. Consideration in the sense of a systematic reassessment of the competence matter as a whole is the only aspect that can-

⁹⁶ Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635, para. 108: 'It follows that, within the specific context of the Convention, a finding that there has been a transfer to the Community of areas of shared competence is contingent on the existence of Community rules within the areas covered by the Convention provisions in issue, irrespective of what may otherwise be the scope and nature of those rules.'

⁹⁷ *Ibid.*, paras. 90-91. See *supra* note 83.

⁹⁸ See P. Craig, *supra* note 3, at 157.

⁹⁹ See for a similar verdict on other premises M. Cremona, *op. cit. supra* note 1, at 57.

not be regarded as a failure, but only because it did not happen in the first place.¹⁰⁰

As regards the law on shared external competences of the Union, Article 216(1) TFEU can be interpreted to reflect the case law of the Court before Lisbon requiring that the exercise of shared external competences should facilitate the exercise of an internal competence of the Union. Any other solution would mean that there are no shared external competences of the Union when this is not expressly provided for by primary law. The Treaty provisions on environmental policy and the treaty-making practice relying on Article 192 TFEU are further evidence that the Lisbon Treaty does not only confer competence 'where the Treaties so provide'.

However, the Court's sudden claim of explicit conferral of shared external power in Article 192 TFEU in the *Lesoochranské* case after much more cautious wording in cases such as *MOX Plant*, the lack of any wording in this provision indicating such conferral, and the ensuing gap between the normative facts and legal practice is symptomatic for the mystification bedevilling this area of European Union law. Unfortunately, the Lisbon Treaty does nothing to clarify matters, thus prolonging legal uncertainty in external relations law.

¹⁰⁰ See *ibid.*



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UPCOMING CLEER EVENTS

‘Tension between universal and regional unification of private law: The conflict between EU law and the maritime and transport law conventions’ conference co-organised by the Erasmus School of Law, RISTL, CLEER and other partners, 16–17 February 2012, Erasmus University, Rotterdam, The Netherlands

The conference is to explore an existing tension between uniform EU law and conventions of uniform private law to which EU Member States are party. The conference will look into more general issues (place of EU law in the international order, constitutional law or autonomous interpretation) as well as more specific problems (possible incorporation of uniform private law conventions into EU law or particular tensions between various legal instruments).

‘One year after the Arab Spring: the European Union’s relations with the Southern-Mediterranean region’ (*tbc*) conference co-organised by CLEER and Universidad de Pablo Olavide, 10–11 May 2012, Seville, Spain

As a response to the events of the Arab Spring, the EU reframed its policy toward the Southern-Mediterranean region, as indeed its entire neighbourhood, and redesigned its tools of cooperation so as to deliver support for transition to democracy and work closely with the partner governments. These instruments include the ‘more aid for more democracy’ conditionality in the reviewed European Neighbourhood Policy; the Dialogue for migration, mobility and security with the Southern Mediterranean countries and the conversion of free trade agreements into deep and comprehensive free trade agreements. The question therefore arises just how effective such instruments are and can be and what the future of the EU’s relations with the Southern-Mediterranean region is.

To approach these new developments, the conference aims at addressing the multilayered construction of EU and Southern-Mediterranean relations, unpacking the new and renewed normative frameworks and policy instruments available within the European Neighbourhood Policy, bilateral agreements and regional approaches. Tackling specific issues from the EU’s Mediterranean strategy, such as the promotion of fundamental rights, rule of law, security and

the future of deep and comprehensive trade agreements, policy-makers and academics from the EU and the Southern Mediterranean region evaluate the cooperation, highlight the major challenges ahead and put forward recommendations for a stable, mutually beneficial approach.

‘Human rights and EU crises management operations: A duty to respect and protect?’ conference co-organised by CLEER, University of Twente, University of Exeter and the Nederlandse Defensie Academie (NLDA), 25 May 2012, T.M.C. Asser Instituut, The Hague, The Netherlands

The conference aims to open up new directions in the study of European security law. Subject to certain exceptions, much of the existing work in this field has focused on the institutional aspects of the EU’s external security and defence policies, rather than on questions relating to the substantive law applicable to operations on the ground. The conference seeks to address this imbalance in the current research and literature by concentrating on a substantive subject matter: the protection and promotion of human rights in EU crisis management missions. The study of this topic ranks among the most pressing current questions in the field of European security law, considering the legal and political importance attached to the respect for human rights, the considerable practical and legal difficulties in their implementation and the significant yet so far almost completely unexplored changes made to the regulatory framework of EU crisis management by the Lisbon Treaty. The conference will contribute to the development of academic studies and –thanks to the interface it offers to academics and practitioners– will promote innovative solutions to practical challenges in the external dimension of the EU’s legal order. In addition, the conference aims to open up new directions in the field of human rights research. The protection of human rights in peace support operations and the need to make such operations more accountable has received considerable attention in recent times. By assessing the practice of the EU in this field, the conference seeks to contribute new insights and innovative approaches to the existing scholarship on human rights.

‘Trade liberalisation and standardisation – Gauging the success of ‘low politics’ in EU foreign policy’ conference co-organised by CLEER and the European University Institute, 21–22 June 2012, Florence, Italy

The EU’s ‘low politics’ of trade and investment negotiations and its export of standards have played an important role in shaping the role of the Union at the international stage. As the world’s largest trading bloc, the European Union has been eager to maintain its position on international markets and increase its competitiveness. Whereas the EU - a member of the World Trade Organization and an actor that (allegedly) speaks with one voice in all of its trade and investment relations – professes multilateralism, it has consistently pursued a policy of entering into preferential trade agreements at bilateral and interregional

levels. In fact, globalization's profound impact on EU trade relations has resulted in a patchwork of preferential trade arrangements and a continued drive towards the harmonisation of laws, so as to secure market access and create regulatory convergence and interoperability. To boost global competitiveness of European industries, regulatory convergence as a policy objective has been revived in EU-led trade talks by aiming for increased standardisation and/or mutual recognition.

Against this background, the one-and-a-half day conference will bring together leading academics and practitioners to explore whether and to what extent trade liberalisation and harmonisation can be regarded as successful 'low-politics' areas in EU foreign policy and what the challenges are that the EU is and will be facing in these areas. The discussion will focus on (i) the legal and policy objectives that the EU applies in its preferential trade arrangements, with particular attention to interregional approaches, the linking of trade to development and conciliation with multilateral efforts in market liberalisation; (ii) the role of and applied practices in the Union's efforts to promote standardisation within the WTO and with regard some particularly important trade partners, such as the US and China; and (iii) challenges and EU strategies for reconciliatory efforts in investment policy within the context of trade.

One-week summer school on EU external relations law, (tbc) co-organised by CLEER and the Inter-University Centre of Excellence Rijeka-Zagreb, September 2012, Opatia, Croatia

The intensive one-week Summer School strives to fill a gap in the academic scene and bring together leading academic experts from European universities, senior legal advisors from EU institutions and a group of graduate students conducting research in EU External relations law. The structure of the CLEER Summer School provides a unique opportunity for students to enhance their knowledge in this area of law and gain feedback, input, perspective on their ongoing research. Participants will gain exposure for their research and work, and an opportunity to expand their network and brainstorm with their peers and the lecturers. The best presented papers will be selected for publication within the CLEER Working Papers series and for the Croatian Yearbook of European Law and Policy. Lectures are delivered by renewed (academic) legal experts from CLEER's collaborative research network and the participating institutions: professors in EU (external relations) law and senior legal advisors from the EU institutions with background in academia.