Part 1:
Defining EU External Action Objectives and Competences

The Principle of Conferral and Express and Implied External Competences

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I. Introduction[1]

The aim of this contribution is to offer some reflections on the relationship between the Union's express and implied external competences by examining them in the light of the principle of conferral of powers. According to the principle of conferral, which is one of the most fundamental of the principles which structure the EU's external relations,[2] "the Union shall act only within the limits of the competences conferred on it by the Member States in the Treaties to attain the objectives set out therein".[3] Competences not conferred on the Union remain with the Member States.[4] This expression of the principle thus emphasises that the source of EU powers is the Member States and that those powers are to be found in the Treaties.

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1 This is a shortened and updated version of a chapter that will appear in T. Tridimas, R. Schütze (eds), Oxford Principles of European Union Law (Oxford: Oxford University Press, 2018).

2 In Opinion 2/13 on the proposed accession of the EU to the European Convention of Human Rights, the Court of Justice refers to the "specific characteristics" of the EU and EU law, including "those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4, paragraph 1, of the Treaty on the European Union (TEU) and 5, paragraph 1, and paragraph 2, TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU". These "essential characteristics" of EU law "have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other". Opinion of 18 December 2014, 2/13, *Accession of the European Union to the ECHR*, EU:C:2014:2454, paras 165-167. On the EU's structural principles in external relations law, see M. Cremona, "Structural Principles and their Role in EU External Relations Law", in M. Cremona (ed), *Structural Principles in EU External Relations Law,* (Oxford: Hart Publishing 2018).

3 Article 5, paragraph 2, TEU.

4 Articles 4, paragraph 1 and 5, paragraph 2, TEU.

Conferral is a principle applicable to both internal and external action, and to both express and implied powers. As expressed in one *locus classicus*,

> [The] principle of conferred powers must be respected in both the internal action and the international action of the Community. The Community acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them.[5]

Both express and implied powers are here referred to as "specific powers": that is, derived from a specific provision of the Treaty, as distinct from the unspecific or residual power contained in what is now Article 352 of the Treaty on the Functioning of the European Union (TFEU).[6] Since the landmark decision in *Commission* v *Council* (*ERTA*),[7] the evolution of implied powers has been one of the defining features of EU external relations law, scholarship focusing on the basis and scope of implied external powers, their relation to internal powers and the conditions under which an implied external power may be declared exclusive.[8] Whereas debates as to the choice of legal basis have rarely explicitly turned on the relation between express and implied powers, there are signs that a shift in that relationship is taking place, which invites us to take stock. The consolidation

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5 Opinion of 28 March 1996, 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:1996:140, paras 24-25.

6 In Opinion 2/94, *supra* note 5, the Court described this provision, sometimes called the "flexibility clause", as "designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty" (para 29) and was careful to make clear that it could not be used to undermine the principle of conferral (para 30).

7 Judgment of 31 March 1971, *Commission* v *Council,* 22/70, EU:C:1971:32.

8 See e.g. R. Schütze, *European Constitutional Law* (Cambridge and New York: Cambridge University Press, 2012), 187–222; P. Eeckhout, *EU External Relations Law*, 2nd ed (Oxford and New York: Oxford University Press, 2011), 70–164; G. De Baere, *Constitutional Principles of EU External Relations* (Oxford and New York: Oxford University Press, 2008), 9–32; M. Cremona, "Defining Competence In EU External Relations: Lessons from the Treaty Reform Process", in A. Dashwood, M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge and New York: Cambridge University Press, 2008), 34; M. Cremona, "EU External Relations: Unity and Conferral of Powers", in L. Azoulai (ed), *The Question of Competence in the European Union* (Oxford: Oxford University Press, 2014), 65-85.

of the *ERTA* line of case law in the Treaty of Lisbon, in particular in Articles 3, paragraph 2 and 216, paragraph 1, TFEU, as well as the development of practice and law since the Treaty of Lisbon came into force in 2009, invite us to rethink the relationship between these two types of "specific power".

The prevailing impression is that – and despite some collecting together of the provisions on external action in dedicated Titles of the TEU and TFEU as a result of the Lisbon Treaty – external competence is still highly fragmented. Certainly there are many different potential legal bases in the Treaties, both express and implied, and disagreements about the appropriate legal basis for international action have not diminished. But if we examine the reality of practice over the last few years we can identify a different trend, towards a consolidation of EU external action and international treaty-making practice on the basis of a number of key express external competences of broad scope.

Two factors have certainly contributed to this trend. The first is the distinct preference on the part of the Court for choosing where possible a single legal basis for a Union act, whether an autonomous measure or the decision concluding an international agreement, based on its "main or predominant purpose". The Court refers to the possibility of using two or more legal bases as "by way of exception" and subject to there being no incompatibility between them.[9] The second factor is the wide scope given to the EU's express external competences, and in particular to certain cen-

9 For a recent example of what has become a standard form of words, see Judgment of the Court of 11 June 2014, *Commission* v *Council*, C-377/12, EU:C:2014:1903, para 34: "According to settled case-law, the choice of the legal basis for a European Union measure, including the measure adopted for the purpose of concluding an international agreement, must rest on objective factors amenable to judicial review, which include the aim and content of that measure. If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component. By way of exception, if it is established that the measure pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the various corresponding legal bases. However, no dual legal basis is possible where the procedures required by each legal basis are incompatible with each other (see, *inter alia,* Judgment of 19 July 2012, *Parliament* v *Council,* C-130/10, EU:C:2012:472, paras 42 to 45 and the case-law cited)".

tral external policy fields: the Common Foreign and Security Policy (CFSP), the Common Commercial Policy (CCP), development cooperation policy, and Association Agreements. These policies are very different in kind but have in common their breadth and their ability, when used as the basis for international action, to encompass a wide range of commitments and activities.

This trend invites us to reconsider the rationale for implied powers in the light of the principle of conferral. In fact, despite their codification in the Lisbon Treaty, implied external powers are of less importance than in the past, and this is not only because new express competences have been added over the years, both general and sectoral. External powers that are implied from internal competence-conferring provisions are certainly not redundant; they are still used in particular where the EU concludes a sectoral agreement such as a convention on private international law or a bilateral fisheries agreement, where the internal sectoral competence may be the most appropriate basis for external action. But their function is less central than we might think, especially when we read a provision such as Article 216, paragraph 1, TFEU.[10]

II. The Principle of Conferral and Express External Competence

The relationship between the principle of conferral and an external competence, which has been expressly conferred, might seem simple, but the nature of these competences can help us to understand the principle of conferral as a structural principle. We will here consider three important fields of express external competence: the CCP, the CFSP, and development cooperation, and we will focus on how the Court of Justice determines the scope of these competences and their relation to other, more specifically sectoral, implied external powers. Despite the obvious differences between these policy fields, as legal bases for conferred competences they have common features which are characteristic of EU external relations. The Treaties establish a set of general external objectives applicable to all external relations activity[11] and, in the case of the CCP and development cooperation, additional policy-specific objectives (liberalization of inter-

10 See below for the text of Article 216, paragraph 1, TFEU.
11 Articles 3, paragraph 5, and 21 TEU.

national trade in the case of the CCP and the reduction and eventual elimination of poverty in the case of development cooperation). The CFSP, in contrast, relies on the general external objectives turned into more specific policy objectives by the political institutions.[12] The Treaties mandate the EU to engage in external policy-making and provide instruments to enable it to do so (including different types of international agreement), and as long as the instruments used are designed to operate within the respective policy field they are open-ended as to the specific objectives of that policy-making. This has allowed the Court, in considering the boundaries of express external competences, to adopt an approach based on the overall framework of the action and, where this context is external, to give preference to broadly-conceived express external policy competences such as the common commercial policy or the common foreign and security policy.

A. The Common Commercial Policy

From Opinion 1/75 onwards it was clear that the CCP was not limited to dealing with tariffs and trade barriers but rather was a "concept having the same content whether it is applied in the context of the international action of a state or to that of the Community".[13] And CCP powers can be used to achieve purposes which go beyond those of trade policy, to include development,[14] environmental protection,[15] the expression of political disapproval,[16] and the promotion of human rights.[17] In the post-Lisbon period,

12 According to Article 24, paragraph 1, TEU the CFSP is to be "defined and implemented" by the European Council and Council.

13 Opinion of 11 November 1975, 1/75, EU:C:1975:145.

14 Judgment of 26 March 1987, *Commission* v *Council,* 45/86, EU:C:1987:163.

15 Judgment of 29 March 1990, *Greece* v *Council,* C–62/88, EU:C:1990:153.

16 In 1982 it was agreed for the first time to use the CCP competence, Article 113 EEC (now Article 207 TFEU) as the legal basis for a Community instrument imposing economic sanctions – by reducing quotas – against the Soviet Union as a reaction to the imposition of martial law in Poland: Council Regulation (EEC) No 596/82 of 15 March 1982 amending the import arrangements for certain products originating in the USS, OJ 1982 L 72/15. See also Judgment of 14 January 1997, *The Queen, ex parte Centro-Com Srl* v *HM Treasury and Bank of England,* C-124/95, EU:C:1997:8.

17 For example, the positive and negative human rights-related conditionality introduced into the EU's Generalised System of Preferences.

following the expansion of CCP exclusive competence to cover trade in services, the commercial aspects of intellectual property and foreign direct investment,[18] attention has been focused on the relationship between CCP competence and powers which may be derived from the EU's internal competence. The Court has adopted an approach which emphasises the external dimension (trade with third countries) over the existence of internal sectoral legislation.

In *Daiichi Sankyo* the Court was not faced with a legal basis question, but rather with the question of its jurisdiction to interpret the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the World Trade Organisation (WTO) agreement on trade-related intellectual property rights (IPR).[19] The action concerned patents for pharmaceuticals and the national court submitted a number of questions on the interpretation to be given to Articles 27 and 70 of the TRIPS. The Court's previous case law on TRIPS[20] and on mixed agreements more generally[21] would suggest that its jurisdiction to interpret the agreement depends on the degree to which the Union had exercised its competence (i.e. legislated) in the field covered by the agreement. The Member States submitting observations in the case took the view that this approach was still valid and that intellectual property should be seen as a shared competence within the framework of the internal market. The Commission, however, took a different approach. It argued that since the Lisbon Treaty revised and expanded the scope of the CCP in Article 207 TFEU, the whole of the TRIPS now falls within the CCP as being concerned with "the commercial aspects of intellectual property", and must therefore be subject as a whole to the EU's exclusive competence and the interpretational jurisdiction of the Court. Thus the scope of the CCP in relation to TRIPS was at issue.

The Court's approach to interpreting the phrase "the commercial aspects of intellectual property" in Article 207 TFEU is striking. Instead of

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18 Article 207 TFEU.

19 Judgment of 18 July 2013, *Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH* v *DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, C-414/11, EU:C:2013:520.

20 Judgment of 14 December 2000, *Parfums Christian Dior SA* v *TUK Consultancy BV and others*, C-300/98 & C-392/98, EU:C:2000:688, and Judgment of 11 September 2007, *Merck Genéricos – Produtos Farmacêuticos,* C-431/05, EU:C:2007:496.

21 Judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125.

starting from the nature of IPR, seeking to distinguish aspects which may be classified as "commercial aspects" from others, the Court starts with the nature of the EU's trade policy, the CCP. In other words, it first defines the scope of the CCP and then moves from that to see which aspects of TRIPS (not IPR in general) fall within that scope. And the CCP, the Court says, is first of all concerned with trade with non-member countries, and not trade within the internal market. In this way it deflects a criticism that an over-broad interpretation of "the commercial aspects of intellectual property" would empty of real meaning the concept of IPR as part of internal market law. Then the Court turns to its tried-and-tested formula for the scope of the CCP:

> "[A] European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade".[22]

Only those IPR rules "with a specific link to international trade" would fall within the scope of the CCP.[23] The next step is to focus on the TRIPS. The Court takes the view that the whole of TRIPS has a "specific link to international trade": it is an integral part of the WTO system and is linked to the other WTO agreements inter alia through the possibility of cross-retaliation. The Court rejects the argument that those parts of TRIPS which deal with the *substance* of rights fall rather within the scope of the internal market. The objective of those rules in TRIPS, it says, is the liberalisation of international trade and not the harmonisation of Member State laws. Importantly, this finding does not prevent the adoption of future internal EU legislation on the harmonisation of IPR based on internal competences, albeit this should be carried out in conformity with the EU's obligations under TRIPS. Thus the Court does not define "commercial aspects" of intellectual property by reference either to TRIPS or to a systematic categorization of intellectual property law rules. The phrase is defined in terms of the Court's own previous definition of the CCP: measures which are intended to promote, facilitate or govern trade. The rules in TRIPS which define the scope of IPR – which may have other purposes in other contexts – could here be seen as linked to international trade.

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22 Judgment of 18 July 2013, *Daiichi Sankyo Co. Ltd*, *supra* note 19, para 51.
23 *Id.,* para 52.

The approach adopted in *Daiichi Sankyo* was affirmed in Opinion 2/15,[24] where the Court held that the provisions on IPR in the EU-Singapore free trade agreement (EUSFTA) fell within the scope of the CCP. The purpose of the provisions, the Court held, was to guarantee entrepreneurs from both the EU and Singapore an adequate level of protection of their IPR so as to "increase the benefits from trade and investment" and liberalization of trade.[25] The fact that the agreement referred to other international conventions that go beyond the "commercial aspects" of IPR (including, for example, provisions on moral rights) did not take these provisions outside the scope of the CCP: such references were not sufficient for moral rights "to be regarded, in its own right, as a component of that agreement".[26]

We have used these cases to illustrate the Court's approach to interpreting the scope of the CCP, but we should not assume that every international agreement in the field of IPR will likewise fall under the CCP. In Opinion 3/15, for example, the Court refused to accept an argument of the Commission that all rules relating to IPR except those concerned with moral rights fall within the CCP, on the ground that this "would lead to an excessive extension of the field covered by the common commercial policy by bringing within that policy rules that have no specific link with international trade".[27]

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24 Opinion of 16 May 2017, 2/15, *EU Singapore Free Trade Agreement*, EU:C:2017:376.

25 *Id*., paras 122-126.

26 *Id*., para 129.

27 Opinion of 14 February 2017, 3/15, *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled,* EU:C:2017:114, para 85. In Opinion 3/15 the Court was asked whether the EU had exclusive competence to conclude the Marrakesh Treaty to facilitate access to published works for persons who are blind or visually impaired. Its first conclusion was that exclusive competence could not be based on CCP powers: its main purpose was not commercial, nor "to promote, facilitate or govern international trade" but to improve access to published works for blind and visually impaired people. The Court then went on to consider competence to conclude the treaty under implied powers based on the existence of secondary legislation dealing with copyright, finding that on this basis EU competence was indeed exclusive.

We can see a similar logic at play in the context of trade in services in *Commission* v *Council* (conditional access services),[28] in which the Court was asked to determine the appropriate legal basis for the conclusion of a Convention on the legal protection of those offering audio-visual and information society services on a conditional basis. The Council's view was that the Convention should be concluded as a mixed agreement on the basis of implied external competence relating to the internal market (Article 114 TFEU), whereas the Commission argued that the Convention fell within the scope of the CCP and thus exclusive competence. Internal legislation, coinciding in part with the scope of the Convention, had been adopted under Article 114, and the Convention effectively extends this internal market harmonisation to third country parties, as well as providing for additional measures on sanctions and remedies for unlawful activity, which go beyond the current internal EU legislation.

The Court held that this link to internal legislation based on Article 114 TFEU did not entail that an external agreement covering the same ground should necessarily also be based on implied external powers deriving from Article 114. It followed the line of reasoning it used in *Daiichi Sankyo*, defining the scope of the CCP and then analyzing the Convention to see whether it is concerned with international trade. The Convention was concerned, the Court found, not with trade in services between Member States but with trade in services between Member States and third countries. The predominant purpose of external trade is confirmed for the Court by the presence of a disconnection clause: in their mutual relations (i.e. within the internal market), the EU Member States are to apply EU rules where they exist, rather than the rules established by the Convention:

> "Article 11(4) of the Convention confirms that, since the approximation of the legislation of Member States in the field concerned has already been largely achieved by Directive 98/84, the primary objective of the Convention is not to improve the functioning of the internal market, but to extend legal protection of the relevant services beyond the territory of the European Union and thereby to promote international trade in those services".[29]

Although aspects of the Convention go beyond the existing EU legislation, and thus can be seen as aimed at improving the functioning of the internal market, the Court held that these were "incidental" effects and not

28 Judgement of 22 October 2013, *Commission* v *Council*, C-137/12, EU:C:2013:675.

29 *Id.*, para 67.

their main purpose. Thus here the presence of existing internal market legislation, instead of indicating that an internal market legal basis should be used for an international agreement covering the same ground, has the opposite effect: it demonstrates that the purpose of the Convention was not internal harmonisation but external markets (and imports from third countries into the EU market).

Thus in deciding whether a measure falls within the CCP the focus of the Court has been on identifying a link to external trade rather than on categorizing different aspects of IPR, services regulation or foreign investment.[30] This approach to defining the scope of the CCP allows it to cover a broad spectrum of rules operating at the international level without however displacing the operation of the (shared) internal market competence where rules are adopted within the EU. It thus reflects Article 207, paragraph 6, TFEU, which can be sensed in the background to these judgments: CCP powers should not be used to encroach on the internal legal bases for regulation.[31] It is an approach which follows the same logic as that applied by the Court in relation to the SPS and TBT agreements in Opinion 1/94.[32]

Opinion 2/15 on the EU-Singapore free trade agreement, while following the logic just described, brings another dimension to this picture and the potential use of CCP competence. The Court was at pains to draw attention to the altered external policy context of the CCP: the fact that as a result of the Lisbon Treaty the CCP must be "conducted in the context of the principles and objectives of the Union's external action".[33] An examination of those principles and objectives allowed the Court to conclude that "the objective of sustainable development henceforth forms an inte-

30 On defining the scope of foreign direct investment so as to include investment protection as well as market access, see Opinion 2/15 (*supra* note 24), paras 94-96. It should be noted that the Court relied on the use of the phrase foreign direct investment in Article 207 TFEU as the basis for excluding from the scope of the CCP all investment that is not direct; however it also made it clear that direct investment fulfils the test of having a direct and immediate effect on international trade, whereas indirect investment (such as portfolio investment) does not: see paras 83-84.

31 Opinion of 16 May 2017, 2/15, *supra* note 24, para 164.

32 Opinion of 15 November 1994, 1/94, *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property*, EU:C:1994:384, paras 30-33.

33 Article 207, paragraph 1, TFEU.

gral part of the common commercial policy",[34] and that the whole of the agreement's chapter on sustainable development could be brought within the scope of the CCP. The possibility for trade instruments to be linked to non-trade objectives is not new,[35] but here we see for the first time an explicit recognition that the policy objectives of the CCP itself extend beyond trade liberalization.

B. The Common Foreign and Security Policy

Although the Lisbon Treaty preserved a degree of specificity for the CFSP,[36] it changed the relationship between the CFSP and other external competences, integrating the CFSP into the general framework of EU external action, including its general objectives and procedures for treaty-making. The requirement that non-CFSP powers must be used where possible, which was based on the Court's interpretation of Article 47 EU,[37] no longer applies. The current Article 40 TEU provides that the different procedures and institutional powers granted by the CFSP provisions on the one hand and other EU competences on the other should not be affected by the implementation of either the CFSP or other competences respectively. The "non-affect" requirement operates in both directions. It is thus necessary to determine the boundary between the CFSP and other EU competences in order to allocate the appropriate legal basis and corresponding procedures and powers of the institutions, and this falls within the Court's jurisdiction under Article 275 TFEU. Three cases decided since the coming into force of the Lisbon Treaty throw light on the nature of CFSP competence and its relation to other competences, as well as on the role of the Court in upholding the principle of conferral.

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34 Opinion 2/15, *supra* note 24, para 147.

35 See references in notes 14, 15, 16 and 17.

36 See Article 24, paragraph 1, TEU, which refers to "specific rules and procedures", including a limited role for the Court of Justice.

37 Judgment of 29 May 2008, *Commission* v *Council*, C-91/05, EU:C:2008:288. As expressed by Advocate General Mengozzi in that case at para 116 of his Opinion, "Article 47 EU aims to keep watertight, so to speak, the primacy of Community action under the EC Treaty over actions undertaken on the basis of Title V and/or Title VI of the EU Treaty, so that if an action *could* be undertaken on the basis of the EC Treaty, it must be undertaken by virtue of that Treaty". Opinion of AG Mengozzi of 19 September 2007, EU:C:2007:528.

The first case concerns counter-terrorism measures, and the choice between two legal bases, one falling within the Treaties" provisions on external action, the other within the Area of Freedom, Security and Justice (AFSJ).[38] The Council and Parliament disagreed over the appropriate legal basis for Regulation 1286/2009/EU, which amended Regulation 881/2002/EC, the main Regulation implementing UNSCR 1390 (2002) and imposing restrictive measures against persons and entities associated with Al Qaeda and the Taliban. The contested Regulation was designed to amend the procedures in the 2002 Regulation so as to comply with the Court judgments in (inter alia) the *Kadi* case.[39] Regulation 881/2002 was based on Articles 60, 301 and 308 of the Treaty establishing the European Community (EC), legal bases which were found in *Kadi I* to be appropriate.[40] Under Articles 60 and 301 EC, which concerned restrictive measures directed at third states, the 2002 Regulation had been preceded by a CFSP measure, in this case Common Position 2002/402/CFSP. The amending Regulation was adopted shortly after the coming into force of the Lisbon Treaty on the basis of Article 215 TFEU which is the equivalent of former Article 301 EC, again linked to the 2002 Common Position.[41]

Article 215 TFEU might therefore appear the logical legal basis for this amended Regulation. But the Treaty of Lisbon also introduced a new provision, Article 75 TFEU in the Title on the Area of Freedom, Security and Justice (AFSJ), which envisages the adoption of regulations for the purpose of combating terrorism which would define a "framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State enti-

38 Judgment of 19 July 2012, *European Parliament* v *Council*, C-130/10, EU:C:2012:472. See also, in this volume, the chapter by Mauro Gatti.

39 Judgment of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P & C-415/05 P EU:C:2008:461.

40 M. Cremona, "EC Competence, "Smart Sanctions" and the Kadi Case", *Yearbook of European Law*, 28 (2009), 559.

41 Articles 60 and 308 EC were no longer needed since Article 215 TFEU, while following closely the wording of former Article 301 EC, has been amended to include financial as well as economic restrictions, and also to cover measures directed at natural or legal persons, groups and other non-State entities, as well as third States.

ties". The delimitation between these two provisions was not (and still is not) clear,[42] and yet it matters because measures based on Article 75 TFEU are adopted by way of the ordinary legislative procedure with the European Parliament as co-legislator, whereas under Article 215 TFEU the Regulation is adopted by the Council, and the Parliament must simply be "informed". The Court decided in favour of Article 215 TFEU in three steps.

First, as in the cases on the CCP we have already discussed, the Court starts by defining the scope of the relevant alternative legal bases. Article 215 TFEU specifically relates to external action, whereas Article 75 TFEU does not. Article 215 TFEU refers to third countries, it is placed within the Title on external action, and it requires the prior adoption of a CFSP decision. Article 75 TFEU, on the other hand, makes no reference to external activities, countries or policies, and expressly refers to achieving the objectives set out in Article 67 TFEU, that is, the creation of the AFSJ, an internal objective. This analysis implies that where a measure is essentially external, preference should be given to an express external legal basis over an internal legal basis.

Second, the Court held that the Regulation was essentially external since it relates to global activities, it responds to a threat of international scope (international terrorism), it is intended to give effect to a United Nations Security Council resolution, and is linked to a CFSP Decision (the procedural prerequisite mentioned above). The Court does not seek to make a distinction between "internal" and "external" terrorism (any more than it sought to distinguish between "commercial" and other aspects of IPR), simply saying that combating terrorism may be an objective of external action.

Third, although combating terrorism is referred to expressly in Article 75 TFEU, Article 215 TFEU can also be used for this purpose (and its precursors had been so used); thus the Court held that Article 75 TFEU is not a *lex specialis* on counter-terrorism which should take precedence. Indeed, the Court says, combating international terrorism and its financing in order to preserve international peace and security are explicit objectives of the

42 See M. Cremona, "EU External Action in the JHA Domain: A Legal Perspective", in M. Cremona, J. Monar, S. Poli (eds), *The External Dimension of the Area of Freedom, Security and Justice* (Brussels: Peter Lang-P.I.E., 2011), 99-100.

Union's external action.[43] Thus the Court prefers an explicitly external competence (Article 215 TFEU) over an express reference to counter-terrorism (Article 75 TFEU). Even where the substance of a measure (counter-terrorism) seems to fall within the scope of an AFSJ provision the latter was not preferred over an explicitly external legal basis where the measure is regarded as external in nature. As the Court put it, "Articles 75 TFEU and 215 TFEU relate to different European Union policies that pursue objectives which, although complementary, do not have the same scope".[44]

In this case, therefore, the choice was between a CFSP-linked external legal basis and an internal legal basis. Our second case[45] concerned the correct procedural legal basis under Article 218 TFEU for the conclusion of an international agreement, the issue being whether the agreement should be regarded as "exclusively" relating to the CFSP. The Council had concluded an agreement with Mauritius against the background of the EU's military mission "Atalanta", a CSDP mission designed to contribute to the deterrence, prevention and repression of piracy off the coast of Somalia.[46] The UN Security Council resolution to which the EU's mission is a response calls for cooperation between States "in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law",[47] and the EU's Joint Action provides that persons detained who are suspected of piracy may be transferred to another State for prosecution, if that State consents and provided that "the conditions for the transfer have been agreed with that third State in a

43 Judgement of 22 October 2013, *Commission* v *Council*, *supra* note 28, para 61. Note that the Court simply points out that the preservation of international peace and security is an external objective – as it is, under Article 21, paragraph 2, c, TEU; unlike Advocate General Bot, the Court does not link this objective directly to the CFSP: see in comparison the opinion of AG Bot, of 31 January 2012, C-130/10, EU:C:2012:50, paras 62-64.

44 *Id.,* para 66.

45 Judgment of 24 June 2014, *European Parliament* v *Council*, C-658/11, EU:C:2014:2025. See also, in this volume, the chapter by Pieter Jan Kuijper.

46 EU NAVFOR Somalia – Operation Atalanta, Council Joint Action 2008/851/CFSP, OJ 2008 L 301/33. In March 2012 the operating mandate was extended until December 2014. Piracy is defined by Art. 101 of the United Nations Convention on the Law of the Sea.

47 United Nations Security Council Resolution of 2 June 2008, S/RES/1816 (2008).

manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment".[48] As a result the EU has entered into agreements with some States in the region who are prepared to accept suspected pirates detained for prosecution, and the agreement with Mauritius was one of these.[49] The dispute between the Parliament and the Council was over the procedure for concluding the agreement. The Council concluded the agreement as a CFSP agreement, based on Article 37 TEU and following the procedure set out in Article 218, paragraphs 5 and 6, TFEU; as an agreement relating (in the Council's view) exclusively to the CFSP it was negotiated by the High Representative, who also proposed the signing and conclusion of the agreement, and there was no requirement to obtain the consent of, or even to consult, the European Parliament. The Parliament however argued that, as well as its CFSP dimension, the agreement contained elements that fell within the AFSJ (judicial cooperation in criminal matters and police cooperation) as well as development cooperation, and did not therefore "relate exclusively" to the CFSP within the meaning of Article 218, paragraph 6, TFEU.

The Court relied in this case on the fact that the Parliament apparently accepted that a substantive CFSP legal basis was appropriate.[50] Following the Advocate General, it first of all linked the choice of procedural legal basis to the choice of substantive legal basis. In other words, an agreement would "exclusively relate" to the CFSP for the purposes of the procedure to be applied if the agreement could be based solely on a substantive CFSP legal basis, no other non-CFSP substantive legal basis being required. This is an important step, given the Court's preference for a single

48 Council Joint Action 2008/851/CFSP, *supra* note 46, Art 12(3).

49 Council Decision 2011/640/CFSP OJ 2011 L 254/1. Agreements have also been concluded with Kenya (which subsequently ended the agreement), Tanzania (also challenged by the European Parliament: see further below) and Seychelles. See further I. Bosse-Platière, "Le volet judiciaire de la lutte contre la piraterie maritime en Somalie: les accords de transferts conclus par l"Union européenne avec les États tiers", in *Les différentes facettes du concept juridique de sécurité. Mélanges en l'honneur de Pierre-André Lecocq* (Lille : Imprimerie centrale du Nord, 2011), 91-112.

50 The European Parliament challenged the substantive legal basis in a parallel case concerning a similar agreement with Tanzania: Judgment of 14 June 2016, *European Parliament* v *Council*, C-263/14, EU:C:2016:435, see further below.

substantive legal basis representing the "predominant purpose" or centre of gravity of an agreement; incidental or subsidiary purposes need not be reflected in additional legal bases.[51] It is certainly rational to link together procedural and substantive legal basis; as Advocate General Bot said, to decide otherwise would entail engaging in two separate enquiries over substance and procedure, which seems redundant (although given that they are dealt with in separate provisions, perhaps not completely so[52]). However, by treating the term "exclusively relates" as referring to the appropriate legal basis, and then applying standard legal basis reasoning which where possible identifies a single legal basis reflecting its predominant purpose, this approach results in a departure from the literal meaning of "exclusively", reading it in effect as "predominantly".[53] We will return to the predominant purpose approach to legal basis, and its link to the principle of conferral.

What then was the appropriate legal basis? The Court spends very little time on this point.[54] It simply refers to the fact that the Parliament itself

51 For a recent statement of this principle see *supra* note 9.

52 Although the original EEC Treaty had a tendency to combine them, the separation of substantive treaty-making powers from procedural provisions has been almost universalized by the Lisbon treaty, Art 218 TFEU now covering even CFSP agreements in terms of procedure (Art 207 TFEU contains some "Special provisions" which operate alongside Art 218 TFEU for the negotiation and conclusion of trade agreements).

53 The Advocate General justifies this by arguing correctly that otherwise there would be no, or virtually no, agreement relating "exclusively" to the CFSP since the requirement of policy coherence entails that an agreement whose centre of gravity is the CFSP will generally also relate to other EU policies, such as development cooperation: "For instance, the well-recognised interrelationship between security, development and human rights means that it would very often be possible to argue that measures taken in one of these three areas will also have some effect on the other two areas and, in that sense, also relate to those areas for the purposes of the application of Article 218, paragraph 6, TFEU. Clearly, that is not what the treaties envisage". Opinion of AG Bot of 30 January 2014, *European Parliament* v *Council*, C-658/11 EU:C:2014:41, para 23.

54 The Court's judgment does not take up the invitation in the Advocate General's opinion to establish a fundamental position on the relationship between the CFSP and (implied) external powers under the AFSJ, the "most significant constitutional challenge" according to Van Elsuwege: P. Van Elsuwege, "Securing the Institutional Balance in the Procedure for Concluding International Agreements: *European Parliament* v *Council (Pirate Transfer Agreement with Mauritius)"*, *Common Market Law Review* 52, no. 5 (2015), 1379 at 1388.

had accepted during the hearing that the CFSP competence (on its own) could be used as the correct substantive legal basis for the agreement. The Parliament's main argument in the case was instead that since the agreement also served secondary or incidental aims falling within other policy fields it could not be regarded as relating "exclusively" to the CFSP for procedural purposes, even if a CFSP legal basis were all that was substantively required. Since the Court rejected that argument, linking the procedural to the substantive legal basis, it concluded that the correct procedure had been followed. It followed its frequent practice of not going further than was required to give a judgment in the particular case. The Court did not, therefore, address the question of whether the agreement indeed served secondary aims, and if so whether these were merely incidental or were substantial enough to require a separate legal basis. We should remember the Court's approach to legal basis: when it is faced with a legal basis question, it does not start by asking what legal basis it would itself have chosen for the measure; rather, it asks whether the legal basis in fact chosen is legally justifiable. The Court's willingness in this case to accept without question the institutions" own characterization of the agreement as in substance a CFSP agreement, simply because there was no institutional disagreement on the matter, is significant because the Court's jurisdiction to determine the boundary between the CFSP and other competences so as to give effect to Article 40 TEU is an important part of its jurisdiction in relation to the CFSP. It is a telling demonstration that the Court sees the distinction (and Article 40 TEU) as essentially concerned with the balance of institutional power rather than an expression of a fundamental constitutional division between types of Union competence. This is also borne out by its approach to the Parliament's right to be informed under Article 218, paragraph 10, TFEU, which stresses the role (limited but important) that the Parliament can play in the conclusion of CFSP agreements.[55]

Our third case is a second challenge by the Parliament to a very similar agreement concluded with Tanzania.[56] Here the European Parliament did contest the substantive legal basis of the agreement, arguing that in addition to the CFSP, Articles 82 and 87 TFEU should have been used since

55 The Court held that the Parliament's right to be kept informed of the negotiation of a CFSP agreement (although it has no right of consent or even formal consultation) is an essential procedural requirement: Judgment of 24 June 2014, *European Parliament* v *Council*, *supra* note 45, paras 80-86.

56 Judgment of 14 June 2016, *European Parliament* v *Council*, *supra* note 50.

the agreement also concerned judicial cooperation in criminal matters and police cooperation. Had these legal bases been included, then the Parliament's consent would have been required under Article 218, paragraph 6, a, v, TFEU. The Court's starting point is important; it referred to Articles 275 TFEU and 40 TEU as the basis for its jurisdiction but then immediately reiterated its standard approach to legal basis.[57] So it is clear that in applying Article 40 TEU the choice between a CFSP and a non-CFSP legal basis is no different from any other legal basis choice. The Court then established that the agreement has a clear link to the CFSP, since it is envisaged by, and designed to facilitate, the EU's Operation Atalanta, which is itself designed to give effect to the UN Security Council's mandate. Indeed, the agreement is "merely ancillary" to the CFSP mission and once the mission ceases it will be "devoid of purpose". Finally, the Court decided that although some of the activities envisaged by the agreement appear to relate to judicial or police cooperation (the transfer and trial of suspected pirates, together with due process safeguards), these activities are inseparably linked to the CFSP mission; they are "an instrument whereby the European Union pursues the objectives of Operation Atalanta, namely to preserve international peace and security, in particular by making it possible to ensure that the perpetrators of acts of piracy do not go unpunished".[58] It concluded that the agreement fell predominantly within the scope of the CFSP and not police or judicial cooperation. Again we find a preference not only for a single legal basis but also for an explicit external legal basis (CFSP) over an implied external dimension to an internal (AFSJ) legal basis, where the context for the act is essentially external (here, a UN Security Council Resolution and a CFSP military mission).

The key to the Court's decision was the close link between the agreement and the CFSP mission giving effect to a UN Security Council Resolution, just as the key to its decision in the counter-terrorism case was the link to a CFSP decision implementing a UN Security Council Resolution. What the Court conspicuously does not do in either case is to attempt a categorization of "security", as it appears in the Area of Freedom, Security and Justice and in the Common Foreign and Security Policy. Such a categorization had been suggested by Advocate General Bot in the Mauritius agreement case,[59] and was accepted by Advocate General Kokott in the

57 *Id.,* paras 42-44. For the standard approach, see citation *supra* note 9.
58 *Id.*, para 54.
59 Opinion of AG Bot, *supra* note 53, para 112.

Tanzania case.[60] According to this argument, "a Union action must be connected with the CFSP where the objective of that action is, first and foremost, peace, stability and democratic development in a region outside the Union". In contrast, action under the AFSJ must contribute to building freedom, security and justice within the EU. This building of the AFSJ may require external action, but in order for external action to be based on an AFSJ legal basis (such as police cooperation) it must relate back to the security of the EU itself. The argument coheres with the rationale for implied powers in that external AFSJ powers should be exercised in order to attain AFSJ Treaty objectives, which are predominantly internal.[61] Thus an international agreement on police cooperation may use an AFSJ legal basis and implied external powers as long as the agreement is directed at furthering the security of the Union, albeit it may also have a strong dimension directed at strengthening international security – the PNR agreements with the USA and Australia would be an example here,[62] as would the "SWIFT" agreement with the USA on the transfer of financial messaging data.[63] As the Advocate General recognises, however, it is often difficult to separate internal and external security in practice and security threats the other side of the world may also threaten Europe. The security of the Union cannot be confined to threats of purely domestic origin.

The Court's approach, wisely, is not to try to categorise different aspects of security but rather to focus on the international context. This is in line with the approach it has adopted, as we have seen, in deciding whether a measure falls within the CCP, where the focus has been on identifying a link to external trade rather than on categorizing different aspects of IPR, services regulation or foreign direct investment. Just as the use of services regulation instruments does not necessarily entail the use of an internal market legal basis, so the fact that police cooperation or training is involved does not *per se* bring the measure within the AFSJ.

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60 Opinion of AG Kokott of 28 October 2015, *European Parliament* v *Council*, C-263/14, EU:C:2015:729, paras 63-70.

61 On the rationale for implied external powers, see further below.

62 Council Decision 2012/381/EU OJ 2012 L 186/3; Council Decision 2012/472/EU OJ 2012 L 215/4, both based on Articles Article 82, paragraph 1, d and Article 87, paragraph 2, a, TFEU in conjunction with Article 218, paragraph 6, a, TFEU.

63 Council Decision 2010/412/EU on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, OJ 2010 L 195/3.

C. Development Cooperation

The third type of express external competence we shall discuss here concerns the ability of the Union to conclude development cooperation agreements of broad scope.[64] In the early years of the Community, international agreements with strong development objectives such as the Yaoundé and Lomé Conventions were concluded as association agreements, but the Maastricht Treaty introduced a specific development cooperation competence, including the possibility of concluding agreements with developing countries.[65] The scope and limits of such agreements have been contested; development after all has potentially very broad economic, social and cultural dimensions. In a case decided in 1996 the Court of Justice held that a development cooperation agreement should be characterized according to its "essential object" and could legitimately contain clauses covering many different spheres of cooperation "provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation" and are "limited to determining the areas for cooperation and to specifying certain of its aspects and various actions to which special importance is attached".[66]

The conditions under which a separate legal basis would be needed for specific sectoral clauses in a development agreement have recently been addressed again by the Court and the result has been an affirmation of this earlier ruling. The case involved the signing of a framework agreement on partnership and cooperation between the EU (and its Member States) and the Philippines.[67] The Commission proposed two substantive legal bases: the common commercial policy (Article 207 TFEU) and development cooperation (Article 209 TFEU). The Council adopted its decision on the signature of the agreement adding several more legal bases: Articles 91 and 100 TFEU (transport), Article 79, paragraph 3, TFEU (readmission of illegal migrants) and Article 191, paragraph 4, TFEU (environment). The Commission challenged the addition of these legal bases, putting forward

64 Article 209 TFEU. Note that Articles 212 and 217 TFEU also provide the basis for wide-ranging cooperation and association agreements.

65 Now Articles 208-211 TFEU.

66 Judgment of 3 December 1996, *Portuguese Republic* v *Council*, C-268/94**,** EU:C:1996:461, paras 39 and 45.

67 Judgment of the Court of 11 June 2014, *Commission* v *Council*, *supra* note 9.

three arguments. First, that all three sectors in question fall within the scope of development cooperation as evidenced by the European Consensus on Development and the EU's financial instrument on development cooperation.[68] Second, that none of the relevant provisions in the agreement contain obligations substantial enough to require a separate legal basis, and to the extent that they establish specific objectives these are „incidental" to the main development objective. And third, that the inclusion of Article 79, paragraph 3, TFEU as a legal basis for the clause on readmission would create uncertainty since Protocols 21 and 22 would hence apply (these are the AFSJ opt-outs applicable to the UK, Ireland and Denmark) and this "variable geometry" in the application of the agreement would be "difficult for the contracting third country to follow".[69]

The Court of Justice essentially supported the Commission's arguments. It refers to the "broad notion of development cooperation", as reflected in the (non-binding) European Consensus on Development. Although development is not in the title of the agreement and appears simply to form one of its several objectives, in analyzing the agreement's provisions the Court finds that sustainable development, the Millennium Development Goals and the reduction of poverty (this last being the "primary objective" of development policy under Article 208, paragraph 1, TFEU) are among its general principles and are linked to many other provisions in the agreement. The question for the Court was whether the provisions on transport, environment and readmission contribute to the aim of development and if so, whether they contain obligations which "constitute distinct objectives that are neither secondary nor indirect in relation to the objectives of development cooperation".[70]

As far as the first question is concerned, the Court had no difficulty in finding a link between these substantive fields of cooperation and the development objectives of the EU's policy frameworks, in particular the European Consensus on Development and the EU's financial instrument

68 The European Consensus on Development, adopted as a joint statement by the Council, the representatives of the Member States meeting in Council, the Commission and the European Parliament, OJ 2006 C 46/1; The financial instrument relevant at the time was Regulation 1905/2006/EC, OJ 2006 L 378/41.

69 Opinion of AG Mengozzi of 23 January 2014, *Commission* v *Council*, EU:C:2014:29, C-377/12, para 16.

70 Judgment of the Court of 11 June 2014, *Commission* v *Council*, *supra* note 9, para 48.

for development cooperation. That being said, the readmission clause merits further consideration. It is hard not to conclude that its main purpose is "the implementation of another policy" – that is, the EU's policy on irregular migration.[71] The fact that it is included in a provision headed "migration and development" should not in itself be decisive. As Advocate General Mengozzi pointed out in his opinion (albeit coming finally to the same conclusion as the Court), the clauses on readmission "depart from the [agreement's] first concern – steady progress in development in the Philippines – to fulfil one of the European Union's own objectives and to serve its interests: the commitment by the contracting third country to take back its own nationals who are illegally resident in European Union territory". The "vision" is a "defensive one which places European Union interests first".[72] The Advocate General nevertheless accepted the link to development on the basis that development assistance is part of the *quid pro quo* which has induced the Philippines to accept the readmission clause. The point illustrates the difficulty of pinning down the objectives of international agreements for the purposes of identifying legal basis where the objectives of the different parties are likely to be different.

The second question was also tricky when applied to the readmission clause, since unlike the provisions on transport and environment it contains specific obligations, not merely general commitments to cooperate. The Council argued that although the obligation on a State to readmit its own nationals is derived directly from international law, the inclusion of these provisions in the agreement created additional legal effects (meaning by this, the possibility of specific enforcement measures). The Court however held that the agreement does not itself contain concrete provisions on the implementation of this obligation; instead it refers to the future conclusion of a readmission agreement. Its conclusion therefore was that the readmission clause did not contain obligations going beyond development cooperation and an additional legal basis was not necessary.

Thus we may conclude that development cooperation agreements, like the CFSP, are capable of covering a broad range of issues and, like the CCP, may accommodate a variety of different objectives. The express development cooperation competence can be used as long as the provisions of the agreement may be said to contribute – even somewhat indirectly –

71 *Id.,* para 44.

72 Opinion of AG Mengozzi, *supra* note 69, paras 70-71.

to the agreement's overall development aims, and as long as they do not contain substantive obligations which are sufficiently distinct to require their own separate legal basis. Again, this suggests that insofar as sectoral policies such as transport or environment are included in such broad agreements, separate sectoral legal bases using implied external powers may not in general be required. This approach of the Court of Justice forces the decision-maker to identify a predominant purpose – generally an expressly external one – and the complexity of an agreement may not be reflected in the resulting choice of a single legal basis: the ancillary or secondary objectives are less visible than if they carried their own legal basis. But we need to bear in mind the following points.

First, the Court's approach accurately reflects the reason for establishing legal basis, which is the principle of conferral. Legal basis is necessary to ground competence to act. It is not intended to be a description of the content of a measure. So only those legal bases should be included which are necessary and sufficient to ground competence. Hence the emphasis on whether the substantive obligations in an international agreement are such as to require a separate legal basis – a separate ground of competence.

Second, although the broad express legal bases discussed here may be used to subsume sectoral elements of an agreement, we are here talking about the conclusion, not the implementation of the agreement. The implementation of specific obligations in an agreement may require a different, sectoral, legal basis. This was clear in our discussion of the CCP cases, where the external and internal dimensions are kept distinct by the Court. In its discussion of the Philippines partnership and cooperation agreement, the Court – in support of its argument that an additional legal basis was not necessary – refers to the need to implement the readmission clause in the cooperation agreement through the conclusion of a specific readmission agreement.[73] In an earlier judgment on the scope of development cooperation the Court pointed out that " [t]he mere inclusion of provisions for cooperation in a specific field does not … predetermine … the legal basis of Community acts for implementing cooperation in such a field".[74] Thus it is in the context of implementation that the more specific sectoral legal bases might come into the picture: the inclusion in a development

73 Judgment of the Court of 11 June 2014, *Commission* v *Council*, *supra* note 9, para 58.

74 Judgment of 3 December 1996, *Portuguese Republic* v *Council*, *supra* note 66, para 47.

cooperation agreement of a provision on matters falling within the scope of the AFSJ, transport or other sectoral policy fields does not pre-judge the question of whether a distinct legal basis will be needed for implementing measures, whether by way of a further agreement or by way of an autonomous act.

Three recent cases involving the updating of sectoral annexes to association agreements illustrate this point. Each case concerned the appropriate legal basis for a Council decision regarding the position to be taken by the EU within the decision-making body established by an association agreement in order to take account of the EU's revision of its regulation on social security for migrant workers.[75] In each case there was a dispute as to the appropriate legal basis for the decision, with the UK disagreeing with the Council's ultimate choice. For present purposes, it is of interest that in all three cases the Court found that an internal, sectoral legal basis was necessary, confirming that the Council had been correct to use Article 48 TFEU (the basis for internal social security measures). In two of the cases – those involving the European Economic Area and the agreement with Switzerland on the free movement of persons – Article 48 TFEU was sufficient on its own, given that the agreement envisaged extending the EU's own freedom of movement legislation to the third countries in question.[76] It is only in the third case, which concerned the association agreement with Turkey, that the Court held that a combination of an internal legal basis (Article 48 TFEU) with Article 217 TFEU (the basis for association agreements) would be appropriate, since the measure was "adopted in the framework of an association agreement and is aimed at the adoption of measures coordinating social security systems".[77]

According to the principle of conferral, then, the EU may use its express treaty-making powers in these policy fields (whether CCP, CFSP or development cooperation) to conclude agreements which include provisions relating to policy fields where specific internal powers, or specific internal legislation, exist. But where particular obligations in these agreements are implemented, or the institutions they establish take decisions de-

75 Judgment of 26 September 2013, *UK* v *Council*, C-431/11, EU:C:2013:589; Judgment of 27 February 2014, *UK* v *Council*, C-656/11, EU:C:2014:97; Judgment of 18 December 2014, *UK* v *Council*, C-81/13, EU:C:2014:2449.

76 Judgment of 26 September 2013, *UK* v *Council*, and Judgment of 27 February 2014, *UK* v *Council*, *supra* note 75.

77 Judgment of 18 December 2014, *UK* v *Council*, *supra* note 75, para 63.

signed to further their objectives in specific fields, then the powers relative to those policy fields should be used, either alone or in conjunction with the external competence.

III. The Rationale *for Implied Powers*

Against this background, what then is the rationale for, and scope of, implied external powers? The original Treaty of Rome contained only two express external fields of action, the common commercial policy and the power to conclude association agreements and as we have seen these provisions were – and are – interpreted broadly. Nonetheless these competences clearly could not cover everything and it was quite common for Article 235 EEC (now Article 352 TFEU) to be used as an additional legal basis for non-association agreements which included provisions on cooperation in addition to trade.[78] Against this background, the Court made its decisive move in the *ERTA* decision, using the fact that the Community had legal personality as a basis for reasoning that "in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty".[79] Whether this capacity translates into a power in a specific case depends on an examination not only of the expressly-stated external competences but also "other Treaty provisions" and measures adopted on the basis of those provisions by the Community's institutions.

The line of case law since *ERTA* establishes two basic rationales for implying external powers.[80] The first, derived from *ERTA* itself, is based on the existence of internal legislation, whether or not adopted within the framework of a common policy,[81] and is founded on pre-emption, the oc-

78 See for example Council Regulation 2300/76/EEC of 20 September 1976 concluding the Framework Agreement for commercial and economic cooperation between the European Communities and Canada, OJ 1976 L 260/1, which was based on Articles 113 and 235 EEC (now as amended Article 207 and 352 TFEU).

79 Judgment of 31 March 1971, *Commission* v *Council, supra* note 7, para 14.

80 A. Dashwood, J. Heliskoski, "The Classic Authorities Revisited", in A. Dashwood, C. Hillion (eds), *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000), 11.

81 Judgment of 31 March 1971, *Commission* v *Council, supra* note 7; Opinion of 19 March 1993, 2/91, *Convention no. 170 of the International Labour Organization concerning safety in the use of chemicals at work,* EU:C:1993:106.

cupation of the field by existing Community or Union law (hence the equation in *ERTA* between the existence of the competence and its exclusive nature[82]). The second relies on the existence of an objective established by the Treaty, for the attainment of which Treaty-based internal powers may be complemented by external powers; this rationale is based on the principle of *effet utile*, the implication of powers necessary to achieve an expressly-defined objective. As recently expressed by the Court,

> "[W]henever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect".[83]

We can also see the *effet utile* rationale in operation in Opinion 2/15, where it provides the basis for implied (non-exclusive) external competence in the field of non-direct investment protection.[84]

> "[I]n the light of the fact that the free movement of capital and payments between Member States and third States, laid down in Article 63 TFEU, is not formally binding on third States, the conclusion of international agreements which contribute to the establishment of such free movement on a reciprocal basis may be classified as necessary in order to achieve fully such free movement, which is one of the objectives of … the FEU Treaty".[85]

Both these rationales – which we may call the *ERTA* rationale and the *effet utile* rationale – suggest an underlying distinction between the competence granted by the Treaty to act within a particular policy field (e.g. movement of capital), and the power to exercise that competence through internal

82 In a famous passage the Court says, "each time the Community, with a view to implementing a common policy envisaged by the Treaty, 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". Judgment of 31 March 1971, *Commission* v *Council, supra* note 7, para 17.

83 Opinion of 14 October 2014, 1/13, *Convention on the Civil Aspects of International Child Abduction*, EU:C:2014:2303, para 67, citing also Opinion of 7 February 2006, 1/03, *Competence of the Community to conclude the new Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,* EU:C:2006:81, para 114.

84 Opinion of 16 May 2017, 2/15, *supra* note 24, paras 239-242.

85 *Id*., para 240.

and/or external instruments.[86] This distinction is useful conceptually to understand the rationale for implied external powers and is consistent with the use made of the term "competence" in Articles 2-6 TFEU, but it must be said at once that as far as terminology is concerned it is impossible to find a consistent distinction between "competence" and "power" in the judgments of the Court. In any event both the *ERTA* rationale and the *effet utile* rationale suggest an organic link and a complementarity between the internal competence-conferring provision and the implied external power, in the first case through the exercise of that competence at the internal level and in the second through the necessity to enter into international commitments to attain the (internal) objective. The *effet utile* rationale emphasises the Treaty objectives: it is based on external powers being required to complement internal powers so as to achieve the objectives of a Treaty-based competence, and it is this rationale that has been called the "principle of complementarity" by Dashwood and Heliskoski.[87] In contrast, in the case of the *ERTA* rationale the link between the exercise of internal competence and the existence of the external power can appear somewhat perfunctory in the reasoning of the Court of Justice, especially in cases where the site of disagreement is over the possible exclusive nature – rather than the existence – of that external power. In Opinion 1/13, for example, the reasoning takes the form of a simple assertion of an internal competence which has been exercised:

> "In the matter in issue, the 1980 Hague Convention concerns civil cooperation where children are moved across borders. The Convention thus falls within the area of family law with cross-border implications in which the EU has internal competence under Article 81, paragraph 3, TFEU. Moreover, the EU has exercised that competence by adopting Regulation 2201/2003. In those circumstances, the EU has external competence in the area which forms the subject-matter of the Convention".[88]

No attention – at this stage of identifying the existence of external powers – seems to be paid to the objectives of the internal competence; in con-

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86 T Tridimas, P Eeckhout, "The External Competence of the Community and the Case Law of the Court of Justice – Principle versus Pragmatism", *Yearbook of European Law* 14, (1994), 143; R Schütze, *Foreign Affairs and the EU Constitution*, (Cambridge: Cambridge University Press, 2014), 250.

87 A Dashwood, J Heliskoski, "The Classic Authorities Revisited", *supra* note 80, at 12, preferring the term to the commonly-used "principle of parallelism".

88 Opinion of 14 October 2014, 1/13, *supra* note 83, para 68. See also Opinion of 7 February 2006, 1/03, *supra* note 83, para 134.

trast, they are extensively discussed in the context of determining whether or not the external competence is exclusive. But the objectives of the internal competence are there in the background, since they are reflected in the internal legislation on which the existence of external powers is based. Thus the priority given to protecting or facilitating internal objectives and the associated competence is common to both rationales, and both are clearly distinguishable from the argument (unsuccessfully) put forward by the Commission in Opinion 1/94 which simply claims an external competence in every policy field for which an internal competence exists.[89] On the contrary, implied external powers are inherently limited and cannot provide the basis for developing an external policy independent of the needs and functioning of the internal regime. For that, explicit external competences (such as those we were examining in the previous section) are needed. This is coherent in terms of the balance between the necessary flexibility provided by an implied powers doctrine and the need to ensure compliance with the principle of conferred powers.

These rationales for implied external powers are now visible in the Treaty provisions on external competences, which aim to reflect existing case law. According to Article 216, paragraph 1, TFEU

> "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".

We find here a reference to express external powers ("where the Treaties so provide"), to the *effet utile* rationale ("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"), and the *ERTA* rationale ("where the conclusion of an agreement … is provided for in a legally binding Union act or is likely to affect common rules or alter their scope").

What, if anything, does this provision add to the pre-existing case law? While seeking to reflect the case law on implied external powers, Article 216, paragraph 1, TFEU does not create a new substantive legal basis for

89 The argument was rejected by the Court in Opinion 1/94, the Court insisting on the need to link the external power to the specific objective established in the Treaty: Opinion of 15 November 1994, 1/94, *supra* note 32, paras 74-75.

the conclusion of international agreements. As Advocate General Kokott rightly says, "Article 216, paragraph 1, TFEU must not be confused with a general conferral of powers on the Union institutions for external action. On the contrary, an external competence can only ever be inferred from that rule in conjunction with the provisions of the Treaties, objectives of the Union, legal acts and rules of Union law mentioned in it".[90] So a substantive provision in the Treaties is still required as a legal basis for an international agreement based on implied powers, in addition to a reference to Article 218 TFEU which is the procedural legal basis for concluding international agreements. In fact although Advocate General Kokott has proposed that, where implied external powers are relied on, Article 216, paragraph 1, TFEU should be included as a legal basis alongside the substantive legal basis (the specific competence-conferring provision) to demonstrate clearly the link between the internal competence and the implied external power, neither the practice of the institutions nor the judgments of the Court have (so far) followed this approach.[91] Thus, for example, when discussing Article 63 TFEU as the basis for external competence in the field of non-direct investment protection, the Court referred to Article 216, paragraph 1, TFEU, but there was no suggestion that the latter was required as a legal basis.[92] And agreements in the field of environmental policy have been concluded on the basis of Article 192 TFEU (the internal environmental policy competence); the concluding decision may mention that the agreement "contributes to the achievement of the objectives of the environmental policy of the Union", reflecting the words of Article 216, paragraph 1, TFEU, but that provision is not included among its legal bases.[93]

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90 Opinion of AG Kokott of 17 July 2014, *UK* v *Council*, C-81/13, EU:C:2014:2114, para 102.

91 For the Advocate General's views on this point, which this author finds convincing, see Opinion of AG Kokott of 17 July 2014, *supra* note 90, para 104; Opinion of AG Kokott of 21 March 2013, *United Kingdom* v *Council*, C-431/11, EU:C:2013:187, paras 64-70; Opinion of AG Kokott of 28 October 2015, *supra* note 60, EU:C:2015:729, para 58.

92 See *supra* note 84.

93 See for example Council Decision 2013/86/EU of 12 February 2013 on the conclusion on behalf of the European Union of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, OJ 2013 L46/1. See also Council Decision 2013/5/EU of 17 December 2012 on the accession of the European Union to the Protocol for the Protection of the

As these examples illustrate, there is certainly still some room for implied external powers, especially for the conclusion of international agreements dealing with action in a specific sector. Agreements concerning transport,[94] agriculture[95] or fisheries[96] – when not simply forming part of a wider agreement which may be based on an express competence[97] – will be concluded under implied powers. In such cases, although there may be disputes over the precise purpose of a measure,[98] the sectoral objectives of EU policy are relatively clear. In contrast, the AFSJ and its relationship with the EU's CFSP competence, as we have already seen, raise complex questions about the nature of the AFSJ and its objectives. It has rightly been pointed out that although external action is necessary if the EU is to achieve its objective of offering its citizens an area of freedom, security and justice,[99] "the main rationale of the AFSJ as a political project is clearly an internal one", and its external dimension is instrumental to that rationale and objective, and thus "cannot be considered as an external policy in its own right, like the CCP or the CFSP, but only as an instrumental ancillary dimension of the essentially internal political project of the AFSJ".[100] The Treaty of Lisbon has not changed this essential orientation: interna-

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Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil, OJ 2013 L4/13.

94 Article 207, paragraph 5, TFEU.

95 Judgment of 7 October 2014, *Germany* v *Council*, C-399/12, EU:C:2014:2258.

96 Judgment of 26 November 2014, *European Parliament* v *Council*, *European Commission v Council*, C-103/12 & C-165/12, EU:C:2014:2400.

97 Opinion of 15 November 1994, 1/94, *supra* note 32; Opinion of 30 November 2009, 1/08*, General Agreement on Trade in Services (GATS) – Schedules of Specific Commitments Concerning Market Access and Granting of National Treatment*, EU:C:2009:739; Opinion of 16 May 2017, 2/15, *supra* note 24.

98 As Opinion 2/00 illustrates, the boundary between the trade and environmental competences may not be easy to draw. See Opinion of 6 December 2001, 2/00, *Cartagena Protocol*, EU:C:2001:664; see also Judgment of 12 December 2002, *Commission* v *Council*, C-281/01, EU:C:2002:761; Judgment of 10 January 2006, *Commission* v *Parliament and Council,* C-178/03, EU:C:2006:4; Judgment of 10 January 2006, *Commission* v *Council,* C-94/03, EU:C:2006:2.

99 "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". Article 3, paragraph 2, TEU.

100 J Monar, "The External Dimension of the EU´s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon", *SIEPS Re-*

tional agreements will need to show that they fall within either the *effet utile* or the *ERTA* rationale in the context of the EU's internal objectives. For an example of the former in the AFSJ field we may look to a number of agreements providing for cooperation between law enforcement agencies that have been concluded on the basis of implied external powers founded upon the AFSJ.[101] For an example of the latter, the EU is becoming increasingly active in the field of private international law, both in the adoption of internal legislation and in the conclusion of international agreements which take as their legal basis the internal legislative competence-conferring provisions on civil justice.[102] The specialised, highly sectoral nature of this legislation when used as a rationale for implied external powers has resulted in a number of rulings of exclusive external competence.[103]

IV. Conclusion

In a series of cases arising since the Lisbon Treaty it has been argued that internal Treaty powers, either one of the AFSJ powers or the internal market, should provide the – or one of the – legal bases for an external mea-

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port 2012/1, 13. Along the same lines, see Opinion of AG Kokott of 28 October 2015, *supra* note 60, para 63.

101 See for example the PNR agreements with the USA and Australia, Council Decision 2012/381/EU, OJ 2012 L 186/3; Council Decision 2012/472/EU, OJ 2012 L 215/4, both based on Articles Article 82, paragraph 1, d, and Article 87, paragraph 2, a, TFEU in conjunction with Article 218, paragraph 6, a, TFEU.

102 See for example Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, OJ 2011 L 192/39.

103 E.g. Opinion of 7 February 2006, 1/03, *supra* note 83; Opinion of 14 October 2014, 1/13, *supra* note 83. We do not have the space here for a full discussion of this question; see for example P. Franzina (ed), *The External Dimension of EU Private International Law after Opinion 1/13,* (Cambridge: Intersentia, 2016); A. Rosas, "Exclusive, Shared and National Competence in the Context of EU External Relations: Do such Distinctions Matter?", in I. Govaere, P. Van Elsuwege, S. Adam, E. Lannon (eds.), *The EU in the World: Essays in Honour of Marc Maresceau*, (Leiden: Martinus Nijhoff, 2013), 17; I. Govaere, "'Setting the International Scene': EU External Competence and Procedures Post-Lisbon Revisited in the Light of ECJ Opinion 1/13", *Common Market Law Review*, 52, no. 5 (2015), 1277, at 1286-1295.

sure. In only two of these cases has the argument been even partially successful.[104] The express competences (the CCP, the CFSP, development cooperation) have prevailed. This, it seems to me, is no coincidence. These external policies may seek to extend beyond the EU's borders the regulatory approach developed by the EU in building the internal market, or may use AFSJ instruments such as police cooperation to achieve their objectives; but this does not necessarily require the use of internal market or AFSJ powers. The Court has avoided categorizing as "internal" or "external" different aspects of IPR, services regulation, investment protection or security. The touchstone is not the specific instruments used but rather the context in, and the purposes for which, they are used. And as we have seen, even where a specific express external power exists (such as for readmission agreements) or specific provisions are included that will improve the functioning of the internal market, alternative legal bases may still be preferred by the Court of Justice on the ground that the centre of gravity (predominant purpose) of the measure in question lies elsewhere.

This certainly does not mean that there is no scope for an external dimension, based on implied powers, to the internal market, the AFSJ or other primarily "internal" policy fields, but such instruments will need to contribute to the attainment of the objectives for which the internal competences have been granted and to demonstrate either the *ERTA* or the *effet utile* rationale, as now expressed in Article 216, paragraph 1, TFEU, and will tend to be sectoral in nature. Agreements on visa facilitation and readmission[105] are concluded with third countries, likewise agreements on specific private international law domains; all these have a clear link to Union territory and the Union's own legal systems at domestic and European level. Agreements on law enforcement and counter-terrorism cooperation may also be concluded, and autonomous measures adopted, as long as there appears to be a link with the Union's security, and (perhaps) as long as their centre of gravity does not lie in the Union's contribution to international cooperation in the context of the United Nations. As far as the in-

104 The only exceptions are the rejection of the CCP as a legal basis for an IPR agreement (Opinion of 14 February 2017, 3/15, *supra* note 27), and the application of the exclusion of transport services and non-direct investment from the CCP (Opinion of 16 May 2017, 2/15, *supra* note 24).

105 Since the Lisbon Treaty readmission agreements have their own express legal basis in Article 79, paragraph 3, TFEU; previously they were based on implied powers.

ternal market is concerned, external measures, including regulatory agreements, are likely to fall within the expanded CCP. An internal market legal basis may be appropriate where the measure is essentially designed to improve the operation of the internal market, the external dimension serving that internal purpose. In the field of intellectual property, an agreement may be designed to harmonise IPR and improve IPR protection without being concerned with promoting international trade, and in such a case an internal market rather than a CCP legal basis would be appropriate.[106]

Given the breadth of express external policy fields and their legal bases, including the CFSP, and given the approach taken by the Court to multiple legal bases (they are exceptional), if one of the broadly-framed express legal bases is chosen by the legislature it is difficult to challenge the choice. As far as the CFSP was concerned, before the Lisbon Treaty revision this was balanced by the precedence given to the EC Treaty; now, the CFSP has equal value. In the *conditional access services* case although the legal basis chosen by the Council and challenged by the Commission was the implied internal market legal basis, the Court (as with *Daiichi Sankyo*) chose to start its reasoning with an analysis of the possible express competence – the CCP – and duly found that the agreement could be fitted within the scope of that provision. In Opinion 2/15, too, the Court starts by examining how much of the agreement can be brought within the scope of the CCP, before considering other implied external powers. In each of the cases we have discussed, then, the express legal basis was the starting point; a case needed to be made (and was not often successfully made) for turning to an implied power.

This of course is perfectly logical, and it is consistent with the principle of conferral to prefer an express over an implied power. But it also has implications for the principle of conferral. Although implied powers might seem to put some strain on that principle, in fact their connection with the Treaty's internal competences and legislation adopted in furtherance of those objectives provides an identifiable Treaty-based rationale for external action. Express external competences, on the other hand are in themselves a conferral of powers. Their open-ended nature is designed to allow the Union to develop as an external actor, using a wide variety of instruments (including those "borrowed" from internal policy fields), and evolv-

106 See e.g. Judgment of 4 September 2014, *Commission* v *Council*, C-114/12, EU:C:2014: 2151; Opinion of 14 February 2017, 3/15, *supra* note 27.

ing its objectives and priorities in line with the Treaty-based objectives and principles governing all external action, but with considerable scope for institutionally-defined policy choice. The principles governing the process whereby such policy choice is made are therefore all the more important.[107]

107 M. Cremona, "Structural Principles and their Role in EU External Relations Law", *supra*, note 2.