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Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty

Friedrich Erlbacher

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**RECENT CASE LAW ON EXTERNAL COMPETENCES OF
THE EUROPEAN UNION: HOW MEMBER STATES CAN
EMBRACE THEIR OWN TREATY**

FRIEDRICH ERLBACHER

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ABSTRACT

The challenges facing Europe today cannot be addressed without putting into practice one of the main objectives pursued by Member States when concluding the Treaty of Lisbon: that the Union should be capable of acting as a strong and united player on the international scene, rather than as a more or less effective coordination platform for 28 international policies. Brexit and the new administration in Washington only reinforce this finding. In order to ensure that the Union can play this role, Member States must, however, accept that the Union effectively exercises the competences that have been attributed to it. Recent case law from the Court of Justice of the European Union regarding the scope and nature of the Union's external competences confirm that the legal framework in force, without being complete, offers an adequate basis to that effect. This contribution offers a systematic analysis of the consequences that should be drawn from recent case law. Mostly, however, it seeks to identify possible avenues to allow legal disputes to be overcome, with a view to achieving the objectives that were pursued through the Treaty of Lisbon; in effect allowing Member States to embrace their own Treaty. Building on recent case law, and relying on the practice of the EU institutions that the author helped to shape as a Legal Advisor of the European Commission, he seeks to show that the conclusion of agreements by the Union alone (without 'mixity') neither leads to 'uncontrolled power creep by Brussels', nor to the disappearance of Member States from the international scene.

ABOUT THE AUTHOR

Friedrich Erlbacher is a Legal Adviser in the European Commission's Legal Service. In recent years he has advised the European Commission in legal matters relating to EU external action and has represented the institution in a number of cases before the CJEU, some of which are analysed in this contribution. Some further insights stem from the author's personal experience. The present article, however, reflects only the personal opinions of the author and not those of the European Commission or its Legal Service.

1. OUTLINE

A stronger and more united European Union (EU) as a key player on the international scene – this was one of the main objectives of the Treaty of Lisbon when Member States introduced changes to the institutional framework and enlarged the scope of Union powers relevant to its external action. The balance sheet of achievements in that regard since its entry into force in 2009 is, however, rather unconvincing. Much of the potential of those Treaty changes has so far remained untapped, despite the fact that many of the challenges that Europe faces today are either immediately linked or closely related to the Union's role in the world.

A stronger and more united EU cannot, however, be achieved without accepting the effective exercise of power at the supranational level instead of a – more or less – coordinated concert of 28 national policies. What is required are efficient procedures to establish the positions that Europe can present on the international scene, be they presented by an EU actor speaking with one voice or by several Union and Member State actors conveying the same message. This can only be achieved if there is consensus that the Union is allowed to fully exercise the external competences that it has been granted by the Treaties. No such political consensus currently exists, however. The debacle¹ that the EU avoided *de justesse* in the context of the signature of the Comprehensive Economic and Trade Agreement with Canada (CETA), or the continuing uncertainty about the Stabilisation and Association Agreement with Ukraine following the negative referendum in the Netherlands² are prominent recent examples. Since the entry into force of the Lisbon Treaty, Member States and the Council as an institution have been repeatedly contesting the scope of these competences, which has led to both heated political and legal debate on many dossiers. In recent years, more cases have been brought to the Court of Justice of the European Union (CJEU) on these matters than during the decades

¹ 'If the EU Cannot Do Trade, What Can It Do? The CETA Debacle Heralds the Age of "Vetocracy"', *The Economist*, 29 October 2016, available at <<http://www.economist.com/news/europe/21709330-ceta-debacle-heralds-age-vetocracy-if-eu-cannot-do-trade-what-can-it-do>>. In their declaration 'Trading Together. For strong and democratically legitimized EU international agreements' 60 European academics take in essence the same view, underlining that insistence on mixity 'weakens the EU's position in international relations', see <<http://www.trading-together-declaration.org/>>.

² See on the political reasons and possible consequences of that referendum C. Deloy and P. Joannin, 'The Dutch Reject the Association Treaty between the EU and Ukraine', Foundation Robert Schuman, *Policy Paper European Issues* No 388 (April 2016), available at <<http://www.robert-schuman.eu/en/european-issues/0388-the-dutch-rejected-the-association-treaty-between-the-eu-and-ukraine>>; M. Brkan and A. Hoogenboom, 'The Dutch Referendum on the EU/Ukraine Association Agreement: What Will the Impact Be?', *EU Law Analysis*, 14 April 2016, available at <<http://eulawanalysis.blogspot.be/2016/04/the-dutch-referendum-on-euukraine.html?m=1>>.

preceding the Treaty of Lisbon; and the cases that have ended up before the EU judicature are only the tip of the iceberg of ongoing disputes in the daily workings of EU institutions. This is all the more remarkable in view of those provisions of the Treaties, which are a mere consolidation of earlier case law, developed by the Court in a long line of rulings since its famous *ERTA* judgment in 1971.³

The significance of the new case law has recently been highlighted by P.J. Kuijper, who concludes, in exasperation: ‘the Member States Reject Their Own Treaty’.⁴ While the different judgments have been discussed in more detail elsewhere,⁵ on the one hand this paper seeks to provide the reader with a systematic analysis of the consequences that follow from this recent litigation regarding the external competences of the EU. On the other hand, some possible avenues are identified that could allow legal disputes to be overcome and achieve the objectives that were pursued through the Treaty of Lisbon; thereby allowing the Member States to embrace their own Treaty.

First, this paper will look at basic principles applying to the Union’s (exclusive) external competences, which the Court was called to revisit in its case law in recent years (2.). Next, recent judgments relating to the scope of the Union’s exclusive competences under Article 3(1) of the Treaty on the Functioning of the European Union (TFEU), such as the Common Commercial Policy, will be briefly presented (3.). The paper will then examine in depth the consequences that follow from the extensive recent case law on the so-called ‘implied’ exclusive external competences of the Union under Article 3(2) TFEU (4.). A separate section will be dedicated to the open question of whether the so-called ‘non-exercised shared competences’ can be exercised by Member States collectively outside the Treaties (5.). Building upon the findings in all these sections, the paper will conclude with some reflections on possible ways to move away from the current situation of inter-institutional litigation, while pursuing the objective of the Lisbon Treaty of a European Union as a credible, forceful, united and effective international actor (6.).

³ CJEU, Case C-22/70, *Commission v. Council (ERTA)*, ECLI:EU:C:1971:32; For a comprehensive analysis of that development, see, *inter alia*, P. Eeckhout, *EU External Relations Law* (Oxford: Oxford University Press, 2nd edition 2011) or, in a condensed form, A. Rosas, ‘EU External Relations: Exclusive Competence Revisited’, 38(4) *Fordham International Law Journal* 2015, 1071-1096.

⁴ P.J. Kuijper, ‘Litigation on External Relations Powers after Lisbon: The Member States Reject Their Own Treaty’, 43(1) *Legal Issues of Economic Integration* 2016, 1-14.

⁵ See the different annotations cited below and, in particular, the overview given by F. Castillo de la Torre, ‘The Court of Justice and External Competences after Lisbon: Some Reflections on the Latest Case Law’, in: M. López Escudero and P. Eeckhout (eds.), *The External Relations of the EU in Times of Crisis* (Oxford: Hart Publishing 2016).

2. THE COURT'S CLARIFICATION OF SOME BASIC PRINCIPLES ON EXTERNAL COMPETENCES

One of the striking features of the Court's case law after the entry into force of the Lisbon Treaty is that, while the declared objective of that Treaty was to strengthen the Union's external action, the Court was first of all confronted with arguments from Member States and the Council that invited it to interpret the new provisions in a way that would have meant a weakening of the role of Union. The Court had to ring-fence the existing *acquis* by restating principles that appeared to be well established – it did so vigorously and allowed for some very useful clarification of that field of law. And still, cases abound in which these basic principles are called into question. We will first look into basic principles regarding external competences in general before turning to those governing exclusive external competences in particular.

2.1 Basic principles regarding the EU's external competences

2.1.1 Greater systematisation of the division of competences

Under the principle of conferral laid down in Article 5(1) and (2) of the Treaty on European Union (TEU), the Union can only act within the limits of the competences conferred upon it. The Treaties now contain a comprehensive catalogue of competences, including external competences, which the Member States have conferred upon the Union through the Treaties. While these rules have certainly not clarified all aspects of the division of competences between the Union and its Member States,⁶ they should, however, lead to a clearer understanding of the division of competences between the Union and its Member States, including that of external competences.

For the first time since the famous *Lugano Opinion*,⁷ which at the time strongly influenced the drafting of the relevant rules of the Treaties, the CJEU, in its Opinion handed down in 2014 on the *1980 Hague Convention on the Civil Aspects of International Child Abduction*,⁸ has made a remarkable effort of *systematisation*, making a clear distinction between the *existence* of an EU competence on the one hand and the *nature* of that competence on the other.

⁶ A. Rosas, 'Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?', in I. Govaere et al. (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau* (Leiden: Martinus Nijhoff Publishers 2013); R. Mögele, 'Art. 216', in R. Streinz, *Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union* (Munich: C.H.BECK 2nd edition 2012), parts 37 and 44.

⁷ Opinion 1/03 of the Court (Full Court), ECLI:EU:C:2006:81.

⁸ Opinion 1/13 of the Court (Grand Chamber), ECLI:EU:C:2014:2303 (hereinafter: *1980 Hague Convention*). See further I. Govaere, 'Setting The International Scene': EU External Competence And Procedures Post-Lisbon Revisited In The Light Of ECJ Opinion 1/13', 52(5) *Common Market Law Review* 2015, 1277-1307, T. Fülöp, A.J. Kumin, and J. Weichenberger, 'Recent Austrian Practice in the Field of European Union Law. Report for 2014', 607 (629) *Zeitschrift für Öffentliches Recht* 2015, L. Ankersmit, Requiring 'Unity First' in Relations with Third States: The Court Continues ERTA-Doctrine in Opinion 1/13, *European Law Blog*, 20 October 2014, available at <<http://europeanlawblog.eu/?p=2574>>.

As this Opinion concerned the issue of competence to conclude an international agreement, the Court consistently first refers to Article 216(1) TFEU as well as to the relevant provision of the internal policy concerned (here: Article 81(3) TFEU regarding the area of family law with cross-border implications) to establish that the Union has competence in the area that forms the subject matter of the 1980 Hague Convention, before entering, in a second step, into the analysis as to whether or not that competence of the Union is exclusive, referring for that purpose to Article 3(2) TFEU and earlier case law. Further clarification can be expected from the upcoming ruling in a pending case where Germany, supported by France and the United Kingdom, argues that the Union cannot act externally in an area of shared competence (in this case: railway transport), which has not yet been subject to EU internal harmonisation (meaning: exercise in the sense of Article 3(2) TFEU) and where the Treaty does not explicitly foresee that this Union competence can be exercised by way of the conclusion of an international agreement (as it does for example in the field of environment - Article 191(4) TFEU).⁹

This greater systematisation by the Court is very welcome. Indeed, the first step is about whether the Union can act at all, while as a second step it is to be assessed whether *only* the Union can act. This also corresponds to earlier case law. For example, in the famous *MOX Plant* case, the Court had decided that the 'Community can enter into agreements in the area of environmental protection even if the specific matters covered by those agreements are not yet, or are only very partially, the subject of rules at Community level, which, by reason of that fact, are not likely to be affected'.¹⁰ This greater systematisation is all the more important as in practice, as will be shown below, this distinction is frequently not made, leading to further cases of political friction and litigation.

2.1.2 *The Treaty of Lisbon as a consolidation of earlier case law*

The Court has made it clear that the 'post-Lisbon' Treaty rules on the external competences of the Union constitute a consolidation and not a change of earlier case law. Both in the *1980 Hague Convention* and in *Broadcasting Organisations*,¹¹

⁹ CJEU, Case C-600/14, *Germany v. Council* [pending].

¹⁰ CJEU, C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345, para. 95 with further references.

¹¹ CJEU, C-114/12, *Commission v. Council*, ECLI:EU:C:2014:2151 (hereinafter: *Broadcasting Organisations*). See further M. Abner and F. Picot, 'Qui a le Droit de Négocier les Accords Internationaux? - Clarification de la Jurisprudence AETR', 3 *Revue des Affaires Europeennes* 2014, 641-648; F. Le Bot, 'Compétences Externes Implicites après le Traité de Lisbonne', 3 *Revue des Affaires Europeennes* 2014, 633-640; L. Woods and S. Peers, 'Copyright: Anything Left of Member States' External Competence?', *EU Law Analysis*, 23 September 2014, available at <<http://eu.lawanalysis.blogspot.be/2014/09/copyright-anything-left-of-member.html>>; A. Ramalho, 'It Takes Two to Tango? The Ever-Expanding EU Exclusive Competence in IP-Related Treaties', *Kluwer Copyright Blog*, 4 November 2014, available at <<http://kluwercopyrightblog.com/2014/11/04/it-takes-one-to-tango-the-ever-expanding-eu-exclusive-competence-in-ip-related-treaties/>>; T. Fülöp, A.J. Kumin, and J. Weichenberger, *supra* note 8.

following the conclusions of three Advocate Generals,¹² the Court has explicitly decided so with regard to Article 3(2) TFEU, noting that the terms of this provision are to be ‘interpreted in the light of the Court’s explanation with regard to them in the judgment in ERTA [...] and in the case-law developed as from that judgment’.¹³ Certainly, as the Court notes explicitly, this ruling relates only to one of the ‘various cases of exclusive external competence of the EU envisaged by that provision, namely the situation in which the conclusion of an international agreement ‘may affect common rules or alter their scope’.¹⁴ There is, however, no reason why this conclusion should be different in relation to the other aspects of Article 3(2) TFEU which, too, stem from rulings of the Court and, indeed, to other Treaty provisions relating to the external competences of the Union. Indeed, on the contrary: in *1980 Hague Convention*, when assessing the existence of a Union competence, the Court first relies on its earlier case law on the matter and adds that this ‘is also referred to in Article 216(1) TFEU’.¹⁵ Two of its Advocate Generals have specifically taken the view that the Lisbon Treaty rules on external competences do generally constitute a prolongation of the pre-Lisbon jurisprudence.¹⁶ If any further proof were needed, it is useful to refer to *Green Network*,¹⁷ a preliminary ruling rendered in 2014. In that case, the Court had to apply pre-Lisbon law, but nevertheless proceeded to an analysis identical to the two other cases referred to above (and indeed citing them explicitly), which were decided on the basis of the post-Lisbon rules of the Treaties.¹⁸

This clearly shows the objective of the Court (considering that this was also the will of the authors of the Treaty of Lisbon) to ensure that earlier case law continues to have full authority for the interpretation of these rules of the Treaties. It is also a clear reply to positions taken by several Member States and the Council itself, as summarised by the Court, that ‘since the entry into force of the Lisbon Treaty, the exclusive external competence of the European Union is viewed in a more restrictive manner’.¹⁹ The Court has not invented any new concepts; it rather stayed within its earlier case law. That said, as Advocate General Bot recalled recently, the case law on that matter has developed in various stages over the years, some of which are more integration-friendly than others. It can no doubt be said that, with its recent judgments, the Court has clearly carried on the most integration-friendly stages of its past case law.

¹² Opinion of Advocate General Sharpston in CJEU, Case C-114/12, *Broadcasting Organisations*, ECLI:EU:C:2014:224, paras. 96 and 97; Opinion of Advocate General Kokott in CJEU, Case C-137/12, *Commission v. Council*, ECLI:EU:C:2013:441, para. 83; View of Advocate General Jääskinen in CJEU, Case A-1/13, *1980 Hague Convention*, ECLI:EU:C:2014:2292, para. 69.

¹³ CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, para. 67.

¹⁴ *Ibid.*, para. 65.

¹⁵ Opinion 1/13, *1980 Hague Convention*, *supra* note 8, para. 67.

¹⁶ *Ibid.*, para. 63; Opinion of Advocate General Bot, ECLI:EU:C:2014:156, in CJEU, Case C-66/13, *Green Network SpA v. Autorità per l’energia elettrica e il gas*, ECLI:EU:C:2014:2399 (hereinafter: *Green Network*), para. 33.

¹⁷ CJEU, Case C-66/13, *Green Network*, *supra* note 16. See further M. Abner and F. Picot, *supra* note 11.

¹⁸ CJEU, Case C-66/13, *Green Network*, *supra* note 16, paras. 24 - 33.

¹⁹ CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, para. 72.

2.1.3 *Distinction between the existence of competence, the nature of that competence as being exclusive and the external exercise of that competence*

Since the famous ERTA decision in 1970, the Court has clarified that the competence of the Union to enter into international commitments in policies that fall under shared competences arises not only from an express conferment by the Treaties, but that it may equally flow, implicitly, from other provisions of the Treaties or from secondary law.²⁰ This implied power, which exists whenever international action can be considered as necessary to achieve the objectives set for the different Union policies, flows directly from the Treaties; its *existence* does not depend on the prior adoption of internal rules harmonising the area concerned.²¹ It is only its *nature* as being exclusive, which, to some extent, depends on its prior internal exercise (as will be discussed in detail below). Furthermore, as recalled above, in *MOX Plant* and others, the Court decided that the Union can act externally in a policy area falling under shared competences (in that particular case: aspects of environmental policy), even if it has not yet covered that area internally.

Following the entry into force of the Treaty of Lisbon, this case law has again been called into question and two cases have been brought to the Court. In one case, Germany (supported by France and the United Kingdom) challenged a decision taken by the Council on the basis of Article 218(9) TFEU, establishing the position to be taken at a meeting of the Convention concerning International Carriage by Rail (*COTIF*).²² The position of these Member States is that, since the Union had not yet legislated internally on that matter, it cannot act externally, even more so as in the field of transport policy (contrary, for example, to the environmental policy in which the Court had rendered the *MOX Plant* ruling, see above) the Treaty does not provide that the Union can exercise that competence by way of internal legislation and international agreements. In a second case, for a similar situation in the area of Telecommunications, a qualified majority could not be found as different Member States argued that the EU did not have the competence to act, and therefore the Council could not adopt a Decision under Article 218(9) TFEU. Instead of adopting a decision under Article 218(9) TFEU as the Commission had proposed, the Council then adopted conclusions, which the Commission challenged.²³ While, of course, the judgments of the Court must be awaited, it is disconcerting to note that, instead of promoting the Union's external action as one would believe it to be in line with the objectives that the Member States themselves set out in the Lisbon Treaty, Member States (and even the three biggest ones together) seek to dismantle the very foundations on which that action is built.

Another argument that is frequently made against the very existence of a competence of the Union to act externally is that, as is the case in many

²⁰ CJEU, Case C-22/70, *supra* note 3, para. 16.

²¹ CJEU, Case C-459/03, *supra* note 10, paras. 94 and 95.

²² CJEU, Case C-600/14, *supra* note 9.

²³ CJEU, Case C-687/15, *Commission v. Council (ITU)* [pending].

instances, the Union cannot act itself in the international forum concerned. However, also from this point of view, in *OIV*²⁴ and *1980 Hague Convention* the Court made it plain that a clear distinction must be drawn between the existence (and qualification) of a competence on the one hand, and its exercise on the other. Indeed, in *OIV*, the Court had to assess whether the Council rightfully adopted the positions to be taken by the EU in an international organisation in which the EU is neither a member nor an observer. The fact that, given these circumstances, the Union cannot exercise its competence on the international forum through its own external actors, in particular the Commission or the High Representative, has no implications whatsoever for the issue of the existence of a competence (or even its qualification as being exclusive or not), which the Court had no difficulty accepting in this case. As the Court recalls: in such circumstances the Union must act via its Member States, members of that organisation, acting jointly in the interest of the Union.²⁵ The same conclusion must be drawn from *1980 Hague Convention*, where the Court confirmed that the Union is (exclusively) competent to accept the accession of a non-EU country to that Convention without being distracted in any way by the fact that the EU is not a party thereto.²⁶ Again, the Court could rely in that regard on the conclusions of more than one Advocate General.²⁷

The practical importance of this fresh clarification, as evident as it may appear given the longstanding case law of the Court on this matter, cannot be underestimated. Indeed, currently, the Union is (still) not a member (or even an observer) of many (if not most) international organisations; nor is it party to many international conventions, despite the fact that the work of these organisations and the scope of these conventions either largely coincide with Union *acquis* or at least decisively influence Union law and policy.²⁸ The fact that the Union is not a member or a party to these international instruments does not mean that it has no competence to decide on the positions to be taken with regard to these instruments. The only consequence that may follow

²⁴ CJEU, Case C-399/12, *Federal Republic of Germany v. Council*, ECLI:EU:C:2014:2258 (hereinafter: *OIV*). See further I. Govaere, 'Novel Issues Pertaining to EU Member States Membership of other International Organisations: The *OIV* Case', in I. Govaere et al. (eds.), *supra* note 6; T. Konstadinides, 'In the Union of Wine: Loose Ends in the Relationship between the European Union and the Member States in the Field of External Representation', 21(2) *European Public Law* 2015, 679-689; C. Tournaye, 'International Organizations Soon Blocked by EU's External Powers?', *Völkerrechtsblog*, 21 October 2014, available at <<http://voelkerrechtsblog.com/international-organizations-soon-blocked-by-eus-external-powers>>; S.E. Karasmani, 'One Hand for Yourself and One for the Ship: A Case Comment on the Case (C-399/12) *Federal Republic of Germany v Council* [2014]', 3(1) *UK law Student Review* 2015, 64-71, available at <<http://www.uklsa.co.uk/wp-content/uploads/2015/01/UKLSR-v3i1-A5.pdf>>; T. Ramopoulos and J. Wouters, 'Charting the Legal Landscape of EU External Relations Post-Lisbon', *KU Leuven Working Paper No 156* (2015), available at <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp151-160/wp156-ramopoulos-wouters.pdf>.

²⁵ CJEU, Case C-399/12, *OIV*, *supra* note 24, in particular para. 51.

²⁶ Opinion 1/13, *1980 Hague Convention*, *supra* note 8, para. 43.

²⁷ Opinion of Advocate General Sharpston in CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 12, paras. 90; Opinion of Advocate General Jääskinen in CJEU, Case A-1/13, *1980 Hague Convention*, *supra* note 12, para. 65.

²⁸ See, in more detail, A. Rosas, *supra* note 6, p. 29 and following.

therefrom is that the Union positions, to be established in accordance with the rules of the Treaties, may have to be represented on the international forum not by the EU actors foreseen for that purpose in the Treaties, but by representatives of Member States, who will have to act as trustees of the Union and in accordance with the pre-established Union positions.

2.1.4 *Link between the existence (and qualification) of Union competences and the choice of the legal basis*

While technically different questions,²⁹ the issues of the existence and the qualification of the Union competence and the choice of the legal basis for the adoption of the relevant acts by the Council are interrelated. Indeed, it is the legal basis that indicates the policy field and hence the competence attributed to the Union that the EU institutions consider relevant. Therefore, as the Court has decided, the legal basis is one of the central elements of legal reasoning of the act.³⁰

From this point of view it is not surprising that one finds a certain parallel in the Court's reasoning, in particular in its recent case law, regarding the existence and the nature of the Union's external competences, on the one hand, and the choice of the legal basis, on the other. Indeed, as will be shown below (4.4), in its recent case law on Article 3(2) TFEU, the Court rejects the idea that the Union is only exclusively competent to conclude an agreement if it can be established *for each individual clause* of the agreement that common rules may be affected, or their scope altered. It rather takes the line that it is enough that the *wider policy area* addressed in the international act could be affected or its scope altered. This approach is in fact similar to constant case law regarding the choice of legal bases, including for the signature and conclusion of an international agreement, which the Court recently had occasion to recall and further develop. The basic rule³¹ is in essence that Union measures are to be founded on a single legal basis, namely that required by the main or *predominant* purpose or component. This applies in principle even if the act pursues different purposes. More than one legal basis is only to be chosen where the measure pursues several objectives that are inseparably linked without one being secondary and indirect in relation to the other.

In *PCA Philippines*,³² the Court had to decide whether, next to the legal basis for development cooperation (Article 209 TFEU), further legal bases for different sectoral policies (policies under Article 4(2) TFEU in which the com-

²⁹ As the Court has already clarified in Opinion 1/03, *supra* note 7, para. 131.

³⁰ CJEU, Case C-370/07, *Commission v. Council* ('CITES'), ECLI:EU:C:2009:590, in particular para. 53.

³¹ See in particular CJEU, Case C-130/10, *Parliament v. Council*, ECLI:EU:C:2012:472, paras. 42-45 and the case-law cited there.

³² CJEU, Case C-377/12, *Commission v. Council*, ECLI:EU:C:2014:1903. See further M. Broberg and R. Holdgaard, 'Demarcating the Union's Development Cooperation Policy after Lisbon: Commission v. Council (Philippines PCFA)', 52(2) *Common Market Law Review* 2015, 547-567; A. Ott, 'The Legal Bases For International Agreements Post Lisbon. Of Pirates and The Philippines', 4 *Maastricht Journal of European and Comparative Law* 2014, 739-752.

petences between the EU and the Member States are shared) had to be added, as indeed the Council decided to do. As such, this appears to be a rather technical issue, even more so as the Partnership and Cooperation Agreement (PCA) at issue is a mixed agreement, meaning an agreement that is both concluded by the EU and ratified by all of its 28 Member States. However, it also has an indirect impact on competence matters. Indeed, the Court decided that the addition of the further legal bases was illegal because the relevant clauses of the agreement actually did not establish a purpose separate from development cooperation. Insofar as the Parties merely agree on the aims of cooperation³³ and on the means to be applied³⁴ in whatever policy area, the agreement does not go beyond classical development cooperation. Where specific rights and obligations are undertaken,³⁵ such clauses are ancillary as long as they promote the overall objectives of development cooperation and are not so extensive that Parties also concluded the agreement with an aim outside development cooperation.

At least two conclusions flow from the Court's reasoning in terms of division of competences between the Union and its Member States. First, as long as clauses are limited to 'cooperation', the Union can enter into such clauses even if that cooperation is built upon 'specific obligations',³⁶ independently from whether or not the Union has internal policy in that field. Indeed, by entering into such cooperation clauses, the Union exercises its competence of development cooperation under Article 209 TFEU or cooperation with non-developing countries under Article 212 TFEU or in the context of an association under Article 217 TFEU – and not that of the substantive policy concerned. For example, if the Union agrees with a third country to cooperate in providing technical support in 'all areas of the protection of the environment' that can include that the Union may finance studies on, for instance, aspects of soil protection in the third country on which the Union may not have internal legislation. This circumstance can in any event³⁷ not lead to the conclusion that the agreement is to be mixed. Indeed, in entering into such a commitment, the Union does not exercise its competence under environmental policy, but rather that of cooperation with developing countries under Article 209 TFEU, economic, financial and technical cooperation with industrialised countries under Article 212 TFEU or cooperation in the context of an association, as provided for in Article 217 TFEU, depending on the scope of the agreement and the third country concerned. Such cooperation, however, falls under the category of parallel competences, which do not lead to pre-emption of national policies. As a consequence,

³³ E.g.: 'The development cooperation dialogue shall aim at, inter alia ... pursuing inclusive economic growth...'.
³⁴ E.g. mutual exchange of information on legislation, the promotion of mutual access to services, the effective administration of services, exchange of views, dialogue, etc.
³⁵ E.g. the obligation of each side to readmit nationals who do not fulfil the conditions of entry or residence on the territory of the other party and to provide these persons with documents required for such purposes.
³⁶ C-377/12, *supra* note 32, para. 57.
³⁷ See also below (5.) regarding the issue of whether Member States could at all exercise Union competences in an intergovernmental way.

if limited to cooperation, such clauses cannot turn unexercised shared competences into exercised shared competences with the effect that, in accordance with Article 2(2) TFEU, Member States may no longer take internal acts in that area or enter into international agreements, as a consequence of Article 3(2) TFEU. For example, if the Union were to decide to set up an international mission to combat a certain disease (in relation to which it may not have established any internal Union policy) in developing countries, that does not mean that, in doing so, the Union exercises its competences of the Treaties to harmonise or coordinate public health matters in the Union with regard to that disease and therefore now ‘occupies the terrain’. Certainly, in acting in that field, Member States would have to ensure the efficiency of that external Union cooperation measure. However, as such, the external Union cooperation measure with that specific third country will not bar Member States from legislating internally or entering into a bilateral agreement with another (or even the same) third country in that area in the future, as long as national action is coordinated with the Union’s and does not hinder the achievement of the Union’s objectives. This is due to the specific legal nature of the cooperation under Articles 209 and 212 TFEU as ‘parallel competence’: the exercise of that competence by the Union does not result in Member States being prevented from exercising theirs (Article 4(4), 209(2) 2nd subparagraph, and 212(3) 2nd subparagraph TFEU). But even if an agreement concluded on the basis of Article 168 TFEU (public health) would contain such a cooperation clause, the effects of Article 2(2) and 3(2) TFEU would not be triggered as such clauses could not be seen as ‘occupying the terrain’.

Second, it appears difficult to consider that clauses which, in accordance with the principles recalled in *PCA Philippines*, are ancillary to the main objective of an agreement could be considered as being a policy area for which the test of Article 3(2) TFEU must be applied. We will turn to this complex matter below. In short, what is meant is this: if an international commitment contains clauses on cooperation in the area of transport and if these clauses are to be considered ancillary to the main objective of that agreement (in a way that the decisions to enter into that commitment by the Union shall not use the relevant Treaty provisions for transport policy as legal basis), it cannot be argued that the Union only has exclusive competence to conclude that commitment if it has already exercised to a large extent its competences related to transport policy internally.

2.2 Specific principles regarding exclusive external competences

2.2.1 *Concepts revisited: ‘shared does not mean mixed’; ‘internally shared – externally exclusive’; ‘external exclusiveness does not trigger pre-emption’*

It is important not to mix the concepts of shared competences and mixed external action. The first concept means that for certain policy areas, in particular those listed in Article 4(2) TFEU, the Union or the Member States may act,

unless the Union has already adopted rules to the effect that Member States are barred from acting. The second concept is different and means that in cases where the Union does not have competences for all areas covered by the international act, Member States must fill the gap and hence act together with the Union.

It is accepted that, under certain conditions, the Union may be exclusively competent for the conclusion of an international agreement in the area of shared competences, namely when the conditions of Article 3(2) TFEU are fulfilled. However, unwilling to give up or even diminish the practice of mixed agreements, Member States argue (*a contrario*) that the Union can therefore only conclude an agreement alone (without it being mixed) when these conditions are fulfilled. In other words, Member States see such non-exercised shared competences as national competences and hence take the view that whenever (parts of) an agreement falls under shared competences that have not yet been exercised in the sense of Article 3(2) TFEU, that agreement must be mixed. This has become a position of principle, ever since the so called 'General Arrangements' on EU Statements in multilateral organisations, a difficult compromise found in the aftermath of the entry into force of the Treaty of Lisbon. Member States read this arrangement in a way that EU and Member State action is required whenever it covers areas of shared competence that are not yet covered by Union rules.³⁸ In contrast, the Union institutions, in particular the Commission, see unexercised shared competences as competences attributed to the Union that the Union can therefore exercise, including externally for the first time. They therefore argue that 'shared does not mean mixed'.

This debate is at the heart of two pending cases already referred to above.³⁹ The Court will have to decide whether its pre-Lisbon case law (in particular *MOX Plant*, see 2.1.1. above) still holds and, therefore, whether the Union can act externally in a policy falling under shared competences that has not been first exercised internally in the sense of Article 3(2) TFEU (meaning in a way that the Union has become exclusively competent to act externally).

Soon after the entry into force of the Treaty of Lisbon, Member States and the Council nevertheless took the view that, even if the Union could, in law, act alone in shared-competence policy areas, the external action of the Union *should* in any event be limited to the exercised shared competences and that, whenever an international commitment covered issues falling outside these 'exercised shared competences', both the Union and its Member States should act. In other words, the Union should never act externally in areas of shared competence that have not yet been covered already by internal rules.⁴⁰ Since

³⁸ See Council Doc 15855/11 of 21 October 2011 as well as Statements of the United Kingdom (ADD2), available at <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015855%202011%20INIT>>.

³⁹ Pending cases CJEU, Case C-600/14, *supra* note 9, and CJEU, Case C-687/15, *supra* note 23.

⁴⁰ To that end, the scope of Union external action is frequently limited to 'areas in which the Union has adopted rules' (see for example Council Decision (EU) 2015/798 of 11 May 2015 Authorising the European Commission to Negotiate, on Behalf of the European Union, Amendments to the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Sub-

international instruments are obviously not organised along the lines of a division of competences between the Union and its Member States and since certain parts of international instruments, be they very minor, for which the Union has not yet adopted specific rules internally can in nearly all cases be identified, that position has, in practice and despite all clarification by the Court, led, as a rule, to 'mixed action' of the Union and Member States.

This position is motivated by the idea that the Union would become exclusively competent 'by exercise' and that hence Member States would lose their future liberty of action. This position is based on the assumption that the pre-emption principle applies to Article 3(2) TFEU in the same way as it does to Article 2(2) TFEU. This assumption is, however, wrong. Therefore, the opposition against letting the Union act externally even in non-exercised shared competence fields is largely unjustified.

Certainly, there are cases where a certain policy area is harmonised in the context of an international organisation without being harmonised previously at EU level, even if of course the EU would have been competent to do so. Examples of this are acts taken by different specialised international organisations, such as the Codex Alimentarius, the Organisation for International Carriage by Rail (OTIF) or the International Organisation of Vine and Wine (OIV) in the context of which rules for that sector are harmonised. Where the Union or the Member States, based on a position adopted by the Council under Article 218(9) TFEU, adhere to such rules, they have essentially the same effect as internal legislation. The conclusion of such an agreement by the Union would then indeed lead, in essence, to the same result as that set out in Article 2(2) TFEU: the Union has adopted a legally binding act in the sense of that provision (namely the decision to conclude that agreement or to participate in the adoption of such harmonisation within an international body), which pre-empts Member States from adopting internal national measures. That situation, however, is quite rare, because in most cases the Union will first strive to ensure that it adopts internal rules that correspond to or implement the relevant international norms.⁴¹ Furthermore, in fact, this conclusion can hardly appear to be anything extraordinary. On the contrary, even if Member States were to (collectively or independently) enter into such an international commitment (instead of the Union), they would be bound by international law and hence lose their freedom to take national measures that would collide with those set up by the international body.

stances that Deplete the Ozone Layer, *OJ* [2015] L 127/19, 22.5.2015). Such a limitation is, however, not only unnecessary, but it is in any event incorrect as the concept of 'having adopted rules' differs (and is narrower) from the rules of the Treaty laid down in Art. 3(2) TFEU (see 4. below).

⁴¹ See, for example, Council Decision 2014/699/EU of 24 June 2014 Establishing the Position to Be Adopted on Behalf of the European Union at the 25th Session of the OTIF Revision Committee as Regards Certain Amendments to the Convention Concerning International Carriage by Rail (COTIF) and to the Appendices Thereto, *OJ* [2014] L 293/26, 9.10.2014, which is subject to the pending CJEU, Case C-600/14 (OTIF), *supra* note 9. The Annex to that decision shows that for all the points on the agenda of that international organisation for which the Union had not yet established its own rules the position was taken by the Union to postpone the adoption of the rules by OTIF.

This being said, as the example of the Philippines case⁴² shows, commitments taken at international level rarely harmonise the policy field in a way that can lead to pre-emption. In such cases, international commitments are limited to general clauses like: ‘the Union and a third country agree to cooperate to reduce industrial emissions’. Where some of these emissions are not harmonised at Union level, for example by setting maximum emission standards, the entering into such cooperation clauses at international level does not lead to the Union ‘occupying the terrain’ of all industrial emissions and hence triggering the pre-emption effect of Article 2(2) TFEU. Or if, for example, the Union agrees with third parties to enhance safety conditions of international sea transport whereas certain aspects thereof are not harmonised at EU level (and there is no intention to do so), again, this does not lead to Member States being barred in the future from legislating in the fields which have, for whatever reason, not been harmonised at EU level. Yet again, where the international agreement goes as far as harmonising some of these rules, as for example in the OTIF case mentioned above, then and only then would the fact that the Union enters into this agreement and not its Member States lead to the latter being bound, not only under international law (by the agreement), but also under Union law.

These examples show that, in the case of the finding of exclusive EU competence under Article 3(2) TFEU, not only is Article 2(2) TFEU irrelevant, but also Article 2(1) TFEU cannot be applied in the same way. Indeed, it is not because there is a risk of affectation of the *acquis* in a certain area that in the whole policy area ‘only the Union may [...] adopt legally binding acts’ in the sense of that letter provision. Article 3(2) TFEU must be looked at for each international agreement and the finding that the conditions thereof are fulfilled leads to the conclusion that only the Union may enter into that specific agreement. It does not, however, lead to the conclusion that for all the matters covered by that agreement only the Union may in future legislate or act externally. After all, as will be discussed in detail below, Article 3(2) TFEU grants the Union exclusive competence, *inter alia*, on the finding that Union *acquis* may be affected. This is a finding that must be made for each individual international action. Therefore, the consequence, namely pre-emption of national measures, can a priori only be limited to that international action and cannot have any ‘spill-over effect’ on the whole policy area in question.

2.2.2 *Exclusive external competence beyond (legally binding) international agreements*

Article 2(1) TFEU provides that when the Treaties confer upon the Union’s exclusive competence in a specific area, only the Union may ‘legislate and adopt legally binding acts’. With regard to the conditions for exclusive external competence in areas other than those already covered by Article 3(1) TFEU, the Treaty uses a slightly different language: Article 3(2) TFEU sets out the

⁴² C-377/12, *supra* note 32, see in particular paras. 8 to 12.

conditions under which the Union is exclusively competent ‘for the conclusion of an international agreement’.

Under these rules, Member States are certainly barred, unless so empowered by the Union, from entering into international agreements.⁴³ It appears to be commonly agreed that, despite the wording of Article 3(2) TFEU (‘conclusion of an international agreement’), the same applies to the adoption, within an international body, of acts that produce legal effects.⁴⁴ Equally, in *Broadcasting Organisations*, the Court has accepted exclusive Union competence under that provision regarding the decision of opening negotiations of a future international agreement, without taking issue with the fact that such decisions do not constitute a ‘conclusion of an international agreement’ in the sense of Article 3(2) TFEU.⁴⁵

The scope of Article 2(1) TFEU, read in conjunction with Article 3(2) TFEU, however, is wider. Indeed, it follows from case law, that – to cite the Court in other circumstances⁴⁶ – Articles 2(1) and 3(2) TFEU are the expression of a general principle. Since the *ERTA* case, repeated on many occasions, the Court has decided that there was a risk that common rules may be adversely affected by international ‘commitments’ undertaken by Member States.⁴⁷ The term ‘commitment’, however, is clearly wider than that of international (legally binding) agreements. In one instance, the Court found that a member state violated the Union’s exclusive external competences when it submitted a proposal (which in itself does not produce legal effects) within an international body for action in that same body.⁴⁸ Furthermore, in their practice, both the EU institutions and Member States clearly endorse this reading. This is apparent, for example, in different inter-institutional arrangements that have been concluded between the Council and the Commission regarding the action of the Union and its Member States in international organisations, which typically do not adopt legal acts, let alone international agreements in the sense of Article 3(2) TFEU, but mainly acts of a technical and political nature. These arrangements, which can be binding on the institutions,⁴⁹ regularly refer to the division of competence between the Union and its Member States and provide, in essence, that for action that is covered by exclusive external competence of the Union, a position can only be taken by the Union and not by Member States.⁵⁰

⁴³ As was the case, for example, in CJEU, Case C-66/13, *Green Network*, *supra* note 16, see para. 14.

⁴⁴ As was the case, for example, in the facts underlying CJEU, Case C-399/12, *OIV*, *supra* note 24. See, for example, also Council Decision 2014/346/EU of 26 May 2014 on the Position to be Adopted on Behalf of the European Union at the 103rd Session of the International Labour Conference Concerning Amendments to the Code of the Maritime Labour Convention, OJ [2014] L 172/28, 12.6.2014, where – without referring explicitly to Art. 3(2) TFEU – the test for implied exclusive competences under Art. 3(2) TFEU is applied.

⁴⁵ CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, para. 103.

⁴⁶ CJEU, Case C-73/14, *Council v. Commission* (ITLOS), ECLI:EU:C:2015:663, para. 58.

⁴⁷ CJEU, Case C-22/70, *supra* note 3, para. 30.

⁴⁸ CJEU, Case C-45/07, *Commission v. Greece*, ECLI:EU:C:2009:81.

⁴⁹ CJEU, Case C-25/94, *Commission v. Council* (FAO), ECLI:EU:C:1996:114, para. 49.

⁵⁰ See, for example, the arrangements between the Council and the Commission regarding preparation for FAO meetings, statements and voting, available at <<http://www.eeas.europa>

2.2.3 *Empowerment of Member States under Article 2(1) TFEU vs authorisation of Member States to act as trustees of the Union*

Under Article 2(1) TFEU, Member States may take international commitments even though the Union is exclusively competent only 'if so empowered by the Union or for implementation of Union acts'. What Article 2(1) TFEU provides for is a real *delegation of competence*: as long as and to the extent that this delegation is granted, Member States regain sovereignty over the matter: Member States can legislate or conclude international agreements without being limited by Union constraints other than those ordering to stay within the delegation granted. This delegation is sometimes granted through legislative acts or in individual Council decisions,⁵¹ but is in practice rather rare.

That form of 'decentralisation' should, however, not be confused with situations of a very different kind that bear very different legal consequences. First, where the Union decides, for example, in a Directive (as it often does) to leave Member States with a (considerable) margin of discretion regarding the attainment of objectives set out therein, that does not mean that the Union has, in the sense of Article 2(1) TFEU, 'empowered' Member States to enter into international commitments in the area concerned or to implement EU law by international agreements.⁵² Second, a different issue is the situation where the Union tasks Member States to act (jointly) in the interest of the Union. This pragmatic solution has been confirmed by the Court for situations in which the Union cannot act, given, for example, that an international organisation does not allow regional integration organisations ('RIOs') to become a member thereof, or grants to RIOs only observer status without voting rights. In such cases, in tasking Member States to act, the Union does not delegate its competences, but only entrusts Member States' representatives to act in the interest of the Union. In such cases, the Union actually exercises its competence by adopting a position that is then represented externally by Member States acting as trustees of the Union. The Court recently confirmed this longstanding principle in *OIV*.⁵³ Despite that clarification, the Council has repeatedly failed to adopt decisions on proposals of the Commission and in one instance, in which that refusal was motivated partly by the fact that only Member States are represented in the international organisation in question, the Commission has once again decided to take the Council to Court.⁵⁴

On that basis, and given that as a matter of fact the Union is in many instances not a member of international organisations or party to agreements,

eu/delegations/rome/eu_united_nations/work_with_fao/ec_status_fao/index_en.htm>. See, in detail, F. Hoffmeister, 'Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organisations and Treaty Bodies', 44(1) *Common Market Law Review* 2007, 41-68.

⁵¹ See, in detail, A. Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States', 34 *Fordham International Law Journal* 2011, 1304-1345.

⁵² An example thereof has been analysed by Advocate General Bot in his conclusions in CJEU, Case C-66/13, *Green Network*, *supra* note 16, para. 79.

⁵³ CJEU, Case C-399/12, *OIV*, *supra* note 24.

⁵⁴ CJEU, Case C-687/15, *supra* note 23.

even if these instruments cover Union competences, including where they are entirely or largely exercised by internal legislation, Member States' representatives have certainly not disappeared from the international scene. On the contrary, they are often predominantly present, and the Union's actors, in particular the Commission, the High Representative/EEAS and the EU Delegations, often act behind the scenes rather than in the forefront – only that, in law, Member States act in the interest of the Union, based on positions established beforehand.

3. SCOPE OF 'EXPLICIT' EXCLUSIVE EXTERNAL COMPETENCES UNDER ARTICLE 3(1) TFEU

In the years immediately following the entry into force of the Lisbon Treaty, different views have arisen, as was to be expected, in relation to the scope of the Common Commercial Policy (CCP) as modified by that Treaty.⁵⁵ In *Daiichi Sankyo*,⁵⁶ a preliminary ruling case against the position taken by no less than nine intervening Member States, the Court has in essence decided that, after the Lisbon Treaty, the rules of the TRIPs Agreement are, within the EU, covered by the CCP. This position, however, is not shared by all Member States. The Commission therefore considered it necessary to bring two further cases to the Court that should bring final clarification on that matter.⁵⁷ In addition, in *Conditional Access*,⁵⁸ the Court has decided that an international agreement that aims to extend the application of EU internal market rules beyond the borders of the EU falls within the CCP and not within the internal policies concerned, mostly of shared competence. This, again, leads to such conventions being signed and concluded by the Union alone and not as mixed agreements, without it being necessary to examine if and to what extent the Union has become exclusively competent under Article 3(2) TFEU.

⁵⁵ See, *inter alia*, L. Ankersmit, 'The Scope of the Common Commercial Policy after Lisbon: The Daiichi Sankyo and Conditional Access Services Grand Chamber Judgments', 41(2) *Legal Issues of Economic Integration* 2014, 193-209; J. Larik, 'No Mixed Feelings: The Post-Lisbon Common Commercial Policy in Daiichi Sankyo and Commission v. Council (Conditional Access Convention)', 52(3) *Common Market Law Review* 2015, 779-799; M. Abner, 'Les Compétences Exclusives en Matière de Politique Commerciale Commune', 20 *Revue des Affaires Européennes* 2013, 589-594.

⁵⁶ CJEU, Case C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, ECLI:EU:C:2013:520.

⁵⁷ Pending CJEU, Case A-3/15 on the Marrakesh Treaty, which, in essence, obliges the contracting parties to introduce in their national legislation a limitation or exception to the protection of copyright to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. In its conclusions, published on 8 September 2016, the Advocate General has already taken the view described in this paper, see Opinion 3/15, ECLI:EU:C:2016:657, paras. 45 to 49. See also CJEU, Case C-389/15, *Commission v. Council* [pending], by which the Commission seeks annulment of a decision of the Council authorising the opening of negotiations on a revised Lisbon Agreement on Appellations of Origin.

⁵⁸ CJEU, Case C-137/12, *Commission v. Council*, ECLI:EU:C:2013:675 (hereinafter: *Conditional Access*). See further L. Ankersmit, *supra* note 55; J. Larik, *supra* note 55; M. Abner, *supra* note 55.

Further clarifications regarding the scope of CCP should come from an Opinion requested by the Commission under Article 218(11) TFEU in relation to the Free Trade Agreement (FTA) with Singapore.⁵⁹ In this case, the Commission has asked the Court to decide whether the Union has the competence to sign and to conclude the FTA alone, and not as a mixed agreement. The Commission has asked the Court specific questions about whether provisions of the agreement on the protection of foreign investment (in particular regarding the so called 'portfolio investments'), transport services, intellectual property, transparency and sustainable development as regards provisions of investments fall within the CCP, or whether they are covered by exclusive competences of the Union under Article 3(2) TFEU. The Court has attributed this case to the plenary and held the hearing in September 2016.⁶⁰ The upcoming Opinion of the Court should clarify if in future the Union is in a position to enter into broad-range trade agreements without having to undergo ratification in all 28 Member States, and is hence often considered to have precedent effect on other ongoing or terminated trade negotiations, in particular with Canada (CETA) and the United States (TTIP).⁶¹

Another policy area that is particularly relevant for the Union's external action and the scope of which has been disputed in the famous *Pringle*⁶² case is the monetary policy (exclusive EU competence under Article 3(1)(c) TFEU) and its delimitation from economic policy as a policy in which Member States merely coordinate within the Union (Article 5(1) TFEU). In this case, contrary to the ones mentioned above regarding the CCP, the Court has favoured a strict interpretation of the scope of the Union's exclusive competence. Furthermore,

⁵⁹ Opinion 2/15 [pending]. See Commission Press Release, 'Singapore: The Commission to Request a Court of Justice Opinion on the Trade Deal', 30 October 2014, available at <http://europa.eu/rapid/press-release_IP-14-1235_en.htm>. See further A. Hervé, 'L'Union Européenne comme Acteur Émergent du Droit des Investissements Étrangers: Pour le Meilleur ou pour le Pire?', 51(1) *Cahiers de Droit Européen* 2015, 179-234.

⁶⁰ For a description of arguments presented at the hearing, see D. Kleimann and G. Kübek, 'The Future of EU External Trade Policy - Opinion 2/15: Report from the Hearing', *EU Law Analysis*, 4 October 2016, available at <<http://eulawanalysis.blogspot.be/2016/10/the-future-of-eu-external-trade-policy.html>>.

⁶¹ See, for example, F. Hoffmeister, 'Wider die German Angst – Ein Plädoyer für die Transatlantische Handels- und Investitionspartnerschaft (TTIP)', 53(1) *Archiv des Völkerrechts* 2015, 35-67.

⁶² CJEU, C-370/12 *Pringle*, ECLI :EU:C:2012:756. See further B. de Witte and T. Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: *Pringle*', 50(3) *Common Market Law Review* 2013, 805-848; P. Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology', 20(1) *Maastricht Journal of European and Comparative Law* 2013, 3-11; G. Beck, 'The Legal Reasoning of the Court of Justice and the Euro Crisis – The Flexibility of the Court's Cumulative Approach and the *Pringle* Case', 20(4) *Maastricht Journal of European and Comparative Law* 2013, 635-648; P. Craig, 'Pringle and the Nature of Legal Reasoning', 21(1) *Maastricht Journal of European and Comparative Law* 2014, 205-220; P. Nicolaidis, 'The Legal Implications Of The Incompleteness Of The Economic And Monetary Union', 22(4) *Maastricht Journal of European and Comparative Law* 2015, 479-482; C. Koedooder, 'The *Pringle* Judgement: Economic and/or Monetary Union?', 37(1) *Fordham International Law Journal* 2013, 111-146; C. Murphy, 'Pringle – The Unconstitutional Constitutional Amendment Conundrum', *European Law Blog*, 6 December 2012, available at <<http://europeanlawblog.eu/?p=1305>>.

the delimitation of the conservation of marine biological resources under the Common Fisheries Policy (exclusive EU competence under Article 3(1)(d) TFEU) from, mainly, the environmental policy (shared competence par excellence under Article 4(2)(e) TFEU) can be difficult. Clarification on that issue should come from a further case that the Commission brought to the Court in 2015 against a decision of the Council approving the submission – on behalf of the EU and its Member States (and not the Union alone) – of a reflection document on a future proposal to the Commission for the Conservation of Antarctic Marine Living Resources for the creation of a marine protected area in the Weddell Sea.⁶³

4. 'IMPLIED' EXCLUSIVE EXTERNAL COMPETENCES UNDER ARTICLE 3(2) TFEU

4.1 General considerations on Article 3(2) TFEU

In accordance with Article 3(2) TFEU, the Union is 'also' – meaning in addition to the situations set out in Article 3(1) TFEU – exclusively competent to conclude an international agreement in three situations: i) 'when its conclusion is provided for in a legislative act of the Union'; ii) when its conclusion 'is necessary to enable the Union to exercise its internal competence'; and iii) 'in so far as its conclusion may affect common rules or alter their scope'.

This provision has given rise to most of the institutional disputes in the post-Lisbon Treaty discussion on external relations. In only a few months between September and November 2014, the Court handed down three rulings on the interpretation of Article 3(2) TFEU. In all these cases, handed down in Grand Chamber formations, the Court rejected arguments brought by Member States and the Council itself in favour of a restrictive interpretation of Article 3(2) TFEU. In *Broadcasting Organisations*, the Court annulled a Decision of the Council and the representatives of governments of the Member States meeting in the Council on the participation of the Union and the Member States in negotiations for a Convention of the Council of Europe on the protection of rights of broadcasting organisations, deciding that this 'mixed setup' of the negotiations breached Article 3(2) TFEU. In *1980 Hague Convention*, the Court handed down an Opinion, requested by the Commission in accordance with Article 218(11) TFEU, deciding that the 1980 Hague Convention of the civil aspects of international abduction was entirely covered by Union exclusive competences under Article 3(2) TFEU. In *Green Network*, finally, after a request for preliminary ruling by the *Consiglio di Stato* of Italy, the Court decided on the scope of exclusive competence of the Community before the entry into force of the Treaty of Lisbon, hence based on *ERTA* case law, regarding the conclusion of agreements with third states on certificates for the production of renewable energy. These three Court decisions were preceded by an extensive debate between no less than four Advocates Generals.

⁶³ CJEU, Case C-626/15, *Commission v. Council*, OJ [2016] C 59/5, 15.2.2016 [pending].

As such, the intensity of this litigation could appear rather surprising given that, as shown above, this provision is a mere consolidation of early case law of the CJEU. One of the reasons for this renewed litigation is certainly that, even if new rules of primary law directly stem from earlier case law, when translated into Treaty language, their interpretation can and does take on a new dynamic. Furthermore, earlier case law upon which this provision has been built has not always been entirely consistent, but has rather evolved in different waves, some more integration-friendly than others.⁶⁴ In the aftermath of the Lisbon Treaty, some Member States, and indeed the Council itself, argued for a narrower interpretation of the new rules than those prevailing in case law before the entry into force of the Lisbon Treaty. Finally, the entry into force of the Lisbon Treaty has certainly led the EU institutions, in particular the Commission, to review earlier practice where that case law had not been applied very consistently and to make a fresh attempt at using Union competences to their full extent with a view to achieving the goal of stronger and more unified EU external action. Therefore, the inclusion of the words used in that case law into the Treaty has quite logically led to different positioning, depending on the political interest pursued – which, as mentioned above, has proven to be fundamentally different between (at least many) Member States on the one hand, and EU institutions, in particular the European Commission, on the other.

Certainly, these judgments have not clarified all disputed issues of interpretation of Article 3(2) TFEU. And to the extent that this is the case, it is often not applied consistently in practice, which is the reason why the Commission has frequently issued statements in the Council and, in certain individual cases, decided to bring cases before the Court.⁶⁵ However, despite this ongoing debate, on the most commonly used situation, namely external exclusive competence because of risk of affectation of the *acquis* or risk of alteration of its scope (the third of the situations mentioned above), the cases already decided provide clear guidance for its application in practice. On that basis, it is now possible to draw a number of rather clear operational conclusions, which, with the necessary political will, could put an end to certain inter-institutional disputes, or, at least, help to rationalise the debate. Also with that objective in mind, a checklist for the assessment of Article 3(2) TFEU appears at the end of this chapter.

⁶⁴ As was recalled by Advocate General Bot in his conclusions in CJEU, Case C-66/13, *Green Network*, *supra* note 16, paras. 42-50.

⁶⁵ See pending CJEU, Case A-3/15, *supra* note 57, in relation to the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled, in which the Commission argues that the Union is exclusively competent, either because that Treaty falls under the CCP (see above) and/or because the author's rights affected by that Treaty are harmonised in the EU and that the EU is hence exclusively competent under Art. 3(2) TFEU. In CJEU, Case C-389/15, *Commission v. Council* [pending], *supra* note 57, the Commission seeks annulment of a decision of the Council authorising the opening of negotiations on a revised Lisbon Agreement on Appellations of Origin, arguing, *inter alia*, that the Union is exclusively competent under Art. 3(2) TFEU for the agreement to be negotiated.

4.2 Under which conditions ‘may’ common rules be ‘affected’ or their scope ‘altered’?

First of all, the Court has recalled that the notion of ‘affectation’ of the *acquis* does not mean that the Union is only exclusively competent under Article 3(2) TFEU where the international instrument is incompatible with existing *acquis* (‘common rules’), which would hence have to be adapted in order to comply with international obligations. As the Court has put it, Member States may not enter into international commitments ‘even if there is no possible contradiction between those commitments and the common EU rules’.⁶⁶ This conclusion – which is, despite all clarification by the Court, in practice frequently put in doubt – is the logical consequence of the fact that the Union is bound by international law and that therefore international law, even where it is in line or even identical to Union law at the time of its adoption, will limit the freedom of the Union to shape the development of its internal rules in the future.⁶⁷

The second important point is that Article 3(2) TFEU does not require that the international instrument in question indeed affect common rules or alter their scope, but only states that it ‘may’ do so. This wording clearly indicates that the scope of common rules does not actually have to be affected or altered, but rather that it is sufficient for an international agreement to be *capable of producing such effects*.⁶⁸ Advocate General Kokott rightly deduces from the foregoing that the international agreement must nevertheless entail the ‘specific risk’ of the scope of common rules being affected or altered. In other words, while the reality of affectation or alteration of the *acquis* is not to be demonstrated, it can also not be merely hypothetically presumed. In practice, however, this test is still applied inconsistently in such a way that exclusive competence is only found where and to the extent that affectation is effectively found and demonstrated.⁶⁹ Moreover, the test that will have to be applied can depend on the act that the EU institutions are to take: the assessment will naturally have to be fact-based for decisions to sign or conclude an agreement. Here, this test must be applied on the basis of the already negotiated texts. It will, however, have to be process-based for the decision to open negotiations as in *Broadcasting Organisations*, as it might have to be for the decision to adopt the position to be taken in an international body under Article 218(9) TFEU (depending on how far the international act to be taken has already been prepared); indeed, in such cases, the examination is forward-looking, based

⁶⁶ CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, para. 71; C-66/13, *Green Network*, *supra* note 16, para. 32.

⁶⁷ See, for example, A. Thies, *The European Court of Justice and External Relations Law* (Oxford: Hart Publishing 2014), at 165, 172.

⁶⁸ Opinion of Advocate General Kokott on CJEU, Case C-137/12, *supra* note 12, para. 100.

⁶⁹ See, for example, Council Decision (EU) 2015/1534 of 7 May 2015 on the Position to be Adopted on Behalf of the European Union at the International Maritime Organization during the 68th Session of the Marine Environment Protection Committee and the 95th session of the Maritime Safety Committee on the Adoption of Amendments to MARPOL, SOLAS and the 2009 Guidelines for Exhaust Gas Cleaning Systems, OJ [2015] L 240/61, 16.9.2015, where the scope of the decision is limited to the scope of the international act which ‘will affect’ Union rules and ‘therefore’ falls under Union exclusive competences (see recital 5).

on the envisaged subject matter for the negotiations. In other words, the Union is exclusively competent to enter into the negotiations, if, in all likelihood and based on the agenda for the negotiations ahead, the result may affect the *acquis* and will not substantially cover any issues that fall entirely out of competences conferred upon the Union by the Treaties. As the Court has put it in *Broadcasting Organisations*, Member States cannot question this by referring to the abstract possibility that negotiations may also relate to further issues that are not concretely envisaged at the moment of the decision to authorise negotiations, and which would be of national competence.⁷⁰

Hence, the Court rightly sees Article 3(2) TFEU as a dynamic and forward-looking safeguard rule to reduce the likelihood that unilateral international agreements and other commitments of Member States may limit the development of the *acquis* in the future.

4.3 What qualifies as ‘common rules’?

The next question is: what are the ‘common rules’, the possible affectation or alteration of which allow for the conclusion of the existence of exclusive competence? Indisputably, this is the case for any legally binding Union rule, meaning the Treaties themselves, legislative acts or individual acts, such as decisions as well as international agreements that the Union entered into. The fact that the relevant area of the international agreement is, in the EU, covered by rules spread out in various legal instruments is without relevance.⁷¹

An issue that is often disputed in practice is whether the notion of ‘common rules’ also refers to rules in the making, i.e., where, at the moment of assessing the conditions of Article 3(2) TFEU, the area is only covered by Commission proposals or even preparatory works like communications, green papers, Council conclusions calling upon the Commission to submit legislative initiatives, et cetera. This question is of particular relevance because, in practice, international and Union rules often develop in parallel, one being ‘pushed forward’ by the other. In earlier case law, the Court had already decided that the analysis under the ERTA case law must take into account not only the current state of EU law in the area in question, but also its future development, insofar as that would be foreseeable at the time of analysis.⁷² In its recent cases, the Court confirmed that point.⁷³ In *Green Network*, the Court ruled that, even though at the time the Union legislator had not regulated the specific issue (namely the support schemes for electricity produced from renewable energy sources), the relevant Directive contained the following review clause: the Commission had to present within a certain timeframe a report on experience gained with rules in place (providing for the coexistence of different national support systems),

⁷⁰ CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, paras. 94 and 95.

⁷¹ *Ibid.*, paras. 80-83.

⁷² Opinion 1/03, *supra* note 7, para. 126.

⁷³ Opinion 1/13, *1980 Hague Convention*, *supra* note 8, para. 74; CJEU, Case C-66/13, *Green Network*, *supra* note 16, para. 33 and, by reference to Opinion 1/03, in CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, para. 70.

and, where that appeared necessary, had to accompany this report with relevant proposals for further Union legislation.⁷⁴ Here again, without making this very explicit, the Court was manifestly guided (and rightly so) by the idea that unilateral international action of Member States could jeopardise foreseeable future development of Union law. It is with this objective in mind that the unavoidable grey areas need to be addressed on a case-by-case basis.

The situation for which in practice the issue of 'common rules in the making' is mostly discussed, is where either the Parliament (in the form of non-legislative Resolutions) or the Commission (in communications, green papers, etc.) have taken preliminary steps towards future legislation without the Council having taken a political position regarding such initiatives, for example by adopting Conclusions supporting such future initiatives and calling upon the Commission to come up with the relevant proposals. In such situations, Member States take the position that they cannot depend on political action of the Commission or the Parliament alone to turn a certain shared policy matter into an exclusive external competence of the Union, thereby hindering the unilateral international action of Member States. This position indeed appears founded as, in accordance with Article 16(1) TEU, it is for the Council to carry out the policymaking of the Union.⁷⁵ Therefore, it is the position that the Council may take on political initiatives of the Commission or the Parliament, which can turn positions of these institutions into positions of the EU. Yet again, in most cases, Commission initiatives follow up with political positions taken by the Council. And, in any case it is on a combination of existing legislation and envisaged or already prepared policy instruments that the assessment takes place.

It has not yet been decided by the Court if non-legally binding acts, such as recommendations or policy documents like Council conclusions, can constitute 'common rules'. On that issue, it appears important firstly to note that such acts often have some legal effect, since, as the Court has already decided, they can be a source of interpretation.⁷⁶ That does not, however, lead to such acts constituting common rules in themselves; they may only have to be taken into account for the interpretation of the content (and possibly indeed the scope) of such common rules. A recent case in which the Court assessed the consequences of the existence of such political acts is the so called *PFOS* case.⁷⁷ In this judgment, the Court decided that where the Council has already adopted a certain 'common strategy', without that strategy being enshrined in any legally binding act, Member States cannot take unilateral action on the inter-

⁷⁴ CJEU, Case C-66/13, *Green Network*, *supra* note 16, para. 62.

⁷⁵ See, most recently, CJEU, Case C-660/13, *Council v. Commission*, EU:C:2016:616, para. 16.

⁷⁶ Opinion of Advocate General Villalón in CJEU, Case C-399/12, *OIV*, ECLI:EU:C:2014:289; CJEU, Case C-188/91, *Deutsche Shell v. Hauptzollamt Hamburg-Harburg*, ECLI:EU:C:1993:24. See further F. Castillo de la Torre, 'Case C-188/91, *Deutsche Shell v. Hauptzollamt Hamburg-Harburg*, Judgment of 21 January 1993', 30(5) *Common Market Law Review* 1993, 1043-1050.

⁷⁷ CJEU, Case C-246/07, *Commission v. Sweden (PFOS)*, ECLI:EU:C:2010:203, para. 77. See further M. Cremona, 'Case C-246/07, *Commission v. Sweden (PFOS)*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2010', 48(5) *Common Market Law Review* 2011, 1639-1665.

national level that may undermine that common strategy. It is important to recall that the Court has explicitly noted that, in its application, the Commission has not asked the Court to decide that, because of that strategy, the area was covered by common rules leading to it being governed by exclusive EU competence. Therefore, the Court did not have to establish who, as between the EU or the EU and its Member States, had the competence to request such a listing of a certain substance with the Stockholm Convention. It merely decided that Sweden could not do so without prior Union coordination.

In the author's view, it follows from EU law as it currently stands that, unless non-legally binding acts such as recommendations or policy documents like Council conclusions actually constitute enough elements or form part of a *corpus iuris nascendi* to decide that common rules are in the making (see above), they do not trigger the shift provided for in Article 3(2) TFEU of the area being covered by exclusive external competence of the EU. The consequence of the adoption of such acts is nevertheless far-reaching: Member States are bound by their obligation of loyal cooperation, and, on that basis, may not enter unilaterally into any commitment on the international scene, be it legal or political, without prior Union coordination.⁷⁸

4.4 Does the analysis of the risk of affectation of common rules (or alteration of its scope) require an 'atomistic approach' or only one determining the (wider) 'relevant policy area'?

Once the acts are defined that, from a formal perspective, can make up the 'common rules', the fundamental question that the Court had to decide was this: is the risk of affectation or alteration to be assessed for each individual clause of the international agreement in question (or any other international act, like resolutions or decisions of an international body), or rather for the whole agreement or consistent policy parts thereof? This issue has been heatedly debated between and in the EU institutions (and despite the clear 'fresh guidance' from the Court is still often a matter of dispute). The Council has mainly followed the first approach, often referred to in Brussels' circles as the 'atomistic approach'. In practice, this means that the Commission was invited to show for each individual clause of the international act that the Union had already exercised its competence by adopting common rules covering the substance of each of these clauses. This approach often led to a burdensome, time consuming and most of all polarising phrase-by-phrase reading of the agreements in Council Working Parties. Most importantly, however, it led in many cases to the conclusion that an agreement or other international act must be entered into in a mixed manner (by the Union and its Member States), as with this approach, one or a few clauses are identified for which the Union has not yet adopted corresponding provisions (or is not in the process of doing so).

⁷⁸ See in more detail M. Cremona, *supra* note 77, at 1652 and A. Rosas, *supra* note 6, from 35.

In its recent rulings, however, the Court has clarified that, instead of such an atomistic approach, the risk of affectation of common rules or alteration of its scope must be carried out on the level of ‘the relevant policy area’.⁷⁹

To start with, it is interesting to note that the formula used by the Court to introduce its analysis seems, a priori, to support a more detailed analysis than the one it then actually carries out. In the first of the three rulings, the *Broadcasting Organisations* case, the Court referred itself to its *Lugano* Opinion and ruled that ‘it is important to note that, since the European Union has only conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a *specific analysis* of the relationship between the envisaged international agreement and the EU law in force, from which it is clear that such an agreement is capable of affecting the common EU rules or of altering their scope’ [emphasis added].⁸⁰ The words ‘specific’ and ‘relationship’ do, however, not indicate that the analysis is to take place in detail for each provision or commitment of the agreement. In this ruling, the Court still omitted to add a second part of its appreciation in the *Lugano* Opinion in which it had stated that ‘a *comprehensive and detailed analysis* must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive’ [emphasis added].⁸¹ This omission in the *Broadcasting Organisations* case is all the more remarkable as it was in this case that Advocate General Sharpston took a view that came closest to the one defended by the Council and the Member States appearing before Court. Indeed, Advocate General Sharpston argued that ‘everything depends on the content of the *commitments* entered into and their possible connection with EU rules’ in a way that the ‘application of the ERTA principle requires the *precise content of the obligations assumed* under both the international agreement and EU law to be determined’, requiring thus that a ‘*detailed and comprehensive comparison* [be undertaken] between the areas covered by the envisaged international agreement and EU law’.⁸² In Advocate General Sharpston’s view it is hence on the level of ‘commitments’ (and not areas) that a detailed and comprehensive analysis would have to take place, coming close to the atomistic approach that the Council followed (and often continues to follow) in practice. In the next two rulings, the Court then combined the two parts of the *Lugano* Opinion, using words on which Advocate General Sharpston had insisted, but in the end rejecting the approach she advocated. The Court now seems to consistently start from the formula that, ‘since the EU has only conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a *comprehensive and detailed*

⁷⁹ In its rulings (and also in Advocate Generals’ conclusions), this step of the analysis is mostly done together with the one on the extent of affectation (on this, see 4.4.5. below). In the view of the author, dealing with these two issues separately brings greater clarity to the analysis.

⁸⁰ CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, para. 74; referring to Opinion 1/03, *supra* note 7, para. 124.

⁸¹ Opinion 1/03, *supra* note 7, para. 133.

⁸² CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, paras. 107-109 of the conclusions.

analysis of the relationship between the envisaged international agreement and the EU law in force'.⁸³

Based on this formula, the Court then identifies the 'area concerned' or 'area covered' by the agreement and proceeds to a 'comprehensive and detailed analysis' on that level. In *Broadcasting Organisations*, the Court identified the 'area concerned' as the set of rules relating to 'the protection of neighbouring rights of broadcasting organisations', noting that 'those rights are the subject, in EU law, of a harmonised legal framework which seeks, in particular, to ensure the proper functioning of the internal market and which [...] established a regime with high and homogeneous protection for broadcasting organisations in connection with their broadcasts', concluding that 'the protection of those organisations' neighbouring rights – the subject matter of the Council of Europe negotiations – must be understood as the relevant area of the purpose of the present analysis'.⁸⁴ In *1980 Hague Convention*, the Court identified two areas concerned, namely 'on the one hand, the procedure for returning wrongfully removed children and, on the other, the procedure for securing the exercise of rights of access', listing for each of these areas certain (but not one by one all of the) provisions of the Convention at issue.⁸⁵ In *Green Network*, the Court notes that the agreements at issue

'essentially seek to determine on what conditions and under what arrangements electricity produced in a third State and imported into a Member State must be certified as green electricity by the authorities of that third State in order for it to be recognised as such in the internal consumer electricity market of that Member State, in particular, in connection with the implementation of a national support scheme for the consumption of green energy established by that Member State'.⁸⁶

It follows that the Court identifies in broad terms the content and the objectives pursued by the international act and determines in this way the 'policy area(s) concerned' by that act. The Court does not determine these areas as being as wide as 'environmental policy' or even 'water pollution', but also not at the level of the very content of the provisions at stake that would lead to a (possible endless) list of policy areas (like 'maximum level of (a) phosphates, (b) nitrates, (c) etc.', control measures, preventive measures or alike). The definition of the policy areas concerned serves to examine whether those areas are covered by Union common rules (existing or in the making) in a way that the competence of the Union must be considered to be exclusive, so as to ensure that Member States do not enter into international commitments that are liable of conflicting with Union rules. The Court does not seek to assess whether this applies to each of the provisions of the international act, let alone to each of the chapters or titles.

⁸³ Opinion 1/13, *1980 Hague Convention*, *supra* note 8, para. 74; CJEU, Case C-66/13, *Green Network*, *supra* note 16, para. 33.

⁸⁴ CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, paras. 78-80.

⁸⁵ Opinion 1/13, *1980 Hague Convention*, *supra* note 8, from para. 75.

⁸⁶ CJEU, Case C-66/13, *Green Network*, *supra* note 16, para. 39.

Therefore, it may well be so that for certain commitments to be entered into force corresponding Union rules may not yet exist, or may not even have been envisaged at all. And still, the Union would be exclusively competent to conclude the whole agreement (which does not necessarily mean that by doing so the Union exercises the policy for the ‘internal’ purposes under Article 2(2) TFEU, see 2.2.1. above). Such specific commitments are being dealt with as rules ‘ancillary’ to the ones for the ‘policy areas concerned’. The existence of such specific commitments in an agreement with no corresponding Union rules can hence not be invoked to state that the agreement at issue must be concluded as mixed, by the Union and the Member States.

4.5 When is the relevant area largely covered by common rules and who is to show that it is?

Against positions taken by many Member States and the Council itself, the Court has confirmed that it is not required that an agreement is entirely covered by Union rules or that the areas covered by the international commitments and those covered by EU rules coincide fully.⁸⁷ What matters is whether the areas concerned are ‘covered to a large extent’ by Union rules.⁸⁸ It is clear that this analysis necessarily depends on a case-by-case (but not clause-by-clause, see above) examination. It would therefore go beyond the scope of this contribution to analyse the Court’s assessment in each of the three recent cases *Broadcasting Organisations*, *1980 Hague Convention* and *Green Network*. That said, some abstract and horizontal conclusions can be drawn from these cases.

First, whether a policy area is ‘covered to a large extent’ by Union rules is not a quantitative analysis of counting the number of provisions for which precise Union rules exist against those for which this is not the case; indeed, as said, the Court does not enter into an article-by-article examination of the agreements concerned, but looks at the main objective pursued by an agreement. Coverage of a certain ‘quantum’ of rules of the agreement will certainly be key to show that the agreement is covered to a large extent by Union rules. A qualitative analysis must, however, prevail in all cases. In that regard, the example of *Broadcasting Organisations* shows that the Court first defines the area concerned and then subdivides it in different key features along the line of the objectives pursued by the different rules, and then examines if Union legislation, existing or in the making, pursues these objectives in a comparable

⁸⁷ CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, para. 69; Opinion 1/13, *1980 Hague Convention*, *supra* note 8, para. 72; CJEU, Case C-66/13, *Green Network*, *supra* note 16, para. 30.

⁸⁸ Opinion 1/13, *1980 Hague Convention*, *supra* note 8, para. 73. In *Broadcasting Organisations* and in *Green Network*, the Court uses the formula ‘area already largely covered’, which must be considered as being identical in substance to the one used in the other rulings, see CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, para. 70 and CJEU, Case C-66/13, *Green Network*, *supra* note 16, para. 31.

way, replying at the same time to arguments presented by those parties to the proceedings that argue against the existence of exclusive Union competence.⁸⁹

Secondly, it is interesting to note that the Court appears to be ready to identify certain key provisions in an agreement that, in themselves, appear to be decisive to conclude that unilateral action by Member States would risk undermining the uniform and consistent application of common EU rules⁹⁰ or risk achieving the objectives pursued by EU *acquis*.⁹¹ For example, where an international agreement contains definitions of core notions for the policy area concerned, the Court has found it 'undeniable' that such rules may have a 'horizontal effect on the scope of the body of common EU rules' relating to the area concerned.⁹² Equally, where an international agreement would affect the scope *ratione materiae* of the EU rules, that agreement would normally be capable of altering the scope of common EU rules.⁹³ The same conclusion will normally apply for a modification *ratione tempore* or *ratione loci* of the relevant Union rules. It also appears that the existence in an international agreement of horizontally applicable enforcement rules will also be a strong indication of affectation of the EU *acquis*, even more so where the EU *acquis*, too, contains certain (even if not the same) rules on enforcement.⁹⁴

Probably the most complex issue in that regard is the question of whether and when EU rules that do not fully harmonise the area concerned, but only establish minimum requirements, as is quite frequently the case, constitute common rules that may be affected or altered in scope by international rules, in particular where the latter also lay down minimum standards.⁹⁵ It is well known that, in various past cases, the Court decided that in such situations Member States remain competent, and that, therefore, such agreements are to be concluded as mixed agreements.⁹⁶ While there is no doubt that the Court has recognised this case law in recent cases by referring to the most relevant judgments, it appears questionable to what extent the Court would still come to the same conclusion in specific cases.

First of all, that case law is in any event only relevant for a specific situation. Relying on that case law, in *Broadcasting Organisations*, the Council and Member States argued that Union rules with regard to various rights of broadcasting organisations are merely minimum harmonisation. On that point, the Court followed its Advocate General and decided that that case law was not relevant to the situation at stake, where EU rules in that area do not cover all aspects of the rights of broadcasting organisations. That is quite different from the situation where an area is governed by EU rules, but Member States are left some

⁸⁹ CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, paras. 88-101.

⁹⁰ Opinion 1/13, *1980 Hague Convention*, *supra* note 8, para. 89.

⁹¹ CJEU, Case C-66/13, *Green Network*, *supra* note 16, para. 60.

⁹² CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, para. 87.

⁹³ CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, para. 98; CJEU, Case C-66/13, *Green Network*, *supra* note 16, para. 48.

⁹⁴ CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 11, para. 100.

⁹⁵ See also the in-depth analysis by F. Castillo de la Torre, *supra* note 5.

⁹⁶ See the discussion of this case-law in the Opinion of Advocate General Sharpston in CJEU, Case C-114/12, *Broadcasting Organisations*, *supra* note 12, in particular para. 112 with citations.

liberty as regards the intensity or harmonisation, such as, for example, rules laying down minimum space for animals during transport, allowing Member States to require higher standards of protection. Secondly, Union minimum rules frequently contain horizontal rules, such as definitions of core concepts, enforcement rules or clauses, requiring Member States to ensure that stricter national rules do not create situations of unfair competition or distort the internal market. Where the international act also contains such clauses (which then apply both within and outside the margins left to members), is there not a case to argue that the international act risks affecting the *acquis* all together? Thirdly, it is not clear how this case law fits within the principles that the Court has now so fiercely confirmed and established. Indeed, if the finding of exclusive competence is not dependent on the area being entirely covered by Union law, but if largely covered is sufficient, and if it is not relevant for that finding that the international rule does or may contradict Union rules, why should these principles not apply in the same way to the situation of international and Union rules, being only a minimum harmonisation? Indeed, on the one hand, by setting certain minimum rules and defining the latitude that is left to Member States, did the Union legislator not frame the policy area in a way that is similar to covering the area with rules set out in a Directive, giving Member States considerable room for implementation? And, on the other hand, both the minimum Union and international rules may develop in such a way that unilateral member state action in the 'free zone' may, as time goes by, become an obstacle for future Union policy in the matter.⁹⁷ Finally, even if that is not a legal argument strictly speaking, if the allowed minimum international standards were to be lower than the minimum standards set by the EU, could that not lead to *de facto* pressure to modify EU rules to maintain the competitiveness of Union production?

Finally, it is sometimes said that the burden of proof as to whether or not the relevant area is covered to a large extent by common rules lies with the Commission.⁹⁸ While this is certainly true when the Commission brings an action to the Court arguing that the Council violated Article 3(2) TFEU, it is not so during the procedure leading up to the adoption of the Union acts before the Council.

4.6 Checklist for the test under Article 3(2) TFEU

On the basis of the above, it appears possible to provide a checklist of issues to be assessed in different steps. This checklist of course only applies to the extent that the matter dealt with by the international act falls, in Union law, under one of the shared competences areas set out in Article 4(2) TFEU. Using such an approach may help to structure and rationalise the debate.

⁹⁷ In its conclusions in the pending CJEU Case A-3/15 (Marrakesh Agreement), *supra* note 57, the Advocate General takes in essence the view that the 'largely-covered-test' should apply in the same way with regard to minimum harmonisation Directives (see conclusions, paras. 140 and 141).

⁹⁸ See, for example, L. Woods and S. Peers, *supra* note 11.

Step 1: It is necessary to define the policy area concerned by the international act and to translate that into Union policies by defining the level of Union law and policy the corresponding EU policy area. In doing so, both the international act and the Union act must be assessed in reference to their main objective or, possibly, main objectives and not cut off in subsections or even clause-by-clause.

Step 2: It is necessary to screen the EU policy area concerned and identify the Union common rules in place or in the making, as common rules qualify any primary or secondary Union rule as well as any legislative development that can be expected in the foreseeable future. Soft law alone will not be enough, but may serve as an additional factor.

Step 3: It must be verified if these (future) Union common rules cover the EU policy area concerned, as defined in step 1, to a large extent. This will require a qualitative analysis and not, at least not primarily, a quantitative analysis (counting of clauses). The existence of horizontal provisions, such as definitions of core concepts or enforcement rules in either Union or international rules, will have to be taken into account in particular.

Step 4: Finally, the question must be asked if the content and the nature of the international commitments are such that the EU common rules may be affected or altered in their scope. In most cases, this will already flow from the analysis in step 3 as the mere existence of an overlap will lead to the conclusion that Union rules can be affected. Merely the risk of affectation or alteration is thus sufficient. Particular attention must be paid in cases where the international commitments and the EU common rules lay down minimum rules only.

5. ELEPHANT IN THE ROOM: ARE MEMBER STATES FREE TO COLLECTIVELY EXERCISE THEIR COMPETENCES IN THE CASE OF 'NON-EXERCISED SHARED COMPETENCES' OUTSIDE THE RULES OF THE TREATIES?

The analysis above shows that most, if not all, attempts by certain Member States and the Council as an institution to promote a restrictive interpretation of the Union's external competences have so far failed before the EU judicature. The Union's exclusive competences under Article 3(1) TFEU, notably the Common Commercial Policy, are given the larger scope as foreseen by the Treaty of Lisbon; the Union's development cooperation is confirmed to be a multifaceted policy in the context of which the Union can enter into commitments, including substantial sectoral policy commitments without the need to have recourse to other Union or national policies (which may trigger either mixity or the need for unanimity votes). In accordance with Article 3(2) TFEU, the Union is externally exclusively competent in shared-policy areas as soon as there is a risk of affectation of the *acquis* insofar as the existing *acquis* covers the area concerned by the international act to a large extent; and the Union can act externally even outside these margins of Article 3(2) TFEU, as long as it stays within the competences conferred upon it by the Treaties (Article 5(2) TEU). These principles, together with the integration of the Common Foreign and

Security Policy (CFSP) and the former third pillar (Area of Freedom, Security and Justice) into the Union corpus of policies, could in fact lead to much 'fade out of mixity'. Indeed, mixity is required where the Union does not possess the necessary competences under the Treaties to cover all the commitments of an international agreement or other act. However, as Union law stands, there is hardly any policy area in which the Union does not have competence, the bulk of it being policies where competences are shared between the Union and its Member States. Regarding these policies, as explained above, Member States have adopted the position that they should not be exercised externally, often in search of any hook possible to achieve the result that is politically intended, namely to continue the practice of mixed agreements, which, strikingly, is still omnipresent.⁹⁹

This discrepancy between the legal framework and the politically motivated result has led in post-Lisbon Treaty times to a renewed¹⁰⁰ discussion on the nature of the so-called non-exercised shared competences. The issue is, to put it simply, whether, when entering into an international commitment covering aspects of shared policy areas for which the Union is competent to act, but has not yet done so internally, Member States are free to decide, as a matter of political opportunity, between two options: either to exercise the Union competences so far unexercised and to enter into the international commitment by following the rules and procedures set out in the Treaties; or to act outside the Union rules, albeit collectively as 28 States, thereby not exercising Union competences and avoiding following the rules and procedures provided for in the Treaties. This issue has been underlying interinstitutional discussions of dozens of files, but so far has actually never reached the Kirchberg in Luxembourg.¹⁰¹ It is submitted that, if the Court were to reject the option of the intergovernmental exercise of Union competences, mixity would indeed *have to* disappear to a very large extent. Given the political insistence of Member States to maintain the practice of mixed agreements, this issue can indeed be qualified as 'the elephant in the room', which, so far, has not been addressed before the Court.

The defendants of the 'intergovernmental opportunity theory' sometimes invoke the principle of conferral, provided for in Article 5(1) and (2) TEU. That, however, is not convincing. Indeed, where the Treaties have conferred competences upon the Union, they do not depend on their prior exercise. The matter in fact depends on the interpretation given to Article 2(2) TFEU and on the appreciation of fundamental principles governing Union law. Article 2(2) TFEU provides that the 'Member States shall exercise their competence to the extent that the Union has not exercised its competence'. This provision could be read as leaving the Member States the freedom to decide not only to leg-

⁹⁹ In certain instances, the Council has operated to modify agreements tabled by the Commission with a view to 'creating mixity', see R. Passos, *The External Powers of the European Parliament*, in: M. López Escudero and P. Eeckhout (eds.), *The External Relations of the EU in Times of Crisis* (Oxford: Hart Publishing 2016), p. 84-128, at 113.

¹⁰⁰ See already in the past, for example, P. Eeckhout, *supra* note 3, from 216.

¹⁰¹ See also A. Rosas, *supra* note 6, at 26.

islate internally insofar as the Union has not exercised its competence, but also to collectively enter into international commitments in that regard.

A priori it would appear possible, as a fresh source to support this view, to refer to the Court's judgment handed down in November 2012 in the famous *Pringle* case.¹⁰² In this judgment, the Court took the view that the Treaty between Member States on the European Stability Mechanism (ESM) did not violate Article 3(2) TFEU, as that Treaty did not affect common rules or alter the scope of common rules in the sense of that provision. It could be deduced thereof that, since Article 3(2) TFEU relates to international agreements, the Court would also take the view that international agreements entered into by Member States in areas of Union competences, but which are not exercised by the Union, would be compliant with Union law. In our view, however, such a reading of that ruling is not convincing. First of all, the ESM is an agreement between EU Member States (*inter se* agreement) and not an international agreement. With regard to such agreements, the Court already decided in the past that Member States could act collectively outside the Treaties by concluding *inter se* agreements.¹⁰³ It is therefore unclear why, in *Pringle*, the Court referred to Article 3(2) TFEU at all (or did not reject the question asked to that effect by the Irish Supreme Court as being irrelevant). After all, this provision only applies to international agreements¹⁰⁴ and not to *inter se* agreements. For *inter se* agreements, the 'safeguard rule' of Article 3(2) TFEU is indeed not necessary: the principle of primacy of Union law applies not only to national legislation, but also to agreements between Member States.¹⁰⁵ Secondly, the ESM is not an agreement between all Member States, while the 'intergovernmental opportunity theory' precisely includes intergovernmental agreements between the 28 states. Third, the Court decided that the ESM fell within the economic policy, an area in which the Treaty limits the Union competences to coordination, different to that in the classical shared competence areas under Article 4(2) TFEU.

Another recent reference in this direction could be the Opinion of Advocate General Kokott in its conclusions in the *Conditional Access* case. In one point, the Advocate General indeed seems to imply that, in concluding the relevant international agreement as a mixed agreement of the Union and its Member States rather than as a Union-only agreement (as the Commission contended), the Member States 'simply exercise the discretion which they enjoy as EU law

¹⁰² CJEU, Case C-370/12, *Pringle*, *supra* note 62, see in particular paras. 99-107.

¹⁰³ See, in particular, CJEU, Joined Cases C-181/91 and C-248/91, *Parliament v. Council*, ECLI:EU:C:1993:271, para. 16.

¹⁰⁴ While Art. 3(2) TEU does not say this explicitly, this follows from the very context, in particular when read together with Art. 216(1) TFEU, which refers to international agreements of the Union 'with one or more third countries or international organisations'.

¹⁰⁵ CJEU, Case C-546/07, *Commission v. Germany*, ECLI:EU:C:2010:25, para. 42. See on this matter B. de Witte and T. Beukers, *supra* note 62, at 805, 828; B. De Witte, 'Old Fashioned Flexibility: International Agreements between Member States of the European Union', in: G. de Búrca and J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford: Hart Publishing 2000). In fact, if one were to apply Art. 3(2) TFEU to *inter-se* agreements, one would have to question the legality of recent *inter-se* agreements in the banking sector.

stands at present'.¹⁰⁶ Yet again, this very short passage is not elaborated on further and has so far not been confirmed by the Court itself.

It is submitted that the 'intergovernmental opportunity theory' is not in line with the Treaties. It is true without a doubt that insofar as an agreement in a shared competence area does not risk affecting the Union *acquis* (and none of the other conditions of Article 3(2) TFEU are fulfilled), Member States can act both internally by adopting national laws and externally by entering into international agreements or participating in multilateral international organisations. Article 2(2) TFEU can, however, not be read in a way to mean that, instead of applying the substantive and procedural rules of the Treaties, Member States may meet in the Council as Representatives of the Governments and decide collectively not to apply the rules of the Treaties, but to adopt an intergovernmental decision to enter into an agreement with a third country. The Council is not, as it sometimes appears to believe, acting 'double-hatted' on one specific agenda item as Council of the European Union and one on another (or even on the same) as an intergovernmental organisation, incidentally meeting in the Justus Lipsius building (the Council building in the European quarter of Brussels) with the support of the Council services, including its General Secretariat, its Legal Service or its interpreters.

On the contrary, Article 13(2) TEU, introduced by the Treaty of Lisbon, provides that each institution must act within the limits of the powers conferred upon it by the Treaties, and in conformity with the procedures, conditions and objectives set out in them. This rule is the expression of one of the most fundamental principles of Union law, the so-called Community method, which the Court recently (2015) had the occasion to recall in the *Air Transport Agreement Case*.¹⁰⁷ The rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves. Acting collectively outside the Treaties effectively circumvents the rules of the Treaties. It would lead to the very cancellation of the Community method as it denies the Commission's prerogative of initiative, turns voting rules in the Council from qualified majority, as a rule, to an intergovernmental practice of consensus, requires agreements to be ratified by all national Parliaments thereby reducing the role of the European Parliament to the last of 29 (or more) parliaments that is to give its consensus, and hinders legal control by the CJEU. The Member States have agreed, however, when entering into the Treaties, insofar as they have conferred competences upon the Union, to act on the basis of the substantive and procedural rules set out in these Treaties. It belongs to the most fundamental principles of Union law that, as the Court has equally recalled in the *Air Transport Agreement Case*,¹⁰⁸ the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States have limited their sovereign rights,

¹⁰⁶ CJEU, Case C-137/12, *Conditional Access*, *supra* note 58, see in particular para. 108 of the Opinion, *supra* note 12.

¹⁰⁷ CJEU, Case C-28/12, *Commission v. Council*, ECLI:EU:C:2015:282, para. 42.

¹⁰⁸ *Ibid.*, paras. 39 and 40.

in ever wider fields, and the subjects of which comprise not only those states but also their nationals. Under these Treaties, the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law, to the exclusion, if EU law so requires, of any other law. If the Council, however, were to be considered double-hatted in the way explained above, it would in some instances apply Union law and in others international law, even though in both circumstances it acts in areas in which competences have been conferred upon the Union by the Treaties (Article 5(2) TEU).

6. YEARS OF LITIGATION JUST TO RETURN TO SQUARE ONE. AND NOW?

A closer look at the issues discussed in this paper shows a rather anachronistic picture. With the Treaty of Lisbon, the Member States have added a few bricks that were missing in the foundation of the Union's external competences. From day one, however, the horses were held back or even ordered to run backwards.¹⁰⁹ In an unprecedented number of judgments, most of which rendered in the Grand Chamber formation, the Court has either confirmed pre-Lisbon case law or drawn relevant conclusions from the consequences of the recent Treaty changes. In other words, the Union now stands where it could have started from in November 2009, to put into practice the objectives that had been agreed upon.

Continuing the stream of litigation is no doubt exciting for lawyers. And, getting clarification from the Court may certainly still be required where specific issues remain unclear. The Court, however, will only be in a position to decide on individual cases, and, as much as these decisions foster legal understanding, the next case is always different. The EU cannot, however, run the risk of becoming a lame duck on the international scene, with international agreements taking years to be concluded or being kept hostage at national level for reasons that have nothing to do with the requirements of the agreement to be concluded. Renewed political consensus on the Union's external action, including a common understanding of the interpretation of the provisions and principles of the Treaties relating to external competences, which respects and builds upon the case law of the Court, is therefore unavoidable. In short, the practice of mixed agreements must be reviewed. It should be limited to situations in which the Union does not have all the required competences, which therefore legally requires joint action by the Union and its Member States.

To that end, the Union institutions must address Member States' objections. On the basis of the analysis conducted in this contribution, reassurances can

¹⁰⁹ R. Gosalbo-Bono and F. Naert report a 'repentance, almost regret', of some Member States which, while having contributed to its birth, decided to seek only limited use of its potential, R. Gosalbo-Bono and F. Naert, *The Reluctant (Lisbon) Treaty and Its Implementation in the Practice of the Council*, in: M. López Escudero and P. Eeckhout (eds.), *The External Relations of the EU in Times of Crisis* (Oxford: Hart Publishing 2016), p. 13-84, at 81.

be offered to Member States on at least three levels. First; the conclusion of agreements by the Union alone does not lead to uncontrolled 'power creep' by Brussels. Secondly, giving up 'mixity' does not lead to a disappearance of Member States and their representatives on the international scene. And, lastly, mixity is not required to ensure democratic legitimation.

As regards the first point, it must be recalled that the division of competences between the Union and its Member States results from the Treaties that the Member States have concluded.¹¹⁰ It does not depend on the Union's exercise. Even where an international commitment is not a mere copy/paste of existing internal Union rules, the fact that the Union enters into it alone does not lead to any 'creeping' transfer of power from member state capitals to Brussels. The author has sought to show in this contribution that the only situation in which that may happen, is when, for the first time, rules are harmonised in multilateral international agreements to which the Union adheres. Outside such exceptional situations, Union agreements, including in areas not yet internally harmonised, do not trigger the pre-emption effect. Where so required, the relevant Union or international acts, adopted at the moment of signature or conclusion, can clarify that the external exercise of the Union competences at stake is not intended to lead to any shift in the division of competences. That may allow representatives of Member States in the Council to more easily accept Union-only action, instead of mixity.

Second, fading out or at least considerably reducing mixity would certainly increase the visibility of Union actors, possibly in some instances at the expense of their counterparts from 28 Union Member States. This, however, is the essence of pursuing the objective of a stronger and more united EU and it would be surprising if such a development were considered undesired by those who have concluded the Treaty of Lisbon in the first place. This being said, accepting that the EU intervenes as an autonomous international actor does not lead to a disappearance of member states on the international scene. Indeed, as was discussed in this contribution, at this stage, the Union can often not act through its own actors on the international scene and Member States, therefore, continue to take on that role, as trustees of the positions agreed upon beforehand in the relevant bodies, mostly the Council, which, again, is made up of delegations of Member States. Furthermore, even where Union actors represent the Union outside (on the basis of the positions that in most cases were previously decided by the Council, made up of Member States), representatives of Member States can play a decisive role within the Union delegation that seeks to achieve the best possible common result.¹¹¹ Arguing that the Union is not yet ripe for fulfilling such a role, that it is not equipped with the necessary staff

¹¹⁰ It is, therefore, not understandable where the Union institutions are said to interfere with national policies when exercising the tasks that have been conferred upon them; see such argumentation of 'interference' in T. Konstadinides, *supra* note 24, at 679, 688. See, however, the refreshing statement: 'However, the convincing counter argument is that Member States have voluntarily joined the European Union, and thus it would be absurd to claim that the EU would be imposing any measures on them whatsoever', S.E. Karasamani, *supra* note 24, at 64, 69.

¹¹¹ The idea that the Court's judgment leads to 'the EU dancing alone' is simply not to the point, as stated by A. Ramalho, *supra* note 11.

or still requires the support of the much more experienced national diplomatic services, is just a way of refusing to accept that the Union has only become a highly respected player in the international trade environment because the decision was taken and effectively put into place in order to let the new player grow into this role. And it is, finally, also incorrect to argue that the necessity to first coordinate Union positions ‘in Brussels’ before being able to participate in meetings on the international scene would ‘hamper the work efficiency’ of either the EU or international organisations.¹¹² Indeed, the Union institutions are equipped with the necessary means to efficiently coordinate Union positions. Most importantly, however, in practice, many hours of coordination take place, but often much time is lost on competence discussions rather than concentrating on issues of substance.

Third, to those who claim that Union-only agreements do not have a sufficient democratic basis, it must be recalled that such agreements cannot be concluded without the consent of the directly elected European Parliament. Furthermore, nothing hinders Member States from fully involving their national parliaments in the internal decision-making process when it comes to establishing the positions that each member state is to take within the Council, regarding the different steps in the process of negotiating an international agreement, and in particular its signature and conclusion.

All these considerations, however, can of course only prevail if there is the necessary political will to effectively pursue and achieve the objectives that have been set out in the Treaty of Lisbon – a matter of policy, not of law. In the aftermath of the referendum decision in the UK to withdraw from the European Union, a renewed discussion on the future of Europe might be a good opportunity to seek renewed political consensus on the role of the Union on the international scene.

¹¹² As it has, in our view, been incorrectly claimed by C. Tournaye, *supra* note 24.

