

External Powers: Competences and Procedures

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Introduction

The constitutional distinction between internal and external affairs emerges with the rise of the territorial State. With political communities becoming defined by geographical borders, foreign affairs would refer to those matters that entailed an ‘external’ dimension.¹ The recognition of foreign affairs as a distinct public function received its classic formulation in the political philosophy of John Locke. Locke classified all external competences under the name ‘federative’ power, that is: ‘the power of war and peace, leagues and alliances, and all the transactions with all persons and communities *without the commonwealth*’.² This definition reveals the classic scope of the foreign affairs power. It was the power to decide over war and peace. The treaty power is thereby principally perceived as an appendage to the right of war.³ Foreign affairs were consequently considered part of the executive power. For relations between States were thought to have remained in a ‘natural state’. And their ‘law-less’ character provided an argument against the allocation of external powers to the legislative branch.⁴

In the modern world, this reasoning is not as persuasive as three hundred years ago. The military connotations behind foreign affairs would partly be replaced by the rise of the international treaty as a regulatory instrument. With the internationalisation of trade and commerce in the eighteenth century, a new foreign affairs occupation became consolidated: regulatory international agreements. The amount of tariffs for goods needed to be regulated;⁵ river navigation

¹ ‘Foreign’ partly derives from the Latin ‘foris’ meaning ‘outside’.

² J. Locke, *Two Treatises of Government* (P. Laslett, ed.) (Cambridge University Press, 1988), 365 – § 146.

³ See P. Haggemacher, ‘Some Hints on the European Origins of Legislative Participation in the Treaty-Making Function’ [1991] 67 *Chicago-Kent Law Review* 313, 318–19: ‘The treaty-making capacity was considered as an integral part of sovereignty. But mostly it appeared as a mere extension of the right of war . . . The sovereign’s power is shown to exert itself in two main directions, either to insure peace among the citizens within the State, or outside to warrant their security against threats from abroad. These external powers, comprising the right of legation as well as the faculty to enter treaties, tend to be subjoined to the power of war and peace.’

⁴ The unruly character of international society dissuaded Locke from placing the federative power into the hands of the legislature (see Locke (supra n. 2, § 147). And in whose hands did Locke place the federative power? Locke allocates this public function to the institution that exercises the executive function – the monarch (*ibid.*, § 148): ‘Though, as I said, the executive and federative power of every community be really distinct in themselves, yet they are hardly to be separated and placed at the same time in the hands of distinct persons. For both of them requiring the force of the society for their exercise, it is almost impracticable to place the force of the commonwealth in distinct and not subordinate hands, or that the executive and federative power should be placed in persons that might act separately, whereby the force of the public would be under different commands, which would be apt some time or other to cause disorder and ruin.’ Locke here took lessons from the English civil war and its fiercest critic, T. Hobbes. To minimise the danger of an armed conflict within the commonwealth, the use of force is to be monopolised in the hands of *one* institution. While the powers of internal execution and foreign policy are functionally distinct, they are united in the same institution for the sake of securing internal peace.

⁵ For example: 1860 Anglo-French Trade Agreement (Cobden–Chevalier Treaty).

had to be coordinated;⁶ and intellectual property rights required to be protected.⁷ This development led one of the drafters of the American constitution to suggest placing the treaty-making power ‘in between’ the rival constitutional claims of the executive and the legislative department.⁸

Globalisation and the economic interdependence of our time have much intensified the need for – peaceful – legal coordination between States. Yet, the Union is not a State – it is a Union of States. Is it nonetheless entitled to partake in the international affairs of the world? This depends – of course – on the structure of international law,⁹ as well as the European Treaties themselves. The 1957 Treaty of Rome had already acknowledged the international personality of the European Community,¹⁰ and the Treaty on European Union now grants such legal personality to the Union.¹¹

This chapter looks at the external powers and procedures of the European Union. Sadly, the Union – even after Lisbon – suffers from a ‘split personality’ when it comes to the constitutional regime for foreign affairs. It has a general competence for its ‘common foreign and security policy’ (CFSP) within the TEU; and it enjoys various specific external powers within the TFEU. Sections 1 and 2 shall analyse each of these competences and their respective nature. Section 3 looks at the procedural dimension of the external relations of the Union. How will the Union act, and which institutions need to cooperate for it to act? This depends on which of the two constitutional regimes applies. For while the CFSP is still characterised by an ‘executive’ dominance, the procedures within the Union’s special external powers are closer to the ‘legislative’ branch. Section 4 looks at two constitutional safeguards regulating the exercise of shared external competences: mixed agreements, and the duty of loyal cooperation.

⁶ For example: 1868 Rhine Navigation Convention.

⁷ For example: 1883 Paris Convention for the Protection of Industrial Property.

⁸ For A. Hamilton’s views, see: Chapter 3 – Section 1 above.

⁹ The capacity of international organisations to be international actors has been recognised since 1949, see: *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion (1949) ICJ Reports 174: ‘Accordingly, the Court has come to the conclusion that the Organisation is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is “a super-State”, whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims’ (*ibid.*, 179).

¹⁰ Ex-Article 281 EC. By contrast, the legal personality of the (Maastricht) European Union had been in doubt. In theory, it had no legal personality, as there existed no legal provision for it. In constitutional practice however, the (old) Union’s international legal personality was implicit for it had been entitled to conclude international agreements under ex-Article 24 (old) EU. For this old debate, see: D. McGoldrick, *International Relations Law of the European Union* (Longman, 1997), Chapter 2.

¹¹ Article 47 TEU.

1. The external competences of the Union

What are the Union's objectives as an actor on the international scene? The external objectives are spelled out in Article 21 TEU. After a commitment to some 'universal' objectives,¹² the provision commits the Union to a number of 'particular' objectives. These 'Union-specific' objectives are as follows:

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- (g) assist populations, countries and regions confronting natural or man-made disasters; and
- (h) promote an international system based on stronger multilateral cooperation and good global governance.

But in order to achieve these objectives, the Union cannot act as it pleases. For in accordance with the principle of conferral, the Union must act 'within the limits of the competences conferred upon it by the Member States in the Treaties'.¹³ And this principle applies to 'both the internal action and the international action of the [Union]'.¹⁴

The competences of the Union on foreign affairs can generally be found in two constitutional sites. Title V of the Treaty on European Union deals with the 'Common Foreign and Security Policy',¹⁵ whereas Part V of the Treaty on the

¹² Article 21 (1) TEU: 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.

¹³ Article 5 (2) TEU. ¹⁴ Opinion 2/94 (*Accession to the ECHR*), [1996] ECR I-1759, para. 24.

¹⁵ The TEU's common provisions also contain two external competences for the Union. Article 6 (2) TEU empowers the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Union's 'Neighbourhood Policy' finds its constitutional basis in Article 8 TEU. The Union is here entitled to develop a 'special relationship' with neighbouring countries so as to establish 'an area of prosperity and good neighbourliness'. To that effect, Article 8 (2) TEU allows the Union to conclude 'specific agreements

Table 11 Union External Policies

EU Treaty – Title V: CFSP	FEU Treaty – Part V: External Action
Chapter 1 General Provisions	Title I General Provisions
Chapter 2 Specific Provisions on the CFSP	Title II Common Commercial Policy
Section 1 Common Provisions	Title III Cooperation with Third Countries and Humanitarian Aid
Section 2 Common Security and Defence Policy	Title IV Restrictive Measures
	Title V International Agreements
	Title VI Union’s Relations with International Organisations and Third Countries and Union Delegations
	Title VII Solidarity Clause

Functioning of the European Union enumerates various external policies within which the Union is entitled to act.¹⁶ The relationship between both constitutional sites is complex and, in some ways, they are ‘living apart together’. They are living apart, as Article 40 TEU draws a constitutional dividing line between them; yet, they are also living together under a common roof, as the ‘General provisions on the Union’s External Action’ apply to both of them.¹⁷ This means that all of the Union’s external actions are guided by the same principles and objectives.¹⁸

This Section looks at the Union’s general competence for its CFSP first of all, before analysing the main external competences conferred in the Treaty on the Functioning of the European Union. These competences are thematically

with the countries concerned’. For an analysis of the European Neighbourhood Policy, see: M. Cremona, ‘The European Neighbourhood Policy: More than a Partnership?’ in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford University Press, 2008), Chapter 7.

¹⁶ A number of legal bases *outside* Part V of the TFEU also grant the Union external competences. For example, Article 168 (3) TFEU confers the power to adopt measures that foster cooperation with third countries and competent international organisations in the context of the Union’s Public Health policy. For other express treaty-making competences, see only: Title XX on the environment, where the Union is given a competence to conclude environmental agreements with third States under Article 191 (4) TFEU.

¹⁷ Title V – Chapter 1 (Articles 21 and 22) TEU. This is expressly confirmed for both constitutional sites in – respectively – Article 23 TEU and Article 205 TFEU. The latter states: ‘The Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.’

¹⁸ According to Article 21 (3) TEU: ‘The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union’s external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.’

arranged competences, yet there exists one exception: Article 216 TFEU. The provision grants the Union a ‘residual’ competence to conclude international agreements that horizontally cuts across all Union policies in the Treaty on the Functioning of the European Union. In some respects, it thus resembles Article 352 TFEU and warrants special attention. Finally, we shall look at the complex relationship between the two external relations regimes within the Treaties.

(a) The Common Foreign and Security Policy

The general competence of the Union on foreign affairs can be found in Title V of the Treaty on European Union. The second Chapter of this title deals with the ‘Common Foreign and Security Policy’. Article 24 TEU here grants the Union ‘competence in matters of common foreign and security policy [that] shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence’. This general competence is subsequently broken down into specific provisions dealing with the Union’s power to adopt decisions. And with regard to the conclusion of international agreements, Article 37 TEU generally states that ‘[t]he Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter’.

The Common Security and Defence Policy (CSDP) is seen as ‘an integral part’ of the CFSP.¹⁹ What is the scope of the CSDP? The latter ‘shall provide the Union with an operational capacity’, which the Union may use ‘on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter’.²⁰ While already bearing the name, the CSDP shall – in the future – also include the ‘progressive framing of a common Union defence policy’.²¹ This will happen once the European Council so decides. Importantly however, Article 42 TEU contains a constitutional guarantee not to prejudice the neutrality of certain Member States, and to respect other Member States’ obligations within the North Atlantic Treaty Organisation (NATO).²²

(b) The Union’s special external powers

Part V of the TFEU contains seven titles. After confirming the common principles and objectives of the Union’s external action,²³ three Titles deal with special external policies,²⁴ two subsequent titles concern institutional

¹⁹ Article 42 (1) TEU. ²⁰ *Ibid.* ²¹ Article 42 (2) TEU – first indent.

²² *Ibid.* – second indent. ²³ Article 205 TFEU. ²⁴ Part V – Titles II–IV of the TFEU.

matters,²⁵ and one Title establishes a ‘Solidarity Clause’.²⁶ The majority of the Union’s external competences are found in Titles II-IV. But we also find competences in the institutional provisions. Title V thus grants the Union a general competence to conclude international agreements,²⁷ and a special competence to conclude ‘association agreements’.²⁸ Finally, Title VI grants the Union a horizontal competence to establish and maintain cooperative relations ‘as are appropriate’ with international organisations, in particular the United Nations and the Council of Europe.²⁹

Let us briefly look at the three Titles dealing with specific external policies. Title II concerns the Union’s Common Commercial Policy (CCP). This is the external expression of the Union’s internal market. The Union is here tasked to represent the common commercial interests of the Member States on the international scene and to contribute to ‘the harmonious development of world trade’.³⁰ Under Article 207 TFEU, the Union is thereby expressly entitled to adopt (unilateral) legislative acts,³¹ and to conclude (bi- or multilateral) international agreements.³² The scope of the CCP covers all matters relating to trade in goods and services, commercial aspects of intellectual property, and foreign direct investment.³³ However, the competence encounters two express limits – one specific and one general. First, international transport agreements are specifically excluded from the scope of the CCP.³⁴ And Article 207 TFEU establishes a second – general – limit to the CCP competence. It states that the exercise of the CCP competence ‘shall not affect the delimitation of

²⁵ *Ibid.* – Titles I, V, and VI.

²⁶ *Ibid.* – Title VII. Despite its position within Part V of the TFEU, the solidarity clause is not a ‘real’ external policy of the Union. It imposes an obligation on the Union and its Member States to act jointly ‘if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster’ (Article 222 (1) TFEU); and this situation may not necessarily have foreign implications for the European Union. However, there are intimate constitutional links with the Union’s CFSP. For example, the Union is entitled to mobilise military resources made available by the Member States (*ibid.*).

²⁷ See Article 216 TFEU (discussed below).

²⁸ See Article 217 TFEU. These agreements are special agreements in that they create ‘special, privileged links with a non-member country which must, at least to a certain extent, take part in the [Union] system’ (see Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719, para. 9). The ‘European Economic Area’ Agreement between the European Union and Lichtenstein, Iceland and Norway is an association agreement.

²⁹ Article 220 TFEU. The European Union is a – full or partial – member of a number of international organisations. For a list of these organisations and the respective status of the Union, see: A. Missiroli, ‘The New EU “Foreign Policy” System after Lisbon: A Work in Progress’ [2010] 15 *European Foreign Affairs Review* 427 at 449 et seq.

³⁰ Article 206 TFEU.

³¹ Article 207 (2) TFEU: ‘The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.’

³² Article 207 (3) TFEU.

³³ Article 207 (1) TFEU. For a brief constitutional history of the scope of the CCP, see: P. Eeckhout, *EU External Relations Law* (Oxford University Press, 2011), Chapter 2.

³⁴ Article 207 (5) TFEU.

competences between the Union and the Member States'.³⁵ This – odd – formulation is best understood as a – bad – attempt to say that the CCP competence should find a systemic limit in the internal competences of the Union. This prohibition is exemplified in the rule that the exercise of the Union's CCP competence 'shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation'.³⁶

Title III deals with three related but distinct external policies of the Union in three chapters. All three policies allow the Union to adopt unilateral measures,³⁷ and to conclude international agreements with third States.³⁸ Chapter 1 concerns 'Development Cooperation', whose primary objective is 'the reduction and, in the long term, the eradication of poverty' in developing countries.³⁹ Chapter 2 extends various forms of assistance to 'third countries other than developing countries'.⁴⁰ The Union's competence in respect of humanitarian aid can be found in Chapter 3 of this Title. It permits the Union to provide 'ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations'.⁴¹

Finally, Title IV confers on the Union a competence to adopt economic sanctions. These are unilateral acts with a 'punitive' character. This competence has had an eventful constitutional history,⁴² and still constitutes a strange animal. For according to Article 215 TFEU, the Union is not entitled to act on the basis of this competence alone. It can only exercise this competence *after* the Union has exercised its CFSP competence. The latter must have been exercised through a decision in favour of 'the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries';⁴³ or, with regard to 'smart sanctions', against 'natural or legal persons and groups or non-State entities'.⁴⁴ In such a case, the Union is then entitled to implement this CFSP decision through the 'necessary measures' adopted under Article 215 TFEU. The provision indeed constitutes the central platform for the implementation of Resolutions of the Security Council of the United Nations.

(c) The residual treaty power: Article 216 TFEU

Under the 1957 Rome Treaty, the European Union only enjoyed two express treaty-making powers: one with regard to the Common Commercial Policy,

³⁵ Article 207 (6) TFEU. ³⁶ *Ibid.* ³⁷ See Articles 209 (1), 212 (2), 214 (3) TFEU.

³⁸ See Articles 209 (2), 212 (3), 214 (4) TFEU. ³⁹ Article 208 (1) TFEU.

⁴⁰ Article 212 (1) TFEU. ⁴¹ Article 214 (1) TFEU.

⁴² For a good account of that constitutional history, see: P. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law: the Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments* (Hart, 2001), 58 et seq.

⁴³ Article 215 (1) TFEU. ⁴⁴ Article 215 (2) TFEU.

and the other with regard to Association Agreements.⁴⁵ And while subsequent Treaty amendments have – significantly – increased the number of specific treaty-making competences, there existed no general ‘Treaty Power’ of the European Union.⁴⁶ This absence was noted. And in an attempt to provide the Union with a general competence to conclude international agreements the European Court invented a doctrine of implied external powers.

The existence of implied powers was expressed in *ERTA*.⁴⁷ The Court here acknowledged, among other things,⁴⁸ that the competence to conclude international agreements ‘arises not only from an express conferment by the Treaty’, ‘but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the [Union] institutions’.⁴⁹ The doctrine of implied treaty powers has had a complex constitutional history, and combines three jurisprudential lines.⁵⁰ The Lisbon Treaty has tried to codify the doctrine in Article 216 TFEU.⁵¹ The provision states:

The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.⁵²

While recognising the express treaty-making competences of the Union conferred elsewhere by the Treaties, the provision grants the Union a residual competence to conclude international agreements in three situations.

The first alternative mentioned in Article 216 (1) TFEU confers a treaty power to the Union ‘where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties’. This formulation is – strikingly – similar to the one found in the Union’s general competence in Article 352 TFEU. And if the Court decided to confirm this parallelism, the Union will have a residual competence to conclude international agreements that cuts across the jurisdictional scope of

⁴⁵ Ex-Articles 113 and 238 EEC.

⁴⁶ By contrast, Article 101 Euratom Treaty grants that Community a general competence in paragraph 1: ‘The Community may within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State.’

⁴⁷ Case 22/70, *Commission v. Council (ERTA)*, [1971] ECR 263.

⁴⁸ On the various aspects of this multi-layered ruling, see: R. Schütze, *From Dual to Cooperative Federalism: the Changing Structure of European Law* (Oxford University Press, 2009), 317 et seq.

⁴⁹ Case 22/70, *Commission v. Council* (supra n. 47), paras. 15–16.

⁵⁰ See Eeckhout (supra n. 33), Chapter 3; as well as: Schütze (supra n. 48), 290 et seq.

⁵¹ See European Convention, ‘Final Report Working Group VII – External Action’ (CONV 459/02), para. 18: ‘The Group saw merit in making explicit the jurisprudence of the Court[.]’

⁵² Article 216 (1) TFEU.

the entire Treaty on the Functioning of the Union.⁵³ This competence would be wider than the judicial doctrine of parallel external powers. For past doctrine insisted that an external competence derived from an internal *competence* – and thus did not confer a treaty power to pursue any internal *objective*.⁵⁴ Yet the first alternative in Article 216 textually disconnects the Union's external competences from its internal competences. The latter might therefore no longer represent a constitutional limit to the Union's treaty powers.

Regardless of what the Court will eventually make of this first alternative, Article 216 mentions two additional situations. The Union will also be entitled to conclude international agreements, where this 'is provided for in a legally binding act or is likely to affect common rules or alter their scope'. Both alternatives make the existence of an external competence dependent on the existence of internal Union law. Two objections may be launched against this view. Theoretically, it is difficult to accept that the Union can expand its competences without Treaty amendment through the simple adoption of internal Union acts.⁵⁵ Practically, it is hard to see how either alternative will ever go beyond the first alternative.⁵⁶ And in any event, as we shall see in Section 2(b) below, it is likely that alternatives two and three were the result of a fundamental confusion within the Constitutional Convention drafting the text behind Article 216 TFEU.

⁵³ It is true that Article 216 TFEU – unlike Article 352 TFEU – has no fourth paragraph excluding its use 'for attaining objectives pertaining to the common foreign and security policy'. The problem therefore has been raised whether Article 216 is even wider than Article 352 in that it may also be used to pursue a CFSP objective (see M. Cremona, 'External Relations and External Competence of the European Union: the Emergence of an Integrated Policy' in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 2011), 217 at 226). However, even in the absence of an express limitation, Article 40 TEU should – in theory – operate as an implied limitation to the scope of Article 216 (1) TFEU. For a discussion of Article 40 TEU, see Section 1 (d) below.

⁵⁴ The classic doctrine of implied external powers, as defined in Opinion 1/76, thus stated that 'whenever [European] law has created for the institutions of the [Union] powers within its internal system for the purposes of attaining a specific objective, the [Union] has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion' (Opinion 1/76 (*Laying-up Fund*), [1977] ECR 741, para. 3 – emphasis added). And to make it even clearer, the Court continued to state that the external powers flowed 'by implication from the provisions of the Treaty creating the internal power' (*ibid.*, para. 4 – emphasis added).

⁵⁵ On the notion of *Kompetenz-Kompetenz*, see: Chapter 2 – Section 2(a) above.

⁵⁶ In any event, the existence of the first alternative next to the second alternative should now – finally – put to rest the idea that the existence of (implied) treaty power depends on the existence of internal legislation. For a long time the European Court was, however, undecided whether implied external powers were automatically implied from internal powers; or whether they were contingent on the actual exercise of these internal powers through the adoption of internal legislation. The better view had always insisted on parallel external powers running alongside the Union's internal powers without regard to European legislation (See E. Stein, 'External Relations of the European Community: Structure and Process' [1990] 1 *Collected Courses of the Academy of European Law* 115 at 146).

(d) The relationship between the CFSP and the special external competences

What is the constitutional relationship between the Union's general CFSP competence and its special competences listed in the external relations part of the Treaty on the Functioning of the European Union? While both are (now) housed under the same common provisions, the borderline between the CFSP and the other external policies has always been hotly contested. The reason for this contestation lies in the distinct procedural regime for each constitutional site. While the CFSP is still – principally – governed by an intergovernmental procedural regime, the Union's special external policies are supranational in character.⁵⁷ The key provision governing the borderline between the intergovernmental CFSP and the supranational external Union policies is Article 40 TEU. The provision states:

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

The first indent protects the Union's supranational procedures and powers. It is designed to prevent the (European) Council from using the Union's CFSP competences, where recourse to one of the Union's supranational competences is possible. This is indeed the traditional – and, prior to Lisbon: exclusive – function of the provision.⁵⁸ The Court has interpreted this aspect of Article 40 in *ECOWAS*.⁵⁹ The case involved a legal challenge to the constitutionality of Union acts combating the spread of small arms and light weapons in the 'Economic Community of Western African States' (ECOWAS). Would these acts have to be adopted under the CFSP competence or the Union's competence in development cooperation? The Court found that the acts pursued a general foreign affairs aim and a specific development cooperation objective. However, as long as the CFSP objective was only *incidental*, the Union could adopt its acts

⁵⁷ On this point, see Section 3 below.

⁵⁸ In order to protect the *acquis communautaire*, the (old) TEU provided that 'nothing in this Treaty shall affect the Treaties establishing the European Communities' (ex-Article 47 (old) EU); and the Court of Justice was expressly called upon to police that border (see ex-Article 46 (f) (old) EU). For case-law under the old provision, see: Case C-170/96, *Commission v. Council (Airport Transit Visa)*, [1998] ECR I-2763; Case C-176/03, *Commission v. Council (Environmental Criminal Penalties)*, [2005] ECR I-7879; as well as Case C-440/05, *Commission v. Council (Ship-Source Pollution)*, [2007] ECR I-9097.

⁵⁹ Case C-91/05, *Commission v. Council (ECOWAS)*, [2008] ECR I-3651.

on the basis of its specific external competences. The decisive test was akin to a ‘centre of gravity’ test.⁶⁰

Has this result been ‘amended’ by the Lisbon Treaty? The Lisbon Treaty added the second indent to Article 40 TEU. The provision now equally protects the intergovernmental CFSP from a supranational incursion through the Union’s specific external competences. And as such it seems to ‘codify’ the *ECOWAS* solution. However, this might need to be qualified in one respect. *ECOWAS* had suggested that a Union act that equally pursued a CFSP and a non-CFSP objective would have to be split into two separate acts – with one act being adopted under the CFSP and the other under the special legal basis within the Treaties.⁶¹ And while this prohibition of a dual legal basis for a single act may still apply to unilateral Union acts, it is harder to imagine for the conclusion of international agreements. For the Lisbon Treaty has established a single unified procedure for CFSP and non-CFSP agreements alike.⁶²

How best to characterise the constitutional relationship between the CFSP competence and the Union’s special external powers? The Lisbon Treaty has abandoned the idea that the Union’s CFSP objectives form a separate set of Union objectives.⁶³ And in light of the general nature of these objectives, the CFSP should best be viewed as *lex generalis* to the *specialised* Union policies within Part V of the TFEU. This view will give priority – but not unconditional priority – to the special external competences of the Union. The latter will apply as a more refined constitutional mandate of Union foreign policy, wherever an action can be fully founded on that competence. By contrast, whenever a special Union objective is only incidental to the general foreign policy aim of a Union act, Article 40 TEU will henceforth protect the CFSP chapter. Thus a Union act that mainly pursues a general foreign policy objective, and only incidentally the objective of development cooperation, will have to be based on the Union’s CFSP.

⁶⁰ On the ‘centre of gravity’ test, see: H. Cullen and A. Charlesworth, ‘Diplomacy by other Means: the Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States’ [1999] 36 CML Rev 1243.

⁶¹ Case C-91/05, *Commission v. Council* (supra n. 59), paras. 75–7: ‘With regard to a measure which simultaneously pursues a number of objectives or which has several components, without one being incidental to the other, the Court has held, where various legal bases of the EC Treaty are therefore applicable, that such a measure will have to be founded, exceptionally, on the various corresponding legal bases. However, under [ex-]Article 47 [old] EU, such a solution [was] impossible with regard to a measure which pursues a number of objectives or which has several components falling, respectively, within development cooperation policy, as conferred by the EC Treaty on the Community, and within the CFSP, and where neither one of those components is incidental to the other. Since [ex-]Article 47 [old] EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community.’

⁶² On this point, see: Section 3(b) below.

⁶³ This view can still be seen in Case C-402/05P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, [2008] ECR I-6351.

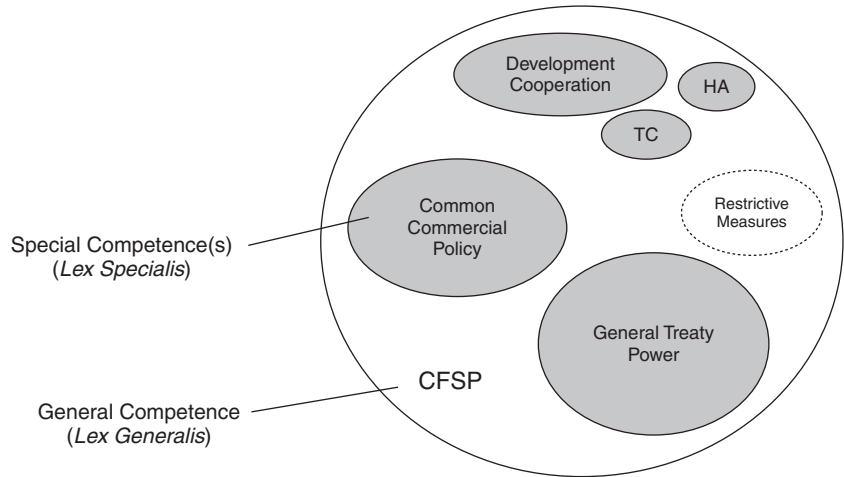


Figure 14 Relationship among Union External Competences

The characterisation of the CFSP competence as *lex generalis* turns it into a subsidiary competence – like Article 352 TFEU for the internal policies of the Union.⁶⁴ This subsidiary character establishes – with the exception of the Union competence on ‘restrictive measures’⁶⁵ – a reciprocal relationship between the CFSP and the special external competences. The broader the interpretation given to the latter, the smaller the remaining scope of the CFSP competence.

2. The nature of external competences

What is the nature of the Union’s external competences? What competence categories exist in the external sphere? With regard to their constitutional nature, the Treaties do not – as a rule – distinguish between internal and external competences. And indeed, within the areas of Union competences listed in Articles 3–6 TFEU, we find a number of external competences.⁶⁶

⁶⁴ However, unlike Article 352 TFEU, the Union’s general CFSP competence might not be open to be combined with a special competence. On the subsidiary character of Article 352 TFEU for the Union’s internal policies, see: R. Schütze, ‘Organized Change towards an “Ever Closer Union”’: Article 308 EC and the Limits to the Community’s Legislative Competence’ [2003] 22 YEL 79 at 95 et seq.

⁶⁵ The availability of this competence depends on the CFSP competence having first been exercised.

⁶⁶ For example, the common commercial policy is listed under the Union’s exclusive competences (see Article 3 (1) (e) TFEU), environmental policy is listed as a shared competence (see Article 191 (4) TFEU: ‘Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned’); and public health is listed as a complementary competence (see Article 6 (a) TFEU, and Article 168 (3) TFEU: ‘The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health’).

However, there are two exceptions to this rule. First, Article 2 TFEU specifically isolates the Union's CFSP competence from the ordinary competence categories – an arrangement that suggests a *sui generis* competence. Second, Article 3 (2) TFEU provides a source of exclusivity for the conclusion of international agreements that goes beyond the competence areas listed in Article 3 (1) TFEU.

Let us look at both derogations from the 'ordinary' competence categories discussed in Chapter 5.

(a) The *sui generis* nature of the CFSP competence

The nature of the Union's CFSP competence has been a legal problem ever since its inception. According to an early view, law adopted under a CFSP competence was 'classic' international law that contrasted with the supranational European law adopted under the 'ordinary' competences of the Union.⁶⁷ A second view, by contrast, argued that CFSP competences were part of one and the same European legal order.⁶⁸ The Lisbon Treaty has reinforced this second view. While recognising that the CFSP 'is subject to specific rules and procedures',⁶⁹ the Treaty on European Union and the Treaty on the Functioning of the European Union confirm that the two treaties 'have the same legal value'.⁷⁰ This includes secondary CFSP law. For indeed, CFSP competences will be exercised by the 'ordinary' legal instruments of the Union legal order,⁷¹ yet unlike 'ordinary' Union law, the direct effect of CFSP law appears to be exceptional.⁷²

How shall we then best characterise CFSP competences? The Treaties treat CFSP competences as distinct from the Union competences referred to in Articles 3–6 TFEU.⁷³ But what is their exact nature? We might find a first key to this question in Article 24 TEU dealing with the nature of the CFSP competence. The provision declares that '[t]he adoption of legislative acts shall be excluded' within the CFSP area. What will this mean? If the reference

⁶⁷ M. Pechstein and C. Koenig, *Die Europäische Union* (Mohr Siebeck, 2000), 5 et seq. The thesis that Union law differed from Community law had gained support from ex-Article 47 (old) EU, and Case C-402/05P, *Kadi* (supra n. 63), para. 202: 'integrated but separate legal orders'.

⁶⁸ K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law' (2006) 31 EL Rev 287 at 288.

⁶⁹ Article 24 (1) TEU. ⁷⁰ Article 1 TEU and Article 1 TFEU.

⁷¹ That is: decisions and international agreements. Prior to the Lisbon Treaty, the CFSP competence was to be exercised by a number of special legal instruments, such as 'joint actions' and 'common positions'.

⁷² On the doctrine of 'direct effect' of European law, see: Chapter 9 below. Direct effect is centrally determined by the European Courts. Yet the jurisdiction of the Court is generally excluded with respect to CFSP provisions and acts adopted on the basis of those provisions. The Treaties acknowledge only two express exceptions. First, CFSP law can be reviewed under Article 40 TEU. Second, the Court has jurisdiction to review the legality of 'decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union' (see Article 275 (2) TFEU).

⁷³ Article 40 TEU makes a clear distinction between the CFSP competence and 'the Union competences referred to in Articles 3–6 of the Treaty on the Functioning of the European Union'.

to 'legislative acts' were given a formal meaning, that is: referring to acts adopted under a legislative procedure, then Article 24 TEU would state the obvious. Indeed, neither the ordinary nor any of the special legislative procedures apply within the CFSP. By contrast, if the formulation is given a material meaning, then Article 24 TEU signalled the exclusion of *generally* applicable CFSP norms. A second key to the nature of CFSP competences might be found in Declaration 14 to the European Treaties, which underlines that the CFSP competence 'will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations'.⁷⁴ This formulation comes close to the idea of a parallel competence, but the better view insists that CFSP competences are 'special' or '*sui generis*' competences within the Union legal order.⁷⁵

(b) Article 3 (2) TFEU: subsequent exclusive treaty powers

We find a second exception to the 'ordinary' competence categories of the Union in Article 3 (2) TFEU. The provision provides a special rule for the Union's competence to conclude international agreements. It states:

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

In addition to the constitutionally fixed exclusive competences – mentioned in Article 3 (1) – the Union legal order thus acknowledges the possibility of a *dynamic* growth of its exclusive competences in the external sphere. We shall look at the constitutional practice of subsequently exclusive powers first, before criticising its underlying constitutional theory.

(i) Three lines of exclusivity: codifying constitutional practice?

According to Article 3 (2), the Union may subsequently obtain exclusive treaty-making power, where one of three situations is fulfilled. These three situations are said to codify three famous judicial doctrines. These doctrines were developed in the jurisprudence of the European Court prior to the Lisbon Treaty.⁷⁶

According to the first situation, the Union will obtain a subsequently exclusive treaty-making power when the conclusion of an international agreement 'is provided for in a legislative act'. This formulation corresponds to the 'WTO

⁷⁴ Declaration (No. 14) concerning the Common Foreign and Security Policy.

⁷⁵ M. Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' [2003] 40 CML Rev 1347 at 1354.

⁷⁶ On the three judicial doctrines, see: R. Schütze, 'Parallel External Powers in the European Community: from "Cubist" Perspectives towards "Naturalist" Constitutional Principles?' [2004] 23 YEL 225.

Doctrine'. In *Opinion 1/94* on the compatibility of the WTO Agreement with the Treaties,⁷⁷ the Court had stated: '[w]henver the [Union] has concluded in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on the institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts'.⁷⁸ Article 3 (2) codifies this judicial doctrine. However, the codification is more restrictive, as it excludes the first alternative ('provisions relating to the treatment of nationals of non-member countries') from its scope.

The second situation mentioned in Article 3 (2) TFEU grants the Union an exclusive treaty power, where this 'is necessary to enable the Union to exercise its internal competence'. This formulation appears to codify the 'Opinion 1/76 Doctrine',⁷⁹ albeit in a much *less* restrictive form. In its jurisprudence the Court had indeed confined this second line of subsequent exclusivity to situations 'where the conclusion of an international agreement is necessary in order to achieve Treaty objectives *which cannot be attained by the adoption of autonomous rules*',⁸⁰ and where the achievement of an internal objective is 'inextricably linked' with the external sphere.⁸¹ None of these restrictions can be found in Article 3 (2) TFEU. And in its unqualified openness, the second situation comes close to the wording of the Union's 'residual' legislative competence: Article 352 TFEU. The almost identical wording of Article 3 (2) and Article 216 TFEU indeed suggests that 'implied shared competence would disappear'; yet, this would be 'a wholly undesirable departure from the case law'.⁸²

Finally, the third situation in Article 3 (2) appears to refer to the Court's 'ERTA doctrine'. Under the ERTA doctrine,⁸³ the Member States are deprived of their treaty-making power to the extent that their exercise affects internal European law. Each time the Union 'adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries *which affect those rules*'.⁸⁴ The principle behind ERTA is to prevent an international agreement concluded by the Member States from undermining 'the uniform and consistent application of the [Union] rules and the proper functioning of the system which they establish'.⁸⁵ Has Article 3 (2) properly codified this third judicial line of subsequently exclusive powers? The third alternative in Article 3 (2) – strangely – breaks the link between a

⁷⁷ *Opinion 1/94 (WTO Agreement)*, [1994] ECR I-5267. ⁷⁸ *Ibid.*, para. 95.

⁷⁹ *Opinion 1/76 (Laying-Up Fund)*, [1977] ECR 741. On the evolution of the *Opinion 1/76* doctrine, see: Schütze (supra n. 76), 250 et seq.

⁸⁰ *Opinion 2/92 (Third Revised Decision of the OECD on national treatment)*, [1995] ECR I-521, Part V – para. 4 (emphasis added).

⁸¹ Case C-476/98, *Commission v. Germany (Open Skies)*, [2002] ECR I-9855, para. 87.

⁸² M. Cremona, 'A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty', EUI Working Paper 2006/30, 10.

⁸³ Case 22/70, *Commission v. Council* (supra n. 47). ⁸⁴ *Ibid.*, para. 18 – emphasis added.

⁸⁵ *Opinion 1/03 (Lugano Convention)*, [2006] ECR I-1145, para. 133.

Member State agreement and internal European law, and replaces it with an analysis of the effect of a *Union* agreement on European rules. This simply must be an ‘editorial mistake’ on the part of the Treaty-makers, and it is hoped that the Court will correct this as soon as possible.

(ii) Subsequent exclusivity: criticising constitutional theory

The Treaties take great care to clarify that the question of competences is a ‘constitutional’ question. The competences of the Union should thus be increased solely by (ordinary) Treaty amendment.⁸⁶ Should we not expect that the nature of a competence – that is: the degree to which Member States remain entitled to act – is equally constitutionally fixed? In other words, is there not something strange in the idea that the Union can – without Treaty amendment – change its order of competences? As we saw above, this is not the position of the Lisbon Treaty, nor has it been that of the European Court. For the latter expressly subscribed to the theory of subsequently exclusive powers in Opinion 2/91:

The exclusive or non-exclusive nature of the [Union]’s competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the [Union] institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis.⁸⁷

But even if Article 3 (2) and the European Court embrace the idea of subsequently exclusive powers, should we uncritically accept this theory? A number of theoretical objections may be advanced against it.⁸⁸ Indeed, identifying the effect of internal Union legislation with exclusive external competences raises serious objections from the perspective of the hierarchy of norms. The scope of the Union’s exclusive competences is a constitutional question and, as such, it should – at least theoretically – only be extended by means of constitutional amendment. It thus seems a feat of legal alchemy to permit the Union to modify its order of competences, especially because this would allow the European legislator to escape the reach of the subsidiarity principle.⁸⁹ But the exclusionary effect in the first and third situation in Article 3 (2) stems from the effect of Union legislation. And this legislative ‘exclusivity’ is more fragile than constitutionally exclusive powers, since it can again be repealed by a legislative act.

The two phenomena of constitutional and legislative exclusivity should therefore be kept apart. And while the Lisbon Treaty-makers couched the effects mentioned in Article 3 (2) TFEU in terms of exclusive competences,

⁸⁶ On the idea of ‘Kompetenz-Kompetenz’, see: Chapter 2 – Section 2 above.

⁸⁷ Opinion 2/91 (*ILO Convention 170*), [1993] ECR I-1061, para. 9.

⁸⁸ Schütze (*supra* n. 48), 305 et seq.

⁸⁹ C. Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (Nomos, 1999), 95.

they should have been better expressed in the more nuanced vocabulary of the doctrine of legislative preemption.⁹⁰

3. External decision-making procedures

How will the Union externally act, and through which procedures? This depends on the type of act adopted. An analysis of decision-making procedures within the Union's external powers must distinguish between unilateral acts and international agreements.⁹¹ Unilateral external acts are acts that are single-handedly adopted by the European Union but directed at a third party.⁹² By contrast, international agreements are agreements between the Union and a third party, and thus require the consent of the latter. We find *both* instruments within both constitutional sites for external relations. However, while the constitutional regime for unilateral acts is fundamentally different between the CFSP and the specialised TFEU external policies, both share the same treaty-making procedure.

This third section looks at the procedural regime for unilateral acts and international agreements. It will thereby concentrate on the decision-making procedure for unilateral CFSP decisions. The reason for this is that unilateral acts adopted under the specialised external competences generally follow the (ordinary) legislative procedure;⁹³ and, as formal Union legislation, their adoption was already discussed in Chapter 5. All international agreements on the other hand, are concluded according to procedures found in the Treaty on the Functioning of the European Union. The 'ordinary' treaty-making procedure is set out in Article 218 TFEU. The provision constitutes a *procedural* link between the two external relations sites, which – like the *personal* link in the form of the High Representative of FASP – has been introduced by the Lisbon Treaty.

Importantly, there is also an *institutional* link between the CFSP and the Union's specialised external policies. It is expressed in Article 22 TEU – placed in the Chapter on 'General Provisions on the Union's External Action'. According to this provision, the European Council must 'identify the strategic interests and objectives of the Union'. And these decisions on the strategic interests of the Union 'shall relate to the common foreign and security policy

⁹⁰ On the doctrine of preemption, see: Chapter 10 – Section 3 below.

⁹¹ This section will not deal with 'positions' adopted within an international organisation.

⁹² Such unilateral acts might range from development aid to economic sanctions. For an example of the latter, see: (Council) Regulation 204/2011 concerning restrictive measures in view of the situation in Libya ([2011] OJ L 58/1), as well as: (Council) Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban ([2002] OJ L139/9).

⁹³ See Article 207 (2) TFEU (emphasis added): 'The European Parliament and the Council, acting by means of regulations in accordance with the *ordinary legislative procedure*, shall adopt the measures defining the framework for implementing the common commercial policy.'

and to other areas of the external action of the Union'.⁹⁴ The European Council is thus the Union's – formal or informal – guide and pacemaker for all its external actions.⁹⁵

(a) The 'specificity' of CFSP decision-making procedures

The decision-making procedures for unilateral CFSP acts are specific to the CFSP.⁹⁶ The specificity of CFSP procedures manifests itself in the institutional arrangements for decision-making, as well as the voting requirements in the Council. Their 'intergovernmental' character differs significantly from the supranational procedures governing all other external Union policies.

(i) Institutional actors and institutional balance

The original institutional arrangement within the CFSP has been described as 'confused'.⁹⁷ And while the Lisbon Treaty has simplified some matters, the constitutional principles governing the institutional dimension within the CFSP remain complex.

The central *policy* maker is the European Council, which identifies the strategic interests and general guidelines for the CFSP. It acts by means of decisions on a recommendation from the Council.⁹⁸ These decisions not only set the direction of the European foreign policy, but also its pace. (For decisions of the European Council will, as discussed below, have consequences for the voting arrangements in the Council.) The President of the European Council will 'at his level and in that capacity' ensure the external representation of the Union on issues concerning the CFSP without prejudice to the representational role of the High Representative of Foreign Affairs and Security Policy.⁹⁹

The Council (here the Foreign Affairs Council) is the central *decision-making* body in the CFSP. It shall 'frame' the CFSP and 'take the decisions necessary for defining and implementing it' on the basis of the strategic interests and general guidelines adopted by the European Council.¹⁰⁰ This central decision-making role extends to the conclusion of international agreements.¹⁰¹ The High Representative of Foreign Affairs and Security Policy, who will chair the Foreign Affairs Council, will generally assist the Council in its tasks.¹⁰²

⁹⁴ Emphasis added

⁹⁵ The European Council indeed regularly decides on the strategic interests of the Union. It is interesting to note, however, that the European Council has come to prefer 'informal' strategies (see Strategy on Small Arms and Light Weapons) over 'formal' strategies (see Common Strategy 1999/414 on Russia, [1999] OJ L157/1). On this point, see: Eeckhout, *EU External Relations Law* (supra n. 33), 476–7.

⁹⁶ See Article 24 (1) TEU.

⁹⁷ P. Eeckhout, *External Relations of the European Union* (Oxford University Press, 2004), 420.

⁹⁸ See Articles 22 (1) and 26 (1) TEU. ⁹⁹ Article 15 (6) TEU. ¹⁰⁰ Article 26 (2) TEU.

¹⁰¹ See Article 218 (2) TFEU: 'The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.'

¹⁰² Article 27 (1) TEU.

What is the role of the supranational Union institutions? The role of the Commission within the CFSP is minimal and ill defined. It ‘may’, with the High Representative, make joint proposals to the European Council on the strategic interests of the Union;¹⁰³ and it ‘may’ support proposals by the High Representative to the Council, but this joint right of initiative is shared with any Member State.¹⁰⁴ What is the role of the European Parliament? The role of the European Parliament is even smaller than that of the Commission. Its principal prerogative lies in being regularly consulted ‘on the main aspects and the basic choices’ within the CFSP and having its views taken into consideration.¹⁰⁵ Parliament can ask questions and make recommendations to the Council, and it must hold a debate, twice a year, on the state of the CFSP.¹⁰⁶

(ii) Voting arrangements in the Council

The Council is the central decision-taker within the CFSP. The Council voting rules are set out in Article 31 TEU. The general rule is that the Council acts unanimously. However, unlike other Union policies, the CFSP recognises the constitutional possibility of a ‘constructive abstention’. It is constructive in that it allows the Council to act, despite an abstention, by unanimity. The abstaining Member State, having made a formal declaration, is not obliged to apply the Union decision.¹⁰⁷

In derogation from the unanimity rule, Article 31 (2) enumerates a number of exceptional situations in which qualified majority voting applies. The Council can adopt a decision by qualified majority: (i) when it is based on a decision of the European Council; (ii) when it is based on a proposal from the High Representative following a specific request from the European Council; (iii) when it implements its own decisions; or (iv) when appointing a special representative (in accordance with Article 33 TEU).¹⁰⁸ This list of categories may be extended if the European Council so decides by unanimity.¹⁰⁹ Importantly, what constitutes a qualified majority under Article 31 TEU differs according to the category involved. This follows from Article 238 (2) TFEU,¹¹⁰

¹⁰³ Article 22 (2) TEU.

¹⁰⁴ Article 30 TEU. The Lisbon Treaty appears thus to have extinguished the Commission’s autonomous right of initiative within the CFSP.

¹⁰⁵ Article 36 (1) TEU. ¹⁰⁶ Article 36 (2) TEU.

¹⁰⁷ This procedural mechanism finds a quantitative limit in one-third of the Member States comprising one-third of the population of the Union.

¹⁰⁸ Article 33 TEU states: ‘The Council may, on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy, appoint a special representative with a mandate in relation to particular policy issues. The special representative shall carry out his mandate under the authority of the High Representative.’

¹⁰⁹ Article 31 (3) TEU.

¹¹⁰ The provision states: ‘By way of derogation from Article 16(4) of the Treaty on European Union, as from 1 November 2014 and subject to the provisions laid down in the Protocol on transitional provisions, where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority

which distinguishes between an ‘ordinary’ and a ‘special’ qualified majority for Council decisions, depending on whether the Council acts on a proposal from the High Representative. With the exception of category (ii), all CFSP decisions would thus seem to require a special qualified majority.

Finally, Article 31 TEU establishes two ‘exceptions to the exception’ of qualified majority voting. For it sets two absolute limits to decisional supranationalism. The first is of a political nature, the second of a constitutional nature. The political limit incorporates the ‘Luxembourg Compromise’ into the CFSP.¹¹¹ Any Member State may ‘for vital and stated reasons of national policy’ declare that it opposes a decision to be taken by qualified majority voting.¹¹² By contrast, the second limit is of a constitutional nature: any qualified majority voting can never apply to decisions having military or defence implications.¹¹³

(b) The Union’s (ordinary) treaty-making procedure

The ‘ordinary’ procedure for the conclusion of international agreements by the Union is set out in Article 218 TFEU.¹¹⁴ And the central institution within this procedure is the Council – not just as *primus inter pares* with Parliament, but simply as *primus*. Article 218 TFEU acknowledges the central role of the Council in all stages of the procedure: ‘The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.’¹¹⁵ The Council hereby acts by a qualified majority,¹¹⁶ except in four situations. It shall act unanimously: when the agreement covers a field for which unanimity is required; for association agreements; with regard to Article 212 agreements with States that are candidates for Union

shall be defined as at least 72 per cent of the members of the Council, representing Member States comprising at least 65 per cent of the population of the Union.’

¹¹¹ On the ‘Luxembourg Compromise’, see: Chapter 1 – Section 2(b) above.

¹¹² Article 31 (2) TEU. ¹¹³ Article 31 (5) TEU.

¹¹⁴ Two special procedures are found in Articles 207 and 219 TFEU. The former deals with trade agreements within the context of the Union’s common commercial policy. Article 207 (3) here expressly clarifies that ‘Article 218 shall apply, subject to the special provisions in this Article’. Article 207 thus constitutes a *lex specialis* to the *lex generalis* of Article 218. The special rules within Article 207 principally concern the enhanced powers of the Commission and the special voting rules in the Council. A second express derogation from the ‘ordinary’ procedure in Article 218 is made for ‘formal agreements on an exchange-rate system for the euro in relation to the currencies of third states’ (see Article 219 (1): ‘[b]y way of derogation from Article 218’). The Council here acts, on a recommendation from the Commission or the European Central Bank, unanimously after consulting the European Parliament in accordance with the specific arrangements (to be decided under paragraph 3).

¹¹⁵ Article 218 (2) TFEU.

¹¹⁶ Importantly, the new Article 218 TFEU has not incorporated the old CFSP rule under ex-Article 24 (5) (old) EU, according to which a Member State would not be bound by an agreement to which its representative had not consented. However, the constitutional relationship between the general voting rules in Article 218 (8) TFEU and the special CFSP voting rules in Article 31 TEU is not yet clarified. Whether special CFSP arrangements, such as the ‘constructive abstention’ or the ‘emergency break’, will apply to CFSP agreements remains to be seen. (However, importantly, unlike Article 222 (3) TFEU, no express mention is made of the applicability of the voting arrangements in Article 31 TEU.)

accession; and, in respect of the Union's accession agreement to the ECHR.¹¹⁷

Having recognised the primary role of the Council, Article 218 TFEU then defines the secondary roles of the other EU institutions in the various procedural stages of treaty-making. The provision distinguishes between the initiation and negotiation of the agreement, its signing and conclusion, and also provides special rules for its modification and suspension. Exceptionally, the Union can become a party to international agreements without having concluded them. This – rare – phenomenon occurs, where the Union 'inherits' international agreements from its Member States through the doctrine of functional succession.

(i) Initiation and negotiation

Under Article 218 (3), the Commission holds the exclusive right to make recommendations for agreements that principally deal with non-CFSP matters. By contrast, as regards subjects that exclusively or principally fall within the CFSP, it is the High Representative who must submit recommendations to the Council. For matters falling partly within the CFSP and partly outside it, there is also the possibility of 'joint proposals'.¹¹⁸

On the recommendation, the Council may decide to open negotiations and nominate the Union negotiator 'depending on the subject matter of the agreement envisaged'.¹¹⁹ This formulation is ambivalent. Textually, the phrase suggests a liberal meaning. The Council can – but need not necessarily – appoint the Commission as the Union negotiator for an agreement. According to this reading the Commission will not enjoy a prerogative to be the Union's negotiator for non-CFSP agreements. However, a systematic reading of the phrase leads to a more restrictive meaning. For if read in light of the jurisdictional division between the Commission and the High Representative at the recommendation stage, the Commission would be constitutionally entitled to be the Union negotiator for all Union agreements that 'exclusively or principally' fall into the Treaty on the Functioning of the European Union.¹²⁰

The Council will be able to address directives to the negotiator and/or subject its powers to consultation with a special Council committee. Where the Commission is chosen as the Union negotiator, it will thus need to be 'authorised' by the Council and would conduct the negotiations under the control of the Council. The Commission's powers here are therefore between 'autonomous' and 'delegated' powers. The lower degree of institutional autonomy is justified by the fact that third parties are involved. (The subsequent rejection of the negotiated agreement by the Council would indeed have 'external' negative repercussions, and for that reason the *ex ante* involvement of the Council is a useful constitutional device.) On the other hand, the existence of an internal safeguard checking the Union negotiator creates, to some extent, a 'two-front

¹¹⁷ Article 218 (8) TFEU. ¹¹⁸ See Articles 22 (2) and 30 (1) TEU.

¹¹⁹ Article 218 (3) TFEU. ¹²⁰ In this sense also: see Eeckhout (supra n. 33), 196.

war'. For the Union negotiator has not only to externally negotiate with the third party, but it also needs to internally deal with the Council.

Parliament is not formally involved in the negotiation. However, Article 218 (10) TFEU constitutionalises Parliament's right to be informed during all stages of the procedure. And this right has the potential of becoming an informal political safeguard that anticipates the interests of Parliament at the negotiation stage.¹²¹

Finally, any Union institution and the Member States are entitled to challenge the 'constitutionality' of a draft agreement *prior* to its conclusion. This judicial safeguard can be found in Article 218 (11) TFEU, which creates the jurisdiction of the Court for an 'Opinion'.¹²² Where this 'Opinion' leads to a finding that the envisaged agreement is not compatible with the Treaties, the agreement may not enter into force – unless the Treaties themselves are amended.¹²³ The possibility of an *ex ante* 'review' of a draft agreement contrasts with the Court's ordinary *ex post* review powers.¹²⁴ However, the exception is – again – justified by the fact that third party rights under international law are involved. Indeed, it is a rule of international law that, once an agreement is validly concluded under international law, a contracting party generally cannot subsequently invoke internal constitutional problems to deny its binding effect.¹²⁵ *Ex post* review of an international agreement will thus be too late to negate the external effects of an international agreement.

¹²¹ See Framework Agreement on Relations between the European Parliament and the European Commission, especially Annex III. According to paragraph 3 of the Annex, '[t]he Commission shall take due account of Parliament's comments throughout the negotiations'.

¹²² Article 218 (11) TFEU. The Court has so far delivered fifteen Opinions on international agreements: Opinion 1/75 (*Local Cost Standard*), [1975] ECR 1355; Opinion 1/76 (*Laying-Up Fund*), [1977] ECR 741; Opinion 1/78 (*Natural Rubber Agreement*), [1979] ECR 2871; Opinion 1/91 (*EEA Draft Agreement*), [1991] ECR I-6079; Opinion 2/91 (*ILO Convention 170*), [1993] ECR I-1061; Opinion 1/92 (*EFTA Agreement II*), [1992] ECR I-2821; Opinion 2/92 (*Third Revised OECD Decision*), [1995] ECR I-521; Opinion 1/94 (*WTO Agreement*), [1994] ECR I-5267; Opinion 2/94 (*Accession to ECHR*), [1996] ECR I-1759; Opinion 3/94 (*Banana Framework Agreement*), [1995] ECR I-4577; Opinion 1/00 (*European Common Aviation Area*), [2002] ECR I-3493; Opinion 2/00 (*Cartagena Protocol*) [2002] ECR I-9713; Opinion 1/03 (*Lugano Convention*), [2006] ECR I-1145; Opinion 1/08 (GATS), (nyr); Opinion 1/09 (*European Patent Court*), (nyr).

¹²³ This happened, for example, with regard to the European Convention of Human Rights in 1996, see: Opinion 2/94 (*Accession to ECHR*), [1996] ECR I-1759. Prior to the Lisbon Treaty, accession to the Convention was thus unconstitutional. The Lisbon Treaty has amended the original Treaties, which now contain an express competence to accede to the ECHR in Article 6 (2) TEU.

¹²⁴ On (*ex post*) judicial review in the Union legal order, see: Chapter 8 – Section 1 below.

¹²⁵ See Article 46 Vienna Convention of the Law of Treaties: '(1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. (2) A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.'

(ii) Signing and conclusion

The Council will sign and conclude the agreement on a proposal by the negotiator.¹²⁶

Prior to the formal conclusion of the agreement, the European Parliament must be actively involved, except where the agreement *exclusively* relates to the CFSP. (When compared with the Commission's involvement at the proposal stage,¹²⁷ the TFEU is here more generous for it expands parliamentary involvement to agreements that even principally relate to CFSP matters.) Article 218 (6) thereby distinguishes between two forms of parliamentary participation in the conclusion procedure: consultation and consent. The former is the residual category and applies to all agreements that do not require consent. The types of agreements where the Council needs to obtain parliamentary consent are enumerated in the form of five situations listed under Article 218 (6) (a) TFEU: (i) association agreements; (ii) the agreement on Union accession to the ECHR; (iii) agreements establishing a specific institutional framework; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The first, second and third category may be explained by the constitutional idea of 'political treaties'.¹²⁸ For association agreements as well as institutional framework agreements, such as the ECHR, will by definition express an important *political* choice with long-term consequences. For these fundamental political choices Parliament – the representative of the European citizens – must give its democratic consent. The fourth category represents a constitutional reflex that protects the special role the European Parliament enjoys in establishing the Union budget.¹²⁹ The fifth category makes profound sense from the perspective of procedural parallelism. Under paragraph 6 (a) (v) of Article 218, Parliament is entitled to veto 'agreements covering fields' that internally require parliamentary co-decision or consent.¹³⁰ The parallelism between the internal and external sphere is however not complete: Parliament

¹²⁶ Article 218 (5) and (6) TFEU. The conclusion will usually be done by means of a Council Decision.

¹²⁷ Article 218 (3) TFEU: agreements relating 'exclusively or principally' to the CFSP (emphasis added).

¹²⁸ R. Jennings and S. Watts (eds.), *Oppenheim's International Law* (Oxford University Press, 2008), 211.

¹²⁹ For an extensive discussion of this category, see: Case 189/97, *Parliament v. Council (Mauritania Fisheries Agreement)*, [1999] ECR I-4741.

¹³⁰ The Lisbon reform of the provision removes two constitutional oddities that characterised ex-Article 300 EC. First, Parliament's prerogative to participate in the agreement is henceforth independent of the pre-existence of internal legislation. The consent requirement hinges on the internal decision-making procedure *as such*. Second, unlike ex-Article 300 EC, Article 218 has extended parliamentary consent for international agreements to all internal procedures that also require parliamentary consent. And again, this reform enhances the parallelism between the internal and the external sphere.

will indeed *not* enjoy the power of co-conclusion in areas in which the ‘ordinary’ legislative procedure applies. Its internal power to co-decision is here reduced to a mere power of ‘consent’. It must ‘take or leave’ the negotiated international agreement. This structural ‘democratic deficit’ in the procedural regime for international agreements is however not a *sui generis* characteristic of the European Union, but can be found in other constitutional orders of the world.¹³¹ It is generally justified by reference to the ‘exceptional’ nature of foreign affairs, and in particular their ‘volatile’ and ‘secretive’ nature.¹³²

(iii) Modification, suspension (and termination)

Article 218 (7) TFEU deals with modifications of international agreements that have been successfully concluded. The Council may ‘authorise the negotiator to approve on the Union’s behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement’. (The Council can attach specific conditions to such an authorisation.) In the absence of such a specific authorisation for a simplified revision procedure, the ordinary treaty-making procedure will apply. This follows from a constitutional principle called *actus contrarius*. In order to modify an international agreement the same procedure needs to be followed that led to the conclusion of the international agreement in the first place.

Article 218 (9) TFEU deals with the suspension of an international agreement. The provision specifies that the Commission or the High Representative may propose to the Council the suspension of the agreement. (And while the provision does not expressly refer to the jurisdictional division between the two actors, as mentioned in Article 218 (3) TFEU for the proposal stage, we should assume that this rule would apply analogously. The High Representative should thus solely be entitled to recommend the suspension for international agreements that relate ‘exclusively or principally’ to the CFSP.) Parliament is not expressly mentioned and will thus only have to be informed of the Council decision. This truncated procedure allows the Union quickly to decide on the (temporary) suspension of an agreement. However, this ‘executive’ decision without parliamentary consent distorts to some extent the institutional balance in the external relations field.

How are Union agreements terminated? Unfortunately, Article 218 TFEU does not expressly set out a procedural regime for the termination of a Union agreement. Two views are possible. The first view is again based on the idea of *actus contrarius*: the termination of an agreement would need to follow the very same procedure for its conclusion. This procedural parallelism has been contested by reference to the constitutional traditions of the Union’s Member

¹³¹ It can be found, for example, in the United States. According to Article II, Section 2 of the US Constitution, it is the President who ‘shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur’. The American Parliament – the House of Representatives – is not formally involved.

¹³² On this classic perception of foreign affairs, see: Introduction to this chapter, above.

States, which leave the termination decision principally in the hands of the executive.¹³³ A second view therefore reverts to the suspension procedure applied analogously.

(iv) Union succession to international agreements of the Member States

Can the Union be bound by agreements that it has not formally concluded? The counter-intuitive answer is positive: under European law, the Union can be bound by agreements of its Member States where the former has succeeded the latter.¹³⁴

The doctrine of Union succession to international agreements of the Member States is a doctrine of *functional* succession.¹³⁵ It is not based on a transfer of territory, but on a transfer of *functions*. The European Court announced this European doctrine in relation to the General Agreement on Tariffs and Trade in *International Fruit*.¹³⁶ Formally, the Union was not a party to the international treaty, but the Court found that ‘in so far as under the [European] Treat[ies] the [Union] has *assumed the powers previously exercised by Member States* in the area covered by the General Agreement, the provisions of that agreement have the effect of binding the [Union]’.¹³⁷ Functional succession thus emanated from the exclusive nature of the Union’s powers under the Common Commercial Policy (CCP). Since the Union had assumed the ‘functions’ previously exercised by the Member States in this area, it was entitled and obliged to also assume their international obligations.

For a long time after *International Fruit*, the succession doctrine remained quiet. But in the last decade it experienced a constitutional revival. This allowed the Court better to define the doctrine’s contours. Three principles seem to govern functional succession in the European legal order. First, for the succession doctrine to come into operation *all* the Member States must be parties to an international treaty.¹³⁸ Second, *when* the international treaty is concluded is irrelevant. It will thus not matter whether the international treaty was concluded before or after the creation of the European Community in 1958.¹³⁹

¹³³ C. Tomuschat, ‘Artikel 300 EG’ in H. von der Groeben and J. Schwarze (eds.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (Nomos, 2004), vol. IV, para. 61.

¹³⁴ For an overview, see: R. Schütze, ‘The “Succession Doctrine” and the European Union’ in A. Arnulf et al. (eds.), *A Constitutional Order of States: Essays in Honour of Alan Dashwood* (Hart, 2011), 459.

¹³⁵ See P. Pescatore, *L’Ordre Juridique des Communautés Européennes* (Presses Universitaires de Liège, 1975), 147–8 (my translation): ‘[B]y taking over, by virtue of the Treaties, certain competences and certain powers previously exercised by the Member States, the [Union] equally had to assume the international obligations that controlled the exercise of these competences and powers[.]’

¹³⁶ Joined Cases 21–24/72, *International Fruit Company NV v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219.

¹³⁷ *Ibid.*, paras. 14–18 (emphasis added).

¹³⁸ Case C-188/07, *Commune de Mesquer v. Total*, [2008] ECR I-4501.

¹³⁹ Case 308/06, *Intertanko and others v. Secretary of State for Transport*, [2008] ECR I-4057.

Third, the Union will only succeed to international treaties, where there is a ‘full transfer of the powers previously exercised by the Member States’.¹⁴⁰ The Union will thus not succeed to all international agreements concluded by all the Member States, but only to those where it has assumed an exclusive competence. Would the European succession doctrine thereby be confined to the sphere of the Union’s *constitutionally* exclusive powers; or, would *legislative* exclusivity generated by Article 3 (2) TFEU be sufficient? The Court has shown a preference for a succession doctrine that includes legislative exclusivity. In *Bogiatzi*,¹⁴¹ the Court indeed found that a ‘full transfer’ could take place where the Member States were completely preempted within the substantive scope of the international treaty.

4. Sharing external power: constitutional safeguards of unitarianism

States are sovereign subjects of international law.¹⁴² From an international law perspective, they thus enjoy full external powers. But this – simple – solution might not apply to unions of States. Two constitutional traditions here co-exist. Within the American tradition, the Union is seen as the sole bearer of external sovereignty. It is the unitary external representative – with the Member States being ‘closed’ off from the international scene.¹⁴³ By contrast, according to the German tradition, the Union and its Member States may partake in international relations.¹⁴⁴ Within such an ‘open federation’, the external relations of the Union and its Member States need to be coordinated so as to safeguard diplomatic and political consistency. The European Union follows this second tradition. It is an open federation in which the Union and its Member States are active participants on the international scene.

How has the European legal order coordinated the (potentially) dual presence of the Union and its Member States? The Union has followed two mechanisms. The first mechanism is a political safeguard that brings the Union and its Member States to the same negotiating table for an international agreement. In the past fifty years, the Union indeed cultivated the international technique of mixed agreements. By contrast, a second mechanism is ‘internal’ to the Union and imposes a ‘duty of cooperation’ on the Member States that ‘flows from the requirement of unity in the international representation of the [Union]’.¹⁴⁵ And while this duty – theoretically – operates on the Union as well

¹⁴⁰ *Ibid.*, para. 4 (emphasis added).

¹⁴¹ Case C-301/08, *Bogiatzi v. Deutscher Luftpool and others*, (nyr).

¹⁴² Article. 6 of the 1969 Vienna Convention: ‘Every State possesses capacity to conclude treaties.’

¹⁴³ For the American tradition of a ‘closed federation’, see: R. Schütze, ‘Federalism and Foreign Affairs: Mixity as an (Inter)national Phenomenon’ in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited* (Hart, 2010), 57 at 59 et seq.

¹⁴⁴ For the German tradition of an ‘open federation’, see: *ibid.* at 65 et seq.

¹⁴⁵ Opinion 1/94 (supra n. 122), para.108.

as the Member States,¹⁴⁶ it has – practically – been solely used to facilitate the exercise of the Union’s external powers on the international scene.

(a) Mixed agreements: an international and political safeguard

Who can conclude international agreements that do not entirely fall into the competence sphere of the Union or the Member States? The traditional answer to that question has been the Union and the Member States combined in the form of mixed agreements – that is: agreements to which both the Union and some or all of its Member States appear as contracting parties.¹⁴⁷ Mixity had originally been designed for a specific sector of European law.¹⁴⁸ However, it soon spread to become the hallmark of the European Union’s foreign affairs federalism.¹⁴⁹

The growth and success of mixed agreements in Europe’s foreign affairs federalism may be accounted for by a number of reasons – internal and external to the Union legal order. First, mixed agreements would allow the Union and its Member States to complement their competences into a unitary whole that matched the external sovereignty of a third State. The division of treaty-making powers between them could then be reduced to an ‘internal’ Union affair.¹⁵⁰ Second, the uncertainty surrounding the nature and extent of the treaty-making powers of non-state actors under international law originally provided an additional reason.¹⁵¹ As long as it remained uncertain whether or how the Union could fulfil its international obligations, mixed agreements would provide legal security for third States by involving the Member States as international ‘guarantors’ of the Union obligation.¹⁵²

¹⁴⁶ *Ibid.*

¹⁴⁷ Mixity extends to all phases of an international agreement and may thus add a pluralist dimension to the negotiation, conclusion and implementation stage.

¹⁴⁸ Article 102 Euratom Treaty: ‘Agreements or contracts concluded with a third State, an international organisation or a national of a third State to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws.’

¹⁴⁹ The first mixed agreement concluded by the EEC was the 1961 Agreement establishing an association between the European Economic Community and Greece, [1963] OJ 26/294. For a relatively up-to-date registry, see J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer, 2001), 252–77, listing 154 mixed agreements concluded between 1961 and 2000.

¹⁵⁰ See Ruling 1/78 (*IAEA Convention*), [1978] ECR 2151, para. 35: ‘It is sufficient to state to the other Contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which Third States have no need to intervene.’

¹⁵¹ P. Pescatore, ‘Les Relations Extérieures des Communautés Européennes: Contribution à la Doctrine de la Personnalité des Organisations Internationales’ [1961] 103 *Recueil des Cours* 1, 105.

¹⁵² M. J. Dolmans, *Problems of Mixed Agreements: Division of Powers within the EEC and the Rights of Third States* (Asser Instituut, 1985), 95.

The constitutional developments within the European legal order in the last four decades have weakened both rationales. Not only have the external powers of the Union been significantly expanded through the development of the doctrine of implied powers – now codified in Article 216 TFEU – its internal powers have been sharpened to guarantee the enforcement of Union agreements within the European legal order.¹⁵³ Today, the dominant – third – reason behind mixed agreements appears to be of a purely political nature: Member States insist on participating in their own name so as to remain ‘visible’ on the international scene.¹⁵⁴ Even for matters that fall squarely into the Union’s competence, the Member States dislike being (en)closed behind a supranational veil.

How has the European Union reacted to the *internal* demand for mixed agreements? Shared competences do not constitutionally require mixed action.¹⁵⁵ Not every international agreement falling within an area of shared competences must therefore be mixed. Within shared competences, the Union or the Member States can both act autonomously and conclude independent agreements; or, if they so wish, they may act jointly.¹⁵⁶ It originally seemed that the European Court would demand specific *constitutional* justification for mixed external action in place of a pure Union agreement.¹⁵⁷ However, in the last three decades, the Court of Justice has given a judicial blessing to the uncontrolled use of mixed agreement in areas of shared competences.¹⁵⁸

The widespread use of mixed external action evinces a remarkable Union tolerance towards the Member States’ international powers, as the practice of

¹⁵³ On the direct and indirect effects of international agreement in the Union legal order, see: Chapter 9 – Section 4 below.

¹⁵⁴ C. D. Ehlermann, ‘Mixed Agreements: A List of Problems’ in O’Keeffe and Schermers (eds.), *Mixed Agreements* (Kluwer, 1983), 3 at 6: ‘Member States wish to continue to appear as contracting parties in order to remain visible and identifiable actors on the international scene. Individual participation is therefore seen as a way of defending and enhancing the prestige and influence of individual Member States.’

¹⁵⁵ R. Schütze, ‘The European Community’s Federal Order of Competences: A Retrospective Analysis’ in M. Dougan and S. Currie (eds.), *Fifty Years of the European Treaties – Looking Back and Thinking Forward* (Hart Publishing, 2009), 63, esp. 85–7.

¹⁵⁶ See Case 316/91, *Parliament v. Council*, [1994] ECR I-625, para. 26. In this sense, see also R. Holdgaard, *External Relations of the European Community: Legal Reasoning and Legal Discourses* (Kluwer, 2008), 152.

¹⁵⁷ Opinion 1/76 (*Laying-Up Fund*) [1977] ECR 741, paras. 6–8. The Court recognised that ‘the danger of mixed agreements (and their attraction for Member States) lies in their tendency to over-emphasise at the expense of the [Union] the participation of the Member States as traditional international legal persons’ (M. Cremona, ‘The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community’ [1982] 2 *Oxford Journal of Legal Studies* 393, 414).

¹⁵⁸ In the last thirty years, these ‘facultative’ mixed agreements – i.e., agreements in which the Union has competence to conclude the entire agreement – have become the prominent category of mixed agreements: ‘Indeed, there is no decision from the Court under the EC Treaty where the explicit justification for recourse to the mixed procedure would have been the limited scope of [Union] competence – commonly regarded as the principal legal explanation for the practice of mixed agreements’ (see Heliskoski (*supra* n. 149 at 68)).

mixed agreements entails a significant *anti*-Union consequence. According to a European ‘constitutional convention’, the Council concludes mixed agreements on behalf of the Union only once *all* the Member States have themselves ratified the agreement in accordance with their constitutional traditions.¹⁵⁹ The convention thus boils down to requiring ‘unanimous’ consent before the Union can exercise its competence. The conventional arrangement thus prolongs the (in)famous Luxembourg Accord in the external sphere. The constitutionally uncontrolled use of mixed agreements under the Union’s shared powers has, unsurprisingly, been criticised as ‘a way of whittling down systematically the personality and capacity of the [Union] as a representative of the collective interest’.¹⁶⁰ Others have celebrated the practice of mixed agreements as ‘a near unique contribution to true federalism’.¹⁶¹ The truth lies in between. Mixity should be confined to situations where solid constitutional reasons necessitate the doubling of the Member States on the international scene.

(b) The duty of cooperation: an internal and judicial safeguard

The Member States’ duty to cooperate loyally and sincerely informs all areas of European law.¹⁶² However, the duty is particularly important in the external sphere.¹⁶³ And this is especially so where the Union and the Member States must coordinate their international powers under a mixed agreement.¹⁶⁴

¹⁵⁹ The inspiration for this constitutional convention appears to lie in Article 102 of the Euratom Treaty (supra n. 148). On the convention and ways to alleviate its consequences, see: P. Eeckhout, (supra n. 33), 258–9.

¹⁶⁰ P. Pescatore, ‘Opinion 1/94 on “Conclusion” of the WTO Agreement: is there an Escape from a Programmed Disaster?’ [1999] 36 CML Rev 387 at fn. 6. The criticism on mixed agreements has been rich from the very beginning, see: A. Barav, ‘General Discussion’ in C. W. A. Timmermans and E. L. M. Völker (eds.), *Division of Powers between the European Communities and their Member States in the field of External Relations* (Kluwer, 1981), 144: ‘[M]ixed agreements are probably a necessary evil, part of the integration process, but nobody would like to see any more of them.’

¹⁶¹ J. H. H. Weiler, ‘The External Relations of non-unitary Actors: Mixity and the Federal Principle’ in Weiler (ed.), *The Constitution of Europe* (Cambridge University Press, 1999) at 130.

¹⁶² For the general duty, see: Article 4 (3) TEU.

¹⁶³ For a special expression of the general duty of Article 4 (3) TEU in the CFSP area, see: Article 24 (3) TEU: ‘The Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.’ For even more specific duties of cooperation, see: Article 32 TEU (consultation and coordination of national policies within the European Council and the Council) and Article 34 TEU (coordination of Member States in international organisations).

¹⁶⁴ See Case 459/03, *Commission v. Ireland (Mox Plant)*, [2006] ECR I-4657, paras. 175–6: ‘The Court has also emphasised that the Member States and the [Union] institutions have an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they conclude a mixed agreement. That is in particular the position in the case of a dispute which, as in the present case, relates essentially to undertakings resulting from a mixed agreement which relates to an area, namely the protection and preservation of the marine

However, while developed in the context of mixed agreements, this is not the only situation where the duty of cooperation has been given an active constitutional role.¹⁶⁵ For the Union legal order has equally employed the duty of cooperation to facilitate the (autonomous) exercise of the *Union's* external competences. This facilitating role has been expressed in a positive and a negative manner. The positive aspect of the duty of cooperation may demand that the Member States act as 'trustees of the Union interest'. By contrast, the negative aspect of the duty of cooperation can place a limit on the Member States exercising their shared external competences. In this second role, the duty of cooperation operates – partly – as the 'reverse' of the principle of subsidiarity.¹⁶⁶

(i) Member States as 'trustees of the Union'

Classic international law is built on the idea of the sovereign State.¹⁶⁷ This State-centred structure of international law creates normative difficulties for non-State actors.¹⁶⁸ The European Union is a union of *States*, and as such still encounters normative hurdles when acting on the international scene. These normative hurdles have become fewer, but there remain situations in which the Union cannot externally act due to the partial blindness of international law towards compound subjects. And where the Union is – internationally – 'disabled' from exercising its competences, it will have to authorise its Member States to act on its behalf. This positive manifestation of the duty of cooperation is called the 'trustees doctrine'.¹⁶⁹

environment, in which the respective areas of competence of the [Union] and the Member States are liable to be closely interrelated, as is, moreover, evidenced by the Declaration of [Union] competence and the appendix thereto.' For an analysis of the duty of cooperation within the (mixed) WTO Agreement, see: J. Heliskoski, 'The "Duty of Cooperation" between the European Community and its Member States within the World Trade Organisation' [1997] 7 *Finnish Yearbook of International Law* 59.

¹⁶⁵ See Case 266/03, *Commission v. Luxembourg*, [2005] ECR 4805, para. 58: 'That duty of genuine cooperation is of general application and does not depend either on whether the [Union] competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries.' For a general analysis of the duty in the external relations context, see: M. Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart, 2008), 125; as well as: E. Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the field of EU External Relations' [2010] 47 *CML Rev* 323.

¹⁶⁶ I am aware that this is a controversial formulation as the subsidiarity principle may theoretically operate downwards *and upwards*. However, in the past, European law has mainly identified subsidiarity as a mechanism for protecting the exercise of State competences. And for that reason 'reverse subsidiarity' tries to capture the idea that the Court here uses the duty of cooperation to protect the exercise of Union competences.

¹⁶⁷ M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006).

¹⁶⁸ See Jennings and Watts, *Oppenheim* (supra n. 128), 245 et seq.

¹⁶⁹ For a first analysis of this doctrinal construction in the external sphere, see: M. Cremona, 'Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union' in Arnulf (supra n. 134), 435.

A good illustration of the trustees doctrine may be found in the context of the Union's inability to participate in international organisations. Many of these organisations still only allow States to become (active) members; and hence the European Union finds itself unable to exercise its competences in these international decision-making fora. An example of this state-centred membership is the International Labour Organisation (ILO). Here, the Union cannot itself conclude international conventions and must thus rely on its Member States. The obligation to act as trustee of the Union thereby derives from the duty of cooperation: 'In this case, cooperation between the [Union] and the Member States is all the more necessary in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO convention and must do so *through the medium of the Member States*.'¹⁷⁰ The Union must here exercise its external competences indirectly, that is: through the Member States 'acting jointly in the [Union's] interest'.¹⁷¹

We find a more recent example of the trustees doctrine in the Council Decision 'authorising the Member States, in the interest of the [Union], to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances at Sea'.¹⁷² The Union could not accede to the Convention, as it was only open to sovereign States.¹⁷³ But since the relevant Convention was 'particularly important, given the interest of the [Union] and its Member States', the Union authorised and obliged its Member States to conclude the Convention.¹⁷⁴ The Union thus overcame its inability under international law by enabling and obliging its Member States to act in the common 'European' interest on the international scene.

(ii) 'Reversed' subsidiarity: restrictions on the exercise of shared State power

In an area of shared competences both the Union and the Member States are entitled to act externally by – for example – concluding an international agreement with the United States. But due to the various procedural obstacles in the Union treaty-making power, the Member States might be much quicker in exercising their shared competence. And third parties might indeed be more interested in twenty-seven bilateral agreements than one Union agreement on a matter.¹⁷⁵

In order to safeguard the 'unity in the international representation of the [Union]',¹⁷⁶ the Court has therefore developed a 'negative' aspect to the duty of cooperation. Where the international actions of a Member State might jeopardise the conclusion of a Union agreement, the Court has imposed specific

¹⁷⁰ Opinion 2/91 (*ILO Convention 170*), [1993] ECR I-1061, para. 37 (emphasis added).

¹⁷¹ *Ibid.*, para. 5. ¹⁷² See Council Decision 2002/971/EC, [2002] OJ L 337/55.

¹⁷³ *Ibid.*, Preamble 4. ¹⁷⁴ *Ibid.*, Articles 1 and 3.

¹⁷⁵ This approach might be inspired by the classic Roman strategy of '*divide et impera*', that is: divide and rule.

¹⁷⁶ Opinion 1/94 (*WTO Agreement*), [1994] ECR I-5267, para. 108.

obligations on the Member States. These obligations limit the exercise of their shared powers, and thus – to some extent – mirror and invert the principle of subsidiarity. And like the principle of subsidiarity, the duty of cooperation has traditionally been thought to be of a ‘procedural’ nature.¹⁷⁷

We find a good illustration of the negative duties imposed on the Member States when exercising their shared external competences in *Commission v. Luxembourg*.¹⁷⁸ Luxembourg had exercised its international treaty power to conclude a number of bilateral agreements with Eastern European States. The Commission was incensed, as it had already started its own negotiations for the Union as a whole. It thus complained that even if Luxembourg enjoyed a shared competence to conclude the agreements, ‘[t]he negotiation by the Commission of an agreement on behalf of the [Union] and its subsequent conclusion by the Council is inevitably made more difficult by interference from a Member State’s own initiatives’.¹⁷⁹ The Union’s position was claimed to have been weakened ‘because the [Union] and its Member States appear fragmented’.¹⁸⁰ The Court adopted this view – but only partly:

The adoption of a decision authorising the Commission to negotiate a multi-lateral agreement on behalf of the [Union] marks the start of a concerted [Union] action at international level and requires, for that purpose, *if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation* between the latter and the [Union] institutions in order to facilitate the achievement of the [Union] tasks and to ensure the coherence and consistency of the action and its international representation.¹⁸¹

Importantly, the Court did not condemn the exercise of the Member State’s treaty power as such. Endowed with shared external power, Luxembourg could very well conclude bilateral agreements with third States. However, since the Commission had started a ‘concerted [Union] action’ for the conclusion of a Union agreement in this area, the Member State was under an obligation to cooperate and consult with the Commission. And in not consulting the Union, Luxembourg had violated the duty of cooperation.¹⁸² The duty of cooperation was thus primarily seen as a duty of information. It appeared to be a *procedural* duty of conduct, and not a substantive duty of result.

The purely procedural character of the duty has however recently been put into question. In *Commission v. Sweden*,¹⁸³ the Union institution brought proceedings against Sweden for ‘splitting the international representation of the [Union] and compromising the unity achieved ... during the first

¹⁷⁷ Cremona, ‘Defending the Community Interest’ (supra n. 165), 168; as well as Neframi, ‘The Duty of Loyalty’ (supra n. 165), 355–6.

¹⁷⁸ Case 266/03, *Commission v. Luxembourg*, [2005] ECR 4805. ¹⁷⁹ *Ibid.*, para. 53.

¹⁸⁰ *Ibid.* ¹⁸¹ *Ibid.*, para. 60 (emphasis added). ¹⁸² *Ibid.*, para. 61.

¹⁸³ Case C-246/07, *Commission v. Sweden*, (n/r). For an extensive analysis, see: G. de Baere, ‘“O, Where is Faith? O, Where is Loyalty?” Some Thoughts on the Duty of Loyal Co-operation and the Union’s External Environmental Competences in the light of the PFOS Case’ [2011] 36 EL Rev 405.

Conference of the Parties to [the Stockholm Convention on Persistent Organic Pollutants]'.¹⁸⁴ What had happened? Sweden had not abstained from making a proposal within the international conference, and the Commission claimed that this unilateral action violated the duty of cooperation. Sweden counterclaimed that it had given sufficient information to and consulted with the Union and the other Member States.¹⁸⁵ But this time, this was not enough. After duly citing its case law, the Court moved to examine whether there existed a Union 'strategy' not to make a proposal.¹⁸⁶ And in finding that such a Union strategy existed, and that Sweden had 'dissociated itself from a concerted common strategy within the Council',¹⁸⁷ the Court found that Sweden had violated the duty of cooperation. In a remarkable feat of judicial creativity, the Court now found that its past case law stood for the proposition 'that Member States are subject to special duties of action *and abstention* in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent a point of departure for concerted [Union] action'.¹⁸⁸

This case might indeed be the beginning of a *substantive* duty of cooperation. For the Court was not satisfied with the procedural obligation to inform and consult, but prohibited the very exercise of a shared external competence by a Member State. Are there dangers in a substantive reading of the duty of cooperation? While such a reading better protects the unity of external representation of the Union and its Member States, there is a danger for the autonomous exercise of the States' international powers.¹⁸⁹ It all depends on how early the duty to abstain from international action departing from the Union position starts. The temporal aspect of the duty will thus principally determine its substantive effect.

Conclusion

The European Union has international personality and indeed represents a significant international actor. Unlike its Member States, the Union is not regarded as a sovereign State in international law. The European Union is a union of States and, as such, it is a compound subject of international law.

The Union's external competences are conferred competences. For in the absence of external sovereignty, the Union must have power transferred to it by its Member States. What is the scope of the Union's competences? Section 1 analysed the dual constitutional regime for external competences, as the latter are generally found in two constitutional sites. Title V of the Treaty on European Union confers a general competence on the Union to deal with the

¹⁸⁴ Case C-246/07, *Commission v. Sweden*, (supra n. 183), para. 44. ¹⁸⁵ *Ibid.*, para. 63.

¹⁸⁶ *Ibid.*, para. 76. ¹⁸⁷ *Ibid.*, para. 91. ¹⁸⁸ *Ibid.*, para. 103.

¹⁸⁹ Sweden rightly claimed that a substantive interpretation was 'likely to render shared competence in the case of mixed agreements meaningless' (*ibid.*, para. 63).

‘Common Foreign and Security Policy’. By contrast, Part V of the Treaty on the Functioning of the European Union enumerates a number of special competences in particular policy areas. In addition to these thematic competences, the Union is also given a ‘residual’ treaty-making power: Article 216 TFEU. We saw above that the provision attempts to codify the Court’s jurisprudence on the Union’s implied treaty-making powers. This article is however a textual fiasco. For Article 216 (1) appears to be – mistakenly – shaped by three principles created by the European Court in the context of the European Union’s *exclusive* competences.

What is the nature of the Union’s external competences? Can they be classified by means of the same categories that apply to the Union’s legislative competences? We saw in Section 2 that this is indeed generally the case. Yet, there are two constitutional exceptions. First, the character of the CFSP competence cannot be captured by the competence categories mentioned in Articles 3–6 TFEU. This follows implicitly from the – still – mysterious qualities of CFSP law, and expressly from Article 40 TEU. The CFSP competence is best seen as ‘*sui generis*’ – a singular phenomenon that corresponds to the ‘special’ nature of the CFSP rules and procedures.¹⁹⁰ The second exception to the general competence categories of the Union is the idea of subsequently exclusive treaty-making powers. This idea derogates from the classification within the Union’s legislative powers, whose exercise will not lead to an exclusive competence.¹⁹¹ The idea of subsequent external exclusivity or ‘exclusivity by exercise’ had originally been developed by the European Court. The Lisbon Treaty has tried to codify past jurisprudence in the form of Article 3(2) TFEU. This codification is – again – not without problems, and it is – again – in the hands of the European judiciary to sharpen its contours in the future.

Section 3 analysed the decision-making procedures in the external relations of the Union. Which procedure thereby applies depends on two factors. First, is the measure to be adopted a unilateral act; or is it an international agreement? If it is an international agreement, then the Treaties follow common treaty-making procedures. If it is a unilateral measure, then the Treaties distinguish between the two constitutional regimes for external relations. While acts adopted under the Union’s special competences principally follow the (ordinary) legislative procedure, the procedure for unilateral CFSP acts is ‘special’.¹⁹² It has a special nature both in relation to the constitutional balance between the institutional actors involved, and the special voting arrangements in the Council. Both features turn the CFSP into an ‘intergovernmental’ area of European law that contrasts with the rest of the Union’s ‘supranational’ decision-making procedures. These ‘intergovernmental’ elements are however

¹⁹⁰ See Article 24 (1) TEU: ‘The common foreign and security policy is subject to specific rules and procedures.’

¹⁹¹ The supremacy of European law leads to the ‘preemption’ of conflicting national law. For a discussion of this point, see: Chapter 10 – Section 3 below.

¹⁹² See Article 24 (1) TEU.

less obvious in the procedure for treaty-making. For the Lisbon Treaty has 'unified' the procedural regimes for CFSP and non-CFSP treaties in Article 218 TFEU. The provision distinguishes between various stages. The negotiation of international treaties is thereby principally left in the hands of the Commission and the High Representative. The conclusion of the agreement is the task of the Council. However, Parliament will need to give its consent on a wide range of agreements; yet, as we saw above, consent is not co-decision. The external powers of the Parliament are thus lower than its internal powers.

Section 4 finally looked at constitutional devices designed to safeguard a degree of 'unity' in the external actions of the Union and its Member States. These devices are necessary as the European Union is an 'open federation'. In order to ensure unity and consistency, the European legal order has principally had recourse to two constitutional mechanisms. Mixed agreements constitute an international law mechanism that brings the Union and the Member States (as well as third parties) to the same negotiating table. In an era of shared external powers,¹⁹³ mixed external action might not be mandatory; yet Member States have insisted on using mixed agreements as a political device. The second constitutional device is internal to the Union legal order. It is the duty of cooperation. While the duty is said to be reciprocal, it has principally been developed to facilitate the exercise of *Union* competences in the external sphere. The duty of cooperation has thereby been given a positive and a negative aspect. Positively, the Member States might be obliged to act as 'trustees of the Union interest' in international fora. Negatively, the duty has imposed obligations on the Member States when exercising their shared competences. This negative aspect is – to some extent – the opposite of the principle of subsidiarity. For the Member States are prevented from exercising their shared competence in order to prevent 'splitting the international representation of the [Union]'.¹⁹⁴

¹⁹³ See J. de la Rochère, 'L'ère des Compétences Partagées de l'étendue des Compétences Extérieures de la Communauté Européenne' [1995] 390 *Revue Du Marché Commun et de l'Union Européenne* 461; as well as: Schütze, *From Dual to Cooperative Federalism* (supra n. 48), Chapter 6.

¹⁹⁴ Case C-246/07 (supra n. 183), para. 44.