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*Proceedings of the Interdisciplinary Doctoral Colloquium
“The EU as a Global Actor”*

THE EU AND ITS MEMBER STATES IN THE WORLD: LEGAL AND POLITICAL DEBATES

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THE EU AND ITS MEMBER STATES IN THE WORLD: LEGAL AND POLITICAL DEBATES

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PREFACE

Prof. Dr. Jan Wouters

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This compilation brings together a number of the best papers that were presented at the interdisciplinary doctoral colloquium 'The European Union as a Global Actor' that took place on 8 May 2015. The colloquium was organized by the Leuven Centre for Global Governance Studies at KU Leuven, in co-operation with the Centre for EU Studies at Ghent University, the Antwerp Centre for Institutions and Multilevel Governance (ACIM) at Antwerp University, the Faculty of Law of KU Leuven and the Leuven Institute for International and European Studies (LINES) at KU Leuven, and with the support of the Flemish Government and the European Society of International Law.

The colloquium – the programme of which is included as an appendix to this volume - came at a propitious moment. Establishing the European Union (EU) as a more visible, more effective and stronger global actor was one of the key objectives of the Treaty of Lisbon, which had been in force for more than five years in the spring of 2015. The EU had taken initiatives in many different areas of international law and relations, making the area of EU external action increasingly the subject of research in law and political science. Indeed, the study of the EU's place in the world, and the way in which the Union seeks to influence international developments, is a topic of interest for a rapidly increasing number of doctoral researchers, in Belgium and throughout Europe. Too often, this research is dispersed and isolated, among different universities, among different departments and in different academic disciplines. One of the reasons we decided to organise the interdisciplinary doctoral colloquium of 8 May 2015, based on an international call for papers, was to bring together these researchers, from law, international relations and political science in order to discuss these issues. How do lawyers and political scientists assess the EU's influence and role as an international actor? With the colloquium, we aimed to encompass different topics in this wide area of research, and give doctoral researchers in law and political science the opportunity to present and discuss their research in a conference style format. Senior speakers and discussants from the EU institutions and from academia interacted with more junior researchers.

When introducing the conference on that 8th of May (just a day before Europe Day), I pointed to the topicality of the EU's actions and position on the international scene. The European External Action Service's (EEAS) Security Policy and Conflict Prevention Directorate was just hosting peace mediation experts from sixteen regional and international organisations in Brussels to discuss peace mediation as a key foreign policy tool; the Advisory Group of the Transatlantic Trade and Investment Partnership (TTIP) was meeting to discuss investment arbitration; and, in the beginning of the week the new Secretary-General of the EEAS, Alain Le Roy, had delivered a strong statement reconfirming the EU's commitment to multilateralism at the United Nations General Assembly Thematic Debate on Strengthening Cooperation between the UN and regional and sub-regional organizations. Just a week before, the 2015 Review Conference of the Parties to the Non-Proliferation Treaty had begun its work, with the EU Delegation being led by High Representative Mogherini; the Commission and the High Representative had presented a new Action Plan for Human Rights and Democracy for the period 2015-2019; and the Council had adopted new conclusions on a review of the European Neighborhood Policy. In addition, EU foreign policy was facing a number of ongoing crises: the situations in Libya, the Sahel, Syria, Ukraine, and the issues of migration and the trafficking and smuggling of people across the Mediterranean.

From the presentations and discussions at the colloquium, it became clear that the EU still has an important role to play in exporting its values and shaping the international order. We had panels on topics such as the EU as a social actor, as a sustainable actor, as a human

rights actor, and as a normative power. Despite the challenges facing the Union, we could see, throughout that doctoral day, how the EU continues to seek to shape and influence events, rather than just to respond to crises.

Our Centre is grateful to Tina Van den Sanden and Jed Odermatt for their determination and steadiness – I would even be tempted to use a catchword that is very much à la mode today in EU parlance: resilience – in compiling and editing some of the most fascinating papers that were presented at the colloquium. We plan to organize a new interdisciplinary doctoral colloquium in 2018.

INTRODUCTION

Jed Odermatt and Tina Van den Sanden

The European Union has no shortage of internal challenges. With the European migrant crisis, the European debt crisis and inconsistent economic recovery, recent terrorist attacks in EU Member States, the surge of populist and nationalist movements and parties, and the withdrawal of the United Kingdom, all facing Europe, one may be forgiven for overlooking the goal, espoused in the Treaty of Lisbon, to establish the EU as a more effective and visible global actor. While the EU is confronted with such internal challenges, the need for the EU to play a role in the world is greater than ever. The European Commission's White Paper on the Future of Europe¹, which sets out the possible future alternatives for the European Union, for example, is not an entirely inward-looking document. It recognizes that addressing the EU's challenges requires a broad-ranging and effective foreign policy. Many of these 'internal' issues, moreover, can only be addressed through more effective action at the international level. And while global governance institutions are under increasing pressure, especially in the light of waning commitment from the United States (as shown, for example, through its withdrawal from the Paris Climate Agreement) the European Union can provide support for the multilateral system in which these goals can be achieved.

There continues to be a great deal of research examining and evaluating how well the EU has been able to live up to this ambitious goal. Political science scholars have discussed how well has the EU performed as a security actor, a human rights actor, an environmental actor and so on. The question is often whether, and to which extent, the EU has been able to influence international developments. Lawyers, for their part, have generally focused on the multitude of legal issues that arise from the EU seeking to play a greater role on the world stage. It recognizes that the EU's ability to do so is often hampered by both political and legal complications, and presents ways in which the EU may overcome these hurdles. In this vein, the Department of European and International Law and the Leuven Centre for Global Governance Studies at the University of Leuven held a Doctoral Colloquium on the topic of "The EU as a Global Actor". The event brought together doctoral researchers from Belgium and across Europe and from different disciplines whose aim was to assess the political and legal issues from a variety of perspectives. This Working Paper brings together some of the research presented at the Colloquium.

The central issue that arose from this research is two-fold. On the one hand, the EU has set itself ambitious (external) objectives in several areas of global governance, such as in human rights protection, trade, health and development cooperation policy. Not only does the EU pursue an ambitious agenda, it also aims to establish itself as an 'agenda-setter' in these fields. On the other hand, legal and political barriers may hinder the realization of this aspiration. These barriers are caused, first, by the fact that the EU Member States remain highly relevant actors in their own right, both politically and legally speaking. The EU's enhanced role on the world stage does not necessarily mean that this should come at the expense of the active participation of the EU Member States, however. Second, the internal division of competences and institutional set-up may create obstacles to the realization of the EU's ambitions. This collection explores the ways in which the EU might seek to overcome these obstacles. The contributions combine analyses of discrete topics, all addressing the main question formulated above. The collection follows an interdisciplinary approach, allowing the volume to make an argument about how the EU can become a more effective international actor in different fields.

¹ European Commission, White Paper on the Future of Europe, Reflections and Scenarios for the EU27 by 2025, 1 March 2017, https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf

Steurs, Van de Pas, Delputte and Orbie address the main research question in the field of global health. They discuss a discrepancy between the EU's aspiration to be an actor in global health, while the EU Member States have remained highly active in this domain. The question is not whether the EU is active, but to what extent a common EU vision on global health has emerged. Some Member States have their own global health strategies, and the conceptual shift from 'international health' to 'global health' has not emerged across all EU Member States. A comparative framing analysis of the global health policy documents of the European Commission and seven EU Member states aims to investigate the extent to which such a common vision exists. They identify the issues that might impede the EU having 'added value' in global health.

Querci discusses the agenda-setter objective of the EU in the area of human rights protection and individual sanctions. The author argues that the European Union is one of the most active actors to issue individual sanctions, while firmly integrating human rights protection standards, initially mainly through the activism of European courts. Querci questions whether the EU's approach to a human rights based adoption of individual sanctions may serve as a legal model for other legal orders. The EU's action in the area of individual sanctions can also therefore be seen as a field where the EU is an international norm shaper and agenda setter.

Saluzzo focuses on the legal complications that arise from the continued international action of the EU Member States, particularly with regard to international agreements. The EU Member States remain international legal subjects in their own right, and continue to enter into a range of international agreements with third states. Nonetheless, this right is conditioned by EU Membership. Saluzzo discusses how Member States are required to uphold the EU's interests when engaging in legal relationships with third countries and international organizations, especially if that action were to affect the EU legal order.

Moskvan discusses the internal scope and division of competences in the area of foreign direct investment, which since the Treaty of Lisbon falls under the exclusive common commercial policy competence of the Union. Nevertheless, the author argues that the limited and ambiguous scope of the competence, with the Member States retaining competence over important investment aspects and challenging the scope of the EU's competence, might still form an obstacle to the achievement of a successful investment policy. The question of who is competent to conclude agreements in this field (the EU only, or the EU and the Member States) continues to vex EU lawyers, and was one of the key issues in the Court of Justice of the European Union's recent *Opinion 2/15* on the EU-Singapore Free Trade Agreement.²

Van den Sanden addresses the discrepancy between the EU's ambitious policy objectives in the area of development cooperation policy on the one hand and the difficulties with defining the legal scope of the area on the other hand. The EU pursues a coherent and comprehensive development cooperation policy, formulated as a multidimensional policy field. The legal scope of the EU's competences is, however, governed by the principle of conferral, which requires the EU to act only within the limits of the competences conferred upon it. The paper analyses how a balance is struck between these two principles by analysing the legal scope of development cooperation policy and its delimitation with closely linked areas, such as environmental protection and trade.

The contributions demonstrate the wide variety of topics addressed and methods used by doctoral students studying the EU as a global actor. The authors not only point towards problems and questions, but also discuss some of the ways in which these challenges might be addressed and overcome. Steurs et al, for example, question whether a 'division of labor' might be appropriate in the field of health and development, rather than pushing for a common EU approach. Saluzzo focuses on the legal mechanisms that can be used to coordinate the

² Opinion of the Court (Full Court) of 16 May 2017, EU:C:2017:376.

external action of the EU Member States. Querci, Moskvan and Van den Sanden discuss how a balance must be struck between competing interests (the fight against terrorism and human rights) between different actors (the EU and the Member States) and between different external goals (development cooperation policy and environmental protection).

The EU's role in the world, and its relations with other states and international organizations, continues to be an important subject of discussion. These debates often focus on issues such as trade and investment agreements, especially in the light of certain political opposition to agreements such as CETA and TTIP in Europe. These contributions demonstrate how the EU seeks to be an agenda-setter in fields such as global health, development, climate change, and the fight against terrorism. However, it seems that the current discussion is less about 'EU and the world' but rather the 'EU *and its Member States* in the world'. For the EU to be a successful and influential global actor, it must be able to find ways to deal with the issues that arise from the continued legal and political relevance of those Member States. This is especially the case when some, such as the United Kingdom, view that their international interests are best served outside, rather than from within, a European Union.

THE GLOBAL HEALTH POLICIES OF THE EU AND ITS MEMBER STATES: A COMMON VISION?^{1 2}

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ABSTRACT

This contribution assesses the global health policies of the European Union (EU) and those of its individual Member States. So far, EU and public health scholars have paid little heed to this, despite the large budgets involved in this area. While the European Commission has recently attempted to define the 'EU role in Global Health', Member States are active in the domain of global health as well. Therefore, this paper raises the question to what extent a common EU vision on global health exists. This is investigated through a comparative framing analysis of the global health policy documents of the European Commission and seven EU Member states (France, Germany, the UK, Belgium, Denmark and the Netherlands). The analysis is informed by a typology of four 'global health frames', namely social justice, security, investment and charity. The findings show a mixed picture. It became clear that the conceptual shift from 'international health' towards 'global health' has not gained ground within the Member States. Consequently, there are also differences in how health is being framed. While the European Commission, France, Belgium, Denmark and Spain clearly support a social justice frame, the policy documents of the UK, Germany and the Netherlands put an additional focus on the security and/or investment frames.

¹ This manuscript builds on the working paper "International assistance from Europe for global health: searching for a common paradigm" (2012) of our colleagues Gorik Ooms, Rachel Hammonds and Wim Van Damme from the Institute of Tropical Medicine, Antwerp. We are grateful for their insight and advice, on which we could build our conceptualization and analysis.

² This manuscript was completed in January 2016.

1. Introduction

During the past 20 years, health has increasingly gained importance on the global policy agenda. There has been an unprecedented growth in funding for health, several new partnerships and initiatives were launched³, philanthropic foundations such as the Bill and Melinda Gates Foundation became key players, and health emerged on the agenda of high-level fora such as the UN and the G8. This 'global health revolution' has also been accompanied by "a re-conceptualization of health as more than a technical, humanitarian concern and as relevant to the vital interests of states in security and economic well-being".⁴ A milestone has been The Oslo Ministerial Declaration, advanced by the ministers of Foreign Affairs of Brazil, France, Indonesia, Norway, Senegal, South Africa, and Thailand in 2006, that declares that "health as a foreign policy issue needs a stronger strategic focus on the international agenda".⁵

The European Union has been trying to find its place in the growing global health arena, in addition to the efforts of its Member States.⁶ Health has always been an important issue in the development policy of the EU. In 2002 the Communication from the European Commission on Health and Poverty Reduction in Developing Countries established for the first time "a single Community policy framework to guide future support for health, AIDS, population and poverty within the context of overall EC assistance to developing countries".⁷ While recognizing the "differing histories and experiences in framing development policy"⁸ of Member States, the increasing convergence of general development objectives was mentioned as an opportunity to improve coordination of EU Member States' development policies and approaches in the health sector. Furthermore, the European Consensus on Development (2006) stressed the importance of the Millennium Development Goals (MDGs), with a specific focus on the health-related MDGs. Also in the EU's health policy, more attention has been given to global health issues. In 2007, the importance of a European contribution to the global health debate was recognized in a white paper stating that "in a globalized world, it is hard to separate national or EU-wide actions from the global sphere, as global health issues have an impact on internal community health policy and vice versa".⁹

Recognizing that global health is influenced by several policy domains, the Directorate-General Health, DG Development and DG Research initiated a consultation process with several stakeholders in 2009, which resulted in the launch of a Commission communication on the EU Role in Global Health in 2010.¹⁰ This document stated, "the EU should apply the common values and principles of solidarity towards equitable and universal coverage of quality health services in all external and internal policies and actions".¹¹ By focusing on universal coverage of basic quality care, health systems strengthening and policy coherence, it proposed a clear vision on global health. It was followed by Council conclusions¹² and the

³ E.g. GAVI, the Vaccine Alliance in 2000, the Global Fund to Fight AIDS, Tuberculosis and Malaria in 2002 and the US President's Emergency Plan For AIDS Relief (PEPFAR) in 2003.

⁴ Fidler, D. P.(2009). After the revolution: global health politics in a time of economic crisis and threatening future trends. *2 Global Health Governance (2008/09)*, 2.

⁵ Feldbaum, H., Lee, K. & Michaud, J. (2010) Global health and foreign policy. *Epidemiol Rev* 32; 86.

⁶ Rollet, V., & Chang, P.(2013). Is the European Union a global health actor? An analysis of its capacities, involvement and challenges. *European Foreign Affairs Review*, 3, 309-328.

⁷ European Commission. (2002). Communication from the Commission to the Council and the European Parliament: Health and poverty reduction in Developing Countries. Brussels, 2.

⁸ Communication Health and poverty reduction in Developing Countries, 15.

⁹ European Commission. (2007). White Paper -Together for Health: A Strategic Approach for the EU 2008-2013 (COM(2007) 630). Brussels.

¹⁰ European Commission. (2010). Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: The EU Role in Global Health. Brussels.

¹¹ Communication The EU Role in Global Health, 5.

¹² Council of the EU. (2010). Council Conclusions on the EU role in Global Health. . Brussels.

establishment of a Global Health Policy Forum, bringing together several stakeholders to discuss a wide range of global health issues.

The attempts of the EU to claim a role in global health are clearly linked with current debates on the EU's role in development policy. The European Commission is not only an international donor in its own right; the EU also has a 'federalizing' role in coordinating and harmonizing the aid policies of its Member States. Since the 2000s, the European Commission has increasingly stressed this latter role, fostering European aims, European approaches and European actions in development policy.¹³ The Commission communication and Council Conclusions on the EU Role in Global Health of 2010, can thus be seen as part of these ongoing coordination efforts, specifically focusing on the health sector.

However, despite the attempts to coordinate EU action on global health, Member States want to retain their influence on this domain as well. The Council Conclusions on the EU role in Global Health make it very clear that the stronger EU voice on global health should be endeavored "without prejudice to the respective competencies".¹⁴ As development policy is a shared competence, EU donors have their own policies regarding (health) development policy. Furthermore, the conceptual shift from 'international health' to 'global health' (infra) has not manifested itself in the same way along all EU Member States. Like the European Commission, some Member States have released their own global health strategies (the UK in 2008 and 2011 and Germany in 2013). While these strategies are also the result of an interdepartmental cooperation, they might however not necessarily echo the central objectives of the 2010 Commission communication. As Member States remain important actors in development policy in general, and in global health more specifically, the question remains to what extent a common EU vision on global health exists. This paper therefore investigates to what extent an EU vision on global health exists.

The relationship between global health policies of the EU and its Member States has so far received little attention among EU and public health scholars. The limited literature on the role of the EU in global health mainly focuses on the European Commission's policy¹⁵ and on the representation of the EU towards the World Health Organization (WHO).¹⁶ The policies of EU Member States on global health have been largely neglected in literature.¹⁷

Besides the European Commission, seven Member States were selected for our comparative analysis, namely: France, Germany, the UK, Netherlands, Belgium, Spain and Denmark. This selection is based on two main reasons. First, this selection comprises the largest EU financial donors in health. Second, by including northern, southern and central European countries, this

¹³ Bretherton, C. (2013). Development policy. In C. B. a. M. L. Mannin (Ed.), *The Europeanization of European Politics*. New York: Palgrave Macmillan; Orbie, J. (2012). The EU's role in development: a full-fledged development actor or eclipsed by superpower temptations. *The European Union: enlightened superpower in the making*, Basingstoke: Palgrave Macmillan, 17-36;

¹⁴ Council conclusions, 3.

¹⁵ Aluttis, C., Krafft, T., & Brand, H. (2014). Global health in the EU—a review from an agenda-setting perspective. *Global health action*, 7; Emmerling, T., & Heydemann, J. (2013). The EU as an Actor in Global Health Diplomacy *Global Health Diplomacy* (pp.223-241): Springer; Rollet, V., & Chang, P.(2013). Is the European Union a global health actor? An analysis of its capacities, involvement and challenges. *European Foreign Affairs Review*, 3, 309-328.

¹⁶ Battams, S., van Schaik, L., & Van de Pas, R. (2014). The EU as a Global Health Actor: Policy Coherence, Health Diplomacy and WHO Reform. *European Foreign Affairs Review*, 19(4), 539-561; Van Schaik, L. (2011). The EU's Performance in the World Health Organization: Internal Cramps after the 'Lisbon cure'. *Journal of European Integration*, 33(6), 699-713.

¹⁷ Gagnon, M. L., & Labonté, R. (2013). Understanding how and why health is integrated into foreign policy—a case study of health is global, a UK Government strategy 2008–2013. *Glob Health*, 9(1), 24 is a noteworthy exception.

selection covers a broad range of European approaches towards development.¹⁸ By comparing the policy documents of the Commission with these Member States, we aim to identify differences and similarities which might impede or strengthen the EU's added value in global health.

In the next part, we will provide more information on framing analysis and describe the typology of global health frames. Next, the findings of the comparative analysis will be discussed. Lastly, the conclusions will summarize the main findings and discuss some suggestions for further research.

2. Typology of Global Health Frames

Global health is a complex policy area which is understood differently by academic scholars and policy makers. For this paper, we will not stick to a strict definition, as the question on how different EU Member States interpret global health is an integral part of the research. An important discursive distinction made by several authors, however, is the one between 'international health' and 'global health'.¹⁹ The term 'international health' originates from the colonial period and is associated mainly with assisting developing countries in fighting infectious and tropical diseases. In contrast, 'global health' is understood as a broader concept, focusing on health issues that transcend national boundaries, the health impacts of deepened globalization for all countries (also industrialized countries), and the need for global action and solutions by a wide range of actors.²⁰

On top of the difference between 'international' and 'global' health, there are different perspectives on the main problems (and solutions) involving 'global health'. In this paper we refer to these as global health 'frames'. A frame can be defined as "an organizing principle that transforms fragmentary or incidental information into a structured and meaningful problem, in which a solution is implicitly or explicitly included".²¹ Framing analysis has been used extensively in social sciences.²² More recently, it has also been used among EU-scholars²³ and global health scholars.²⁴ Despite methodological and theoretical differences,

¹⁸ Carbone, M. (2007). *The European Union and international development : the politics of foreign aid* : UACES contemporary European studies series. New York: Routledge; Hoebink, P.& Stokke, O. (2005). *Perspectives on European Development Co-operation. Policy and performance of individual donors countries and the EU*. New York: Routledge.

¹⁹ E.g.: Bozorgmehr, K. (2010). Rethinking the "global" in global health: a dialectic approach. *Globalization and Health*, 6(1), 19; Koplan, J. P., Bond, T. C., Merson, M. H., Reddy, K. S., Rodriguez, M. H., Sewankambo, N. K., & Wasserheit, J. N. (2009). Towards a common definition of global health. *The Lancet*, 373(9679), 1993–1995.

²⁰ For reasons of simplicity, the term global health is used in this chapter as an overarching term for both 'international' and 'global' health. When referring to the semantic difference between both terms, the terms 'international' and 'global' health will be put between quotation marks.

²¹ Verloo (2005). Mainstreaming gender equality in Europe. A critical frame analysis approach. *The Greek Review of Social Research*, 117,20.

²² Entman, R. M.(1993). Framing: Toward clarification of a fractured paradigm. *Journal of Communication*, 43 (4), 51-58; Snow, D. A., & Benford, R. D. (1988). Ideology, frame resonance, and participant mobilization. *International social movement research*, 1(1), 197-217.

²³ Verloo (2005). Mainstreaming gender equality in Europe. A critical frame analysis approach. *The Greek Review of Social Research*, 117,11-34; Lombardo, E. & Meier, P.(2006). Gender Mainstreaming in the EU. Incorporating a feminist reading? *European Journal of Women's Studies*, 13(2), 151-166; Daviter, F. (2007). Policy Framing in the European Union. *Journal of European Public Policy*, 14(4), 654-666.

²⁴ Labonté, R. Gagnon M.L. (2010) Framing health and foreign policy: lessons for global health diplomacy. *Globalization and Health* 6:14; Shiffman, J. (2009). "A Social explanation for the rise and fall of global health issues." *Bulletin of the World Health Organization*, 87, 608-613; McInnes, C. et al (2012) Framing global health: the governance challenge. *Global Public Health*,7, Suppl 2, S83-94.

these studies share the idea that the same issue can be framed differently by different actors, and that the way a certain topic is ‘framed’ also affects the proposed solutions to deal with this topic.

Importantly, framing analysis pays specific attention to how actors and institutions frame issues in a particular way.²⁵ We can expect that dominant frames will differ depending on the country, and specifically also on which institution within the country takes the lead in formulating a global health policy. Before the global health revolution, international health policy was mainly dealt with by the ministries of development cooperation, growing out of former colonial relations. However, the increasing awareness of Western states’ own interests in global health has ‘lifted’ the subject onto the agenda of ministries of health and foreign affairs. In a growing number of countries, a ‘whole-of-a-government approach’ is used to address a broad range of global health themes. Although policy documents rarely follow just one frame, the dominance of one or another frame may be linked to who had the biggest voice in the debate.

Previous research has identified several ‘frames’, ‘perspectives’ or ‘metaphors’ of global health.²⁶ To provide insights into the different policy discourses, this paper will make a distinction between four frames, namely *social justice*, *charity*, *investment* and *security*. Differences between these frames relate to four criteria: the purpose, main interest, commitment towards international health assistance (IHA), and the main focus (table 1).

	Charity	Social justice	Investment	Security
Purpose	Fight absolute poverty	Reinforce health as a social value and a human right	Maximize economic development	Combat infectious diseases and contribute to social and political stability
Main Interest	Partner Countries	Partner countries	Donor	Donor
Commitment towards IHA	Ad-hoc, unpredictable	Long-term	Long-term	Long-term
Main focus	Popular themes of victimhood & emergencies	Health systems & primary health care	Disease-specific	Disease-specific

Table 1: Typology of global health frames

²⁵ Verloo (2005). Mainstreaming gender equality in Europe. A critical frame analysis approach. *The Greek Review of Social Research*, 117,11-34; McInnes, C. et al (2012) Framing global health: the governance challenge. *Global Public Health*,7, Suppl 2, S83-94.

²⁶ Kickbusch, I. (2011). Global health diplomacy: how foreign policy can influence health. *BMJ*, 342(d3), 154; Labonté, R. Gagnon M.L. (2010) Framing health and foreign policy: lessons for global health diplomacy. *Globalization and Health* 6:14; Stuckler, D., & McKee, M. (2008). Five metaphors about global-health policy. *The Lancet*, 372(9633), 95-97;

The charity frame promotes health as a key element in the fight against poverty and prioritizes popular themes of victimhood such as mother and child mortality health and malnutrition.²⁷ Lencucha²⁸ links the charity frame also with the periodic engagement with events such as natural disasters or catastrophic events that pose an imminent threat to the health of people. Just like the social justice frame, it refers to the interests of the inhabitants of the countries receiving health assistance. However framed as charity, international health assistance is voluntary, temporary and reactive.²⁹ The amount of IAH depends entirely on the benevolence or generosity of the contributor, which makes it less reliable than the social justice frame.

The social justice perspective aims to “reinforce health as a social value and human right, supporting the UN MDGs, advocating for access to medicines and primary health care, and calling for high income countries to invest in a broad range of global health initiatives”.³⁰ It builds on cosmopolitan values that stress the importance of solidarity towards individuals at the global level, notwithstanding their nationality.³¹ According to this frame, the national government is not the sole body responsible for realizing the right to health for its population, as countries ‘in a position to assist’ bear a complementary international obligation as well. The level of the health assistance should be based on the needs of the country and aims to fill the gap between what the national government can provide and what is needed to realize the right to health. The funding is for a considerable part focused on health systems and primary health care.

The investment frame considers health as a means of maximizing economic development.³² It is not only concerned with the economic effects of health on the population of countries receiving IHA, but also with the result of a growing global market in health goods and services.³³ Compared to the two previous frames, the investment frame thus marks a shift from other-interestedness to self-interestedness: if IAH contributes to economic growth, the donors will benefit as well, as they will be able to sell more products and services to the countries. This frame provides strong incentives for the continuation or even increase of IHA, but with a focus on the control of diseases that mostly affect people who are economically productive.

Similar to the investment frame, the security frame is also self-interested, as it is mainly concerned with protecting donor countries’ own population. Global health funding can contribute in two ways to security: either by helping to contain infectious diseases in other parts of the world or by contributing to social and political stability (which might be at risk due to bad health conditions). The security frame motivates long-term action, following the logic that sustained support will ensure sustained national security.³⁴ Nevertheless, security-based concerns lead to the focus being placed on infectious diseases. According to Rushton³⁵ health

27 Stuckler, D., & McKee, M. (2008). Five metaphors about global-health policy. *The Lancet*, 372(9633), 95-97.

28 Lencucha, R. (2013). Cosmopolitanism and foreign policy for health: ethics for and beyond the state. *BMC International Health and Human Rights*, 13(1).

29 Lencucha, R. (2013). Cosmopolitanism and foreign policy for health: ethics for and beyond the state. *BMC International Health and Human Rights*, 13(1).

30 Kickbusch, I. (2011). Global health diplomacy: how foreign policy can influence health. *BMJ*, 342(d3), 154.

31 Lencucha, R. (2013). Cosmopolitanism and foreign policy for health: ethics for and beyond the state. *BMC International Health and Human Rights*, 13(1).

32 Stuckler, D., & McKee, M. (2008). Five metaphors about global-health policy. *The Lancet*, 372(9633), 95-97.

33 Kickbusch, I. (2011). Global health diplomacy: how foreign policy can influence health. *BMJ*, 342(d3), 154.

34 Lencucha, R. (2013). Cosmopolitanism and foreign policy for health: ethics for and beyond the state. *BMC International Health and Human Rights*, 13(1).

35 Rushton, S. (2011). Global Health Security: Security for Whom? Security from What? *Political Studies*, 59(4), 779-796.

security could also be conceptualized in a less self-interested way, namely as a vital part of 'human security', recognizing a broader range of threats and taking the individual/community as the primary referent object instead of the (western) state. However, the infectious disease-focused and state-centric version of health security is used more frequently.

Although we do not consider it as a separate frame, it is worth mentioning the concept of health as a global public good (GPG).³⁶ Although there have been arguments that health itself for societal reasons should be considered a GPG,³⁷ more recent literature talks about Global Public Goods for Health (GPHG). GPHG for health could include, for example, infectious disease control, universal health coverage, and mitigating climate change. GPHG is thus more of an umbrella concept that ties the several frames together, than a frame in itself.

Our framing analysis was informed by the typology of four global health frames mentioned above. These frames were applied to the main global health policy documents of the European Commission and the selected donors (table 2). Except for the Netherlands, we found specific policy notes on external health policy. These can be sector strategies of the development/international cooperation department and/or 'whole-of-government strategies'. For Denmark, we also analyzed the specific strategies for HIV/AIDS and sexual and reproductive health and rights, as the general health and development policy note mentions that the Danish development assistance in health is underpinned by these two strategies. The Netherlands does not have a specific policy note on global health, but the policy document on aid, trade and investment also touches upon external health policy. Table 2 provides an overview of the relevant documents.

European Commission	Communication on 'the EU role in Global Health' (2010) + accompanying working documents
United Kingdom	Health is Global: A UK Government Strategy 2008-2013. UK government. Health is Global: An outcomes framework for global health 2011-2015. DFID Health position paper - Delivering health results. (2013)
Germany	Sector Strategy: German Development Policy in the Health Sector (2009) Shaping global health - taking joint action - embracing responsibility: the federal Government's strategy paper (2013)
France	Strategy for international health cooperation (2012)
The Netherlands	A world to gain: a new agenda for aid, trade and investment (2013)
Belgium	The Right to Health and Healthcare (2008)
Denmark	Health and Development, a guidance note to Danish Development Assistance to Health (2009)

³⁶ Kaul I. & Gleicher D.(2011) *Governing global health: is Europe ready?* Global Health Europe Research Paper No.3; Labonté, R. Gagnon M.L. (2010) Framing health and foreign policy: lessons for global health diplomacy. *Globalization and Health* 6:14.

³⁷ Woodward, D. Smith, RD (2003). 1. Global Public Goods and Health: concepts and issues in Global Public Goods for Health - A reading companion. World Health Organization. Retrieved from http://www.who.int/trade/distance_learning/gpgh/gpgh1/en/index15.html.

	Strategy for Denmark's Support to the International Fight against HIV/AIDS (2005) The promotion of sexual and reproductive health and rights, strategy for Denmark's support (2006)
Spain	Health Strategy for Spanish Cooperation (2007) Sector-specific Action Plan for Health (PAS-S) (2011-2013)

Table 2: overview of analyzed policy documents

The documents were read, reread and analyzed using NVivo software. Codes were attributed to text parts which expressed arguments of the donor to invest in global health, for example 'moral duty', 'health industry', 'protect own population', 'health as a human right'. Accordingly, these codes were linked to the four frames of the strategy. Additional information was acquired through an interview with a global health expert within the European Commission, as well as through some secondary literature on the policy documents.

3. Findings

3.1 The Notion of 'Global Health' within the EU

Before discussing the results of the framing analysis, it is necessary to elaborate briefly on a finding that emerged through the selection of the above-mentioned document. Interestingly, it has become clear that the concept of 'global health' has been less dominant with the EU Member States than may have been expected. With regards to the distinction between 'international health' and 'global health', the latter concept seems to have gained ground only in the policy notes of the European Commission, the UK and Germany. Their policy documents focus on the health impacts of globalization, the shared risks and threats and the need for a truly global action. Moreover, even within the documents of those countries that do refer to 'global health', there is not a clear definition of what the concept means. Only the global health strategy of the UK is clear on this. The European Commission on the other hand, claims that "no single definition of the concept exists"³⁸ and the German strategy does not elaborate on the meaning of the concept.

What is special about the 'global' health policy documents is that they are developed by several Ministries or Directorate-Generals. Both the UK and the German strategy are presented as whole-of-government strategies. Within the UK, the Department of Health led an inter-ministerial working group for Global Health, which coordinated the development of the 2008 strategy and would oversee its implementation.³⁹ The group included representatives of a wide range of departments,⁴⁰ with the Department of Health, the Ministry of Defense, the Department for International Development and the Foreign and Commonwealth Office being the most important. For the development of the German strategy, several ministries were

³⁸ European Commission. (2010). Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: The EU Role in Global Health, 2.

³⁹ Primarolo, D., Malloch-Brown, M., & Lewis, I. (2009). Health is global: a UK Government strategy for 2008–13. *The Lancet*, 373(9662), 443-445.

⁴⁰ The working group includes Ministers from the Department for Business, Enterprise & Regulatory Reform, Department for Children, Schools and Families, Department for Environment, Food and Rural Affairs, Ministry of Defense, Department of Health, Department for Innovation, Universities & Skills, Department for International Development, Foreign and Commonwealth Office, Home Office, HM Treasury, and the Northern Ireland Government.

involved as well, claiming that “the federal ministries involved already regularly share their information and experience on current and planned activities in the field of global health when needed, this instrument will be expanded”.⁴¹ However, it is unclear from the Strategy *which* ministries are actually involved. Bozorgmehr et al⁴² also criticized the lack of clarity on how the inter-ministerial collaboration would be effectively arranged. The Communication of the European Commission ‘The EU Role in Global Health’ was launched by three directorates-general, namely DG Devco, DG Sanco and DG Research. These three DGs are also taking the lead in the further development of global health action of the EU as rotating chairs of an inter-service group on global health.⁴³ The participation of other services depends on the specific subjects, but recurring services are DG Trade, DG Environment, DG Near, DG Enlargement, DG ECHO, and the EEAS.

France takes a particular stance with regards to the concept of global health. As mentioned before, it was one of the seven signatories of the Oslo Ministerial Declaration on health and foreign policy.⁴⁴ Nevertheless, the main policy document on global health is entitled ‘international health strategy’. Despite stating that “the important pace of globalization has increased the cross-cutting nature of health threats and demonstrated the shared benefits of universal access to quality care”, the strategy focuses only on the development aspects of health. The strategy can thus be considered as a sector strategy for international cooperation rather than a global health strategy, as it was developed by the Directorate-General of Global Affairs, Development and Partnerships of the French Ministry of Foreign and European Affairs.

Belgium, Denmark and Spain do not have global health strategies. They do have policy notes on the health sector, however, developed respectively by DG Development of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, DANIDA (the Danish International Development Agency) of the Ministry of Foreign Affairs of Denmark, and AECID (Agencia Española de Cooperación Internacional para el Desarrollo) of the Ministry of Foreign Affairs and Cooperation. As mentioned already, the Netherlands does not have a specific policy note on external health policy. The policy note “A World to Gain”, that we have analyzed, was developed by the Ministry of Foreign Affairs.

The fact that some countries have a global health strategy, while others only have a sector strategy, also impacts on the framing of the policy documents, as will be discussed in the next part.

3.2 Differences in Framing

When looking at the frames, we can make a distinction between two main groups. The first group includes the European Commission, France, Belgium, Denmark, and Spain. Within the analyzed policy documents, the dominant frame is social justice. The second group is Germany, the UK and the Netherlands. While the social justice arguments are present in their strategies as well, there is an additional, more dominant focus on the security and/or investment frame.

3.3 Dominance of the Social Justice Frame

The social justice frame is present in the policy documents of all donors. It is the most explicit in the documents of the European Commission, France, Belgium, Denmark and Spain. Firstly,

⁴¹ German Federal Ministry of Economic Cooperation and Development (2009). Sector Strategy: German Development Policy in the Health Sector. Retrieved from http://www.bmz.de/en/publications/type_of_publication/strategies/konzept187.pdf, 41.

⁴² Bozorgmehr, K., Bruchhausen, W., Hein, W., Knipper, M., Korte, R., Razum, O., & Tinnemann, P. (2014). The global health concept of the German government: strengths, weaknesses, and opportunities. *Global health action*, 7.

⁴³ Information based on an interview.

⁴⁴ Feldbaum, H., Lee, K. & Michaud, J. (2010) Global health and foreign policy. *Epidemiol Rev* 32; 82–92.

these often refer to certain values. For example, the European Commission states “the EU should apply the common values and principles of solidarity towards equitable and universal coverage of quality health services in all external and internal policies and actions.”⁴⁵ Also the Spanish Plan of Action⁴⁶ mentions that the values of solidarity, equity and social justice, which are central in their domestic health system, should be translated in their international cooperation for health. The strategy of France mentions solidarity, human rights and aid effectiveness as the central values of their strategy, which are all three clearly linked with the social justice frame.⁴⁷ However, the strategy does not elaborate much on the specific understanding of these values.

Closely linked to this, these documents also often refer to health as a human right. This is the most explicit in the policy document of Belgium, which is entitled ‘right to health’ and focuses entirely on how to achieve this “inalienable right”. But the policy documents of Spain, Denmark, France and the European Commission also make reference to the universal right to health. In the Spanish Plan of Action it is stated that that “health is a fundamental human right and a key element for equitable and sustainable development, including poverty reduction, whose public responsibility is both locally and internationally.”⁴⁸ For Denmark “the rights issue is key” and in the France document human rights are mentioned as a central value. Lastly, the EU’s focus on strengthening health systems should lead to “basic equitable and quality health care for all without discrimination on any grounds as defined by Article 21 of the Charter of Fundamental Rights.”⁴⁹

As we will discuss in the next part, the social justice frame also appears to a certain extent in the policy notes of the UK, Germany and the Netherlands, but the security and/or investment frames are more dominant in these documents. This seem to correlate with differences in institutional set-up, as could also be expected from a framing analysis perspective. In Belgium, Denmark, France and Spain, the sector strategy was developed within the development department only. Although the communication of the European Commission was launched by three DGs, there was only one commissioner taking the lead, which happened to be the development commissioner.⁵⁰

3.4 Additional Security and Investment Frames

Within the German, the Dutch and British policy documents, there is a more vague combination of frames. The British ‘Health is Global’ strategy also fits the social justice frame in that it claims to aim to contribute to a ‘better and fairer world’ through a global health policy. However, as Labonté and Gagnon pointed out,⁵¹ the most prevalent objective of this strategy is to benefit the UK. One of the criteria used to determine the areas covered in the Health is Global strategy was “whether the UK stands to benefit directly from engaging in the issue, for example, where there are clear links to the health of the UK population”.⁵² Accordingly, there

⁴⁵ European Commission. (2010). Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: The EU Role in Global Health, 5.

⁴⁶ Ministerio de Asuntos Exteriores y de Cooperación, Aecid (2007). Plan de actuación sectorial de salud vinculado al III Plan Director.

⁴⁷ French Ministry of Foreign and European Affairs, Directorate-General of Global Affairs Development and Partnerships. (2012). France’s strategy for international health cooperation, 5.

⁴⁸ Ministerio de Asuntos Exteriores y de Cooperación, Aecid (2007). Plan de actuación sectorial de salud vinculado al III Plan Director, 3.

⁴⁹ European Commission. (2010). Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: The EU Role in Global Health, 6.

⁵⁰ Information based on an interview.

⁵¹ Labonté, R. Gagnon M.L. (2010) Framing health and foreign policy: lessons for global health diplomacy. *Globalization and Health* 6:14.

⁵² UK government. (2008). Health is Global: A UK Government Strategy 2008-2013, 18.

is a dominant focus on security and investment within the strategy. As mentioned in the foreword written by Gordon Brown, “global health is a question not just of morality but of security as well. [...] the first duty of any government must be to ensure the safety of its people, but this can no longer be achieved in isolation.”⁵³ Interestingly, the security arguments not only focus on protecting the population against infectious diseases, but there is also much attention on possible threats stemming from political instability elsewhere for the UK.

“Poor health is more than a threat to any one country’s economic and political viability – it is a threat to the economic and political interests of all countries. Working for better global health is integral to the UK’s modern foreign policy.”⁵⁴

This quote illustrates that the focus is not only on political stability, but also on economic stability. This connects with the investment frame, which can be derived from two main arguments made in the document. Firstly, there are many references to the link between a healthy population and economic stability, productivity and growth. Secondly, the specific economic benefits for the UK health industry are stressed, with one of the objectives being “the enhancement of the UK as a market leader in well-being, health services and medical products.”⁵⁵ The dominance of the security and investment frames was even more apparent in the 2011 outcomes framework, which aimed to “reassure the UK’s security and prosperity at home, and UK citizens’ interests overseas.”⁵⁶ Furthermore, the brief reference to human rights, which was still present in the 2008 strategy, has disappeared.

The German sector strategy of 2009 had a clear human rights approach. It explicitly claimed that “German development policy in the health sector pursues a human rights-based approach.”⁵⁷ The German global health strategy of 2011 still referred to human rights and values. Nevertheless, in addition to the social justice frame, the 2011 strategy also witnesses security and investment frames. The security arguments are mainly focused on the protection against cross-border health threats, claiming that one of the goals of the strategy is to “ensure the sustainable protection and improvement of the health of the German Population”. The investment frame is clearly present when stating that “German health research and the health care industry [...] can make an essential contribution to improving the global health situation”.⁵⁸

Since the Netherlands does not have a specific policy note on external health policy (see above), we analyzed the policy note “A World to Gain”. This document proposes an integrated agenda on aid, trade and investment. Consequently, it focuses not only on poverty reduction, but pays considerable attention to the economic and investment aspects. While combating poverty is said to be based on solidarity, the trade and investment focus are explicitly framed as self-interested (or at least an “enlightened” form):

“We combat extreme poverty principally out of solidarity. We encourage trade and investment principally out of self-interest. Trade can provide an important contribution to growth. Where aid and trade coincide, we act both out of solidarity and enlightened self-interest.”⁵⁹

With regards to health, the Netherlands focuses only on sexual and reproductive health and rights. This is one of the four priorities of the Dutch aid policy, next to water, food security and

⁵³ UK government. (2008). Health is Global: A UK Government Strategy 2008-2013, 3.

⁵⁴ UK government. (2008). Health is Global: A UK Government Strategy 2008-2013, 14.

⁵⁵ UK government. (2008). Health is Global: A UK Government Strategy 2008-2013, 10.

⁵⁶ UK government. (2011). Health is Global: An outcomes framework for global health 2011-2015, 2.

⁵⁷ The Federal Government of Germany. (2013). Shaping global health - taking joint action - embracing responsibility: the federal Government's strategy paper. Berlin: The Federal Government of Germany, 4.

⁵⁸ The Federal Government of Germany. (2013). Shaping global health - taking joint action - embracing responsibility: the federal Government's strategy paper. Berlin: The Federal Government of Germany, 33.

⁵⁹ A world to gain, p.11

rule of law. On the one hand, it is claimed that the Netherlands invests in sexual health and rights “because these are fundamental rights”,⁶⁰ which links to the social justice frame. On the other hand, however, the document states that the four priorities are also in line with the “Netherlands’ economic and other interests”⁶¹ which links to the investment frame. In a parliamentary letter on the new focus of development cooperation policy, the choice for SRHR as a priority was also underpinned by the fact that life sciences is an economic area in which the Netherlands excels.⁶²

Again, the institutional factor, namely which ministry is taking the lead within the countries, sheds light on these findings. The additional focus on security and investment in Germany and the UK can indeed partly be explained by the fact that several ministries were on the table. The Ministries of health and/or foreign affairs would have focused mostly on the security aspects, while the Ministries of foreign policy and trade would also be stressing the investment arguments. The fact that the former German sector strategy of 2009 does not focus much on investment and security confirms this analysis, as this strategy was only developed by the development departments. Similarly, the DFID health policy position paper of 2013 – which was developed after the ‘health is global’ strategy - again mainly focused on health as a human right without referring to the security interests or investment opportunities for the UK. This DFID strategy paper did however not replace the global health strategy, as “it stops short of being a full health strategy and so does not contain new policy or a full reflection of the whole of the UK government’s health investments in developing countries”.⁶³

4. Conclusion

Global health has appeared highly on the international agenda over the past two decades. In addition, the EU and most of its Member States have been active in this area. The European Commission has been an important actor in global health, while at the same time common strategies for global health have been developed at the EU level. Nevertheless, Member States remain important bilateral players in this field as well. Against this backdrop, this chapter aimed to analyze to what extent a common ‘EU’ vision in global health might have emerged. In order to answer this question, we engaged in a framing analysis of relevant policy documents of the European Commission, the UK, France, the Netherlands, Denmark, Spain, Belgium, and Germany.

Surprisingly perhaps, it became clear that the concept of ‘global’ health has not yet gained ground within the policy documents of all Member States. Besides the Commission communication on the ‘EU role in global health’, only two Member States – the UK and Germany – have issued a ‘global’ health strategy. Their strategies were developed through a whole-of-government approach, thus involving several ministries within the British and German governments. In contrast, the relevant policy documents of the other Member States were elaborated within the development departments. Taking this into account, the framing analysis has shown a mixed picture regarding the existence of an ‘EU’ vision. The documents from the European Commission, France, Belgium, Denmark and Spain clearly hold a social justice frame, stressing values and human rights. While the social justice frame is also apparent, at least to some extent, in the policy notes of the UK, Germany and the Netherlands, the security and/or investment frames are more dominant in these documents.

⁶⁰ A world to gain, p. 37.

⁶¹ A world to gain, p.7

⁶² Dutch Ministry of foreign affairs. (2011). Parliamentary letter presenting the new focus of development cooperation policy., 10.

⁶³ DFID (2013). Health Position Paper: delivering health results. Retrieved from <https://www.gov.uk/government/publications/health-position-paper-delivering-health-results>, 23.

Based on these findings, we can conclude that the existence of an EU vision on global health is questionable. In case the EU wants to be an important actor in global health, there is a clear need for European policy-makers to engage more in deliberations on what exactly their global health policies imply. European Member States that still hold to a traditional 'international health' approach should consider the modernization towards a global health approach, in line with evolutions in global health thinking at the level of the EU, the WHO and other international institutions. However, countries engaging in a global health approach should ensure that interest-based motives (security and investment) do not out-balance social justice considerations.

Further research is needed on several aspects. First, more research is needed in order to explain the observed differences between Member States. Why are the UK and Germany the only Member States with a global health strategy? How can we explain the differences in framing? This paper already mentioned the differences in institutional set-up as one explanatory factor, but other factors related to the domestic politics of these countries should also be considered.

Second, more research is needed on the implementation and operationalization of the global health and international health strategies. We have only focused on a number of relevant policy documents, not on whether and how this may have been translated into political practice. More empirical research should be conducted focusing on whether and how different framings by Member States also translate into different political practice. Several case studies could be examined in this regard, for example, the EU and Member States' approaches to the recent Ebola outbreak in West-Africa.

Third, the results of our comparative analysis also raise further questions on the relationship between the EU and its Member States with regard to global health. While Member States remain important actors in global health, they also refer in their policy documents to the EU as an important actor in this field. While the EU is increasingly trying to coordinate European action in global health, it is not clear yet where these coordination efforts are leading. Given the diversity in approaches, a procedural 'division of labor' that acknowledges existing differences between the EU and its Member States may be more feasible than a 'common' EU policy. Future research could look into procedural coordination (e.g. a 'division of labor') on global health between EU Member States. A critical investigation of Brussels-based coordination mechanisms such as the EU Member States Experts Group on Global Health, Population and Development as well as the Global Health Policy Forum might be helpful in this regard, in addition to fieldwork on European coordination, division of labor and joint programming within developing countries.

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‘EUROPEANIZATION’ OF HUMAN RIGHTS LAW: INDIVIDUAL SANCTIONS AS A CASE STUDY

Isabella Querci

ABSTRACT

The European Union is one of the most active entities to issue individual sanctions in the international arena. These are featured in a unique, human rights-centered fashion, mainly through the activism of European courts. While political institutions of the EU now embrace human rights standards as judicially defined, the study addresses the question whether individual sanctions adopted by the EU may serve as a legal model in framing similar instruments in other legal systems.

KEYWORDS

European Union - human rights - sanctions - legal model – Europeanisation

1. Introduction

Globalization consists, *inter alia*, in the emergence of a set of concurring regulatory mechanisms attributable to a very diverse range of subjects in an increasingly interdependent world. These entities are likely to compete with each other in order to increase their own influence and to profit from the ensuing benefits, such as market enlargement, stabilization of neighboring areas, the generation of political and operational support from other players, etc. The most influential actors on the international scene utilize deeply distinctive legal models and, therefore, their governance techniques tend to diverge sharply. As a consequence, their external activities rely on instruments of international relations that are differently designed. Indeed, in today's plural world order, a different array of jurisdictions and levels of governance increasingly advance competing claims of legal authority.¹

From a historical perspective, human rights are closely connected with globalization, but at the same time, they raise the question about the foundation of globalization: is there a universal community or only economic and political power relations? The political use of human rights discourses is twofold: it serves both as a critique of power and as an extension of power, and the disclosure of this bifurcation helps with the understanding of the inner politics of human rights. Human rights are not a mere ideology but they may serve the same utopian goals that political ideologies once served: that of envisioning and hopefully creating a better and more equal world. At the same time, human rights have a surprising function in legal and political culture, that of creating, legitimizing, branding, or even expanding different communities.²

The point that will be made in the present paper is that for the European Union (EU) human rights are one of the core values in its international relations and that the human rights-led approach that is a typical component of the EU's external action is a distinctive feature capable of catalyzing profitable outcomes. Within external action-related measures, individual targeted sanctions are a particularly pivotal means: conceived initially at the UN level with the aim to avoid that the adverse consequences of sanctions would affect the entire population, as will be further explained, they are considered to focus upon the 'delinquent rulers'³. In a similar way, they were soon to be issued also at the EU level and their issuance is invariably accompanied by strict human rights conditionality. It will also be maintained that the central role of human rights in crafting individual sanctions 'made in the EU' may amount to a legal model that is, to a certain extent, in the process of spreading on a global scale. This paper will examine that issue by analyzing individual sanctions as a case study.

Therefore, the paper aims to answer three, progressive questions: *i)* are human rights the leading principle of EU external action? *ii)* is the mainstreaming of human rights by the EU a feature in the sanctions regime? *iii)* can this approach be considered as a legal model and therefore be suitable for replicating?

In order to answer these questions, the first section will deal with the analysis of human rights as an external action comprehensive principle, as far as the EU is concerned, and will provide an overview of the most common practices in this field. The second section will focus on targeted sanctions issued by the EU, in order to test to what extent the human rights component in the external action of the EU is actually relevant, both internally and externally. The third section, finally, will analyze some empirical data in order to assess if the European

¹ D Halberstam and E Stein 'The United Nations, the European Union, and the king of Sweden: economic sanctions and individual rights in a plural world order' (2009) 46 CML Rev 61.

² K M Simonsen, 'The politics of universalism. Strategic uses of human rights discourses in early modernity' (2013) 5 JAC 1.

³ UNGA, 'We the Peoples, The role of United Nations in the Twenty-first century: Report of the Secretary General', 27 March 2000, UN/Doc A/54/2000 (Millennium Report).

model of individual sanctions is suitable for influencing - or even for legal transplant - in third legal orders.

2. Human Rights in the External Action of the European Union

The EU is an active international actor, despite the number of limitations that scholars have often highlighted.⁴ Also, thanks to its multilevel structure, a mixed supranational and intergovernmental character and its objective towards 'pool and share' approaches, the EU is demonstrating a growing proficiency in engaging in international scenarios and in self-promotion in reference to other international actors. In this regard, the concept of actorness reflects the intra-EU dimension of the EU's international interactions, which is the capacity to emerge as a cohesive, authoritative and autonomous player in the international arena and to become recognized by others as such.⁵

The EU has widened its capacities in human rights protection, mainly through the activism of the European Court of Justice (ECJ). The binding force attributed to the EU Charter of Fundamental Rights since 2009 and the planned accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms⁶ underline the EU's commitment to human rights in all spheres. In the words of the ECJ, 'the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter'.⁷

Moving to the external perspective, although Articles 3(5) and 21 TEU do not attribute any specific competence to the EU in the human rights field, their inclusion in the Treaties supports at least a human rights-oriented interpretation of norms in external action matters, besides influencing (as it will be seen) a groundbreaking conception of international relations. The above-mentioned provisions may appear, at first glance, to be mere political statements but, instead, they constitute a solid background for a wide range of normative activities and operational initiatives. Human rights, as described in the TEU, are an external objective and a policy at the same time. In this context, experts define the concept of 'mainstreaming human rights' as 'a strategic process of deliberately incorporating human rights considerations into processes or organizations which are not explicitly mandated to deal with human rights'.⁸

The EU incorporates human rights in its foreign policy in order to affirm its identity and employs them as a unique signature. Human rights are at the top of the European agenda because the

⁴ According to some positions, the 'high point in terms of political support for the creation of powerful, supranational human rights regime was reached in the early 1950s and ...progress in recent decades has been much more hesitant and deeply contested', see G De Burca 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) *Am. J. Int. L.*, 3. For more references see, *inter alia*, H Bull 'Civilian Power Europe: A Contradiction in Terms?' (1982) 21 *JCMS* 149; S Fernandez 'EU Policies towards Russia, 1999-2007', in N Tocci, *Who is a Normative Foreign Policy Actor?, The European Union and its Global Partners* (CEPS 2008) 37; A Hyde-Price 'Normative Power Europe: a Realist Critique' (2006) *JEPP* 217; C Schneipers and D Sicurelli, 'Normative Power Europe: a Credible Utopia?' (2007) *JCMS* 2007; N Wright 'The European Union: what kind of international actor?' *Political perspectives* (Political Perspectives 2011) <www.politicalperspectives.org.uk/wp-content/uploads/PPVolume5-Issue2-2011-Wright-1_final.pdf>; K Brummer 'Imposing sanctions: not so 'normative power Europe'' (2009) 14 *EFAR* 191.

⁵ S Blavoukos and D Bourantonis, 'Do sanctions strengthen the international presence of the EU?' (2014) 19 *EFAR* 394.

⁶ As it is well known, Art. 6 TEU provides for legal basis for EU's accession to the European Convention on Human Rights (ECHR); nevertheless, the ECJ issued its Opinion 2/15, in which it expresses a number of critical issues in relation to the actual accession. Therefore, presently, the latter could be considered more a political will, rather than a legal accession procedure.

⁷ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 21.

⁸ European Parliament, Human rights mainstreaming in EU's external relations (EXPO/B/DROI/2008/66, 2009).

EU tends to call on human rights in order to increase its international influence and to shape the global context according to its vision of the world.

The wording of Articles 3(5) and 21 TEU implies, in addition, a particular understanding of power, conceived as the 'ability to make another actor to do what he would have not otherwise done'.⁹ In the early 2000's, notoriously, Manners qualified the EU as a normative power, *i.e.* a powerful actor due to the capacity to expand its ideas and shape the will of the recipients of such ideas through culture.¹⁰ Some scholars have argued that this kind of approach is radically incompatible with profitable economic arrangements or strategic interests.¹¹ On the contrary, here it is maintained that, by setting external normative goals that are related to human rights, the EU *does* pursue economic and strategic interests as well. The function of human rights in the EU is therefore what Etienne Balibar has called 'a politics of universalism',¹² and as such their discourse is never neutral. Tensions exist concerning the proper understanding of human rights and especially their role within a community. Human rights are promoted from very specific power-positions and with specific political intentions that reinterpret the sense of human, cultural and political community.¹³ Reasons that have been formulated to explain why the EU would take up the role as a normative power include migration containment, market enlargement, the chance to have others relying on its legal expertise, the increased appeal of settling litigation in the EU *etc.*

In brief, the EU employs human rights as a means to develop, consolidate and enhance its influence and competitiveness at the international level, *i.e.* to promote more effectively '*its values and the well-being of its people*' (Article 2 TEU, emphasis added). Therefore, human rights in the EU's external action fall in the category of normative goals, meaning that they try to shape the wider environment within which the EU unfolds and contribute to the definition of the EU as a human rights champion.¹⁴

In order to pursue its human rights aims in its external action, the EU relies on several instruments: pre-accession procedures (so-called Copenhagen criteria), stabilization agreements, association agreements, neighborhood policies, conditionality clauses in aid agreements, promotion of specialized organizations, funding, demarche, economic sanctions, individual targeted sanctions, Generalized System of Preferences 'plus' (GSP+s), deployment of peacekeeping forces in post conflict situations, Certifications Schemes with violence clauses or consideration of human rights in formulating Impact Assessments.¹⁵ The remaining

⁹ R A Dahl, 'The concept of power' *Behav. Sci.* 3 (1957) 201.

¹⁰ I Manners, 'Normative power Europe: the international role of the EU' (Biennial Conference of the European Community Studies Association, May 2001).

¹¹ T Diez, 'Constructing the Self and Changing Others: Reconsidering "Normative Power Europe"' (2005) 33 *J Int'l St* 613; T Diez, and M Pace, 'Normative Power Europe and Conflict Transformation' (EUSA conference, May 2007).

¹² E Balibar, *We the People of Europe* (Princeton, 2004), 34.

¹³ K. M. Simonsen, 'The politics of universalism. Strategic uses of human rights discourses in early modernity' (2013) 5 *JAC* 1.

¹⁴ N Tocci, 'The European Union as a Normative Foreign Policy Actor', CEPS Working Documents, 2008/281 < <http://aei.pitt.edu/7582/1/Wd281.pdf>> As A Von Bogdandy argued, 'human rights would determine rather than simply limit the European legal system and would move to the forefront of its institutions' activity', 'The European Union as a human rights organization? Human rights and the core of European Union' (2000) 37 *CML Rev* 1307.

¹⁵ The literature on the topic is endless. For some reference, see E Morgera, 'Protecting Environmental Rights Through the Bilateral Agreements of the European Union: Mapping the Field', Edinburgh School of Law Research Paper No. 2013/23 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2273307>; B Brandtner and A Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice', (1998) 9 *EJIL* 469; European Parliament, 'The impact of the resolutions and other activities of the European Parliament in the field of human rights outside the EU' (EXPO/B/DROI/2011/17 2012); D Nougueras and DJ Linan, 'Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems' (2001) 7 *Colum. J. Eur. L.* 307;

part of the paper will not deal with all these means but, instead, will mainly focus on targeted sanctions as a case study and will occasionally touch upon various other measures. Given the number of different instruments available, the Council has recently issued a comprehensive Action Plan,¹⁶ aimed at further implementing the EU Strategic Framework on Human Rights and Democracy, with sufficient flexibility to respond to new challenges as they arise. It builds upon the existing body of EU human rights and democracy support policies in external action and covers relevant human rights aspects.

Before dealing with individual sanctions, however, it is worth briefly concentrating on two instruments that incorporate human rights protection standards in trade relations with developing countries: the Generalized System of Preferences 'plus' and conditionality clauses which, despite their shared objective, have distinctive rationales and tend to operate rather differently.¹⁷ These tools represent the backdrop against which one may evaluate the activism in sanctions issuance by the EU, with reference to human rights situations.

The Generalized System of Preferences "Plus" constitute a specification of the Preferential Trade Agreements cluster of waivers created within the WTO system, under which developed countries allow preferential tariffs to imports from developing countries.¹⁸ These are granted to countries that ratify and implement international conventions relating to human and labor rights, environmental protection and good governance. Conditionality clauses in EU international agreements, on the other hand, grant the EU the power to suspend its treaty relations with other states in the event of human rights violations within that state.¹⁹ The "extraterritorial" promotion and protection of human rights is therefore pursued by the EU as a form of incentive, illustrated in the former example, since beneficiary countries that comply with human rights norms are entitled to benefits,²⁰ and through a sanctioning mechanism in the latter, under which treaty-based preferences may be withdrawn when a contracting party fails to comply with the relevant standards.²¹ Based on two cases in which preferences were withdrawn by the EU (Myanmar²² and Belarus²³), scholars²⁴ concluded that these incentives had little impact on the exports of the two countries, since both of them are strongly supported

M Nowak, 'European Human Rights Mechanisms in Comparison with the US' (2011) *Austrian Review of International and European Law* 7.

¹⁶ General Secretariat of the Council, 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015 - 2019' (10875/15 2015).

¹⁷ T Cottier, J Pauwelyn and E Burgi, *Human rights and international trade* (OUP 2005).

¹⁸ see D Kleimann, 'EU preferential trade agreements: commerce, foreign policy and development aspects', CADMUS Working Paper 2013 < <http://cadmus.eui.eu/bitstream/handle/1814/27661/EU-Preferential-Trade-Agreements.pdf?sequence=6>> and the literature there reported.

¹⁹The policy of the EU to include human rights conditionality clauses in its international agreements is virtually unique. For more details, reference can be made to Directorate-General for External Policies of the Union, 'The application of human rights conditionality in the EU's bilateral trade agreements and other trade agreements with third countries' (EXPO-B-INTA-2008-57 2008). See also L Bartels, *Human rights conditionality in the EU's international agreements* (OUP 2005).

²⁰As an example, on 23 February 2015 the Council has repealed the measures limiting the European Union's cooperation with Guinea-Bissau. This comes in the wake of credible elections in 2014, the restoration of constitutional order and the country's progress in putting into practice reform commitments made to the EU. Therefore, the EU fully resumes cooperation with Guinea-Bissau.

²¹European Parliament, 'The impact of the resolutions and other activities of the European Parliament in the field of human rights outside the EU' (EXPO/B/DROI/2011/17 2012).

²² Council Regulation (EC) 552/97 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar [1997] OJ L 085, 27/03/1997.

²³ Council Regulation (EC) 1933/2006 temporarily withdrawing access to the generalized tariff preferences from the Republic of Belarus [2006] OJ L 405, 30.12.2006.

²⁴ W Zhou and L Cuyvers, 'Linking international trade and labour standards: the effectiveness of sanctions under the European Union's GSP' (2011) 45 *J. World Trade* 63-85; B Kerremans and J Orbie, 'The social dimension of European Union Trade Policies' (2009) 14 *EFAR* 629-641; J Orbie and L Tortell, 'The new GSP+ beneficiaries: ticking the box or truly consistent with ILO findings?' (2009) 14 *EFAR* 663-681.

by two powerful countries, China and Russia respectively. As a consequence, the EU's incentives had little influence on non-economic goals, such human rights. The same criticism appears to apply to other means of human rights promotion enacted in the field of the EU's external action.²⁵

Recent events provide several examples, which demonstrate the interaction among different instruments. Indeed, in several contexts, the EU adopted individual sanctions as part of a wider framework of foreign policy initiatives. While in some of them, for instance Myanmar, the primary concern was the promotion of human rights and democracy, in others, as for instance in the case of Iran, the main objective was to fight illegal nuclear activities undertaken by the government. In the latter case, human rights became relevant as a secondary objective pursued by the EU in the country, although strictly related to the main task of contrasting nuclear proliferation. Furthermore, as a reaction against acts of violence, repression, and serious human rights violations in Burundi, and following President Nkurunziza's announcement that he intended to run for a third term, the EU issued targeted sanctions.²⁶ Almost at the same time, the Council²⁷ triggered Article 96 of the EU-ACP Partnership Agreement. This norm - in the event of failure to respect essential elements of the Agreement namely human rights, democratic principles and the rule of law- constitutes the basis for political consultations in order to remedy the non-respect of the agreement. In the event that the consultations fail, the EU could possibly take a further step and call upon Article 97 of the same agreement, providing the legal basis for the suspension of the Cotonou Agreement in cases where one of the parties feels that the agreement's essential and fundamental elements are not being respected. Inasmuch as theoretical analysis is concerned, the answer to the first question that this paper aims to tackle, that is 'are human rights the leading principle of EU's external action?' may well be affirmative.²⁸

The *mission civilisatrice*²⁹ of the EU, however, receives criticism for being imperialistic,³⁰ because it 'imposes' regulatory standards that incidentally favor European interests. Such a view is, at least, partially true. However, third parties might be able to attain higher human rights standards, while also benefitting from trade opportunities, common infrastructures, interconnection of transport networks, joint tackling of security and environmental threats.³¹ As already indicated, at the same time the EU openly declares that the aim of its global agenda is 'promoting the European interest' and 'making the EU a dynamic, competitive, knowledge

²⁵ D D'Hollander, A Marx and J Wouters, 'Integrating Human Rights in EU Development Cooperation Policy: Achievements and Challenges' Frame Working Paper 134/2014 <<http://www.coris.uniroma1.it/sites/default/files/integrating%20human%20rights%20in%20EU%20development%20cooperation.pdf>>.

²⁶ Council Decision (CFSP) 2015/1763 concerning restrictive measures in view of the situation in Burundi [2015] OJ L 257/1.

²⁷ Letter from ACP Working Party To the Permanent Representatives Committee/Council, on Opening of consultations with Burundi under Article 96 of the ACP-EU Partnership Agreement, 13105/15, 16 October 2015.

²⁸ With reference to the implementation phase, the answer is much less univocal, though, as demonstrated by recent analytical studies: K Starl, et al, 'Baseline Study on Human Rights Indicators in the Context of the European Union' Frame Working Paper 1/2015 <<http://www.fp7-frame.eu/wp-content/materiale/reports/12-Deliverable-13.1.pdf>>. See also A Timmer, et al, 'Critical analysis of the EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law' Frame Working Paper 2/2014 < <http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>>.

²⁹ S Wood, 'European Union: A Normative or Normal Power' (2009) 14 EFAR 113.

³⁰ J Zielonka, 'Europe as a global actor: empire by example?' (2008) 84 Int'l Aff. 480.

³¹ Nevertheless quite a number of contradictory evidences exists, e.g. India and Brazil made it impossible for Europe and US to include core labor and environmental standards on the multilateral trade agenda.

based society', as envisaged in the Lisbon strategy for growth and jobs.³² Human rights protection and promotion in the external action of the EU is a strategic concept, capable of enhancing the competitive position of institutional and private representatives of the EU and of defending the set of European social preferences.³³

The remaining part of the paper is built upon the assumption that human rights are a priority across-the-board for the EU and at the heart of its strategic agenda. The following sections investigate the possible answer(s) to the second and third questions *i.e.* is the mainstreaming of human rights by the EU a feature of the sanctions regime? Can this approach be considered as a legal model and therefore be suitable for replicating? Individual sanctions constitute an excellent case study in order to verify if the European "legal model" of extraterritorial promotion of human rights is actually on its way to being disseminated, as these sanctions are a (relatively) new product of social engineering in the international sphere and are currently adopted by the majority of relevant international actors.

3. Individual sanctions and human rights in the European Union: case study

Individual sanctions are more and more frequently adopted because their deployment reduces collateral effects of other 'conditionality' activities. Authors have referred to the 'humanitarian cost'³⁴ related to traditional sanctioning mechanisms; in fact, these often imply a lowering of the quality of life for the citizens of the recipient States. On the one hand, economic sanctions and all forms of trade and aid restrictions entail coercion in order to modify the target State's cost-benefit calculation of pursuing a certain policy, while the relevant costs (economic as well as social) are deemed to burden civil society. Individual (or "smart", or targeted) sanctions, on the other hand, aim at changing the policy of a third country by putting pressure upon specific individuals. Relevant policies include the failure to respect the rule of law or democratic principles or international law in general, including human rights.³⁵ Individual sanctions directed towards specific natural or legal persons were first adopted by the United Nations Security Council³⁶ (UNSC) in the 1990s and the EU has embarked upon similar policies ever since.

Seen from the point of view of their addressee, the EU issues two different types of individual sanctions. The first type targets governing elites of specific countries, whilst the second is not

³² The European Interest: succeeding in the age of globalization – Communication from the Commission to the Parliament, Brussels 3rd October 2007, COM(2007), pp. 2-6.

³³ J Zielonka, 'Europe as a global actor: empire by example?' (2008) 84 *Int'l Aff.* 480.

³⁴ M Craven, 'Humanitarianism and the Quest for Smarter Sanctions' (2002) 13 *Eur. J. Int'l L.* 45.

³⁵ European Commission – Restrictive measures, 2008, available at http://eeas.europa.eu/index_en.htm.

³⁶ In Supplement to An Agenda for Peace, published in January 1995, Secretary General Boutros Ghali called sanctions 'a blunt instrument.' They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behavior is unlikely to be affected by the plight of their subjects. In a Security Council debate on January 19, 1995, Ambassador N. Rodrigo of Sri Lanka concurred, saying that decisions must take better account of the sanctions' impact on ordinary people and must seek to avoid the 'suffering of the innocent'. Although the Security Council first recognized in resolution 326 (1973) 'the special economic hardships' confronting a member state (Zambia) as a result of the comprehensive sanctions imposed on Southern Rhodesia, it was only in 1995 that all permanent members definitively recognized that 'further collective actions in the Security Council within the context of any future sanctions regime should be directed to minimize unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries' (S/1995/300). While resolving intrastate conflict remains a common objective, there has also been a trend toward using targeted sanctions for other purposes: nonproliferation, counter-terrorism, democratization, protection of civilians and human rights.

geographically defined, because it focuses on specific phenomena (e.g. terrorism), regardless of the addressees' nationality and political status. Another distinction can be drawn based on the relevant international context in which the EU imposes sanctions. In fact, the EU may implement UNSC-sourced sanctions, provide its own lists of targeted individuals or, finally, in implementing UNSC sanctions, it can possibly add other persons as recipients, according to its own (*rectius*, the Member States') intelligence activities.

From now on, within the present paper, unless otherwise stated, "sanctions" shall be used as meaning individual sanctions. Furthermore, only measures *ex* Article 215(2) TFEU will be hereinafter considered.

The next section explores the role of human rights in the deployment of individual sanctions by the EU. This relationship, under EU law, is twofold: from an "internal" perspective, human rights are one of the standards for legislative action and judicial review. From an "external" perspective, the EU adopts sanctions (also) in relation to human rights violations committed outside its jurisdiction.

3.1 The Internal Perspective: Human Rights as a Possible Ground for the Annulment of Sanctions

The ECJ applies very high standards when it comes to the assessment of the legitimacy of EU acts with regard to compliance with human rights, despite the peculiarity of former Common Foreign and Security Policy (CFSP) norms,³⁷ the limited judicial review applied by the ECJ, pursuant to Article 275(2) TFEU. The express derogation to the rule of exclusion of ECJ jurisdiction in CFSP matters *ex* Article 24 TEU - in circumstances under which the review of legality of decisions for which restrictive measures against natural or legal persons adopted by the Council is required - by itself seems to highlight the importance of human rights in the EU legal order.

The famous *Kadi*³⁸ saga established the primacy of fundamental rights and freedoms over security and the prevalence of EU obligations (now grounded in the EU Charter for Fundamental Rights) over those that Member States subscribed to when they adhered to the UN Charter (with particular regard to Article 103, establishing the prevalence of UN law over conflicting national provisions). More specifically, relevant human rights are the 'judicial protection cluster' of rights³⁹: in *Kadi*, the ECJ stated that the applicant who aims to annul its entry in a sanction list benefits from 'in principle full judicial review'⁴⁰ by the EU Courts - despite the confidential nature of the evidence provided for the listing initiatives - and that (s)he has the right to be informed and heard at any stage of the sanctioning process.

The consequences, with regard to the drafting of black lists, are significant. First, the Council must ensure high standards of transparency and accountability, a feature that is not to be taken for granted in a body operating according to the intergovernmental method. Secondly, meeting such requirements may hamper the correct and prompt implementation of UNSC resolutions. Especially in a sensitive field such as targeted sanctions, the threat of 'judicially enforced non-compliance' with UN resolutions is likely to interfere with the very functioning of the UN sanctions mechanism. To some degree this turned the EU into more of an actor on its

³⁷ As widely known, ECJ's scrutiny is usually excluded over the former CFSP pillar.

³⁸ Joined cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] ECR I-06351 and Joined cases C-584/10 P, C-593/10 P and C-595/10 P European Commission and Others v Yassin Abdullah Kadi ECLI:EU:C:2013:518.

³⁹ As per Title VI of EU Charter of Fundamental Rights.

⁴⁰ *Kadi* case, para 326.

own in the field of sanctions, rather than a mere implementing body; an actor more true to its declared policy of fighting terrorism whilst respecting human rights.⁴¹

With regard to the transnational reach of European human rights policy, and its possible negative impact on the coherence of multilateral actions, the United States (US) government expressed its 'increasing concern about the weaknesses in the European sanctions mechanisms'.⁴² Such 'weaknesses' relate to the paramount role played by human rights in EU law, stressing the distance between the EU and US governance techniques when it comes to human rights. This is even more evident when comparing the ECJ decision to annul the regulation blacklisting Mr. Kadi, and one of the US District Court for the District of Columbia that in 2012 had dismissed the same claim. According to the US court, the relevant evidence gave sufficient reason to believe that Mr. Kadi had provided support to terrorists or people associated with them.⁴³ It is not by chance that the use of secret evidence made available to the courts and to those who are listed is one of the most contentious aspects in this field.

In this regard, the EU appears to be at the forefront. Reference is made to the recent amendment of the procedural rules in the EU General Court, defined as part of adapting to jurisprudential reality after the *Kadi* judgment.⁴⁴ Article 105 of the Rules⁴⁵ sets out new procedures for the treatment of confidential information or material pertaining to the security of the EU or of its Member States or to the conduct of their international relations, and the exceptions to the adversarial principle that may arise as a result, in compliance with the Charter of Fundamental Rights. Indeed, a recent study published by the Directorate-General for External Policies of the EU compared the two approaches regarding human rights and its overall conclusion seems to be that the EU is more willing than the US to incur costly sacrifices in order to pursue its human rights policy.⁴⁶

Recent European case law provides many examples of such costs. In the *B and D*⁴⁷ judgment the ECJ took the rather surprising view that being blacklisted does not preclude, in principle, the enjoyment of individual rights, such as those associated to the status of refugee under Directive 2004/83/CE,⁴⁸ which were therefore granted to the applicants despite their alleged

⁴¹ P Eeckhout, 'Kadi and the EU as instrument or actor. Which rule of law for counter terrorism?' in M Cremona, J Monar and S Poli, *The external dimension of the European Union's Area of Freedom Security and Justice* (Peter Lang-P.I.E. 2011).

⁴² L Normann, 'US weights in on problems with EU sanctions regime' *The Wall Street Journal* (30 January 2015).

⁴³ *Yassin Abdullah Kadi v Timothy Geithner*, (United States District Court for the district of Columbia, 19 March 2012). The decision also left open the question of whether or not Mr. Kadi had sufficient financial ties to the U.S. to require due process protections, while the same safeguards in EU do not depend on nationality as they are applied as a default rule. On 11 September 2014, US Office of Foreign Assets Control (OFAC) unblocked the property and interests in property of Mr. Kadi pursuant to E.O. 13224, 'Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to commit, or Support Terrorism'. This removal was due because of the removal of Mr. Kadi's name in UN's lists.

⁴⁴ HD Lidington MP, UK Justice, Institutions and Consumer Protection Sub-Committee, available at <http://www.parliamentlive.com>.

⁴⁵ Entered into force on 1 July 2015.

⁴⁶ Directorate-General for External Policies of the European Union, 'A Comparative Study of EU and US Approaches to Human Rights In External Relations' (EXPO/B/DROI/2014/27 2014).

⁴⁷ Joined cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v B and D* ECR 2010 I-10979.

⁴⁸ Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304. This directive was repealed by directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337.

membership of the PKK.⁴⁹ The same finding was reached by another judgment, with reference to the residency permit of a third country national whose name was blacklisted: in a preliminary ruling the Court stated that ‘the *refoulement* of a refugee (...) is only the last resort a Member State may use where no other measure is possible or is sufficient for dealing with the threat that that refugee poses to the security or to the public of that Member State’.⁵⁰ It is therefore important to verify, on a case-by-case basis, whether the acts of the organization in question can endanger national security or public order.⁵¹ In the EU, the mere fact that the refugee supported a blacklisted organization cannot automatically mean that that person’s residence permit has to be revoked.⁵²

The *Safa Nicu*⁵³ judgment, delivered by the General Court in November 2014 represents another recent example of costly human rights policies pursued by the EU. The applicant, an Iranian company, obtained compensation as a result of the Council’s failure to provide adequate evidence for including it in a black list. This case is presently under the scrutiny of the Court, whose final decision may open a Pandora’s box of compensation claims, considering the great number of pending cases.

Empirical analysis demonstrates that the issuance of sanctions by the EU leads to a considerable amount of litigation: in the relevant period between 1 January 2015 and 7 October 2015, 75 judicial proceedings were considered by the ECJ on the topic of the relation between human rights and sanctions. The number of annulments (12) is now smaller than the number of rejected applications of the same kind (23). Furthermore, every request for interim relief (5) was dismissed. Nevertheless, many (29) proceedings are (as of 7 October 2015) still pending. They cover different questions.

First, some of the decisions continue to be based on the violation of Article 47 of the Charter of Fundamental rights. This is the case of *Dynamo-Minsk*,⁵⁴ where the General Court held that being a leading businessman in a country (Belarus, in this case), upon who individual sanctions had been issued is not enough by itself to show that the applicant provided financial support to the regime nor that he perpetrated any human rights violation, and that the Council had not put forward sufficient evidence that he did. Furthermore, the General Court delivered its first judgment⁵⁵ on the EU’s targeted sanctions regime concerning Ukrainians allegedly responsible for misappropriation of State funds. Mr Portnov’s listing was annulled because, while the Council stated that an investigation into Mr Portnov and others had ‘made it possible to establish’ misappropriation of State funds, the evidence did not specify anything about Mr

⁴⁹ The Kurdistan Workers’ Party, commonly referred to by its Kurdish acronym, PKK (Partiya Karkerên Kurdistanê) is a Kurdish nationalist organization. Taking the view that action by the European Community was needed in order to implement UNSC Res 1373 (2001), on 27 December 2001 the Council of the European Union adopted Common Position 2001/930/CFSP on combating terrorism and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism. The organization’s leader, Mr. Ocalan applied for and obtained the annulment of such measures 00045 because the Council had failed in providing adequate evidence to the listing. Case T-229/02 *Osman Ocalan acting on behalf of PKK v Council of the European Union* [2008] ECR II-45.

⁵⁰ Case C-373/13 *H. T. v Land Baden-Württemberg* [2015] ECLI:EU:C:2015:413.

⁵¹ *Ibid* para 84. Accordingly, in the context of the judicial review, it must be ascertained: whether the applicant has committed terrorist acts, whether and to what extent he was involved in planning, decision-making or directing other persons with a view to committing acts of that nature, and whether and to what extent he financed such acts or procured for other persons the means to commit them (para 90).

⁵² *Ibid* para 87.

⁵³ Case T-384/11 *Safa Nicu Sepahan Co. v Council of the European Union* [2014] ECLI:EU:T:2014:986.

⁵⁴ Case T-275/12 *Football Club ‘Dynamo-Minsk’ ZAO v Council of the European Union* [2015] ECLI:EU:T:2015:747.

⁵⁵ Case T-290/14 *Portnov v Council of the European Union* [2015] ECLI:EU:T:2015:806.

Portnov, and the EU had not conducted its own analysis into whether he fulfilled the criteria for listing.

Second, a certain number of the pending applications raise different issues: probably due to the decreased number of annulment decisions on the grounds of human rights incompatibility of sanction regimes, applicants appear now to challenge the choice of the correct legal basis for sanctions. To provide one example, in *Hmicho*,⁵⁶ an application for annulment was filed in May 2015: the first plea alleges that ‘there is an absence of legal basis for restrictive measures against [the listed person]’, while the second plea challenges the compatibility of the measure with human rights standards. The parties eventually reached an agreement and dropped the proceeding but the change in the litigation strategy on the part of those affected by sanctions could indicate that the high threshold of human rights protection set by the Court is now met at Council level, when sanctions are drafted and issued.

Third, as one of the most recent developments in the field of sanctions, one may also recall the reference for a preliminary ruling,⁵⁷ by which the High Court of Justice of England and Wales asked the Court whether – with regard to CFSP matters – the Court has jurisdiction to give a preliminary ruling under Article 267 TFEU on the validity of an act of secondary law imposing sanctions. Clearly, the answer to such a reference is able to seriously modify institutional balances and, even more importantly, open unexpected ways of access to the ECJ.

3.2 The External Perspective: Individual Sanctions as a Reaction Against Gross Human Rights Violations

As of today, the EU has created 19 sanctioning regimes grounded on human rights violations in third countries. Among them, 11 are unilaterally put forth by the EU,⁵⁸ 6 are implemented in UNSC resolutions⁵⁹ and 3 originated in UNSC resolutions, but, at the same time include

⁵⁶ Case T-275/15 *Hmicho v Council* [Action brought on 29 May 2015].

⁵⁷ Case C-72/15 OJSC Rosneft Oil Company v Her Majesty's Treasury, Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority [Reference for preliminary ruling from High Court of Justice (England & Wales), Queen's Bench Division, filed on 18 February 2015].

⁵⁸ 1. Belarus: Council Decision 2004/661/CFSP (OJ L 301 2004), in force: Council Decision 2012/642/CFSP (OJ L 285 2012);
2. Burundi: Council Decision (CFSP) 2015/1763 (OJ L 257 2015);
3. Ukraine: Council Decision 2014/119/CFSP (OJ L 111 2014);
4. Zimbabwe: Council Common Position 2002/145/CFSP (OJ L 50 2002), in force: Council Decision 2014/119/CFSP (OJ L 111 2014);
5. Syria: Council Decision 2011/273/CFSP (OJ L 269 2011), in force: Council Decision 2013/255/CFSP (OJ L 147 2013);
6. Burma/Myanmar: Council Common Position 2004/423/CFSP (OJ L 125 2004); in force: Council Decision 2013/184/CFSP (OJ L 111 2013);
7. Egypt: Council Decision 2011/172/CFSP (OJ L 76 2011);
8. Bosnia and Herzegovina: Council Decision 2011/173/CFSP (OJ L 76 2011) [ceased];
9. Tunisia: Council Decision 2011/72/CFSP (OJ L 28 2011);
10. Moldova: Council Common Position 2003/139/CFSP (OJ L 53 2003), in force: Council Decision 2010/573/CFSP (OJ L 253 2010);
11. Iran: Council Decision 2011/235/CFSP (OJ L 100 2011).

⁵⁹ 1. South Sudan: Council Common Position 2005/411/CFSP (OJ L 148 2005), pursuant to UNSCR 1591(2005), in force: Council Decision 2014/449/CFSP (OJ L 203 2014);
2. Democratic Republic of Congo: Council Common Position 2005/440/CFSP (OJ L 264 2005), pursuant to UNSCR 1596 (2005), in force: Council Decision 2010/788/CFSP (OJ L 336 2010);
3. Côte d'Ivoire: Council Common Position 2004/852/CFSP (OJ L 368 2004), pursuant to UNSCR 1572 (2004), in force: Council Decision 2010/656/CFSP (OJ L 285 2010).
4. Somalia: Council Common Position 2009/138/CFSP (OJ L 46 2009), pursuant to UNSCR 1844 (2008), in force: Council Decision 2010/231/CFSP (OJ L 105 2010);
5. Yemen: Council Decision 2014/932/CFSP (OJ L 365 2014), pursuant to UNSCR 2140 (2014);

additional individuals and entities to those originally designated by the UN.⁶⁰ It does not consider regimes put in place in order to pursue objectives other than human rights protection and promotion, such for instance, the well-known anti-terrorism regimes.

The numbers are clear: the EU is by far the major 'sanctioner', as a reaction to human rights violations. While the EU implements the largest number of these regimes, other international actors often follow its sanctioning initiatives.

In order to test the EU's stance as a human rights promoter through sanctions and its impact on the international community, only unilateral regimes shall be considered. Because of the binding nature of UNSC resolutions, the regimes set in this context are widely implemented across the globe, which makes them less suitable to test actors' reactions when confronted with human rights violations.

6. Republic of Guinea-Bissau: Council Decision 2012/237/CFSP (OJ L 119 2012), pursuant to UNSCR 2048 (2012).

⁶⁰ 1. Libya: Council Decision 2011/137/CFSP (OJ L 58 2011), pursuant to UNSCR 1970 (2011);

2. People's Democratic Republic of Korea: Council Common Position 2006/795/CFSP (OJ L 200M 2007), pursuant to UNSCR 1695 (2006), in force. Council Decision Council Decision 2013/183/CFSP (OJ L 111,2013).

Table n. 1⁶¹

Table no. 1 shows the correlation between the EU's unilateral regimes and the ones of the US, Canada and Australia,⁶³ also engaged in unilateral sanctions. Regarding the EU's 11 autonomous regimes Australia maintains 7, Canada 5 and the US 4 initiatives directed toward specific individuals allegedly involved in human rights violations in other countries. The regimes pursued by the three States, despite being less than the ones pursued by the EU, are not completely identical, confirming that strategic considerations lie at the root of the sanctioning initiatives and that the latter often have objectives further than the mere promotion of human rights.

The four 'sanctioner' legal orders share both the objective of sanctioning (human rights promotion and protection) and the means used – (assets freezing and travel bans) but only in three cases each and every actor considered maintains a unilateral regime: those are Burma/Myanmar, Syria and Ukraine.

	European Union	Canada	Australia	US
1	Belarus	x		x
2	Bosnia and Herzegovina		x (Former Yugoslavia)	
3	Burma/Myanmar	x	x	x
4	Burundi			
5	Egypt			
6	Iran	x	x	
7	Moldova			
8	Syria	x	x	x
9	Tunisia			
10	Ukraine/Russia⁶²	x	x	x
11	Zimbabwe	x	x	

One of the main goals pursued by the adoption of sanctions is the public display of disagreement from the 'sanctioner' to the 'sanctionee', with reference to a specific policy allegedly disrespectful of basic human rights and democracy standards. Therefore, the choice

⁶¹ Data were gathered through the following governmental websites of Australia (<http://dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/pages/sanctions-regimes.aspx>), Canada (<http://www.international.gc.ca/sanctions/index.aspx?lang=eng>) and US (<http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>).

⁶² At this regard, not every relevant actor relates its sanction regime to strictly Ukraine as a State, since the crisis that has given rise to the need of sanctions involves nationals of several States. Nevertheless, the regimes herewith reported are meant to tackle the same phenomenon of human rights and democracy violations happened in relation to Russian occupation of Crimea.

⁶³ The choice of the case studies is due to linguistical accessibility of the relevant legislation and stance of the actor on the international scene.

of undertaking initiatives in this regard could be a legitimate indicator to identify the commitment of one actor to the cause of extraterritorial human rights promotion and protection.

Table no. 2 considers the three regimes that are maintained by the EU,⁶⁴ US,⁶⁵ Canada⁶⁶ and Australia⁶⁷ as highlighted in Table no. 1, and points at the swift issuance of sanctions. Rapidity can be considered a marker of sanctions effectiveness. Indeed, designated individuals may well withdraw their assets and properties from jurisdictions where they suspect that restrictive measures are about to be issued. In two cases out of three, the EU has been the first international actor to react unilaterally to human rights violations in third countries, by issuing individual sanctions. While the long term possibility of success of these regimes remains to be evaluated, the results outlined in Table no. 2 demonstrate that on the international scene the EU ranks first as a 'sanctioner' legal regime, outside the UN framework. One may also note that the issuance of sanctions by the US against Syrian nationals in 2004 could be related to the latter's opposition to the Iraq war, which strongly deteriorated the diplomatic relations with the US and thus can explain the larger timeframe that separates the US' initiative from other actors. More generally, however, it is possible to affirm that the EU is very often the first to undertake sanctioning initiatives on the international scene, when human rights violations occur.⁶⁸

Table no. 2

	1	2	3	4
Burma/Myanmar	EU (26/04/04)	AU (24/10/07)	CA (13/12/07)	US (11/07/12)
Syria	US (12/05/04)	EU (9/05/11)	CA (24/05/11)	AU (20/08/13)
Ukraine	EU (5/03/14)	CA (17/03/14)	AU (17/06/14)	US (19/12/14)

A comprehensive worldwide study on sanction activism is, in the author's knowledge,⁶⁹ still missing. Nevertheless, on the basis of the data sample considered herein, it is possible to confirm that human rights violations represent a powerful trigger for the EU to apply individual sanctions. This initiative is moreover suitable to be sustained by other actors' in a relatively short period of time.

⁶⁴ Burma regime: Council common position 2004/423/CFSP (OJ L 125 2004), in force: Council Decision 2013/184/CFSP (OJ L 111 2013); Syria regime: Council Decision 2011/273/CFSP (OJ L 199 2011), in force: Council Decision 2013/255/CFSP (OJ L 147 2013); Ukraine regime: Council Decision 2014/119/CFSP (OJ L 66 2014).

⁶⁵ Burma: U.S. EO 13619 Federal Register Vol. 77, No. 135 (11 July 2012); Syria: U.S. EO 13338 Federal Register Vol. 69, No. 93 (12 May 2004); Ukraine: U.S. EO 13685 Federal Register Vol. 79, No. 247 (19 December 2014).

⁶⁶ Burma: *Special Economic Measures Act* SOR/2007-285 (13 December 2007); Syria: *Special Economic Measures Act* SOR/2011-114 (24 May 2011); Ukraine: *Special Economic Measures Act* SOR/2014-60 (17 March 2014).

⁶⁷ Burma: Autonomous Sanctions Regulations 2011 No. 247 (as amended on 21 August 2012); Syria: Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Syria) List 2012 F2013C00664 (20 Aug 2013); Ukraine: Autonomous Sanctions Regulations 2011 No. 247 (as amended on 17 Jun 2014).

⁶⁸ See previous note 57.

⁶⁹ Last checked: 24 January 2017.

Given the relevance of human rights in the EU's sanctioning regimes, as highlighted in this section, it can be affirmed that the mainstreaming of human rights is indeed a feature of EU's sanctions regime (ii).

4. EU sanctions as a legal model on global scale?

The extent to which international actors use sanctions as a means to enforce human rights standards has not received much attention in legal literature. As the leading role of the EU in the sanctioning process is ascertained, it is now worth verifying, at least by way of a selection of case studies, if the EU's approach to sanctions has (or may in the future) become a reference for other legal systems.

Sanctions issued by the UN, as administrative instruments of preemptive security, are based on a severe non-disclosure principle; and they still lack, at this level, an effective judicial protection mechanism. By contrast, EU institutions assert that listed persons have the right to challenge the legitimacy of sanctions before a court, and to have relevant information disclosed to them at any stage of the process and to enjoy 'in principle full judicial review'.⁷⁰

Experience shows that the legitimacy and effectiveness of the sanction could be improved through more precise regulation of the three stages of the sanctioning process.⁷¹ In March 2015 the Council released the updated version of 'EU Best Practices for the effective implementation of restrictive measures',⁷² which contains non-binding recommendations for the implementation of EU sanctions. The context in which the document was elaborated, within the RELEX group, allowed the regular hurdles that arose during the process of implementing sanctions to be tackled. Just to mention one example, the Best Practice provides specific clauses⁷³ in order to deal with issues relating to mistaken identity of the addressee of sanctions. Under the new EU Best Practices a preferential communication channel with the Commission is available to persons who, despite not being the actual designated individual, are subject to sanctions. This illustrates the point that identifiers other than the persons' full names should be provided along with the proposal of the sanction. The aspect is of practical importance, due to relevant difficulties in transliterating names or because of cases of homonymy. Indeed this was the ground for annulment of several entries in black lists⁷⁴ and, through prompt regulation, it offers a means of diminishing successful challenges for annulment.

The design of a comprehensive regulatory package in the field of sanctions can be quite attractive, since it allows interested countries to rely on the EU's expertise and resources, and, on that basis, to be an active player in the international arena.

4.1 Evolution of the UNSC's sanctioning regime in the light of the European 'model'

The *Kadi* decisions have undoubtedly been a particularly important catalyst, as they paved the way for dialogue between the UN and the EU concerning the scope of application of human rights law. The judgment has been interpreted as an "ultimatum" to the UNSC, which was required to amend its blacklisting procedures to ensure compliance with fundamental rights (by, for example, providing means of effective judicial protection and sufficient information to

⁷⁰ *Kadi* case, para 326.

⁷¹ The *ex ante* phase (design and adoption of the measures), to the implementation phase (enforcement and compliance) and the *ex post* phase (responsiveness and flexibility, see *supra* note 37).

⁷² Communication n. 10254 from the Foreign Relations Counsellors Working Party to the Permanent Representatives Committee of 24 June 2015.

⁷³ Paras 8-17.

⁷⁴ Inter alia see Case T-384/11 *Safa Nicu Sepahan Co. v Council of the European Union*, ECLI:EU:T:2014:986.

enable blacklisted individuals to exercise their rights of review) in order to avoid the risk of the blacklists system being declared unlawful in the EU legal order.⁷⁵

It has to be recalled that the *Kadi* saga originated in the context of counterterrorism, from resolution 1267/1999,⁷⁶ which had also set up a designated Sanctions Committee for the management of the black lists. Like the UNSC itself, Sanctions Committees are entrusted with the follow up of the application of sanctions and still qualify as political organs. Their composition mirrors that of the UNSC and so does their decision-making procedure, *i.e.* they decide by *consensus*, with all the well-known consequences. In the words of the *ad hoc* Special Rapporteur for Human Rights,⁷⁷ 'the listing procedure still falls short of providing guarantees with respect to the rights to property, to private life, to the rights of the listed person to be informed of the accusation and to be heard and judged'.

The designation and monitoring procedure has nonetheless progressively taken an administrative turn, in the sense that starting from 2005, a number of resolutions provided procedural safeguards in order to protect the rights of the listed persons and to avoid arbitral decisions. Indeed, shortly after the first *Kadi* ruling,⁷⁸ the UNSC endeavored to reassure at least some of the most relevant human rights concerns: in fact, before it, no procedure existed for obtaining an individual de-listing, apart from the one available to the country of the listed person. At the same time as the ECJ ruling, due to the emerging risks for the uniform implementation of UNSC resolutions, a focal point⁷⁹ responsible for considering such applications and the office of the Ombudsperson⁸⁰ were established. Furthermore, a minimal requirement of notification for blacklisted individuals and an obligation to provide them with a copy of the reasons underpinning the listing decision was introduced.⁸¹ However, the guarantees set up at the UN level were not deemed to be sufficient because the procedure before the Committee did not provide the individual with 'real opportunities to assert its rights'.⁸² Hence, following some further reforms at the UN level, the UNSC was required to provide a narrative summary of reasons for listing available on its website and stated that each entry had to be reviewed every two years.⁸³

Nevertheless, the ECJ in its second ruling on Mr. Kadi's case upheld the right of full judicial review⁸⁴ and reiterated the European choice of human rights prevalence over public interest and international security. Although EU case law in relation to sanctions had (and, to some extent, still has) a considerable impact on UN architecture, European standards of human rights protection are far from being reached. In fact, the EU has developed its own practice of implementing UN sanctions, according to its own values.

⁷⁵ G Sullivan and B Hayes, *Blacklisted. Targeted sanctions, preemptive security and fundamental rights* (2011) < <https://www.tni.org/files/eu-ecchr-blacklisted-report.pdf>>.

⁷⁶ UNSCR 1267 (1999).

⁷⁷ Report of M. Schenin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental freedoms while Countering Terrorism, 6 August 2010.

⁷⁸ 21 September 2005.

⁷⁹ UNSCR 1730 (2009).

⁸⁰ UNSCR 1904 (2009).

⁸¹ UNSCR 1735 (2006).

⁸² Joined cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation vs Council of the European Union and Commission of the European Communities [2008] ECR I-06351 para 323.

⁸³ UNSCR 1828 (2009).

⁸⁴ Joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi*, ECLI:EU:C:2013:518.

4.2 National Sanctions Regimes in Light of the European Model

Although the sanctioning technique of the EU remains unique, it is beyond any doubt that it is carefully monitored and is regarded as particularly advanced by the international community. Moreover, some evidence exists that this model has spread to other legal orders.

In March 2015, the EU decided to renew its sanctions related to the situation in Zimbabwe.⁸⁵ Candidate countries (former Yugoslav Republic of Macedonia, Montenegro, Iceland, Serbia and Albania), potential candidate countries (Bosnia and Herzegovina), EFTA countries (Iceland, Liechtenstein and Norway), as well as Ukraine, the Republic of Moldova and Armenia all aligned themselves with the Council initiative⁸⁶ and thus provided identical packages of sanctions to those of the EU. The wide-scale association to the EU sanctioning initiative happened when the same countries aligned themselves to the Council's decision⁸⁷ to invoke restrictive measures in respect of actions undermining the independence of Ukraine,⁸⁸ and its decision to expand EU sanctions against perpetrators of human rights violations in Belarus⁸⁹ and North Korea.⁹⁰

In Switzerland, legislative reforms now empower the Swiss Federal Council to refrain from implementing the UNSC resolution in certain circumstances - including, *inter alia*, where blacklisted individuals and groups have not been afforded access to an independent mechanism of review or where they have been listed for more than three years without being brought before a court.⁹¹ The Federal Council made it clear that 'it is not possible for a democratic country based on the rule of law that sanctions imposed by the Sanctions Committee, without any due process guarantee, result in the suspension, for years and without any democratic legitimacy, the most basic human rights'.⁹² Furthermore, considering the situation in Ukraine, and following the invitation of the EU to do so, the Federal Council decided to extend its measures in order to prevent the circumvention of EU sanctions. It further added the measures decreed by the EU,⁹³ following the non-recognition of the annexation of Crimea to its ordinance on international sanctions.⁹⁴ The Federal Council also added to its lists the names of 28 other persons and entities who have had financial and travel restrictions imposed on them in the EU.⁹⁵

Australia's restrictive measures against Iran were, *inter alia*, described as 'EU-style'.⁹⁶ In Australia's 'Autonomous Sanctions Bill 2010'⁹⁷ it was expressly stated that 'Australia, as well as the European Union and other states, imposes autonomous targeted financial sanctions and travel restrictions on a range of individuals and entities beyond those required by the Security Council'. This reference explains how relevant the EU's model of sanctions has become, challenging the monopoly of UN-originated regimes as a reference for other like-

⁸⁵ Council Decision 2015/277/CFSP (OJ L 47 2015)

⁸⁶ Declaration by the High Representative on behalf of the European Union on the alignment of certain third countries with the Council Decision 2015/277/CFSP amending Council Decision 2011/101/CFSP concerning restrictive measures against Zimbabwe <<http://www.consilium.europa.eu/en/press/press-releases/2015/04/10-declaration-hr-zimbabwe-alignments>>

⁸⁷ Council Decision 2014/145/CFSP (OJ L 78 2014).

⁸⁸ Council Decision 2015/959/CFSP (OJ L 156 2015).

⁸⁹ Council Implementing Decision 2015/1142/CFSP (OJ L 185 2015).

⁹⁰ Council Decision 2015/1066/CFSP (OJ L 174 2015).

⁹¹ <www.finma.ch/archiv/gwg/e/dokumentationen/gesetzgebung/sanktionen/index.php#21>

⁹² G Sullivan and B Hayes, *Blacklisted. Targeted sanctions, preemptive security and fundamental rights* (2011) <<https://www.tni.org/files/eu-ecchr-blacklisted-report.pdf>>.

⁹³ Council Regulation (EU) No 269/2014 (OJ L 78 2014).

⁹⁴ Ordinance of the Federal Council on international sanctions of 27 August 2014.

⁹⁵ Press release of the Federal Administration of Switzerland <www.news.admin.ch/index.html?lang=en>.

⁹⁶ 'Australia adopts EU-style sanctions against Iran' <www.iran-times.com>.

⁹⁷ *Autonomous Sanctions Bill*, 2010 Bills Digest No. 111, 2010–11.

mindful legal orders. Also in relation to sanctions against Zimbabwe, triggered by human rights violations in the country, both the EU⁹⁸ and Australia had issued sanctions and when the EU partially eased its own, Australia followed.⁹⁹ The same happened when the EU lifted the sanctions that had been imposed in response to the junta's suppression in Myanmar:¹⁰⁰ Australia and Canada also lifted their measures, while the US suspended the sanctions but did not lift them entirely.¹⁰¹

With reference to Canada, the need for granting individual rights in the sanctions field was established by the leading precedent *Abdelrazik*,¹⁰² in which the Canadian Supreme Court stated that the Ministry of Foreign Affairs violated the Canadian Charter of Rights and Freedoms when implementing UN-sourced sanctions against Mr. Abdelrazik, without granting him a fair access to judicial remedy. Again, timing is not irrelevant, since the *Kadi* decision was pronounced by the ECJ in September 2008 and *Abdelrazik* just a few months later, in June 2009 by Canadian Supreme Court.

Recently, the EU Council has sanctioned four Burundian nationals whose activities have been said to be undermining democracy in the country, particularly through violence and serious human rights violations. Shortly after, the Peace and Security Council of the *African Union* decided to impose targeted sanctions,¹⁰³ including asset freezes and travel bans, against any person or entity involved in the perpetuation of violence in Burundi or against anyone who impedes the search for a solution to the crisis the country is facing. The Council of African Union's decision follows the EU's introduction of sanctions, since the list is identical.

In the light of these examples, it is possible to state that the EU is particularly committed to deploy its sanctions mechanism to respond to human rights violations, both in qualitative and quantitative terms. Moreover, some evidence exists that its model has inspired sanctions issuance in the same field by other legal orders.

5. Conclusion

At the beginning of the paper, three questions were outlined, to which it is now appropriate to return.

Human rights are undoubtedly a leading tenet in EU external action. In this perspective, they are a strategic concept, capable of enhancing the competitive position of institutional and private representatives of the EU and of defending the set of European social preferences. At the same time, human rights allow the EU to describe itself as the champion of stability, human rights and democracy promotion, allowing it to spread prosperity, sustainable development and to be a supporter of the enforcement of the rule of law and good governance.

Significant evidence exists that illustrates the way in which human rights play a pivotal role in the EU's issuance of sanctions, from both the internal and the external perspective. This means, on the one hand, that very high standards of human rights are guaranteed to addressees of targeted measures in the EU. This process was boosted by ECJ's annulments of several regimes, until a sufficient standard of 'procedural rights' was reached at Council level. Consequently, the amount of annulments of sanction regimes seems to have now decreased. On the other hand, from the external point of view, the EU is the major international

⁹⁸ Council Decision 2011/101/CFSP (OJ L 42 2011).

⁹⁹ Communiqué PSC/PR/COMM(DLI) Peace And Security Council 551st meeting (17 October 2015).

¹⁰⁰ Council Decision 2014/214/CFSP (OJ L 111 2014).

¹⁰¹ Al Jazeera - English, November 13, 2014.

¹⁰² Case No. T-727-08 *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada*, June 4, 2009.

¹⁰³ Peace and Security Council 551st Meeting PSC/PR/COMM (DLI), 17 October 2015.

actor when it comes to reacting to human rights violations by means of individual sanctions. These allow the population to be spared from further suffering due to the imposition to economic sanctions without renouncing its opposition to gross violations of fundamental rights and to prosecuting actual culprits.

The case studies reported above demonstrate that major international actors closely scrutinize the EU's 'model' of sanctions. The scrutiny has various forms. EFTA countries, candidates to membership potential candidate and partners in Stabilization and Association Agreements seem willing to draw on the experience of the EU. In these cases, one may assert that the European model of sanctions has indeed circulated, since these States rely on the initiative of the EU and then simply align their own national sanction policy to that of the EU, even in fields where the EU's competence is weak, such as visa restrictions. In other cases, such as Australia and Canada, for instance, several differences exist among the regimes but the impact of the *Kadi* decision and the consequences that it had ignited, can be tracked in these legal orders. Furthermore, these actors cautiously monitor the EU's activism in the field of sanctions and seek coordination whenever it is feasible, in order to achieve greater effectiveness. Finally, at the UN level, very little impact can be traced. This may be explained by the structure of this organization that is not deemed to directly regulate individuals' legal positions, which explains why procedural rights at this level are not well developed. As a conclusion, whilst the EU's approach to sanctions may well be considered a legal model, its circulation is limited to countries where the EU is influential across a range of sectors, because of geographic proximity and political and economic dependence. This influence decreases but remains perceivable in other important actors on the international scene, such as Canada and Australia, but evidence does not show any relevant impact on UN architecture.

Furthermore, the same model also suffers from the criticism from the US¹⁰⁴ and China. China's attitude is one of opposition to the values promoted by the EU, in particular as regards human rights. This is particularly interesting because it reveals the most relevant hurdle in the phenomenon of circulation of the legal model, *i.e.* that mere transplants of regulations are not effective, if not accompanied by a fertile cultural and legal environment. Indeed, with specific regard to sanctions, China, as well as India, Brazil and South Africa, showed a certain solidarity with Russia's annexation of Crimea by abstaining at the UN, thus defeating the EU's diplomatic effort in relation to the Ukrainian crisis. As one observer pointed out, as one of the findings from the structured EU-China Dialogue on human rights,¹⁰⁵ 'China does not need human rights lesson'.¹⁰⁶

Due to the existence of Articles 3(5) and 21 TFEU, individual sanctions under EU law are quite unique. The rationale of these norms, indeed, goes very well together with the means of individual sanctions, which encompass human rights both internally and externally. It remains to be seen whether individual sanctions are in fact a valuable administrative instrument in the field of international relations. Some scholars have criticized the effectiveness of targeted sanctions,¹⁰⁷ and one may add that the EU's 'favorable' approach toward blacklisted persons

¹⁰⁴ See part I of the present article.

¹⁰⁵ This dialogue was set up in 1995. Two rounds of the dialogue take place every year, one under each EU Presidency. It allows the EU to channel all issues of concern (such as the death penalty, re-education through labor, ethnic minorities' rights, civil and political freedoms etc.) in a forum where China is committed to responding.

¹⁰⁶ N Nielsen, 'China does not need human rights lesson, says top envoy' *EuObserver*, 9 December 2014.

¹⁰⁷ *Inter alia*, see D Esfandiary, 'Assessing the European Union's Sanctions Policy: Iran as a case study', *Non-Proliferation Papers*, 34/2013 < <http://www.nonproliferation.eu/web/documents/nonproliferationpapers/dinaesfandiary52b41ff5cbaf6.pdf>>; R Drulàková et al, 'Assessing the effectiveness of EU sanction policy', 4 *Central European Journal of International and Security Studies* (2010) 101; AW de Vries, C Portela and B Guijarro-Usobiaga, 'Improving the Effectiveness of Sanctions: A Checklist for the EU', CEPS Special Report

could possibly lead to some forum shopping: it could be more convenient for an individual to risk incurring 'Europeanized' sanctions, rather than those administered by other legal systems. The consequences arising out of the severe scrutiny on the legality of sanctions on the grounds of human rights are twofold: on the one hand, costs are deemed to increase due to the possibility of awarding compensation for wrongful listing initiatives; and on the other hand, the EU is reinforcing its image as an international champion of human rights as well as through very high standards of accountability in political forum.

As a more credible and better-defined international actor, the EU can engage in a number of initiatives, with a view of fostering its strategic and economic interests. Its sanctioning 'model' is at the forefront and is regarded as such by several international actors, while others criticize it. Individual sanctions - at least theoretically - represent the 'win-win' tool in external action of the EU, because they promote its regulatory patterns and jurisdictional capabilities without having devastating downsides. In this regard, commentators maintain deeply diverging opinions about sanction effectiveness in the long run; while some contest that the balance between pain and gain is not worthwhile, the point of the present paper is that individual restrictive measures are a useful tool in foreign policy. This may appear to be an obvious argument but sanctions contribute to shaping the image of the EU, providing diplomatic alternatives with more nuanced and targeted policies which ensure the EU's leverage in foreign policy¹⁰⁸ and show that the EU is able to stand by the principles it claims to uphold.

In other terms, they enable the prosecution of actual culprits of human rights violations, foster a human rights culture as a whole and pave the way for both a fairer world and for more constructive relations among different legal orders. And this is indeed what the EU seems to be expected to do.

95/2014. On the contrary, some Authors have a more positive attitude. For instance, see F Giumelli, *The Success of Sanctions. Lessons Learned from the EU Experience* (Ashgate 2013).

¹⁰⁸ F Giumelli, 'How sanctions work. A new narrative', ISS Chaillot Paper 129/2013 < http://www.iss.europa.eu/uploads/media/Chaillot_129.pdf>.

INTERNATIONAL AGREEMENTS: AN ASSESSMENT OF A FRAGMENTED PRACTICE

Stefano Saluzzo

ABSTRACT

This paper examines the legal aspects of the relationship between the European Union legal order and international agreements concluded by Member States with third countries, by analysing various forms of interference on the part of EU institutions in the exercise of Member States' treaty-making powers. The paper focuses in particular on three different mechanisms used by the EU to coordinate Member States' external action: agreements concluded on behalf (or in the interest) of the Union, agreements concluded under a previous EU authorisation and the practice of common positions that Member States have to follow in international organisations to which the EU is not a party. Although still being sovereign entities within the international community, Member States are required to uphold the Union's interest in their relationship with third countries or international organisations and to avoid any action capable of affecting the EU legal order.

1. Introduction

Research on the relationship between the European legal order and international law has traditionally focused on the issue of international obligations directly binding upon EU institutions. The European Union (EU) can be bound by an international norm by virtue of an agreement concluded by the EU itself with third countries, or by the existence of a norm of customary international law.¹

At the same time, detailed analyses have been devoted to the international obligations Member States have assumed towards third countries before the creation of the EU or before their accession to the organisation. This kind of international obligations – “previous international obligations” or “anterior treaties” – are relevant for the EU legal order in so far as they are protected by Article 351 of the Treaty on the Functioning of the European Union (TFEU).² The Court of Justice of the EU (CJEU) has addressed the issue of previous agreements on several occasions, and this has led to a certain extent of clarity on their value within the EU legal order and on Member States obligations towards the EU in case of conflicting international norms.³

Much less has been said about a different case of interaction between EU law and international law, that is on so called “posterior treaties”, agreements concluded by Member States after the creation of the then European Community (EC) or after their accession to the EU. The reason for this lack of interest is perhaps due to the fact that the CJEU has only incidentally intervened on the matter, generally avoiding the most problematic aspects arising in these situations. Moreover, while the Treaties, after the entry into force of the Treaty of Lisbon, contain many provisions on EU international agreements, they are silent on the matter of international treaties binding only EU Member States. Nevertheless, in recent years, scholars have started to devote more attention to the matter, due to the increasing number of treaties that Member States are still ratifying on their own, even if with some forms of control by the EU.⁴ This raises several questions on the scope of Member States’ foreign powers, the

¹ According to art. 216 of the TFEU “[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States.” See the recent study of M. MENDEZ, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, Oxford, Oxford University Press, 2013. On the status of customary law within the EU legal order see J. WOUTERS, D. VAN EECKHOUTTE, *Giving Effect to Customary International Law Through European Community Law*, Working Paper 25, June 2002, Leuven Institute for International Law; T. KONSTADINIDES, *The Meso Level: Means of Interactions between EU and International Law: Customary International Law as a Source of EU Law, A Two-Way Fertilisation Route?*, in *Yearbook of European Law*, 2016, p. 513 ff.

² Art. 351(1) TFEU reads: “The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.”

³ For the relevant case law and an analysis on agreements pre-dating accession to the EU see P. EECKHOUT, *EU External Relations Law*, Oxford, Oxford University Press, 2011, pp. 421-434. However, the Court’s position in relation to art. 351 of the TFEU has been criticized for having interpreted the clause as a way for balancing EU law with international commitments of Member States. See J. KLABBERS, *Treaty Conflict and the European Union*, Cambridge, Cambridge University Press, 2009, p. 148.

⁴ See e.g. J.V. VAN ROSSEM, *Interactions between EU Law and International Law in the Light of Intertanko and Kadi: The Dilemma of Norms Binding the Member States but not the Community*, in *Netherlands Yearbook of International Law*, 2009, p. 183 ff. A. ROSAS, *The Status in EU Law of International Agreements Concluded by EU Member States*, in *Fordham International Law Journal*, 2011, p. 1304 ff.; M. CREMONA, *Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union*, in A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA (Eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Oxford, Hart Publishing, 2011, p. 435 ff.; ID, *Member States Agreements as Union Law*, in E.

status in the EU legal order of agreements concluded by them with third countries and the possibility to consider those agreements as binding on EU institutions.

The present contribution is aimed at describing the mentioned phenomenon and at understanding its legal implications for both the EU legal order and for Member States' positions *vis-à-vis* third States. In the first part, the article will make an attempt to conceptualize the issue and to present various situations in which Member States continue to retain a form of treaty-making power at the international level. In the next sections, the paper will provide an analysis of the practice of the EU in relation to agreements concluded by Member States on its behalf and on agreements authorized by the Union itself, trying also to identify the effects that Member States agreements can produce within the EU legal order.⁵ In the last part, the work will offer a brief account of the questions raised in the context of common positions established by the EU in relation to Member States' action within other international organisations.

2. International Agreements of EU Member States: a Fragmented Practice

Posterior treaties of Member States are not easy to define nor to classify. Using a negative definition, we should understand posterior agreements as agreements which do not fall under the scope of application of Article 351 of the TFEU.

Some authors have attempted to classify Member States international agreements by focusing on different elements: the time of the conclusion of the agreement, the type of EU competence to which the agreement is related or the effect they produce in the EU legal order.

Rosas has proposed to classify Member States treaties as: agreements binding on the Union through functional succession; agreements to which Union secondary law makes a *renvoi*; agreements concluded in the interests of the Union; and agreements that should be taken into account in the application or in the interpretation of EU law.⁶ As it is clear, this classification already takes into account the effects Member States agreements can produce within the EU legal order.

There exists a wide range of situations in which Member States can exercise their treaty-making power on the international plane, and they are not strictly limited to matters that fall outside the competence of the EU. In fact, on several occasions, EU Member States have ratified treaties which were (at least partly) covered by an EU competence, even by an exclusive one. Thus, competence is not a clear defining criterion to classify posterior treaties concluded by Member States.

The time of conclusion could offer a better perspective, although it is not always easy to distinguish between an anterior and a posterior treaty, especially when an external

CANNIZZARO, P. PALCHETTI, R. A. WESSEL (eds.), *International Law as the Law of the European Union*, Leiden, Martinus Nijhoff Publishers, 2012, p. 291 ff.

⁵ This paper does not deal with international agreements between EU Member States (so called *inter se* agreements), since they pertain to a completely different legal situation, which is regulated by different rules. On this issue, see generally R. SCHÜTZE, *Foreign Affairs and the EU Constitution. Selected Essays*, Cambridge, Cambridge University Press, pp. 138-155; A. DIMOPOULOS, *Taming the Conclusion of Inter Se Agreements between EU Member States: The Role of the Duty of Loyalty*, in *Yearbook of European Law*, 2015, p. 296 ff.

⁶ A. ROSAS, *The Status in EU Law of International Agreements Concluded by EU Member States*, *supra* note 4, p. 1324 ff.

competence of the EU later emerges by virtue of the AETR doctrine, or when amendments to anterior agreements lead to the exclusion of the applicability of Article 351 TFEU.⁷

There is another relevant category of agreements, that is those binding on the EU according to the doctrine of functional succession.⁸ The doctrine has been applied by the CJEU only in relation to the GATT, and it requires very specific and strict conditions in order for the EU to succeed in Member States' international obligations.⁹ Moreover, even if it could theoretically be applied in cases of posterior treaties, it has usually been invoked to establish the binding character for the EU of Member States' anterior treaties.

However, rather than constituting a proper category of agreements, the case of the functional succession should be seen as one of the possible effects that Member States' agreements have in the EU legal order, in the sense that, whenever there has been a complete transfer of competence to the Union (a supervening exclusive competence) in the subject matter regulated by a treaty to which all Member States are party, the latter could become binding for the Union itself.¹⁰

It is nonetheless clear that attempts to classify posterior treaties have not led to more clarity on their relationship with EU law. Thus, it seems that an analysis of the practice concerned could be conducted by looking at the degree of EU "interference" in the exercise of Member States' treaty-making power. This choice leads – for the purpose of this article – to distinguish between different patterns that create limits to Member States' autonomy in the management

⁷ See, e.g., the *Open Skies* judgments: CJEU, case C-467/98, *Commission v. Denmark*, EU:C:2002:625, para. 39; CJEU, case C-468/98, *Commission v. Sweden*, EU:C:2002:626, para. 37; CJEU, case C-469/98, *Commission v. Finland*, EU:C:2002:627, para. 39; CJEU, case C-471/98, *Commission v. Belgium*, EU:C:2002:628, para. 50; CJEU, case C-472/98, *Commission v. Luxembourg*, EU:C:2002:629, para. 45; CJEU, case C-475/98, *Commission v. Austria*, EU:C:2002:630, para. 47; CJEU, case C-476/98, *Commission v. Germany*, EU:C:2002:631, para. 66; more recently, CJEU, case C-523/04, *Commission v. Netherlands*, EU:C:2007:244, paras. 51-52.

⁸ The Court has accepted in at least one case that an agreement concluded by Member States can have binding effects upon the Union. In *International Fruit Company* the Court was asked to assess the compatibility of a trade regulation in the light of the GATT 1947. Although previously concluded only by Member States, the Court acknowledged that the then Community had already assumed the functions inherent in the tariff and trade policies and that "[b]y conferring those powers on the Community, the Member States showed their wish to bind it by the obligations entered into under the General agreement. From this transfer of powers – also recognised by the other contracting parties – it followed that the provisions of the GATT had the effect of binding the Community. See CJEU, joined cases C-22-24/72, *International Fruit Company*, EU:C:1972:115, paras. 14-18. The succession is defined "functional" in so far as it relates to a transfer of functions and not of territory, which is instead required by general international law for the succession of States in international treaties. See R. UERPMMANN-WITTZACK, *The Constitutional Role of International Law*, in A. VON BOGDANDY, J. BAST (eds.), *Principles of European Constitutional Law*, Oxford, Oxford University Press, 2009, p. 131, 149, where the author stresses that "[t]he rules of state succession are applicable when territorial sovereignty over an area has passed from one state to another. In the case of the EC, this is not what has happened. The EC is not a state. In particular it has not replaced its member States as territorial sovereignties but has just taken over some of their functions. One could ask if such a functional succession leads to a transfer of obligations under international law; however, such a functional succession has thus far been recognized neither by international treaties nor by customary international law as a reason for a legal succession."

⁹ See J. WOUTERS, J. ODERMATT, T. RAMOPOULOS, *Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law*, in M. CREMONA, A. THIES (eds.), *The European Court of Justice and External Relations Law*, Oxford, Oxford University Press, 2014, pp. 255-261.

¹⁰ The effects of this succession, however, will only involve the EU and its Member States and not the other third States. Consequently, the agreement will become binding on the Union and EU secondary law could be reviewed in the light of its norms, but the position of Member States *vis-à-vis* third States will stay unchanged. They will still be responsible for any breach of the treaty.

of their international relations.¹¹ In particular, the article will present three forms of interactions between EU law and international agreements of Member States which have recently acquired a remarkable relevance for the field of EU external action, namely: agreements concluded by the entirety of EU Member States in the interest or on behalf of the Union; agreements concluded with a prior authorization of the EU; and the practice of the establishment of a common position Member States have to adopt in the context of other international organisations.

The EU has several times authorized the Member States to ratify treaties falling within an exclusive external competence, whether express or implied and has recently intervened on how Member States should behave in other international organisation to which the Union is not a party. There are different reasons for the EU to adopt such decisions, and they are not necessarily of a legal nature.

First of all, the EU could deem that, notwithstanding its legal capacity to directly ratify the treaty, it would be better to leave the negotiation and the ratification to the Member States. It is a matter of political discretion, by which the EU acknowledges a *de facto* situation, leaving some room for Member States treaty-making power. In the *AETR* case, the then Community, even if claiming an implied external competence in relation to the agreement, decided to let Member States ratify the convention on its behalf, due to the advanced stage of the on-going negotiation.¹²

Another example has been recently provided by a 2012 Regulation establishing a system of transitional arrangements for Member States' bilateral investment treaties (BITs) with third countries. According to the new Article 207 of the TFEU, foreign direct investments have become part of the Common Commercial Policy and thus have become an exclusive external competence of the EU. However, instead of imposing the forced termination of all the existing Member States' BITs with third countries, the Regulation provides that Member States must notify to the Commission all the treaties in force and requests a previous authorization for any amendment to those treaties or for the conclusion of a new BIT with a third country.¹³

In some cases, the reason for authorizing the Member States to act on behalf of the Union is a legal impediment. There are treaties that are open for accession only to States and not to international organisations or other entities, nor to regional economic integration organisations. The usual examples are agreements negotiated within UN agencies, like the

¹¹ On this perspective, see G. GAJA, *Restraints Imposed by European Community Law on the Treaty-Making Power of the Member States*, in I. CAMERON, A. SIMONI (eds.), *Dealing with Integration*, volume II: *Perspectives from Seminars on European Law 1996-1998*, Uppsala, 1998, p. 97 ff. See also J. KLABBERS, *Restraints on the Treaty-Making Powers of Member States Deriving from EU Law: Towards a Framework of Analysis*, in E. CANNIZZARO (ed.), *The European Union as an Actor in International Relations*, Leiden, Martinus Nijhoff Publishers, 2002, p. 151 ff.; J. HELISKOSKI, *The Obligation of Member States to Foresee, in the Conclusion and Application of their International Agreements, Eventual Future Measures of the European Union*, in A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA (eds.), *A Constitutional Order of States. Essays in EU Law in Honour of Alan Dashwood*, Oxford, Hart Publishing, 2011, p. 545 ff.

¹² It was the Court itself that, accepting the Council's argument, decided to let Member States conclude the agreement on behalf of the then European Community. See CJEU, case 22/70, *Commission v. Council (AETR)*, EU:C:1971:32, paras. 82-90. The Regulation that implemented the Agreement recognised this result, by providing that "Whereas, since the subject matter of the AETR Agreement falls within the scope of Regulation (EEC) No. 543/69, from the date of entry into force of that Regulation the power to negotiate and conclude the Agreement has lain with the Community; whereas, however, the particular circumstances in which the AETR negotiations took place warrant, by way of exception, a procedure whereby the Member States of the Community individually deposit the instruments of ratification or accession in a concerted action but nonetheless act in the interest and on behalf of the Community." See Regulation EEC No. 2829/77 of 12 December 1977.

¹³ Regulation (EU) No. 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investments agreements between Member States and third countries.

International Labour Organisation (ILO) and the International Maritime Organisation (IMO). In *Opinion 2/91*, the Court held that the ILO Convention n. 170 concerning Safety on the Use of Chemicals at Work was covered by an exclusive EU competence, but since the EU was not able to ratify the Convention it was for the Member States to conclude the treaty “jointly acting in the Community’s interest”.¹⁴ Indeed, this is a dynamic that pertains to cases of exclusive competence of the EU. In the event of an agreement falling within a shared competence, the most likely solution will be a mixed agreement, jointly ratified by the EU and the entirety of its Member States.¹⁵

There are still other cases in which an agreement binding on the Member States could become relevant for the EU, and it is the one of a *renvoi* to the agreement provided by EU primary or secondary law. Examples of the former are the United Nations (UN) Charter and the European Convention on Human Rights (ECHR) or the 1951 UN Convention of the Status of Refugee and the Protocol to the same convention of 1977.¹⁶ There are instead several references contained in secondary law to international agreements of Member States¹⁷.

As it is evident, there is still a great variety of situations in which Member States exercise their treaty-making power. In this article, however, we will address only three specific hypotheses that assume relevance both for the EU and for the international legal order, in order to understand how the Union has come to manage the Member States’ international agreements.

3. Agreements Concluded by Member States on Behalf of the EU

The practice of agreements being concluded by Member States on behalf of the Union has acquired a notable relevance in recent years.¹⁸ As we have seen, there could also be political reasons for the Union to decide to act externally through its Member States, even if it is often a matter of legal impediments. In all these cases, Member States enjoy a very limited degree of “contractual autonomy”, certainly the most limited if compared to other situations in which

¹⁴ CJEU, *Opinion 2/91 (ILO Convention n. 170)*, EU:C:1991:490, para. 5.

¹⁵ Furthermore, the TFEU recognises a residual treaty-making power of Member States in specific matters. Arts. 34(2) allows for Member States participation in international organisations and conferences. Articles 165(3), 166(3), 167(3) and 168(3) provide that Member States shall enhance cooperation with third countries in the field of education, sport, vocational training, culture and public health. Also articles 191(4), 209(2), 212(3) and 214(4) preserve a role for Member States, stating that the competence of the Union to conclude treaties in the fields of environmental protection, development cooperation, economic, financial and technical cooperation is “without prejudice to Member States’ competence to negotiate in international bodies and to conclude agreements.”

¹⁶ The effects produced by a *renvoi*, even if included in primary law, is however limited. The Court has recently acknowledged not to be competent to interpret the 1951 Geneva Convention, since the EU has not accessed it. See CJEU, case C-481/13, *Qurbani*, EU:C:2014:2101, para. 25: “The fact that Article 78 TFEU provides that the common policy on asylum must be in accordance with the Geneva Convention and that Article 18 of the Charter of Fundamental Rights of the European Union makes clear that the right to asylum is to be guaranteed with due respect for that convention and the Protocol relating to the status of refugees of 31 January 1967 is not such as to call into question the finding in paragraph 24 above that the Court does not have jurisdiction.”

¹⁷ See, e.g., Regulation No. 338/97/EC on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein; Regulation No. 392/2009/EC on the Liability of Carriers of Passengers by Sea in the Event of Accidents; Directive No. 2005/35/EC on Ship-Source Pollution and on the Introduction of Penalties for Infringements. The Court has recognised in these cases that the reference provided by secondary legislation could entail a duty to take the agreement into consideration as an interpretative source. See CJEU, case C-510/99, *Xavier Tridon*, EU:C:2001:559, paras. 23-25.

¹⁸ In contrast to what was originally expected. See P. KLEIN, *La Responsabilité des Organisations Internationales*, Bruxelles, Bruylant, 1998, p. 329: “L’hypothèse de la représentation de la Communauté européenne par ses Etats membres dans le domaine conventionnel appartient donc globalement au passé.”

they negotiate and ratify international treaties. Indeed, the conclusion of these agreements requires a considerable involvement of EU institutions.

The procedure followed by the Commission and the Council for these agreements recalls the one set up by Article 218 of the TFEU for the conclusion of treaties by the Union itself. The Commission makes a proposal to the Council for a decision authorising Member States to negotiate and ratify an agreement in the interest of the EU. The terminology of these decisions has changed during the years. While, originally, they were drafted in terms of Member States acting “in the name and on behalf” of the Union, recent decisions have shifted to less technical formulations, usually requesting Member States to act “in the interest of the Union”. However, the change in terminology seems not to be particularly relevant as regards the nature of the decision or its effects.

It is worth noting that the role of the negotiator is attributed to the Member States, which have to act according to a specific negotiating position, agreed by the Council and by the Commission.¹⁹ The entire negotiation phase must be conducted in compliance with the duty of sincere cooperation, enshrined in Article. 4(3) TEU.²⁰ The value of the common position is self-evident: the result of a unitary representation of the Union by way of its Member States is achieved only in so far as the Member States conform themselves to the jointly defined negotiating position. In this sense, the duty of cooperation becomes an obligation of result, meaning that if Member States are not able to achieve the objective set forth in the common position, they are obliged not to conclude the agreement.²¹

Once the text has been negotiated, the Council can authorise the Member States to conclude the treaty on behalf of the Union. The adoption of this decision, which must also provide the legal basis under which the agreement is to be ratified, should follow the same procedure of Article 218 of the TFEU. This must include, of course, the necessary consent of the European Parliament when required according to article 218(6) TFEU. This is also confirmed by the practice of the Commission. In a recent proposal to the Council, for a decision authorizing the Member States, in the interest of the EU, to ratify ILO no. 170 Convention, the Commission has stated that the proposal “is based on Article 218(6), applicable by analogy”.²² Council decisions also provide Article 218 of the TFEU as a legal basis for this kind of authorisation. The institutional balance that the Treaties have created between the different EU institutions should not be altered by the recourse to exceptional forms of external action.

Even if it will become increasingly rare, the practice of the agreements concluded on behalf of the EU has developed also in relation to agreements not entirely covered by an exclusive competence of the EU. Nonetheless, with the aim of preserving the integrity of internal norms and, at the same time, of guaranteeing the coherence of its external action, the EU has

¹⁹ Note, however, that there are cases where the role of the negotiator has been attributed to the Commission, as, for instance, in the negotiation of the Protocols of amendment to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy.

²⁰ See M. CREMONA, *Member States Agreements as Union Law*, *supra* note 4, pp. 296-297. See, in this sense, the remarks of the Commission in COM (2014) 0559 final, Proposal for a Council Decision authorising Member States to ratify, in the interest of the European Union, the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation with regard to matters related to judicial cooperation in criminal matters, Explanatory memorandum, p. 3.

²¹ The content of the duty of cooperation would thus be rather different from that applicable in case of mixed agreements for the exercise of shared competences, where it is only an obligation of best efforts. This inevitably derives from the exclusive nature of the competence of the EU at stake.

²² See, e.g., COM/2012/0677, Commission Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Convention concerning Safety in the Use of Chemicals at Work, 1990, of the International Labour Organization (Convention No 170); COM/2013/152, Commission Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organization (Convention No 189).

preferred to adopt such an instrument. Having its Member States as agents on the international level, even when they are partly exercising their own external competences, would grant the Union the possibility to participate in legal regimes that would otherwise be precluded.

A remarkable number of international treaties has until today been concluded by Member States as agents of the EU (or the then EC). Apart from the already mentioned AETR and ILO No. 170 Convention, even recent practice is rather extensive. In 2002, the Council authorised Member States to ratify the Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunkers Convention) of 2001.²³ The case is relevant, as parts of the Bunkers Convention, particularly those related to matters of jurisdiction and recognition or enforcement of judgements, were covered by EU exclusive competence, while all the other substantive norms provided in the treaty clearly fell within the competence of the Member States. Notably, Article 5 of the Council Decision imposes on Member States the duty to 'use their best endeavours to ensure that the Bunkers Convention is amended to allow the Community to become a contracting party to it'.²⁴

Other examples are offered by the Decision authorising the Member States to ratify the 2003 Protocol to the 1992 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage and the Decision authorising the Member States to ratify the 1996 Hague Convention on Parental Responsibility.²⁵ Recently the Council has authorized Member States to ratify, in the interest of the Union, two ILO Conventions, namely the No. 170 Convention and the No. 189 Convention concerning Decent work for Domestic Workers.²⁶ Member States have also been authorised to ratify in the interest of the Union the

²³ Council Decision No. 2002/762/EC of 19 September 2002.

²⁴ Other authorizations by the Council are to be found in the nuclear field, in relation to the Convention of 29 July 1960 on Third-Party Liability in the Field of Nuclear Energy, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982. See Council Decision No. 2003/882/EC and Council Decision No. 2004/294/EC. See also Council Decision No. 2007/727/EC, which subsequently authorized Slovenia to individually ratify, in the interest of the Union, the Protocols to the Convention, due to the fact that, at the time of the previous authorizations, Slovenia was not yet a member of the EU. This is, however, a different case from that of authorization given on individual basis, which will be discussed in the next section.

²⁵ See Council Decision No. 2004/246/EC of 2 March 2004 and Council Decision No. 2003/93/EC of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.

²⁶ See Council Decision No. 2014/52/UE of 28 January 2014, authorising Member States to ratify, in the interest of the European Union, the Convention concerning Safety in the Use of Chemicals at Work, 1990, of the ILO (Convention No 170); Council Decision No. 2014/51/EU of 28 January 2014, authorising Member States to ratify, in the interest of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189).

2014 Protocol to the ILO Forced Labour Convention²⁷ and the Arms Trade Treaty, which has been directly negotiated by the Commission.²⁸

Lastly, a number of Council decisions, authorising the Member States to conclude in the interest of the Union certain bilateral agreements for the accession of new States to the 1980 Hague Convention on Child Abduction, have been the object of the recent *Opinion 1/13* by the CJEU.²⁹ Interestingly, the Court has confirmed that decisions related to Member States' agreements could be scrutinised under the Article 218(11) TFEU procedure, thus extending the scope of the opinion procedure beyond the terms of the provision.³⁰ This also seems to confirm that EU institutions are now likely to consider agreements concluded by the Member States on behalf of the EU as a particular form of EU external action.³¹ This is also linked to the fact that agreements concluded in the Union's interest constitute a form of collective representation of the EU by means of its Member States acting collectively on the international plane, which marks the difference with agreements concluded individually by a single Member State with a third country, analysed in the next section.

²⁷ Due to the presence of opt-out clauses in the field of criminal cooperation, the authorisation to the ratification of the Protocol has been split into two different decisions, one addressing criminal cooperation provisions and the other addressing social policy issues. See Council Decision n. 2015/2071/EU of 10 November 2015, authorising Member States to ratify, in the interests of the European Union, the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation as regards Articles 1 to 4 of the Protocol with regard to matters relating to judicial cooperation in criminal matters, in OJ L 301/47 and Council Decision n. 2015/2037/EU of 10 November 2015, authorising Member States to ratify, in the interests of the European Union, the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation with regard to matters relating to social policy, in OJ L 298/23.

²⁸ See Council Decision n. 2014/165/EU of 3 March 2014, authoring Member States to ratify, in the interests of the European Union, the Arms Trade Treaty, in OJ L 89/44. Art. 1 of the Decision makes clear that it applies only "to those matters falling under the exclusive competence of the Union".

²⁹ The dispute arose when the Commission proposed to the Council the adoption of certain decisions authorising Member States to conclude bilateral agreements with new States wishing to accede to the 1980 Hague Convention on Child Abduction. Art. 38 of the Convention, in fact, provides that any new acceding States must conclude a bilateral agreement of accession with every State party to the Convention itself. The Council did not adopt the proposed decisions and the Commission brought a request for an opinion by the Court pursuant art. 218(11) TFEU. EU Member States objected during the proceeding that these agreements could not be considered as falling within the scope of application of an opinion procedure, since they do not constitute proper international agreements but merely acts of implementation of the Convention. See CJEU, *Opinion 1/13*, EU:C:2014:2303, paras. 29-32.

³⁰ See *Opinion 1/13*, paras. 43-44, once again stating that "[...]the question whether it may not be possible for the EU formally to become a party to an international agreement is irrelevant. In a situation where the conditions for being a party to such an agreement preclude the EU itself from concluding the agreement, although the latter falls within the EU's external competence, that competence may be exercised through the intermediary of the Member States acting in the EU's interest." This conclusion had been already envisaged in *M. CREMONA, Trustees of the Union Interest*, *supra* note 4, p. 445, noting also that a negative decision of the Court on the compatibility of the agreement with EU law would not invalidate the agreement under international law. Of course, States will remain responsible for an unlawful exercise of their treaty-making power under EU law.

³¹ However, the decision of the Court has been criticised also in the light of the fact that many of the concerned agreement were not more 'envisaged' according to art. 218(11) TFEU, since they've already been concluded by some Member States with third States, without the Council's intervention. In these cases, it seems that a better solution would have been to start an infringement procedure against Member States, in order not to jeopardise the preventive function of the opinion mechanism. See on this point I. GOVAERE, "*Setting the International Scene*": *EU External Competence and Procedures Post-Lisbon Revisited in the Light of Opinion 1/13*, in *Common Market Law Review* 52, pp. 1299-1305.

4. The Authorization of Member States to Conclude International Agreements

A rather different practice is that of prior authorisation for individual Member States to conclude an agreement with one or more third States. This section will present the main features of this kind of procedure, in order to distinguish these cases from those previously analysed.

First, this practice is usually followed when the agreement that the Member State is ratifying falls partly within an EU exclusive competence. Although the procedure for authorisation for the conclusion of treaties has been provided by some regulations in limited fields, it might be possible that there exists a general duty for Member States to ask for prior authorization when they are about to conclude a treaty with third States in a matter falling within the exclusive competence of the EU. This duty can be derived from the general provision of Article 2(1) of the TFEU, which provides that

‘When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts’.

Thus, whenever Member States are willing to act on the international level in a field of EU exclusive competence, they will be able to do so only if previously empowered by the Union, that is by requesting a prior authorisation to conclude of the international agreement. This seems also to be confirmed by the preamble of the regulations, in which, beside the legal basis, Article 2(1) TFEU is usually mentioned.

One of the first examples is the Regulation on air service agreements between the Member States and third countries. The regulation followed the *Open Skies* cases, decided by the European Court of Justice in 1998, in which the Court found some Member States to be in breach of their EU obligations, for having unilaterally re-negotiated their bilateral air service agreements with the United States.³² In 2004 the above-mentioned Regulation was adopted, providing for a duty upon the Member States to notify the Commission of all the existing bilateral agreements on air service and to request authorisation for the conclusion of new bilateral agreements or for the amendment of existing ones. The rationale for such a regulation is to ensure that newly assumed international obligations of Member States are compatible with the EU legal order, and thus avoiding any possible normative conflicts between EU law and international commitments of Member States.³³

³² Regulation No. 847/2004/EC of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries. See references to judgments reported in note 7.

³³ The same objective is pursued by a recent regulation regarding Member States’ agreements in the energy field. However, the regulation does not provide for a proper authorisation procedure, but instead it sets forth a system of information sharing between Member States and the Commission aimed at verifying the compatibility of envisaged agreements with EU law legislation in the energy sector. This could also be explained in the light of the shared nature of the Union competence in these matters. See Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, in OJ L 299/13. See also COM (2016) 053 final, Proposal for a Decision of the European Parliament and of the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU.

After the air service agreements Regulation, two other Regulations have been adopted in the field of cooperation in civil matters.³⁴ These Regulations set forth a more sophisticated mechanism, according to which the authorisation is to be requested by Member States before the opening of the negotiations. Member States will be authorised to enter into bilateral agreements under strict conditions.³⁵ Before the signing of the agreement they have to notify to the Commission the outcome of the negotiation, so that the Commission can assess its compatibility with EU law. Moreover, the negotiated text must provide for special clauses regarding the possibility of full or partial denunciation in the event of the conclusion of a subsequent agreement of the EU – or of the EU and its Member States – with the same third country, and the direct replacement of the relevant provisions of the agreement with the provisions of the subsequent agreement concluded by the EU with the same third country.³⁶ In the event of a refusal, the Commission will adopt an opinion that will be discussed with the Member State concerned.

In 2012, the new Regulation on Member States BITs was adopted. It followed the extended scope of the EU exclusive competence in the field of common commercial policy, which today, according to Article 207 of the TFEU, also covers foreign direct investments.³⁷ The EU, however, has preferred not to oblige its Member States to terminate all their BITs and to renegotiate them, but instead has decided to set up a procedure to assess the compatibility of already existing and of newly concluded BITs with EU law and with EU external policy. The Regulation is indeed very similar to those on civil cooperation matters, although conditions under which the authorisation is to be issued are different.³⁸

In all these cases, it is for the Commission to verify the compatibility of the foreseen agreement with EU law and to decide whether to issue the authorisation. This is usually to be sought

³⁴ See e.g. Regulation No. 664/2009/EC of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and the law applicable to maintenance obligations; Regulation No. 662/2009/EC of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations.

³⁵ In particular, that the EU does not have an agreement on the same subject matter nor an agreement of this kind is likely to be concluded by the EU in the next 24 months; that Member States have demonstrated that they have a specific interest in concluding the agreement due to economic, geographical, cultural, historical, social or political ties with the third country concerned; that the envisaged agreement will not render EU law ineffective and will not undermine the proper functioning of that law; that the agreement will not undermine the object and purpose of EU's external relations policy.

³⁶ Art. 5 of both Regulation No. 662/2009/EC of 13 July 2009 and Regulation No. 664/2009/EC of 7 July 2009.

³⁷ See L. PANTALEO, Member States Prior Agreements and Newly EU Attributed Competence: What Lesson from Foreign Investment, in *European Foreign Affairs Review* 19, 2014, pp. 312-315, arguing that the Regulation could be considered as an application by analogy of the priority rule of anterior treaties provided by art. 351(1) TFEU. See also J. P. TERHECHTE, Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties, in *European Yearbook of International Economic Law*, 2011, pp. 79 ff.

³⁸ See Regulation No. 1219/2012/EU of 12 December 2012 establishing transitional arrangements for bilateral investments agreements between Member States and third countries. Art. 9 provides conditions for the authorisation to open the negotiation: that the agreement is not in conflict with Union law, apart from the incompatibilities arising from the allocation of competences between the EU and its Member States; that it is not superfluous, because the Commission has submitted a proposal to open negotiations for the same agreement under art. 218(3) TFEU; that is consistent with Union's principles and objective for external action; that it does not constitute an obstacle for the conclusion of BITs with third countries by the EU. The Commission may also require Member States to include or remove from such agreements any clauses where necessary to ensure consistency with the Union's investment policy or compatibility with EU law.

before the signature of the treaty, once the text has been adopted. In fact, according to Article 18 of the Vienna Convention on the Law of Treaties (VCLT), the signature is the moment which triggers a general good faith obligation on the parties not to behave contrary to the object and purpose of the treaty, although the agreement only enters into force with the ratification. This procedure is aimed at facilitating the work of the Commission, which can conduct its verification on the basis of a fixed and definitive text, but before the assumption of any kind of international obligation by the Member State.

5. Effects of Member States Agreements in the EU legal order

What effects do agreements ratified by Member States have within the EU legal order? Since the EU is formally not a party to the treaty, at least from an international law point of view, what consequences does the ratification by its Member States have for the Union? The answer depends on the degree of EU involvement in the conclusion of the agreement. The different effects will be analysed according to the order followed in the sections above.

5.1 Agreements Concluded on Behalf of the EU: the Doctrine of Representation

A related issue concerns the question whether an international organisation is bound by its Member States' international obligations. It can be argued that the set of international obligations which bind an international organisation cannot be defined without taking into account the international duties of its Member States.³⁹ At the same time, the so-called *pacta tertiis* rule, enshrined in Article 34 of the VCLT,⁴⁰ provides that treaties can have no legal effects on third parties. However, agreements concluded by Member States on behalf or in the interest of the Union, have quite contradictory legal implications. On the one hand, they provide international obligations that States have assumed merely as agents of the EU, adhering to international legal regimes the EU has an interest to be part of, while, on the other hand, Member States remain the only subjects responsible, on the international level, for any form of non-compliance or breach of those agreements, in particular as far as implementation is concerned.

Some authors have observed that when Member States of an international organisation are concluding treaties on its behalf, the international obligations should be considered to bind the organisation as well.⁴¹ They have thus recalled the doctrine of international representation (inspired by contract law) according to which a subject of international law can be represented by another subject in the adoption of legal acts or in the commission of legally relevant facts with one or more third parties.⁴² The legal consequence of the relationship between the representative subject and the represented one is that all the obligations assumed by the

³⁹ P. KLEIN, *La responsabilité des Organisations Internationales*, *supra* note 18, p. 326.

⁴⁰ Art. 34 of the 1969 Vienna Convention on the Law of Treaties: "A treaty does not create either obligations or rights for a third party without its consent." The same provision is to be found in art. 34 of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations and between International Organisations.

⁴¹ P. KLEIN, *La responsabilité des Organisations Internationales*, *supra* note 18, pp. 326-331; F. NAERT, *Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations*, *supra* note 22, pp. 132-133.

⁴² The original definition is to be found in R. DAOUDI, *La représentation en droit international*, Paris, L.G.D.J., 1980, p. 228: "un phénomène de substitution du sujet de droit représentant au sujet de droit représenté dans l'accomplissement d'actes juridiques internationaux ou d'activités matérielle dans les relations de ce dernier avec un ou des tiers." See also A. P. SERENI, *Agency in International Law*, in *American Journal of International Law* 34, 1940, p. 638. During the preparatory works for the Vienna Convention on the Law of Treaties, the ILC discussed the matter of States concluding treaties on behalf of other States or international organisations. Much of the debate was related as to whether this practice would fall within the scope of the rules on capacity and thus would not deserve a specific regulation. During the Conference of Vienna the matter was set aside and no rule is to be found in the Convention. See ILC, 781st Meeting, in *Yearbook of the International Law Commission*, vol. I, 1965, p. 39 ff.

representative will be binding upon the represented. However, the possibility under international law of applying the doctrine of representation needs to be cautiously verified.

The VCLT does not contain any reference to the possible application of the doctrine of international representation, nor does the 1986 Vienna Convention on the Law of Treaties between States and International Organisations and between International Organisations (VCLT-IOs). Should the doctrine be considered as based on customary international law, it would be quite difficult to find the necessary evidence in State practice. Apart from the EU, examples of States representing international organisations in the conclusion of treaties with third parties are extremely rare and debated.⁴³ Of course, the possibility of considering the EU directly bound, *vis-à-vis* third States, to international obligations assumed by Member States on its behalf would enhance the clarity of the applicable law regime, and would help to avoid conflicts between EU law and international law. At the same time, it seems difficult to accept that such a doctrine is applicable in international treaty relations, for the reasons mentioned above.⁴⁴

Moreover, the CJEU has never intervened on the matter, except only incidentally in the *Commune de Mesquer* case.⁴⁵ The Court made clear that both the International Convention on Civil Liability for Oil Pollution Damage and the provisions of the International Oil Pollution Compensation Fund Convention were not applicable to the case at hand, since the then Community had never ratified them and not even all the Member States were contracting parties to these treaties at the time of the judgment. The Court also referred to Council Decision No. 2004/246, which authorised Member States to conclude in the interest of the EU the 2003 Protocol to the Fund Convention, but considered that it had no relevance in that proceedings.⁴⁶ The Court does not seem, however, to have in principle excluded that agreements concluded in the interest of the EU could also be binding on the EU itself, but simply did not accept the argument that the convention had become (retroactively) binding on the Union, merely because Member States had ratified the Protocol to one of the invoked conventions in the interest of the EU. According to the settled case law of the CJEU, this can only happen throughout the application of the functional succession doctrine.⁴⁷

To a certain extent, this problem is related to a more general question, that is whether international organisations can be considered bound by their Member States' international obligations. According to some authors, international organisations are 'transitively bound' to obligations of their Member States.⁴⁸ Moreover, the answer could also change depending on

⁴³ See, e.g., P. KLEIN, *La responsabilité des Organisations Internationales*, *supra* note 18, pp. 326-330, giving an account of UN practice, with particular reference to some treaties ratified by the United States on behalf of the UN during the Korean War, and of the practice of the Danube Commission.

⁴⁴ See e.g. F. MÉGRET, F. HOFFMAN, The UN as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities, in *Human Rights Quarterly*, 2003, p. 318.

⁴⁵ The case, related to the Erika accident and to its grave consequences for the French coasts, also raised the question on the status within EU law of the Convention on the liability for oil pollution damage. See CJEU, case C-188/07, *Commune de Mesquer*, EU:C:2008:359.

⁴⁶ *Ibid.*, paras. 85-86.

⁴⁷ The high threshold set by the Court's case-law, however, has rendered the application of the functional succession extremely difficult. The succession of the Union has been rejected in a number of cases, among which see CJEU, case C-301/08, *Bogiatzi*, EU:C:2009:649, paras. 26-34 (in relation to the Warsaw Convention for the unification of certain rules relating to the international carriage by air of 1929); CJEU, case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change (ATAA)*, EU:C:2011:864, para. 63 (in relation to the Chicago Convention on International Civil Aviation of 1944).

⁴⁸ See e.g. H. G. SCHERMERS, N. M. BLOKKER, *International Institutional Law*, Leiden, Martinus Nijhoff Publishers, 2011, p. 996, that, drawing upon the principles on State succession, have considered that "by analogy, an organisation formed by States will be bound by the obligations to which the individual states were committed when they transferred powers to the organisation."

the number of Member States that have ratified a certain convention.⁴⁹ Indeed, it is preferable to consider the organisation bound only to agreements ratified by all Member States, to exclude the risk of indirectly applying a treaty norm to third parties. In a recent judgment, the CJEU has upheld a similar reasoning, confirming the possibility of interpreting EU secondary legislation in conformity with an international agreement only when the latter has been ratified by all EU Member States.⁵⁰ In any case, it remains unclear whether this “transitive” assumption of Member States obligations by the organisations will apply only in relation to previous agreements or even to subsequent ones.⁵¹

Even if decisions authorizing Member States to conclude a treaty on behalf of the Union cannot produce any external effect, that is to bind the Union on the international level, the internal effects of these decisions must be analysed.

It is submitted, in fact, that agreements that all Member States have concluded in the interest of the EU should be considered as internally binding on the Union, that is, in its relationship with the Member States. Indeed, when the competence exercised by the Union is exclusive and it is in the interest of the Union itself to enter into an agreement with third States, but it proves to be difficult to achieve this, it can be argued that the EU has shown the political will and has somehow expressed its consent to be bound by the treaty.⁵² In that case the participation of the Union in the negotiations and the acknowledgement by third States of the fact that Member States are simply representing the EU in the conclusion of the agreement, seems to confirm that the agreement is directly binding on the Union.⁵³

Furthermore, in the majority of the cases the responsibility for the implementation of these agreements will fall on the EU. In fact, while Member States are responsible for the implementation of the agreement *vis-à-vis* the other contracting parties, they will not have the power to adopt any national measure which is covered by an EU exclusive competence. It is thus inevitable that the duty of implementation – at least as far as matters of EU exclusive competence are concerned – rests solely on EU institutions.⁵⁴

All the above considerations, of course, also provide an answer to another question. When the agreement concluded by the Member States is implemented by the EU, would this amount to an integration of the agreement into the EU legal order? Would it be possible, then, to review the implementation measures in light of the agreement?

The matter is rather different in the case of agreements recalled in Union law by a *renvoi*. In *Intertanko*, the Court has recognised that the validity of an EU Directive could not be reviewed

⁴⁹ For instance, according to De Schutter, the number of ratifying Member States will be irrelevant for the agreement to have binding effects on the organisation. O. DE SCHUTTER, *Human Rights and the Rise of International Organisations*, in J. WOUTERS, E. BREMS, S. SMIS, P. SCHMITT (eds.), *Accountability for Human Rights Violations by International Organisations*, Antwerp, Intersentia, 2010, p. 64.

⁵⁰ CJEU, case C-537/11, *Manzi v. Capitaneria di Porto di Genova*, EU:C:2014:19, paras. 45-49.

⁵¹ See K. DAUGIRDAS, *How and Why International Law Binds International Organisations*, in *Harvard International Law Journal*, 2016, p. 350 ff.

⁵² This could essentially amount to an “anticipated succession” of the EU into the obligations of Member States. See F. CASOLARI, *La Corte di giustizia e gli obblighi convenzionali assunti dall’insieme degli Stati membri verso Stati terzi: obblighi comuni o... obblighi comunitari?*, in *Il Diritto dell’Unione europea*, 2009, pp. 271-273.

⁵³ Moreover, in the *Libor Cipra* case, the Court has affirmed that the AETR forms part of the Community law and that it had the jurisdiction to interpret it. See CJEU, case C-439/01, *Libor Cipra and Vlastimil Kvasnicka v. Bezirkshauptmannschaft Mistelbach*, EU:C:2003:31, paras 23–4.

⁵⁴ Conversely, when parts of the assumed obligations fall within a retained competence of the Member States, they will also be responsible for implementing them. This implies a far more complex coordination with EU institutions, which resembles the pattern of implementation of mixed agreements, governed by the duty of loyalty. On this latter aspect see E. NEFRAMI, *The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations*, in *Common Market Law Review*, 2010, pp. 332-337.

in the light of the Marpol 73/78,⁵⁵ even though some of the provisions contained in the Directive made explicit reference to Marpol.⁵⁶ However, the Court took the view that the relevant provisions of the Directive were to be interpreted consistently with the Marpol 73/78.⁵⁷ A *renvoi* to an international agreement that is not binding upon the EU could trigger the application of the principle of consistent interpretation, in order to avoid possible conflicts between EU secondary law and international obligations of Member States.⁵⁸

The case of agreements concluded by Member States on behalf of the EU is, however, different. If we assume that the agreement is binding upon the Union – at least from an internal point of view – this would imply that secondary law could be reviewed in the light of that agreement, subject to its capability of producing direct effects within the EU legal order.⁵⁹ This is the only way to enhance the consistency of EU external action by means of Member States representation and to avoid situations in which Member States could be deemed internationally responsible for the actions of the EU.⁶⁰

5.2 Agreements Concluded Under Prior EU Authorisation

The main difference between agreements concluded on behalf of the EU and agreements concluded under EU authorisation is that in the latter case Member States are usually acting individually and in their own interest.⁶¹ Their treaty-making power, however, suffers some restraints deriving from the fact that they are a member of the EU. This is caused by two main concerns: that Member States do not escape from their EU law obligations by entering into

⁵⁵ The International Convention for the Prevention of Pollution from Ships (so-called Marpol) is one of the main instruments in international law dealing with pollution of the maritime environment by ships from operational or accidental causes. The Marpol was adopted within the International Maritime Organisation (IMO) in 1973. The Protocol of 1978 absorbed the previous convention and both of them entered into force in 1983.

⁵⁶ CJEU, case C-308/06, *The Queen, on the application of International Association of Independent Tank Owners (Intertanko) and Others v. Secretary of State for Transport*, EU:C:2008:312, paras. 50-52.

⁵⁷ *Ibid.*, para. 52. See also, with reference to the CITES Convention, *Criminal Proceedings against Xavier Tridon*, *supra* note 17, paras. 23-25; CJEU, case C-154/02, *Criminal Proceedings against Jan Nilsson*, EU:C:2003:590, para. 39.

⁵⁸ The doctrine – originally conceived in order to strengthen the effectiveness of directives lacking direct effect – requires national law to be interpreted in the light of the directive's provisions. See generally M. KLAMERT, *Judicial Implementation of Directives and Anticipatory Direct Effect: Connecting the Dots*, in *Common Market Law Review*, 2006, p. 1251 ff. See also F. CASOLARI, *Giving Indirect Effect to International Law within the EU Legal Order: the Doctrine of Consistent Interpretation*, in E. CANNIZZARO, P. PALCHETTI, R. A. WESSEL (eds.), *International Law as the Law of the European Union*, Leiden, 2012, pp. 395-415. Authors have suggested that the duty of consistent interpretation may be considered as a corollary of the principle of systemic integration set forth by art. 31(3)(c) of the VCLT. See e.g. M. ARCARI, *The Creeping Constitutionalisation and Fragmentation of International Law: From "Constitutional" to "Consistent" Interpretation*, in *Polish Yearbook of International Law*, 2013, p. 19.

⁵⁹ However, if we consider that the agreement is binding upon the EU by the sole virtue of its implementation, it would be difficult to affirm that it could take primacy over EU secondary legislation. See M. CREMONA, *Member States Agreements as Union Law*, *supra* note 12, p. 309.

⁶⁰ See, in this respect, the Declaration by the ILO regarding the responsibility of Member States deriving from actions attributable to the EU, presented in relation to the conclusion of ILO No. 170 Convention, cited in *Opinion 2/91*, *supra* note 10.

⁶¹ The need to distinguish between the two categories of agreements has been highlighted by various Authors. See, e.g., A. ROSAS, *The Status in EU Law of International Agreements Concluded by EU Member States*, *supra* note 4, p. 1333; M. CREMONA, *Member States Agreements as Union Law*, *supra* note 12, pp. 315-322. See also F. NAERT, *Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations*, in J. WOUTERS, E. BREMS, S. SMIS, P. SCHMITT (eds.), *Accountability for Human Rights Violations of International Organisations*, Antwerp, Intersentia, 2010, p. 132.

international regimes with third countries; and that the integrity and the autonomy of the EU legal order is protected from contradictory actions undertaken by different Member States.

As already seen, the duty to request an authorisation found its *raison d'être* in preventing Member States to assume international obligations that could conflict with EU law. At the same time, the authorisation is somehow a useful tool to protect the Member States' position *vis-à-vis* third States.

Despite the EU intervention in the phases preceding the conclusion of the agreement, this cannot be considered as binding upon the Union, at least for two reasons. Firstly, the authorisation for the conclusion issued by the Commission is not in any way a proof of the consent of the Union itself to be bound by the treaty. Not only does the Commission have limited powers in the external representation of the EU,⁶² its role in these agreements is to avoid any possible infringements of EU law by the external action of EU Member States, which serves a purely internal function. Secondly, agreements concluded with a prior authorisation of the EU are usually bilateral agreements. It seems difficult to argue that a single Member State, in its bilateral relations with third countries, has the power to bind the EU and the entirety of its Member States within the meaning of Article 216(2) of the TFEU. The lack of consent on the part of the EU and of the other Member States to conclude that agreement seems sufficient to exclude such an effect.

Still, these agreements are not without relevance for the EU legal order. Once the agreement has been concluded upon authorisation of the EU, it is submitted that Article 4(3) of the TFEU should govern the relationship between the EU and the Member State concerned by that agreement. Consequently, it flows from the principle of sincere cooperation, but also from the international law principles of *pacta sunt servanda* and of good faith, that EU institutions are obliged not to impede Member States to comply with their international obligations.⁶³ It has been argued that the principle of primacy of Member States' anterior agreements (provided in Article 351 TFEU) cannot be applied to posterior treaties.⁶⁴ AG Kokott has argued, in the conclusion to the *Commune de Mesquer* proceedings, that an application of Article 351 TFEU is even 'conceivable where an international obligation on the part of a Member State conflicts with a subsequently agreed measure of secondary law'⁶⁵. The Court, however, has remained silent on the argument.

6. Member States Position within Other International Organisations

The last form of interaction between EU law and Member States' international obligations relates to the position of the latter in other international organisations. Even in this case, recent practice is showing a growing degree of interference by EU institutions as to how Member States should behave within other international organisations, particularly as regards the use of voting rights. To this aim, the Treaty of Amsterdam and, subsequently, the Treaty of Nice, had provided the EU with the power to establish a common position that Member States have

⁶² For an overview of the recent practice on EU institutions and external representation of the Union see A. P. VAN DER MEI, *Case Note on EU External Relations and Internal Inter-Institutional Conflicts*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 1051-1076; see also P. G. ANDRADE, *The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments*, in *European Papers*, 2016, pp. 115-125.

⁶³ Even if this duty has been until today recognized by the CJEU only with reference to international agreements falling within the scope of art. 351 of the TFEU. See, e.g., CJEU, case 812/79, *Attorney General v. Juan C. Burgoa*, EU:C:1980:231, para. 9.

⁶⁴ See Capotorti AG in Case C-181/80, *Procureur Général v. Arbelaiz-Emazabel*, EU:C:1981:192, para. 4.

⁶⁵ See Kokott AG in Case C-188/07, *Commune de Mesquer*, *supra* note 45, para. 95. According to this argument, however, the posterior treaty would not prevail over prior secondary law.

to follow when they are acting in the framework of international organisations.⁶⁶ Until recently, however, the norm has been usually applied to organisations to which both the Union and the Member States were parties.

Today, Article 218(9) TFEU attributes to the Council the competence to adopt such a common position. The norm is a confirmation of the Court's case-law on the duty of sincere cooperation under Article 4(3) TEU and its implications on the scope of Member States' individual action. Article 218(9) TFEU reads as follows:

'The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement'.

It follows from this Treaty article that the rationale behind the common position is to strengthen the coherence of the external action of the EU by requiring Member States to behave on the international level in a manner consistent with EU law and according to EU interests. This was clearly the argument behind the Court's decision in the *Commission v. Greece* case, which was related to a unilateral proposal put forward by Greece within the framework of the IMO.⁶⁷ In this case, however, the breach attributed to Greece consisted in the adoption of a unilateral proposal in a matter falling within the Union's exclusive competence, notwithstanding the fact that the Union was not a member of the IMO. According to the Court, the fact 'that the Community is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest'.⁶⁸ The argument of a *de facto* exercise by the Member States of Union's external powers is not new for the Court and evidently it recalls the one applied in the context of agreements concluded by Member States on behalf of the EU. The aim, once again, is to avoid actions on the international plane that might negatively affect the integrity of EU law, particularly when there is a risk of Member States assuming international obligations capable of affecting internal common rules.

In a similar vein, the Court considered a few years later, in the *Commission v. Sweden* case, that Sweden had breached its EU law obligations by unilaterally proposing the listing of a substance within an annex to the Stockholm Convention on Persistent Organic Pollutants.⁶⁹

⁶⁶ The EEC Treaty did not contain any such procedure, even if art. 116 provided that "[f]rom the end of the transitional period onwards, Member States shall, in respect of all matters of particular interest to the common market, proceed within the framework of international organisations of an economic character only by common action. To this end, the Commission shall submit to the Council, which shall act by a qualified majority, proposals concerning the scope and implementation of such common action." The Court has frequently made reference to the rule. See CJEU, joined cases C-3/76, 4/76, 6/76, *Kramer and others*, ECLI:EU:C:1976:114, paras. 42-44; CJEU, *Opinion 1/78*, ECLI:EU:C:1979:224, paras. 49-50, in which the Court affirmed that art. 116 was conceived with a view to evolving common action by Member States in international organisations of which the Community was not part and that, in such situations, "the only appropriate means is concerted, joint action by Member States as member of the said organisation."

⁶⁷ The proposal was related to the establishment of a system of monitoring of compliance with the SOLAS and the International Ships and Port Facility Security Code, whose objects fell within the scope of already adopted EU secondary legislation.

⁶⁸ CJEU, case C-45/07, *Commission v. Greece*, EU:C:2009:81, paras 31-31.

⁶⁹ CJEU, case C-246/07, *Commission v. Sweden (PFOS)*, EU:C:2010:203. On the case 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*, in *European Law Review*, pp. 405-419. See also M. CREMONA, *Case C-246/07, Commission v. Sweden (PFOS), Judgment of the Court of Justice (Grand Chamber) of 20 April 2010*, in *Common Market Law Review*

In that case, a particular emphasis was put on the obligations for Sweden deriving from the general duty of sincere cooperation in the field of external relations, but Sweden's breach was mainly a consequence of the fact that the Union was trying to set a common position from which Sweden decided to depart. Therefore, even if the competence at stake was a shared one, the Court applied the principle of sincere cooperation as entailing a duty on the Member States to facilitate the achievement of the objectives set forth in the Treaties and, in any event, not to jeopardise them.⁷⁰

Although *Commission v. Greece* and *Commission v. Sweden* were relevant in assessing the scope of Member States' obligations when acting on the international plane – in particular as regards the need to adopt a common attitude *vis-à-vis* third States or international organisations – they were not directly related to the question of EU powers in relation to an international organisation to which only Member States were parties.

Even after the *CITES* case, in which the Courts addressed the interpretation of Article 218(9) TFEU, the question remained unsettled. This case was about a dispute regarding an EU common position within the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The EU was not a party to the Convention, but it had adopted secondary legislation with a view to implement CITES within the EU legal order. The issue at stake was mainly related to the nature of Article 218(9) TFEU and to whether it could be regarded as a sufficient and autonomous legal basis for the establishment of a common position by the Council. In this particular case, though, it was not a common position of the EU that the Council had established but a common position to be adopted by the Member States within the Conference of the CITES. The Court, following the opinion of the Advocate General, deemed that Article 218(9) TFEU could not constitute the only legal basis for such an act, being a competence of a procedural character. It confirmed that a substantive legal basis would have been necessary for the act to be legitimate. The Court did not take any position as to whether Article 218(9) TFEU could be applicable also to international organisations or agreements to which only Member States are parties. But the fact that it deemed necessary for such a decision to mention a substantive legal basis could be read as an implicit acknowledgment of this possibility.⁷¹

In the recent *OIV* case the Court has firmly confirmed the applicability of Article 218(9) TFEU to situations in which only the Member States are parties to an agreement or members of an organisation. The judgment is of great relevance for the whole field of EU external relations and of course it is of a particular significance in the analysis of the interaction between EU law and international agreements of Member States.

In 2012 Germany brought an action for annulment of a Council decision establishing, in accordance with Article 218(9) TFEU, a common position to be adopted by the Member States on behalf of the EU with regard to the adoption of certain resolutions in the context of the International Organisation for Wine and Vine (OIV), in which the Union is not a member nor an observer. The dispute involved two issues that have a great impact on the duties imposed on Member States in the management of their international affairs. Germany contested the Council's decision on two different grounds, namely that Article 218(9) TFEU would not be applicable to agreements to which the EU is not a party and that a common position could not

48, pp. 1639-1666. The Convention, however, is a mixed agreement and thus both the EU and its Member States are parties to it.

⁷⁰ *Commission v. Sweden*, paras. 69-71, recalling *Opinion 1/03*, par. 119 and *Mox Plant*, par. 164. In this sense, the duty of loyal cooperation implies a duty of abstention even if the competence at issue is neither originally exclusive nor exclusive by virtue of the ERTA doctrine. See on this point G. DE BAERE, "O, Where is Faith? O, Where is Loyalty?", *cit.*, pp. 417-418.

⁷¹ See P. KOUTRAKOS, *EU International Relations Law*, Hart, Oxford, 2015, p. 156.

be established in relation to acts not having a binding force under international law, as was the case with OIV resolutions.⁷²

As for the first claim, Germany had argued that the fact that the Union was not a member of the organisation could not *per se* be decisive on the issue, citing Article 34 TEU as an example of a provision expressly obliging Member States to represent the Union's position in international organisations and international conferences.⁷³ The Council, supported by the Commission, objected to the claim with different arguments, based both on the wording of Article 218(9) TFEU, which just makes a general reference to 'agreements' and on the necessity to protect the exercise of EU competences through the coordination of Member States' international action.

The conclusions of the Advocate General provide a detailed analysis of the provision concerned, starting from its drafting history and trying to apply both a contextual and a teleological interpretation in order to fully understand the scope of Article 218(9) TFEU. After having excluded the relevance of the *CITES* judgment to the case at hand,⁷⁴ the Advocate General addressed the interpretation of the provision from different angles. He highlighted the fact that the provision concerns a special procedure that should be followed both for the suspension of international agreements and for the establishment of a common position. Since the suspension can only occur in relation to EU agreements, the term 'agreements' should be read as being limited to agreements to which the EU is a party.⁷⁵ More interestingly, the Advocate General takes into account the exception, provided in the second part of the provision, on the inapplicability of the simplified procedure in relation to acts 'supplementing or amending the institutional framework of the agreement'. This exception would qualify the simplified procedure set forth in Article 218(9) TFEU as a *lex specialis* with regard to the general procedure for the conclusion of international agreements. In fact, the simplified procedure provides a limit to the Parliament's participation and it is therefore not applicable in cases where the acts concern such a relevant issue as the modification of the terms of an international agreement. The consequence of having established a relationship of speciality between the general procedure for the conclusion of EU agreements and the simplified one

⁷² CJEU, case C-399/12, *Germany v. Council (OIV)*, EU:C:2014:2258, paras. 29-36.

⁷³ This is the case of Member States sitting within the UN Security Council. See I. GOVAERE, *Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case*, in I. GOVAERE, E. LANNON, P. VAN ELSUWEGE, S. ADAM (eds.), *The European Union in the World. Essays in Honour of Marc Maresceau*, Leiden, Martinus Nijhoff Publishers, 2014, pp. 234-235. Note, however, that being this case related only to PESC matters, the principle does not seem applicable to other areas of EU competence. In particular, where the object or the activity of the organisations falls outside the PESC, Member States would not enjoy the possibility of a constructive abstention and will thus remain subjected to the general majority rule when voting in the Council on the EU's common position. See art. 31 TEU, according to which "When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted." In this situation a State opposing the decision would just have the duty not to impede the Union action. Then, whenever an EU position could not be adopted, the State will remain free to act unilaterally and independently. Another example is provided by art. 138(1) TFEU in relation to international financial organisations: "In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences. The Council shall act after consulting the European Central Bank."

⁷⁴ Conclusions of AG Cruz Villalón in *Germany v. Council (OIV)*, EU:C:2014:289, paras. 53-59.

⁷⁵ *Ibid.*, paras. 66-69.

under Article 218(9) TFEU is, according to the Advocate General, that the latter is not applicable to the international agreements of Member States.⁷⁶

Regarding the second issue of the case, the one related to the meaning of 'acts having legal effects', the dispute concerned the question whether these effects should be assessed according to international law or to EU law. In fact, under international law, resolutions as those usually adopted within the OIV are not binding and thus do not produce legal effects.⁷⁷ As a consequence, Germany argued that these acts were therefore not capable of triggering the mechanism of Article 218(9) TFEU. According to the Council's position instead, the assessment of the legal effects should focus on the impact of the acts on the Union *acquis*. In particular, the potential effects would be derived from the dynamic reference to OIV resolutions in several EU acts since 2008.⁷⁸ The Advocate General considered the fact that EU legislation had made reference to OIV resolutions not sufficient to confer on them a quality they did not possess. In fact, Article 218(9) TFEU, when referring to acts having legal effects which the body set up by the agreement 'is called upon to adopt', creates a close relationship between these acts and the action of the international body and it is in this perspective that the notion of its effects is to be assessed. Thus, according to the Advocate General

'The body would thus be called upon to adopt acts which have legal effects *ab origine*. The contested provision does not therefore concern cases where acts without legal effects acquire them for all intents and purposes only *ex post facto*, through the internal law of a contracting party (in this case, the European Union), not even where this occurs automatically by means of a dynamic reference, but rather cases where acts exhibit that quality from the outset (and, therefore, in the legal order of the body itself, that is to say, international law).'⁷⁹

The Court addressed both claims in a rather brief manner and upheld the arguments of the Council by acknowledging the applicability of Article 218(9) TFEU to Member States' international agreements. Without any reference to the arguments put forward by the Advocate General, the Court found that

'where an area of law falls within a competence of the European Union, the fact that the European Union did not take part in the international agreement in question does not prevent it from exercising that competence by establishing, through its institutions, a position to be adopted on its behalf in the body set up by that agreement, in particular through Member States which are party to that agreement acting jointly in its interest.'⁸⁰

It seems that the Court has adopted a pure competence perspective, without addressing the interpretation of the terms of Article 218(9) or taking into account the context in which the provision is settled. With a rather circular argument, the Court reached the conclusion that

⁷⁶ *Ibid.*, paras. 74-77.

⁷⁷ See, however, ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, in *I.C.J. Reports 1996*, p. 226, para. 70, where the ICJ recognised that certain acts, like General Assembly's resolution, can have a normative value, even if not binding upon the Member States. On the relationship between recommendations and good faith obligations see P. DAILLIER, A. PELLET, *Droit international public*, Paris, L.G.D.J., 2002, pp. 379-380.

⁷⁸ See in particular Council Regulation n. 479/2008 of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) No. 1493/1999, (EC) No. 1782/2003, (EC) No. 1290/2005, (EC) No. 3/2008 and repealing Regulations (EEC) No. 2392/86 and (EC) No. 1493/1999, OJ L 148/1; Council Regulation n. 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), OJ L 299/1, as amended by Council Regulation n. 491/2009 of 25 May 2009, OJ L 154/1.

⁷⁹ AG Cruz Villalón in *Germany v. Council (OIV)*, *supra* note 75, para. 90.

⁸⁰ *Germany v. Council (OIV)*, *supra* note 72, para. 52. The Court also makes reference to the *Commission v. Greece* judgment and to *Opinion 2/91*, even if, as already observed, the issues at stake in those cases were not properly the same.

Article 218(9) concerns the establishment of common positions in relation to agreements to which the Union is not a party because, otherwise, EU external competence could not be fully exercised.⁸¹

The Court also applied an extensive approach in relation to the notion of ‘acts having a legal effect’. Following again the Council’s argument, the Court recognised that, by virtue of the reference to OIV resolutions contained in EU secondary legislation, the acts of the OIV are ‘decisively’ capable of influencing EU rules in the area of the common organisation of the wine markets. This argument seems justifiable at least from an EU law perspective, since the reference contained in secondary legislation is a dynamic one, thus incorporating not only existing OIV resolutions but also resolutions to be adopted in the future.⁸² No mention is to be found in the Court’s reasoning as to the fact that resolutions of the OIV are mere recommendations and thus, according to international law, do not have any binding force.

By looking at recent practice, it is quite clear that EU institutions have realized a situation in which the EU will have the relevant power to intervene in the position that Member States should adopt within other international organisations or international fora.⁸³ This certainly has some advantages, in particular as far as coherence of EU external action and effectiveness of EU competences are concerned.⁸⁴ However, it also bears some complexities: the duty to fully implement the common pre-established position, without having the Union present in the organisation, could affect not only the position of Member States, but also the functioning of the organisation itself.⁸⁵ This also raises some questions as to what extent the EU can interfere in the international relations of its Member States and, consequently, how the latter can justify this mechanism vis-à-vis third States participating in other international organisations. All these aspects do not seem to have received the attention they deserved by the EU institutions.

7. Conclusion

This paper has tried to give a brief account of rather a peculiar practice in the external relations of the EU. The treaty-making power Member States can still exercise in the examined cases is a delegated one, limited by the exclusive competence of the EU and anyway pre-empted by EU secondary legislation.

It has been argued that the EU has to be seen as an ‘open federal Union’, since both the Union and its Member States can operate on the international level.⁸⁶ However, this can sometimes

⁸¹ See in this sense *Germany v. Council (OIV)*, *supra* note 72, para. 54.

⁸² See for instance art. 120(g) of the Single CMO Regulation: “The methods of analysis for determining the composition of the products of the wine sector and the rules whereby it may be established whether these products have undergone processes contrary to the authorised oenological practices shall be those recommended and published by the OIV.” For the effects of a reference contained in EU secondary legislation and the relevant CJEU case-law see *supra* para. 5.2.

⁸³ In the recent *ITLOS* case, the Court has affirmed that art. 218(9) is not applicable in relation to the adoption of common position to be taken before international tribunals. See CJEU, case C-73/14, *Council v. European Commission*, EU:C:2015:663. On the judgment see S. R. SÁNCHEZ-TABERNEIRO, *Swimming in a Sea of Courts: The EU’s Representation before International Tribunals*, in *European Papers*, 2016, pp. 751-758.

⁸⁴ See T. KONSTADINIDES, *In the Union of Wine: Loos Ends in the Relationship between the European Union and the Member States in the Field of External Representation*, in *European Public Law*, 2015, pp. 686-688, claiming that the judgement confirms that “agency” exercised by Member States has become a key feature of EU external representation. According to the Author, though, framing these mechanisms in terms of agency could translate Member States’ obligations of conduct deriving from loyalty into obligations of result.

⁸⁵ See I. GOVAERE, *Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case*, *supra* note 73, pp. 240-241.

⁸⁶ See R. SCHÜTZE, *Foreign Affairs and the EU Constitution. Selected Essays*, *supra* note 5, p. 207.

lead to legal uncertainty, especially for third States or other international organisations, as far as competence, implementation, and issues of international responsibility are concerned.

As to the latter aspect, it cannot be ignored that, notwithstanding the status or the protection that Member States agreements could enjoy in the EU legal order, Member States remain fully responsible under international law for any form of non-compliance with international obligations deriving from them.⁸⁷ It is a well-established principle of the law of international responsibility that States cannot justify an internationally wrongful act by the attribution of competences to other entities such as regional organisations. At the same time, EU law cannot produce any effect for third States according to the *pacta tertiis* principle in Article 34 of the VCLT.⁸⁸ This could create a paradoxical situation in which Member States can no longer guarantee the compliance with agreements whose object falls within a competence of the EU, while, at the same time, the EU can claim that those agreements do not create any duty for the organisation to act in conformity with them.⁸⁹

Some of the procedures that the EU has developed in the recent years are certainly relevant in coordinating Member States' external action and in protecting the interests of the Union. However, it is desirable that, in a near future, the EU – and especially the Court of justice – will be able to clarify the effects that these kind of instruments produce both on the internal and on the international plane. It is submitted, in fact, that the principle of sincere cooperation could provide a valuable legal basis for finding a balance between the need to ensure the integrity of the EU legal order and the necessity to take into consideration the legitimate expectations of third States, which to a certain extent have acknowledged that the action of the Member States has been guided by EU institutions. This could be done, for instance, by expressly recognising that agreements concluded in the interest of the Union are to be considered binding as a matter of EU law and that EU secondary legislation must be compatible with them.

Moreover, it is also submitted that the procedure of a previous authorisation to the conclusion of international agreements with third States should be extended to a wider range of situations,⁹⁰ so as to ensure from the very beginning the compatibility of international obligations to be assumed with the EU legal order. This would at least bring some legal certainty and stability in Member States' relationships with other countries and avoid further fragmentation on the internal level.

⁸⁷ See *Manzi*, *supra* note 44, para. 41, in which the CJEU expressly acknowledged the possibility that a conflict between EU law and international obligations of Member States, not suitable to be solved by means of consistent interpretation, will oblige Member States to violate the agreement and, eventually, to incur in international responsibility *vis-à-vis* third parties.

⁸⁸ Nor the scenario will change in case EU law was considered as a constitutional legal order, given the rule of art. 27 of the VCLT prohibiting the invocation of domestic law in order to justify a violation of an international obligation.

⁸⁹ Recently, the EU has tried to solve the question related to financial responsibility arising from international investment disputes and to find suitable criteria for the apportionment of responsibility between EU institutions and Member States. However, the Regulation is applicable only in cases of settlement procedures established by an agreement to which the EU is party. See Regulation n. 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, in OJ L 257/121.

⁹⁰ For instance in the case of bilateral extradition agreements with third countries, where issues of compatibility with the prohibition of discrimination under EU law may arise, as already happened in the recent *Petruhhin* case, where the Court held that the nationality exception provided by an extradition agreement can run counter EU citizenship rights. See CJEU, case C-182/15, *Petruhhin*, EU:C:2016:630.

THE EUROPEAN UNION'S COMPETENCE ON FOREIGN INVESTMENT: LIMITATIONS OF THE PAST AND FUTURE

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Abstract:

In the context of the current investment negotiations, which are affected by the lack of unity amongst the Union and its Member States, this paper explores the evolution of EU foreign investment competence before and after the enactment of the TFEU, concluding that the competence bears significant limitations stemming from the past that have not been remedied thus far. The competence is still relatively new, but necessitates strong improvement.

Keywords:

Foreign Direct Investment (FDI); EU's Investment Competence; Exclusive and Shared Competence; EU External Relations; bilateral investment treaties (BITs); EU – Canada Comprehensive Economic and Trade Agreement (CETA); Transatlantic Trade and Investment Partnership (TTIP); EU – Singapore Free Trade Agreement (EUSFTA)

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1. Introduction

The Treaty on the Functioning of the European Union (TFEU) brought numerous changes into EU law in 2009. For example, the competence on investment now falls under the exclusive Common Commercial Policy competence of the Union. In the context of the current investment negotiations affected by the lack of unity amongst the Union and its Member States, this paper explores the evolution of EU foreign investment competence before and after the enactment of the TFEU, concluding that the competence bears significant limitations stemming from the past that have not been compensated for thus far.

Whereas EU exclusive competence may enhance the negotiation leverage of the EU when compared to individual Member States, portfolio investments² are still excluded from the scope of the competence even after the adoption of the TFEU. Post-Lisbon limitations also pertain to the application of the Treaty to Member States' property ownership governance, despite the fact that investment revolves around property rights, or is even based on them. Such a narrow scope prevents the Union to commit itself to guarantees in case of expropriation of investments that are relatively common to investment arbitration. Furthermore, competence conferred on the Union in Article 207 TFEU curbs implementation of harmonization measures should they be enacted in light of the investment treaty.

Recent negotiations of the Transatlantic Trade and Investment Partnership (TTIP), however, showed defiance of certain Member States to the exclusive competence of the Commission, which undermined the major strength of the unified negotiation power of the Union. Future TTIP negotiations, resistance of some Member States to the already concluded EU-Canada Comprehensive Economic and Trade Agreement (CETA), and legal counsellors advising their clients to restructure their intra-EU investments pursuant to uncontested extra-EU BITs in the light of an unresolved conflict of intra-EU BITs with EU law, all provoke further thoughts of future potential adjustments of the EU investment competence.

2. Multi-level Character of EU and National Competences

The European Union as well as other international organizations and states are subjects of international public law. However, the EU is vitally different from other international organizations or state formations, including confederations or federations, since the European Union acquired part of its capacity to act from the sovereignty of its Member States, which makes the decisions taken on the supranational EU level binding upon all Member States.³ The EU may only act within the limits of the competence that the Member States decided to attribute to the Union. The term competence then delineates areas of power which Member States conferred on the Union motivated, amongst others reasons, by the prospect of a more effective decision-making process at the level of the EU bodies.⁴ The distinctive feature of competence norms lies in the capacity to change legal relations.⁵ The authority for legislative, judicial, and executive measures, formerly executed by the Union's Member States, become

² Short-term market presence of portfolio investments results from the lack of direct control of less than 10% of the enterprise and not its form. Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (OUP 2013) 15.

³ The EU may only act within the limits of the competence that the Member States decided to attribute to the Union. The term competence then delineates areas of power which Member States conferred on the Union motivated, amongst others reasons by the prospect of a more effective decision-making process at the level of the EU bodies. Kimmo Kiljunen, *The European Constitution in the Making* (CEPS, 2004) 21-22; Alina Kaczorowska, *European Union Law* (Routledge, 2009) 84.

⁴ Alina Kaczorowska, *supra* note 3, at 84.

⁵ Gerard Conway, *Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ* 11 (9) *German Law Journal* 966, 975 (2010).

a distinct Union power of its own after their conferral⁶ and is developed within the institutional and procedural design of the European Union.

The areas that Member States have conferred to the EU have expanded remarkably over the years and this process has had the effect of limiting the spheres of Member State competence. According to Article 3 TFEU, exclusive competence entitles the Union to legislate in delineated areas and it at the same time precludes Member States from adopting measures on their own unless authorized; while shared and supporting competences allow for action from both the Union and the Member States.

Historically, the scope of the EU's competences was not entirely clear, which led to some creative interpretations by the Court of Justice of the European Union (CJEU).⁷ The unclear setting of competences made some Member States fear that the EU would encroach on their sovereignty.⁸ Structural limitations of Member State freedom to act were later labeled as 'EU competence creep' or 'creeping competence drift'.⁹ Experience with competence creep, however, do not align with recent developments following the adoption of the TFEU, and complaints against competence drift are becoming less legitimate.¹⁰ It can be stoically said that the Member States competence fluctuates depending on the relationship with the competences of the EU.¹¹ As will be argued in this paper, the investment competence of the EU bears signs of this dynamism too. Questions arising concerning the scope of the investment competence and its potential competence creep were further fueled by general uncertainty about the future collective adoption of an EU comprehensive investment policy.¹² The discourse concerning the division of competences is extremely important for all actors involved – Member States, EU citizens, and the Union as such.¹³

3. Foreign Investment: Competence Shift

Coming into effect on 1 December 2009, the TFEU brought numerous changes to the EU legal system. One of the alterations contained in the TFEU was also a change to the investment competence regime: foreign direct investment (FDI) was now part of the Common Commercial Policy (CCP) and therefore became part of the exclusive competence of the EU.¹⁴ Before the TFEU was adopted, protection of FDI belonged to the competence of both Member States and the European Union. Member States strived for substantive investment safeguards on the

⁶ Kimmo Kiljunen, *supra* note 3, at 22.

⁷ Alina Kaczorowska, *supra* note 3, at 87.

⁸ *Ibid.*

In this respect, Convey asserts that the EU has not been able to define the competences in more detail than their delineation in Article 2 TFEU. He further elaborates on horizontal and vertical competence relationships. See Gerard Conway, *supra* note 5, at 967.

⁹ Sacha Prechal, 'Competence Creep and General Principles of Law' (2010) 3 (1) *Review of European Administrative Law* 19-20.

¹⁰ Alina Kaczorowska, *supra* note 3, at 87.

¹¹ Paul Craig, *Competence and Member State Autonomy: Causality, Consequence and Legitimacy* Oxford Legal Studies Research Paper No. 57/2009, at 17.

¹² European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a Comprehensive European International Investment Policy, COM (2010) 343 final (July 10, 2010).

¹³ Member States might fear unclear delimitation of the Union's powers; EU citizens might demand a higher degree of legitimacy and democracy in the Union's competences; while the Union expects such a setting of powers which would enable the community to effectively reach its objectives and face future challenges. Alina Kaczorowska, *supra* note 3, at 87.

¹⁴ Asja Serdarevic, *The European Union as a Collective Actor in the World Trade Organization* (2013, Cameron May) 43..

basis of diplomatic protection and bilateral and multilateral treaties,¹⁵ and that was one of the reasons why a significant number of BITs was signed between future Member States.

3.1 The Pre-Lisbon Era

The role of the EU in foreign investment was rather limited before the adoption of the Treaty of Lisbon. The CCP of the Union laid down in Articles 131 to 134 of the EC Treaty did not extend to investments¹⁶ and the protection of foreign investments fell within the ambit of the competences of the Member States. Among the instruments for safeguarding investments in EU Member States, BITs became the most common form of investment promotion and protection.¹⁷ This was due to the fact that the EU's competences were restricted to market entry investment aspects and therefore unsuitable for the conclusion of BITs.¹⁸ However, the overlapping existence of BITs and EU internal market law resulted in a conflict between these two systems.

The Treaty Establishing the European Economic Community, which was concluded back in 1957, did not foresee that the relations between the six Member States would be governed exclusively on the level of Community law.¹⁹ Member States slowly became parties to agreements between each other, but they also concluded agreements between them and third countries.²⁰ A great burst of external relations, particularly in the field of commerce, occurred in the 1970s.²¹ However, international relations became an area where the Member States viewed the treaty-making power of the Union with suspicion.²² This might have been caused by the seeming imbalance between the internal and external competence vested to the then Community in the TEC. The proponents of the *doctrine of parallelism*, which called for the Union to have equal powers internally and externally, regarded the then Community as having not only the competences expressly granted to it in the Treaty, but also those powers to take action on any topic that falls within its internal competence.²³

This argumentation is analogous to the justification behind the emergence of the implied powers of the Union, first narrowly formulated in 1956,²⁴ and further extensively developed in 1987.²⁵ Like the doctrine of parallelism, the purely judicial construction²⁶ of implied powers

¹⁵ Andrej Karpat, 'European Union's Exclusive Competence on Foreign Direct Investment' *Notitiae ex Academia Bratislavensi Iurisprudentiae* 1/2011 94, 94.

¹⁶ Christian Soderlund, *Intra-EU BIT Investment Protection and the EC Treaty* 24 (5) *Journal of Investment Arbitration* 455, 462.

¹⁷ *Ibid.*

¹⁸ Jan Asmus Bischoff, 'Just a Little BIT of "Mixity"? The EU's Role in the Field of International Investment Protection Law' 48 *Common Market Law Review* 1527, 1534 (2011).

¹⁹ Bruno de Witte, *Old-Fashioned Flexibility: International Agreements Between Member States of the European Union*, in *Constitutional Change in the EU: From Uniformity to Flexibility?* 31, 32 (Gráinne De Búrca & Joanne Scott eds., 2000).

²⁰ Bruno de Witte distinguishes *inter se agreements*, which are agreements signed between two or more Member States, from *inter se agreements cum tertiis*, which are agreements concluded between a MS and a third state.

Idem.

²¹ Tokyo round of GATT negotiations; first trade agreements with EFTA members; preferential agreements with southern Mediterranean countries, Maghreb, ACP countries as well as Latin America. While most of the competence in the CCP was at that time interpreted by the ECJ as exclusive, Member States were not entirely precluded from negotiations as CCP was being implemented gradually. Paul Craig & Gráinne de Búrca, *The Evolution of EU Law* (OUP, 2011) 226; Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases, Materials* (OUP, 2011) 321.

²² Trevor Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Union* (OUP, 2007) 161.

²³ *Ibid.*

²⁴ Case 8/55 *Federation Charbonniere de Belgique v. High Authority* [1956] ECR 245.

²⁵ Cases 281, 283-5, 287/85 *Germany v. Commission* [1987] ECR 3203.

²⁶ Asja Serdarevic, *supra* note 14, at 43.

stems from a discrepancy between the task given and the competence conferred for its execution.²⁷ The Court confirmed the theory of implied powers arguing that if the Treaty confers a specific task on the EU institutions, it also must delegate 'the powers which are indispensable in order to carry out that task'.²⁸

The EU's power to enter into relations with third countries was further strengthened through the establishment of the *ERTA/AETR*²⁹ doctrine in the EU legal order. In the *ERTA* judgment, the ECJ introduced the doctrine by stating: 'To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions. Such an authority 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 Community institutions.'³⁰

The teleological approach³¹ in the judgment represents an approval of the doctrine of parallelism.³² The *ERTA* doctrine was codified in Article 3 (2) and Article 216 (1) of the TFEU,³³ but interpretation as to how they exactly relate to each other might pose difficulties.³⁴ In practice, the relation between exclusive competence that is not expressly defined and an agreement capable of affecting Community law should be individually analyzed, even in cases where the two areas do not obviously overlap.³⁵ The *ERTA* judgment concludes that Member States should not engage in international obligations that would affect internal Community law.³⁶ Participation of the Community in the negotiation would ensure that the result is consistent with its legislation.³⁷ Holdgaard comments that the Union removes the external competence(s) of Member States that could affect internal Community law and establishes a parallel external Community competence.³⁸ The ECJ further opined on the implied treaty-making powers under the doctrine of parallelism in the *WTO*³⁹ and *OECD*⁴⁰ cases. In these

²⁷ While the background of the debate concerning the *doctrine of parallelism* was a striking gap between internal and external competences, the *theory of implied powers* points out to the gap between authority given and authority needed. '...Community had authority to enter international agreements on subjects for which such an authority had not been expressly granted.' Henry Schermers and Denis Waelbroeck, '*Judicial Protection in the European Union*' (KLI 2001) 752.

²⁸ Cases 281, 283-5, 287/85 *Germany v. Commission* [1987] ECR 3203, 28.

²⁹ European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (AETR), done at Geneva on 1 July 1970 (Consolidated text, version 2006, document ECE/TRANS/SC.1/2006/2).

³⁰ Case 22/70 *Commission v. Council* [1971] ECR 263, 15-16.

³¹ Bart Van Vooren & Ramses A. Wessel, *EU External Relations Law* (CUP 2014) 87.

³² '...The Court therefore had to find a way of upholding the Commission's contention in principle, without applying to the facts of the case. ...this was done by holding that a transfer of treaty-making power occurred 1969 when the internal measure came into effect.' Trevor Hartley, *supra* note 22, 164.

³³ Article 216(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.'

³⁴ Jan Asmus Bischoff, *supra* note 18, at 1545.

³⁵ Tristan Baumé, *Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters: Opinion 1/03 of 7 February 2006* 7 (8) *German Law Journal* 681, 683 (2006).

³⁶ Rass Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (KLI 2008) 100.

³⁷ Piet Eeckhout, *Bold Constitutionalism and Beyond, in The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* 220 (Miguel Poiaras Maduro and Loic Azoulay eds., Hart 2010).

³⁸ Rass Holdgaard, *supra* note 36, at 100.

³⁹ Opinion 1/194 [1994] ECR I-5267.

⁴⁰ Opinion 2/92 [1995] ECR I-52.

cases, the Court expressed some doubts concerning the causal link between the internal powers and exclusive competence.⁴¹ In other words, the fact that the Community has internal power in a specific area does not automatically translate into exclusivity. However, two clear-cut cases regarding the Community's exclusive powers are: i. instances where the Union's adopted internal legislation could be affected by the contracted agreement, and ii. express exclusive competence as laid down in the Treaties.⁴²

What started exclusively as an internal institutional dispute between the Commission and the Council in *ERTA* developed into a pure federalist conflict on the division of powers provoking severe schisms in the Union's legislation which was not rectified until years later.⁴³ The Union however translated the EU's competence into the successful conclusion of free trade and association agreements.⁴⁴

Member States on the other hand, tried to restrain the *ERTA* doctrine by increasing interest in concluding mixed association agreements, which became a norm, although Member States' activity was often technically unnecessary and the Union had the competence to sign it alone.⁴⁵ In the reality of international negotiations, it became more convenient to rely on shared competence, even though according to the *ERTA* doctrine, the Commission could have invoked exclusive competence before the ECJ.⁴⁶ The *Open Skies* agreement was concluded as a mixed agreement, being a direct result of *ERTA*'s jurisprudence.⁴⁷ When negotiating topics that were not under EU exclusive competence, negotiations would feature representatives of Member States as well as those of the Commission sitting in the room together, however in such cases only the Commission's representatives spoke.⁴⁸ It was often a political question as to whether the Member States would allow the Community to proceed on its own or if Member States would demand negotiation of a mixed agreement.⁴⁹

Agreements based on shared competence have to be ratified by national parliaments. As national parliaments are often unfamiliar with the EU's external policies, the ratification process was in most cases a formality, which was sometimes intentionally delayed so that a Member State could gain political leverage on EU internal issues.⁵⁰ The concerned agreements are often described as mixed agreements, as they cover competences of the EU and of the Member States. Agreements in the area of commercial policy used to be the most notable type of mixed agreements, but similarly to the less common mixed agreements governing services and intellectual property, they would all now fall under the exclusive competence of the Union's common commercial policy (CCP). The former complexity of

⁴¹ Opinion 1/194 [1994] ECR I-5267,88-89; Opinion 2/92 [1995] ECR I-521, 31.

⁴² Trevor Hartley, *supra* note 22, at 171.

⁴³ The backlash was represented by the antagonist position of Member States against the adoption of Community environmental policy as they feared that the transfer of internal competence would result in acquisition of external competence. Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* 10-11 (Brill 1986).

⁴⁴ Jan Asmus Bischoff, *supra* note 19, at 1535.

⁴⁵ Pieter Jan Kuijper, *Fifty Years of EC/EU External Relations: Continuity and the Dialogue Between Judges and Member States as Constitutional Legislators*, 31 (6) *Fordham International Law Journal* 1579, 1580 (2007).

⁴⁶ '...it became much easier for the Member States in the Council to insist on a mixed character of international agreements in these fields, and it required much persistence from the Commission and a constant willingness to go to the ECJ to invoke that declaration and to insist on exclusive competence. In the daily reality of external relations, where time is short and questions of competence have to be decided quickly, these were qualities that were difficult to muster.' *Ibid.*

⁴⁷ Markus Burgstaller, *European Law Challenges to Investment Arbitration*, in *The Backlash Against Investment Arbitration: Perceptions and Reality* 455, 481 (Michael Waibel et al. eds., 2010).

⁴⁸ Stephen Woolcock, *The Treaty of Lisbon and the European Union as an Actor in International Trade*, 8 (ECIPE Working Paper No. 01/2010).

⁴⁹ Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011) 88.

⁵⁰ Stephen Woolcock, *supra* note 49, at 8.

requiring ratification from the EU as well as from Member States raised confusion both within the EU as well as with the Union's external trading partners.⁵¹

3.2 The Lisbon Era

Although the European Union has been showing signs of significant growth of competences over the years,⁵² exclusive competence on investment matters was not initially intended to be included in the European Treaties.⁵³ In the beginning, as already established, the Union's competence related only to the admission of new investments of third countries.⁵⁴ However, the increasing economic interactions within the internal market, the extended scope of freedom of capital movement relations with third countries in the Maastricht Treaty, together with the intensified monetary cooperation anchored in the Amsterdam Treaty of 1997, contributed to the Union's interest in including FDI into the Union's exclusive competence. Interestingly, and somewhat contradictorily, the Treaty of Nice introduced a concept of non-exclusive CCP powers.⁵⁵ The debate about extending the Union's competence was materially developed further during the Constitutional Convention meetings beginning in 2002, despite the discussion being insufficient in general.⁵⁶ The Treaty of Lisbon broadened the scope of the CCP and returned to the idea of exclusive competence.

The conferral of the FDI competence to the Union was inconsistent. After the exclusion of the exclusive competence on investments from the Constitutional Treaty at one point,⁵⁷ FDI was included into Article III-217 of the final text later on⁵⁸ and was recognized as one of the areas of the common commercial policy.⁵⁹ Moreover, the characteristic feature of the construction of the competence in the Constitutional Treaty was one of extraordinary vagueness.⁶⁰ After the Treaty failed to get approval via a public vote in France and the Netherlands, the drafters of the TFEU did not follow their previous intention to include FDI within the exclusive competence. An opposite stance was adopted in the latest stage of the preparatory work of the TFEU when the CCP was amended to embrace FDI, leaving no room for a qualified legal discussion on that matter.⁶¹ Due to the lack of transparency surrounding the inclusion of the

⁵¹ *Ibid*, at 9.

⁵² Alina Kaczorowska, *supra* note 3, at 87; Craig, *supra* note 10, at 23-24.

⁵³ Armand de Mestral, *The EU as a Maker of Investment Agreements: The Potential Impact on Canada and the Broader World System of Bilateral Investment Treaties*, McGill University Policy Brief 2 (2008).

⁵⁴ Jan Asmus Bischoff, *supra* note 17, at 1535.

⁵⁵ Marise Cremona, *External Relations and External Competence of the European Union, in The Evolution of EU Law*, 246 (Paul Craig & Gráinne de Búrca eds., 2011); Armand de Mestral, *supra* note 52, at 2.

⁵⁶ '...the European Constitution appears as a simple functional consequence of the process of market integration without a discussion of the values it necessarily embodies: it has been taken as a logical constitutional conclusion without a constitutional debate.' Miguel Poiares Maduro, *Europe and the Constitution: What If This Is As Good As It Gets?*, in J.H.H. Weiler & Marlene Wind, *European Constitutionalism Beyond the State* (CUP 2003) 77.

⁵⁷ The European Convention Cover Note CONV 707/03: Summary Sheet of Proposals for Amendments Concerning External Action, Including Defence Policy (Brussels, 2003) 103.

⁵⁸ The European Convention CONV 850/03 (Brussels, 2003) <http://european-convention.europa.eu/docs/Treaty/cv00850.en03.pdf> (last visited Aug. 15, 2016).

⁵⁹ Koen Lenaerts, Piet Van Nuffel, and Robert Bray, 'Constitutional Law of the European Union (TSM 2005) ¶ 20-006 .

⁶⁰ 'It is recalled, for instance, that, according to Article I-1(1), the Union is to exercise the competences conferred by the Member States 'on Community basis'. This provision is as remarkable for its extraordinary vagueness as it is for its apparent disregard for the subtleties of the development of the Community legal order and the distinct term in which CFSP is articulated within the new Constitutional structure.' Panos Koutrakos, *EU International Relations Law* (Hart 2006) 495.

⁶¹ Alexander J. Bělohlávek, *Ochrana přímých zahraničních investic v Evropské unii* ¶ 479 (C.H. Beck2010).

FDI competence into the EU's exclusive competence, Meunier points out that the process of conferral of the investment competence happened 'stealthily'.⁶²

According to Article 207 (1) TFEU, FDI is considered to be part of the Common Commercial Policy of the Union. The Union conducts action in FDI under the exclusive competence as defined by Article 3 of the TFEU. The CCP is one of five areas of exclusive competence in the TFEU, together with the customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, and the conservation of marine biological resources under the common fisheries policy.

All key aspects of external trade and investment have thus come under exclusive EU competence, including the aforementioned mixed agreements.⁶³ Among others, this also applies to agreements with trade-related elements in services and intellectual property pursuant to Article 207 (1) TFEU.⁶⁴ Up to the date when the TFEU came into effect, FDI fell under the competence shared by the Union and the Member States. Before 2009, Member States would sign BITs, while the Commission would negotiate instruments concerning trade and investment in services (such as modes in GATS), other aspects of investment in GATT, or TRIMs.⁶⁵ The inclusion of these agreements into the exclusive competence ends the lengthy period of discussion concerning the competence division between the Union and its Member States.

4. Competence Shift: Limitations of the Redefined Competence

FDI, as already stated, now falls under the EU's exclusive competence. Despite the fact that the Union's exclusive competence should enhance the negotiation leverage of the EU compared to single Member States,⁶⁶ the competence bears notable limitations.

The first potential limitation to the competence conferred by Article 207 TFEU is its relative incomprehensiveness regarding different forms of investments. The definition in the TFEU pertains only to certain forms of investments, namely those that are direct. Simultaneously, Member States retain their competence to conclude treaties on indirect forms of investment. Bischoff therefore concludes that because of that, the competence for investment is mixed.⁶⁷ This view, which would suggest that portfolio investments fall under the comprehensive protection of FDI in investment treaties, is not generally accepted by international investment law. Inclusion of portfolio investments in the definition of FDI with no foundation in a relevant treaty is erroneous, although not uncommon⁶⁸ due to the close interrelation between the two.⁶⁹ Although the categorization of portfolio investment as a form of direct investment is not

⁶² "...the radical transfer of competence crept its way into the treaty by stealth and serendipity and resulted from Commission actions and Member State inaction."

Sophie Meunier, *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment* (European University Institute, Working Paper No. RSCAS 2014/66) at 7.

⁶³ Stephen Woolcock, *supra* note 49, at 8.

⁶⁴ Article 207(1) TFEU: 'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.'

⁶⁵ *Ibid*, 10.

⁶⁶ Markus Burgstaller, *supra* note 48, at 482.

⁶⁷ Thus, contracting mixed governing indirect investments shall require activity of the EU and Member States at the same time.

Jan Asmus Bischoff, *supra* note 19, at 1534.

⁶⁸ Muthucumaraswamy Sornarajah, *International Law on Foreign Investment* (3d ed. 2010) 9; 196.

⁶⁹ *Fedax N.V. v. Republic of Venezuela*, Decision of the Tribunal on Objections to Jurisdiction (1997).

necessarily a sporadic practice in international investment law, such a classification aptly points out that the competences conferred on the EU in non-direct investments are not exclusive but shared since Article 4 (1) TFEU stipulates that 'The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3⁷⁰ and 6⁷¹ TFEU.' Although portfolio investment is described as a specific form of investment within the broader context of EU comprehensive investment policy,⁷² both FDI and portfolio investment are viewed as significant features of economic interaction: 'The Lisbon Treaty's attribution of EU exclusive competence on FDI integrates FDI into the common commercial policy. It also allows the EU to affirm its own commitment to the open investment environment which has been so fundamental to its prosperity and to continue promoting investment, both direct investment and portfolio investment, also as a tool of economic development.'⁷³

Since portfolio investments are not included in the scope of the Union's exclusive FDI competence in Article 207 (1), should a treaty on their protection be signed, these agreements would have to be ratified by the EU as well as by the Member States⁷⁴ since they would have to be concluded as mixed agreements.⁷⁵ It is, however, possible, that the Union acquires full competence over FDI matters if the Court considers that the ERTA/AETR doctrine codified in Article 3 (2) TFEU⁷⁶ applies to investment treaties, as confirmed in *Pringle*.⁷⁷ The Commission

⁷⁰ Article 3 TFEU: (1.) The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.

(2.) 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.

⁷¹ Article 6 TFEU: The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.

⁷² 'Foreign direct investment (FDI) is generally considered to include any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity. When investments take the form of a shareholding this objective presupposes that the shares enable the shareholder to participate effectively in the management of that company or in its control. This contrasts with foreign investments where there is no intention to influence the management and control of an undertaking. Such investments, which are often of a more short-term and sometimes speculative nature, are commonly referred to as portfolio investments.' European Commission Communication *supra* note 11, at 2-3.

⁷³ *Ibid*, at 11.

⁷⁴ Markus Burgstaller, *supra* note 48, at 472.

⁷⁵ If one part of an agreement may be divided into two parts, one of which falls into the purview of exclusive powers, and another to the competence of EU MS, the agreement has to be concluded by both the Union and M. Should exclusive powers of the Union mix with non-exclusive, the Union cooperates with EU MS, but may activate the competence and pre-empt MS from their treaty-making powers.

Marcus Klamert and Niklas Maydell, *Lost in Exclusivity: Implied Non-exclusive External Competences in Community Law*, 13 (4) European Foreign Affairs Review 493, 493-494 (2008).

⁷⁶ Article 3 (2) TFEU: 'The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.'

⁷⁷ Case C-370/12 Thomas Pringle v Government of Ireland [2012], ¶¶ 100-101: 'In that regard, it must be recalled that, under Article 3(2) TFEU, the Union is to have 'exclusive competence for the conclusion of an international agreement when its conclusion ... may affect common rules or alter their scope'. It follows also from that provision that Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope. However, the arguments put

has requested the Court, pursuant to the procedure envisaged by the Article 218 (11) TFEU,⁷⁸ to determine whether the Free Trade Agreement with Singapore is compatible with the primary law of the EU.⁷⁹ The Commission asked the Court to interpret the scope of the Union's exclusive and shared competence⁸⁰ also in matters relating to foreign investments.⁸¹ To connect the dots of the EU's investment competence it should be recalled that the Court has established that Article 207 (1) by being part of the CCP relates only to the external action with third states and not the trade in the internal market.⁸²

The Opinion of Advocate General Sharpston delivered in December 2016 suggests the Court to declare that the EU does not have exclusive competence over portfolio investment in the context of the conclusion of the Free Trade Agreement with Singapore. Moreover, in so far as the Agreement applies to other than foreign direct investment, investment falls within the shared competences of the Union and its Member States.⁸³ AG Sharpston dismissed the Commission's argument of extending the *ERTA/AETR* principle to the Agreement under Article 3 (2) TFEU, which was submitted to the Court based on the view that "common rules" in Article 3 (2) TFEU should be read as to include "treaty provisions".⁸⁴ Since there is no EU secondary legislation under Articles 63 (1) and 64 (2) TFEU relating to types of investment other than FDI,⁸⁵ and since no other argument was presented for the competence to be exclusive,⁸⁶ the substantive rules on investments other than foreign direct investment in Section 9 (a) of the Agreement should be considered to fall under shared competence.⁸⁷

The second potential limitation to the execution of the Union's exclusive competence on FDI is Article 345 TFEU. This article, which is not a Lisbon novelty to EU law and which is to be found in the General and Final Provisions of the TFEU, limits the scope of the Treaty's application in that it shall in no way prejudice Member States property ownership governance.⁸⁸ This limitation exists despite the fact that FDI revolves around property rights, or even is based on them.⁸⁹ Such a narrow scope of competence prevents the Union to get directly involved in cases of expropriation that are relatively common to investment

forward in this context have not demonstrated that an agreement such as the ESM Treaty would have such effects.'

⁷⁸ Article 218 (11) TFEU: 'A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.'

⁷⁹ Commission Decision of 30 October 2014 requesting an opinion of the Court of Justice pursuant to article 218(11) TFEU on the competence of the Union to sign and conclude a Free Trade Agreement with Singapore, C (2014) 8218 final.

⁸⁰ *Ibid.* Article 1 of the Decision: 'Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically, which provisions of the agreement fall within the Union's exclusive competence?; which provisions of the agreement fall within the Union's shared competence?; and is there any provision of the agreement that falls within the exclusive competence of the Member States?'

⁸¹ *Ibid.*: 'In particular, doubts have been raised with regard to the extent and the nature of the Union's competence in respect of some elements of the chapters of the agreement on the protection of foreign investment, transport services, intellectual property, transparency and sustainable development. It is therefore advisable to seek from the Court of Justice an opinion clarifying the extent and the nature of the Union's competence.'

⁸² C-137/12 Commission v Council [2013] ¶ 56.

⁸³ Opinion of AG Sharpston in Opinion Procedure 2/15 at 370.

⁸⁴ *Ibid.* at 359.

⁸⁵ *Ibid.* at 360.

⁸⁶ *Ibid.* at 361.

⁸⁷ *Ibid.* at 370.

⁸⁸ Article 345 TFEU.

⁸⁹ Andrej Karpat, *supra* note 16, at 94.

arbitration.⁹⁰ Despite the property rights limitations on the EU level, the possibility and margins to expropriate, also in the public interest, are fully governed by national laws. Although only national legal systems cover the protection against expropriation, in *Fearon v. Irish Land Commission*,⁹¹ the CJEU subjected national expropriation rules to the principle of non-discrimination.⁹² A similar development could be identified in the area of intellectual property rights. The Treaty of Lisbon brought about an exceptional treatment to intellectual property rights on the European level as it allowed for their harmonization pursuant to Article 118 TFEU.⁹³ Before the adoption of the TFEU, harmonization efforts at the European level were challenged.⁹⁴ While the TFEU stipulates that European rules should not prejudice national rules on property rights, IP rights were given a clear exception to this rule.⁹⁵ IP rights, should they be legislated in the national laws of EU Member States, shall be exercised in a manner which does not infringe EU law. The argument can be made, by analogy to the distinction between the adoption and the exercise of IP rights, that European measures could theoretically set conditions for expropriations (e.g. procedural guarantees), while respecting the right of Member States to execute the nationalization.⁹⁶

The third limitation to the CCP competence that was conferred on the Union is Article 207 (6) TFEU.⁹⁷ This article limits the exercise of the competence, in particular in light of the supporting competences of Article 6 (a) TFEU. The EU might lack the competence to implement an international agreement if this would amount to enacting harmonization measures in areas in which the latter is excluded.⁹⁸ Examples of such implementation measures may include

⁹⁰ E.g.: ICSID Case No ARB/07/22; *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19; *Eastern Sugar BV v. Czech Republic*, SCC Case No. 088/2004, Partial Award (2007); *Eureko B.V. v. the Slovak Republic*, PCA 2008-13.

⁹¹ Case 182/83 *Robert Fearon & Company Limited v. Irish Land Commission* [1984] ECR 03677.

⁹² *Ibid*, 7.: ‘...although Article 222 of the Treaty does not call in question the Member States’ right to establish a system of compulsory acquisition by public bodies, such a system remains subject to the fundamental rule of non-discrimination, which underlies the chapter of the Treaty relating to the right of establishment.’

⁹³ Article 118 TFEU: ‘In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralized Union-wide authorisation, coordination and supervision arrangements. The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.’

⁹⁴ Case C-3 77/98 *Kingdom of the Netherlands v. European Parliament and Council of the European Union* [2001] ECR 7079.

⁹⁵ Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law* (CUP 2010) 364.

⁹⁶ Angelos Dimopoulos, *Creating an EU Investment Policy: Challenges for the Post-Lisbon Era of External Relations*, in *EU External Relations Law and Policy in the Post-Lisbon Era* 401, 408 (Paul James Cardwell ed., Asser 2002); Marc Bungenberg, *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics*, 2011 *European Yearbook of International Economic Law* 29, 36-37 (2011); Arthur Hartkam, *Towards a European Civil Code* (KLI 2011) 324; see also Opinion of AG Sharpston in *Opinion Procedure 2/15* at 340-41.

⁹⁷ Article 207 (6) TFEU: ‘The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.’

⁹⁸ As Krajewski explains: ‘Article 207(6) TFEU contains a limitation of the exercise of the competences of the common commercial policy according to which the exercise of these competences ‘shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.’ Article 207(6) TFEU contains two elements which are closely connected: the first part of the provision stating that the delimitation of competences between the Union and the Member States shall not be affected by the exercise of the competences in the field of the common

possible investment treaty commitments regarding establishment of national treatment or guarantees of effective judicial remedies in the investment treaty.⁹⁹ In this respect, instead of centralization, the EU shows signs of federalization, as the implementation of the agreement (unlike signing on the EU level) lies within the competence of states.¹⁰⁰

Furthermore, the TFEU does not contain any definition of foreign direct investment, which is therefore further defined by CJEU case law.¹⁰¹

5. Positioning the Competence within EU law

The Treaty of Lisbon affected the allocation of competences between the Commission and the Member States: the development of the Treaty articles mirrors the expanding interrelation between international investment law and EU law.¹⁰² Extra-EU BITs are to be replaced with newly negotiated treaties, while intra-EU BITs face divergent opinions from the Commission and arbitral tribunals. New investment treaties (TTIP with the USA, CETA etc.) are to be negotiated by the EU as a block of states, in line with the EU's exclusive competence. Although the EU declared its ambition to achieve a comprehensive investment policy,¹⁰³ conflicts of intra-EU and extra-EU BITs with EU law are to be resolved independently from each other. Cremona aptly reminds '...there is a need to remember the importance of the different objectives of integration in the internal and external dimensions of the 'Union project', a difference which is perhaps not always adequately recognized in the demands made in relation to approximation of laws'.¹⁰⁴ The distinction between the treatment¹⁰⁵ of extra-EU and intra-EU investment protections may, however, lead to forum shopping through corporate nationality planning.

commercial policy reiterates the general principle of limited and specific conferral of competences (Articles 4(1) and 5(1) and (2) TEU). In the context of external policies this excludes a so-called 'inverse AETR effect' by which an implicit internal competence could be derived from an explicit external competence. The second element of Article 207(6) TFEU holds that the exercise of the trade competence may not lead to harmonisation where the treaty expressly prohibits this. This applies in particular to those areas in which the Union is only competent for 'supporting, coordinating and complementary action', such as education and health (Article 6(a) TFEU). As the Treaty of Lisbon conferred the Union with the exclusive competence to conclude trade agreements covering services, the Union may conclude agreements covering education and health as well. However, the Union may not implement such an agreement if these agreements would require harmonisation measures, because the Union lacks the competence to harmonise in these areas.'

Markus Krajewski, *The Reform of the Common Commercial Policy*, in EU Law After Lisbon (Biondi et al. eds., 2010) 21.

⁹⁹ Luis M. Hinojosa-Martinez, The Scope of the EU Treaty-Making Power on Foreign Investment: Between Wishful Thinking and Pragmatism, 17 *Journal of World Investment and Trade* 86, 104 (2016).

¹⁰⁰ Markus Krajewski, *supra* note 98, at 22.

¹⁰¹ CJEU defined FDI in Case C-326/07 *Commission v. Italian Republic* [2009] ECR I-02291, 35 as follows: 'investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which the capital is made available in order to carry out an economic activity...' while 'the shares held by the shareholder enable him to participate effectively in the management of that company or in its control'.

¹⁰² Markus Burgstaller, *European Law and Investment Treaties*, 26 *Journal of International Arbitration* 181, 183 (2009).

¹⁰³ European Commission, *Communication supra* note 13.

¹⁰⁴ Marise Cremona, *supra* note 56, at 239.

¹⁰⁵ Stephan W. Schill, *Ordering Paradigms in International Investment Law: Bilateralism – Multilateralism – Multilateralization*, in *The Foundations of International Investment Law*, 109, 121 (Douglas et al. eds., OUP 2014).

Although the predictability of investment protection was declared a foundation for any future adjustment resulting from the clash of EU law with international investment treaties,¹⁰⁶ investors have already been advised to consider an extra-EU BITs reconstruction of nationalities of their companies conducting foreign investment due to the fear of uncertain legal regulation of intra-EU BITs. The corporate nationality has become an elusive criterion in investment treaty arbitration¹⁰⁷ and law firms have been publicly advising investors to restructure their investments by pulling them out of the EU, hence enabling them to use extra-EU BITs, which remain uncontested.¹⁰⁸ This is due to the fact that the express knowledge of investment safeguards, i.e. either BITs or EU law provisions, allow investors to internalize relevant regulatory risks into their decision-making process as to whether, how, and at what costs they invest.¹⁰⁹ Moreover, if investors voluntarily opt not to use legal investment protection instruments provided in BITs in order to avoid a possible backlash against BITs in the future, the investment environment clearly does not ensure the necessary legal certainty. Putting it in Ziegler's words: 'If the EU does not manage to quickly convince investors that either the existing BITs of its members or the new EU FTAs do provide a good protection, investors might prefer to use vehicles in countries that do satisfy their needs in a less ambiguous way'.¹¹⁰ Since extra-EU BITs are to remain in place pursuant to Regulation 1219/2012, investors from EU Member States may profit from structuring their investment via a third state with an extra-EU BIT in order to achieve protection similar to intra-EU BITs. Despite the shift to the exclusive competence of the Union to contract extra-EU BITs after the ratification of the Treaty of Lisbon, the Commission has hesitated for years to tackle intra-EU BITs and start procedures against Member States that have intra-EU BITs that conflict with EU law. Finally, in June 2015 five EU Member States were requested to terminate their intra-EU BITs,¹¹¹ whilst the CJEU's ruling on the compatibility of intra-EU BITs with EU law might be issued during the course of 2017.

Internally, the intensification of the power struggle between the European bodies, namely the European Parliament, the European Commission, and the Council during the negotiation of Regulation 1219/2012 manifested itself in significant communication difficulties regarding FDI between the Union actors.¹¹² This might also be due to the fact that after the adoption of the Treaty of Lisbon the Parliament's competences increased and Parliament's role was substantially enhanced¹¹³ to the detriment of the Council's powers.¹¹⁴

¹⁰⁶ European Commission, Directorate-General for Trade, Memorandum of the European Commission Q&A: Commission launches comprehensive European International Investment Policy (2010).

¹⁰⁷ Stephan W. Schill, *supra* note 105, at 121.

¹⁰⁸ Sidley Austin LLP, International Arbitration Update (2/2009); Winston and Strawn LLP, Latest Development Concerning European Investment Treaties (2012).

¹⁰⁹ Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 (2) Harvard Journal of International Law 353, 388 (2015).

¹¹⁰ Andreas R. Ziegler, The New Competence of the European Union in the Area of Foreign Direct Investment (FDI): A Third Country Perspective, in European Yearbook of International Economic Law 235, 243 (2013).

¹¹¹ European Commission, Commission asks Member States to Terminate their Intra-EU Bilateral Investment Treaties, Press Release IP/15/5198 (June 18, 2015).

¹¹² Lavranos mentions that that the battle of European Parliament against the Council and the Member States featured '*outrageous and unfounded allegations*', that European Parliament did not show any proficiency in FDI matters, and that the relations between the Council, the Commission and European Parliament were '*heavily poisoned*'. Nikos Lavranos, *In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs – A Member States' Perspective*, 10 (2) Transnational Dispute Management 12 (2013), <http://ssrn.com/abstract=2226979>, (last visited Aug. 15, 2016).

¹¹³ Markus Krajewski, *supra* note 98, at 26.

¹¹⁴ Markus Krajewski, New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy, in European Yearbook of International Economic Law (2013) 10.

Taking together the Commission's efforts to harmonize FDI in the EU, Member States' disagreement, ineffective communication of future intentions, inconsistent treatment of the distinction between intra-EU BITs and extra-EU BITs, the absolute lack of solutions to replace intra-EU BITs, and most importantly the problematic negotiations of the TTIP and the CETA, the objective of a smooth transition in FDI-policy might not have been met yet.¹¹⁵ EU investment protection has been challenged on various levels from the very beginning.¹¹⁶ Kuijper asserts that with the adoption of the Treaty of Lisbon the EU failed to clearly delineate its treaty-making powers and opted for a solution that may lead to a considerable controversy within such an important area¹¹⁷ of the Treaty instead.¹¹⁸ Koutrakos criticized the vagueness of the competence's wording as formulated in the Constitutional Treaty,¹¹⁹ and Meunier rather harshly pointed out that the process of investment competence conferral could be labelled as a historical accident or action happening by stealth.¹²⁰ Cameron argues that the overlapping frameworks of EU law and investment treaties create confusion among investors, which, without the required attention, might lead to the creation of disincentives to pursue foreign investments in the EU.¹²¹ Belohlavek believes that the Commission's behavior in the field of FDI has been filled with arrogance, an attitude that can be quite deadly in a competitive globalized international community.¹²² Burgstaller contends that the infringement proceedings against Sweden, Finland, and Austria document the determination of the Commission to encroach on the Member State's BITs practice even before the Treaty of Lisbon came into the effect.¹²³ There are also suggestions of the continuous unqualified approach of the Parliament to the matter.¹²⁴ Leal-Arcas confirms the existing doubts surrounding FDI matters in the EU, pointing out the pitfalls of uncertain interpretation and the lack of preparations.¹²⁵ Krajewski points out that the CCP has not become more transparent through the TFEU.¹²⁶ Lenk asserts that the Union's efforts to form a comprehensive (intra-EU and extra-EU) investment policy have been affected by persistent horizontal and institutional incoherence,¹²⁷ Paparinskis also

¹¹⁵ The Commission's report on governance guidelines from 2003 for instance mentions: 'Promoting new forms of governance is by no means the sole responsibility of the European institutions, and even less so that of the Commission alone. It is the responsibility of all levels of public authority, private undertakings and organised civil society because good governance — openness, participation, accountability, effectiveness and coherence — are what the public expects at the beginning of the 21st century.'

European Commission, *Report from the Commission on European Governance 5* (2003), http://ec.europa.eu/governance/docs/comm_rapport_en.pdf, (last visited Aug. 15, 2016).

¹¹⁶ Ineffective translation of competence distribution into concluded agreements; Insufficient conferral of powers to the Union, politicization of the Common Commercial Policy; involvement of the European Parliament.

Marc Bungenberg, *supra* note 96, at 42.

¹¹⁷ Van Vooren and Wessel refer to the CCP as the forming heart of EU external relations law. Bart Van Vooren and Ramses A. Wessel, *supra* note 31, at 87.

¹¹⁸ Kuijper considers Article 216 an '*awkward formulation*' that is to codify the ERTA doctrine and Opinion 1/76: the TFEU mentions potential or exclusive treaty-making powers, although the Court codified them as exclusive in nature, in line with Article 3 TFEU did. See Pieter J. Kuijper, *Super-Power Frustrated? The Cost of Non-Lisbon In the Field of External Relations*, in 51 German Yearbook of International Law 18-19 (2009).

¹¹⁹ Panos Koutrakos, *supra* note 60, at 495.

¹²⁰ Sophie Meunier, *supra* note 62.

¹²¹ Peter D Cameron, *International Energy Investment Law: The Pursuit of Stability* (OUP 2010) 362.

¹²² Alexander J. Belohlavek, *supra* note 62, ¶ 37.

¹²³ Markus Burgstaller, *supra* note 48, at 464.

¹²⁴ See further Nikos Lavranos, *supra* note 96, at 12.

¹²⁵ Rafael Leal-Arcas, *The European Union's Trade and Investment Policy after the Treaty of Lisbon*, 487 Legal Studies Research Paper No. 64/2010.

¹²⁶ Markus Krajewski, *supra* note 116, at 15.

¹²⁷ Inconsistence and incoherence in stances among EU MS, the Commission's argumentation between intra-EU and extra-EU aspects of investment protection, as well as diverging positions within the Commission's DG Trade and DG FISMA (institutional incoherence).

explains that the first steps of the new extra-EU investment policy have been affected by inconsistencies.¹²⁸

Despite the Commission's active role, the competence shift within the Common Commercial Policy still leads to public debate.¹²⁹ The most problematic part is that none of the actors involved seem to consider the implications of the growing assertiveness of EU law against the international obligations of EU Member States.¹³⁰ Such consequences include the doubts of investors as to whether they will be able to depend on investment treaties (current or negotiated) in the future, or whether they will be able to enforce their awards in the EU.¹³¹

6. Concluding Remarks

The general multilateral approach of the EU towards its trade and investment agenda changed in 2006 into a vigorous use of bilateral negotiations as the Union experienced opposition from emerging countries as well as from the USA. The use of bilateral agreements was seen as a reliable instrument to effectively realize the Union's market power that was in decline. The future erosion of the EU's market position will likely continue, which will contribute to favoring the use of bilateral instead of multilateral trade agreements with the EU.¹³² However, as far as competence is concerned, should an investment treaty be signed in the future, this will be done in the framework of the Union's competence, whose precise scope is expected to be further interpreted by the Court in the Opinion on the Free Trade Agreement with Singapore.¹³³ With the lack of clarity concerning the scope of the investment competence, and a parallel elevated assertiveness of the Member States at the expense of the European Commission

Hannes Lenk, *Challenging the Notion of Coherence in EU Foreign Investment Policy*, 8 (2) European Journal of Legal Studies 6, 18-19 (2015).

¹²⁸ Martins Paparinskis, *International Investment Law and the European Union: A Reply to Catherine Titi* 26 (3) European Journal of International Law 663, 669 (2015): '...the definition of most-favoured-nation treatment in the EU–Canada Comprehensive Economic and Trade Agreement (CETA) explains that substantive obligations in other treaties are not 'treatment', unless particular measures are adopted pursuant to them. Why? The proposition that obligations in other treaties do constitute 'treatment' seems to be reflective of consensus in investment arbitration. What is the reason for such a sharp departure from a generally accepted reading of the clause, which is seemingly expressed in the form of an interpretation of the ordinary meaning rather than an exception? Third, the definition of fair and equitable treatment has been supplemented by an explanation of what conduct can constitute its breach. The idea of elaborating fair and equitable treatment in this manner is an interesting one (even if the pedigree and implications of some elements may be more obvious than others). However, the effort to ensure greater predictability may be undercut by significant differences already present within the EU practice: 'targeted discrimination' in the CETA but not in the draft EU–Singapore Free Trade Agreement (FTA); a rule on contractual breaches in the FTA but not in the CETA; and 'legitimate expectations' expressed as part of the obligation in the FTA but only something to be taken into account in application in the CETA.'

¹²⁹ Markus Krajewski, *supra* note 116, at 15.

¹³⁰ Alexander J. Belohlavek, *supra* note 62, 143.

¹³¹ See for instance the hallmark case of the conflict of EU state aid law with Romania's commitments to enforcement of arbitral awards issued pursuant to the International Centre for Settlement of Investment Disputes Convention: 'An arbitral award of December 2013 found that by revoking an investment incentive scheme in 2005, four years prior to its scheduled expiry in 2009, Romania had infringed a bilateral investment treaty between Romania and Sweden. The arbitral tribunal ordered Romania to compensate the claimants, two investors with Swedish citizenship, for not having benefitted in full from the scheme. The revoked investment incentive scheme selectively favoured certain investors and was therefore deemed to be incompatible with EU state aid rules. By paying the compensation awarded to the claimants, Romania actually grants them advantages equivalent to those provided for by the abolished aid scheme. The Commission has therefore concluded that this compensation amounts to incompatible state aid and has to be paid back by the beneficiaries.'

European Commission, Commission orders Romania to recover incompatible state aid granted in compensation for abolished investment aid scheme, Press Release IP/15/4725 (March 30, 2015).

¹³² Stephen Woolcock, *supra* note 49, at 14.

¹³³ Commission Decision, *supra* note 79.

with respect to the CETA and TTIP in the changing political (post-Brexit) environment,¹³⁴ it is questionable whether the competence shift may yield any results for the EU. This is so even if the CJEU interprets the competence as being exclusive, whether it is through the interpretation of the TFEU or the more general doctrine of implied powers.

¹³⁴ Nikos Lavranos, *Why the EU's Foreign Direct Investment (FDI) Competence Should be Re-nationalized*, <https://efilablog.org/2016/08/25/why-the-eus-foreign-direct-investment-fdi-competence-should-be-re-nationalized> (last visited Aug. 15, 2016).

THE ODD ONE OUT: THE LEGAL SCOPE OF EU DEVELOPMENT COOPERATION POLICY

*Tina Van den Sanden*¹

1. Introduction

Development cooperation is formulated by the EU as a multidimensional policy area, which is interlinked with several other areas of EU external action such as trade, security and environment. It is argued that only an integrated approach covering these areas can meet the needs of the developing countries. An important feature of this approach is therefore the need to create coherence between these different aspects. This requirement for coherence cannot only be found in the guiding policy documents but, more importantly, also in the EU Treaties and the legislation on EU development cooperation policy. All EU competences are, however, based on the principle of conferral which requires the EU to act only within the limits of the competences conferred upon it. From a horizontal perspective – referring to the relationship between different competence areas of the EU, such as development cooperation policy, trade or environment – this entails that each policy area is distinct from another policy area, each having its own procedural rules and actors involved. A specific measure may therefore cover various policy areas, while this is not necessarily reflected in the legal competences. This follows from the general principle that the EU only has attributed competences, as will be explained further below, and is a general concern in EU external action. This paper nevertheless argues that the issue is even more pressing in the area of development cooperation policy, as this area is by nature strongly interlinked with other areas of EU (external) action. Hence, an inherent tension can be identified between the EU's aim to attain an integrated development cooperation policy on the one hand and the principle of conferral on the other hand.

This paper aims to examine the relationship between conferral and coherence in the area of development cooperation policy and its effect on the possible attainment of the development cooperation policy objectives from the perspective of the horizontal division of competences: the delimitation between the several competence areas of the EU. Firstly, it will further elaborate on the relationship between coherence and conferral in the area of development cooperation policy, by: (i) exploring the origins of the multidimensional character of EU development cooperation policy, as well as the notion of 'Policy Coherence for Development' and its implications, (ii) the legal roots and consequences of the need for coherence in the area of development cooperation policy in particular and (iii) its relationship with the principle of conferral. Secondly, it aims to assess the legal scope of development cooperation policy by examining how the conferral-coherence relationship affects this scope. This section will also address the delimitation question between development cooperation policy on the one hand and other EU external competences with which it is strongly intertwined on the other hand, namely environment and the Common Commercial Policy. In this light, this paper examines the application of theories on the choice of the correct legal basis in EU law, 'the centre of gravity test' in particular, to the development cooperation policy competence. It is argued that a balance needs to be struck between a too narrow scope and a too broad scope of the development cooperation competence. Because of

¹¹ The author is a PhD researcher and teaching assistant at the Institute for European Law, University of Leuven, and conducts a PhD research on the legal framework of EU development cooperation policy. Some ideas developed in this paper are part of the reasoning developed in the following article on the choice of legal basis in EU external action in general: G. De Baere, T. Van den Sanden, 'Interinstitutional Gravity and Pirates of the Parliament on Stranger Tides: the Continued Constitutional Significance of the Choice of Legal Basis in Post-Lisbon External Action' 12 *European Constitutional Law Review* (2016), p. 85 – 113.

the development cooperation policy's strong interrelationship with other areas of EU external action, such as trade, security or environmental protection, a contradictory risk exists in relation to its legal scope. A too narrow legal scope reduces development cooperation policy to a mere policy objective of EU external action, without it constituting a proper legal competence. Nevertheless, a too broad legal scope facilitates that the development cooperation policy competence oversteps its limits, invading other areas of EU action. This balance always needs to be struck. Finding this balance proves nonetheless to be especially relevant in relation to development cooperation policy, as this area is particularly strong linked to other areas. Another central question to be answered is to what extent the legal scope of EU development cooperation policy corresponds to what constitutes EU development cooperation policy following the policy objectives the EU sets itself in this area² and the relationship with the principle of conferral. Recent case-law from the Court of Justice of the European Union, discussing the scope of EU development cooperation for the first time since the Treaty of Lisbon, will prove to be vital in answering these questions. This case-law concerns the newest generation of development cooperation agreements, which aim to address a variety of issues vis-à-vis a particular partner country in a comprehensive manner. They are an example of the inherent tension present in the development cooperation competence. A comprehensive policy towards a particular country, laid down in a single instrument, is desirable in light of coherence and effectiveness concerns. However, the question is whether the legal competence delimitation rules, governing the legal scope of the development cooperation policy competence, allow this approach.

2. Policy Coherence for Development and the Principle of Conferral

2.1 The Origins of the Multidimensional Nature of EU Development Cooperation Policy and Policy Coherence for Development

The 1957 Treaty of Rome established the basis for the relationship between the EU and the developing countries. This relationship found its origin in European colonialism at the time, and was therefore mainly focused on African countries in a so-called 'natural partnership between Europe and Africa'.³ During that time the development cooperation competence in part IV of the Treaty of Rome took the form of the 'Association of the Overseas Countries and Territories'.⁴ The objective of the Association was 'to promote the economic and social development of the associated countries'. The achievement of this aim contained a trade component and a development aid one, by opening the internal market to colonial imports, by granting tariff measures and by providing development aid through the European Development Fund (EDF).⁵ After some colonies gained independence, the relationship between the EU and the ACP states (African, Caribbean and Pacific) was based on several subsequently concluded agreements: the Yaoundé Conventions and the Lomé Conventions which introduced new areas of cooperation. In addition to the trade and aid model, Lomé III and IV in particular further widened the scope of EU development cooperation policy by including, for example, environmental protection, cultural cooperation but also respect for democracy, human rights and the rule of law in the cooperation with the developing countries.

² See De Feyter who argues that discussions involving Member States and the EU institutions on whether development cooperation policy constitutes the correct legal basis for action are not driven primarily by conceptual concerns about what constitutes development cooperation but on the implications for the distribution of powers: K. De Feyter, *World development law* (Intersentia 2001), p. 110-111.

³ E. Grilli, *The European Community and the Developing Countries* (CUP, 1994), p. 332.

⁴ Article 131 of the Treaty of Rome: this association status was accorded to the OCT's, meaning the non-European countries and territories that had special relations with Belgium, France, Italy and the Netherlands.

⁵ Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century: Challenges and options for a new partnership, COM(96) 570 final, 20 November 1996, 9.

At the same time, from the mid-1970's on, the EU embarked on cooperation with other non-ACP regions, while the idea of the creation of a development cooperation policy at the then Community level emerged. The aim was to create an EU development cooperation policy of its own alongside the Member States' development policies, with the need to move beyond the tariff policy instruments which dominated the relations with the developing world until that time.⁶ Even at this early stage, coherence and coordination were recognized as necessary conditions for the effectiveness of development cooperation policy.⁷ The 1972 Memorandum introducing a Programme for Initial Actions⁸ in particular aimed at focusing on specific coordination mechanisms. The initiatives to create and strengthen coherence and coordination have largely been understood as mechanisms governing the division of competences between the EU's development cooperation policy and the Member States' national development cooperation policies. The need for coherence within the then Community, between development cooperation and other areas, is nevertheless stressed as well.⁹

The 2000 Communication 'The European Community's Development Policy' marks an important change of perspective as it aims to build an overall development cooperation strategy with clear objectives, which was lacking until that time.¹⁰ EU development cooperation policy is considered to be a multidimensional notion. Both the Communication as well as the 2000 Cotonou Agreement, the current framework for cooperation with the ACP states, recognize the encouragement of sustainable development that leads to poverty reduction and poverty eradication to be the general objective of EU development cooperation policy. Poverty reduction and eradication is in itself seen as a multifaceted concept. Because of its multidimensional character, a development policy that fosters poverty reduction requires an integrated approach, touching upon other areas of EU action such as trade, environment, security and political dialogue.¹¹ The aim to create an overall approach to development cooperation at the EU level is largely a response to international initiatives within the Organisation for Economic Cooperation and Development (OECD) and the World Bank, which establish a comprehensive view on development cooperation policy.¹² The notion of 'Policy Coherence for Development' (PCD) indeed finds its origins in the OECD's Development Assistance Committee (DAC), which has been concerned with Policy Coherence for Development since the mid-1990's.¹³ Several definitions of the notion have been formulated¹⁴ at the OECD level but an unofficial working definition, agreed during a 2003 workshop, describes PCD as 'Working to ensure that the objectives and results of a government's development policies are not undermined by other policies of that same government which impact on developing countries, and that these other policies support development objectives where feasible'.¹⁵

The EU implemented this notion in its development cooperation policy with the Communication 'Policy Coherence for Development – Accelerating progress towards attaining the Millennium Development Goals', which considers PCD to be an essential prerequisite to attain the Millennium Development Goals (MDGs).¹⁶ The EU aims to promote and enhance PCD in the

⁶ Commission Memorandum on a Community policy for development co-operation, 27 July 1971 SEC(71) 2700, p. 4 (hereafter: 'Commission Memorandum').

⁷ Commission Memorandum, p. 7, 22.

⁸ Memorandum from the Commission on a Community policy on development cooperation. Programme for initial actions, 2 February 1972, SEC(72) 320, p. 20.

⁹ Commission Memorandum, p. 15.

¹⁰ Communication from the Commission to the Council and the European Parliament: The European Community's Development Policy, COM(2000) 212 final, p. 4-5 (hereafter: 'Communication 'The European Community's Development Policy')

¹¹ Communication 'The European Community's Development Policy', p. 16-21.

¹² Communication 'The European Community's Development Policy', p. 5.

¹³ OECD, Building policy coherence, tools and tensions, 1996.

¹⁴ 2001 DAC Guidelines on Poverty Reduction; The DAC Journal, Development Co-operation 2001 Report.

¹⁵ OECD, Policy Coherence for Development: Promoting institutional good practice, p. 28.

¹⁶ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Policy Coherence for Development – Accelerating progress towards

context of attaining MDG 8 on the Global Partnership for Development¹⁷ PCD is defined as ‘the challenge of how non-aid policies can assist developing countries in attaining the MDGs’ and ‘non-development policies should respect development policy objectives and development cooperation should, where, possible, also contribute to reaching objectives of other EU policies’.¹⁸ The Communication identified the following priority areas: trade, environment, security, agriculture, fisheries, the social dimension of globalization, migration, research and innovation, information society, transport and energy. It is argued that in these areas synergy with development cooperation objectives is considered to be particularly relevant. For each of these priority areas specific ‘coherence for development commitments’ were established. The Commission monitors progress on PCD by the means of a biennial report which covers all EU activities concerning PCD, including activities of the Member States in this regard. The Council confirmed the Communication, added climate change as a twelfth priority area and endorses to examine the Council’s internal instruments, procedures and mechanisms to strengthen the effective integration of development concerns in the decision making procedures on non-development policies and called on the Commission and the Member States to do the same.¹⁹

The European Consensus on Development, the guiding document on the EU’s vision on development cooperation policy,²⁰ further underlines the multidimensional character of development cooperation and poverty eradication in the context of sustainable development, which is firmly recognized as the primary and overarching objective of EU development cooperation. A broader understanding of poverty eradication is reflected, possibly encompassing different areas of EU action.²¹ The areas of trade, environment, infrastructure, energy, rural development and agriculture, governance, democracy, human rights and institutional reform, conflict prevention and human development are marked as areas for action. The commitment to PCD receives a central role in the European Consensus, defining PCD as “ensuring that the EU shall take account of the objectives of development cooperation in all policies that it implements which are likely to affect developing countries, and that these policies support development objectives”.²²

In line with the definition formulated by the OECD, this notion therefore brings about a negative and a positive aspect. Other policies may not only have a negative impact on developing cooperation policy, but they must also support the attainment of the policy objectives of development cooperation.²³ In the framework of a more effective development cooperation policy, PCD is further embedded as a priority for future development cooperation frameworks in

attaining the Millennium Development Goals, COM(2005) 134 final, p. 3 (hereafter: Communication ‘Policy Coherence for Development’). The EU upholds to be one of the most committed partners in helping achieve the MDGs: Conclusions of the Council and the representatives of the governments of the Member States meeting within the Council, Millennium Development Goals: EU contribution to the review of the MDG’s at the UN 2005 High Level Event, 24 May 2005. Following Article 208 (2) TFEU the European Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organizations.

¹⁷ Council of the European Union, ‘Millennium Development Goals: EU contribution to the review of the MDGs at the UN 2005 High Level Event. Conclusions of the Council and the Representatives of the Governments of the Member States Meeting within the Council’ 24 May 2005, p.9.

¹⁸ Communication Policy Coherence for Development, p. 3-4.

¹⁹ Council of the European Union, ‘Millennium Development Goals: EU contribution to the review of the MDGs, p. 10.

²⁰ Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus’ (2006 OJ C46/1) (hereafter: European Consensus). On the occasion of the signing of the European Consensus on Development by High Representative Ashton, the European Consensus was confirmed as the guiding document for EU development cooperation: Ashton Schultz Joint Statement on the European Consensus on Development, 3 April 2014.

²¹ European Consensus, points 11-12.

²² European Consensus, point 35.

²³ G. Ashoff, ‘Enhancing Policy Coherence for Development: Justification, recognition and approaches to achievement’ German Development Institute, 2005, p. 11.

the Communications 'An Agenda for Change'²⁴ and 'A Decent Life for All'.²⁵ In 2013 the Commission and the High Representative issued a Joint Communication which acknowledged the 'comprehensive approach' to be the guiding principle for EU external action across all areas, in particular in relation to conflict prevention and crisis resolution. The Joint Communication argues that increased consistency between the different areas of EU external action and between these and its other policies by drawing on the EU's full range of instruments and resources will make the EU's external action more consistent, effective and more strategic.²⁶

The guiding policy documents on development cooperation therefore formulate development cooperation policy as a multidimensional concept, which is interlinked with several other areas of Union action. This intertwinement between development cooperation and other areas of EU action inevitably brings about the necessity for coherence, reflected by the notion of 'Policy Coherence for Development'. This notion occupies not only an important place in the legally non-binding policy documents on EU development cooperation policy, coherence in general and its specific expression in the area of development cooperation is also confirmed in the EU Treaties.

2.2 Policy Coherence for Development as a Treaty Obligation

The principle of coherence is not only a political and economic imperative,²⁷ it also has constitutional significance. Although some authors do not attach legal importance to the principle²⁸ the majority of legal scholarship recognises coherence as a constitutional principle because of the multiple references to the principle in the EU Treaties as a legal obligation.²⁹

Provisions on the need to ensure coherence and consistency in the EU's external action framework in general can be found in different articles of the Treaty on European Union (TEU). Article 21 (1) TEU lays down the principles which are pursued by this area, while paragraph (2) of this article formulates the objectives which are common to EU external action. Following Article 21 (3) TEU these principles and objectives shall be respected and pursued in the development and implementation of all different areas of the Union's external action, which brings about the need for coherence: the Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative, are the central actors in ensuring consistency by cooperating to that effect. The Treaty provisions on the institutions further clarify the role of the different institutions in ensuring coherence.³⁰ The General Affairs Council shall ensure consistency in the work of the different Council configurations, while the Foreign Affairs Council shall ensure that the Union's external action is consistent.³¹ The High Representative, who is also one of the Vice-Presidents of the Commission, plays a key role in ensuring the consistency of the Union's external action. He or she shall be responsible within the Commission for responsibilities incumbent on it in

²⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Increasing the impact of EU Development Policy: an Agenda for Change, COM(2011) 637 final.

²⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Decent Life for All: Ending poverty and giving the world a sustainable future, COM(2013) 92 final.

²⁶ Joint Communication to the European Parliament and the Council. The EU's comprehensive approach to external conflict and crises. JOIN(2013) 30 final.

²⁷ M. Carbone, 'Mission impossible: the European Union and Policy Coherence for Development', 30 *Journal of European Integration* (2008), p. 326.

²⁸ P. Gauttier, 'Horizontal coherence and the external competences of the European Union', 10 *European Law Journal* (2004), p. 24.

²⁹ B. Van Vooren, *EU external relations law and the European Neighbourhood Policy: A paradigm for coherence?* (2011 Routledge), p. 59; E. Herlin-Karnell, T. Konstadinides, 'The rise and expression of consistency in EU law: Legal and strategic implications for European integration', 12 *Cambridge Yearbook of European Legal Studies* (2013), p. 141.

³⁰ Article 13(1) TEU.

³¹ Article 16(6) TEU.

external relations and for coordinating other aspects of the Union's external action.³² Article 26 (2) TEU lays down the coherence requirement in the area of CFSP.

A first observation is that the Treaty refers to the notion of 'consistency' rather than using the term 'coherence'. In legal scholarship it is generally accepted that the terms consistency and coherence differ in degree: while consistency points to the absence of contradictions between different areas, coherence brings about a more positive aspect which requires synergy, added value and complementarity between different areas of EU action.³³ It can, moreover, be argued that the term consistency in the Treaties in fact relates more to the latter concept of coherence. The references to consistency in the Treaties should therefore not be understood as merely demanding the absence of contradictions, but require a higher degree of synergy between the different areas of Union action.³⁴ In this sense, coherence entails different dimensions. Firstly, coherence applies (i) horizontally, requiring coherence between the TEU external competences, the TFEU external competences and the (external aspects of the) internal competences (ii) vertically, between Union and Member State action and (iii) institutionally between the EU institutions.³⁵ Secondly, coherence covers other principles of EU law: the negative dimension of coherence, avoiding contradictions, gaps and duplications, is attained by delimitation rules that apply horizontally, vertically and institutionally, as well as rules on conflict resolution. The positive dimension of coherence, ensuring synergy and complementarity, needs to be achieved by rules on cooperation and coordination - mainly through the principle of sincere cooperation - which apply vertically and institutionally, affecting horizontal coherence as well.³⁶

The specific expression of coherence in the area of development cooperation policy in the form of PCD is embedded in the Treaties: the specific Treaty articles on development cooperation policy lay down a reinforced demand for coherence by requiring the integration of development concerns in other areas. The explicit development cooperation competence was introduced by the Maastricht Treaty, as one of the objectives of the Treaty was to 'assert the European Union's identity on the international scene'.³⁷ The Treaty articles on development cooperation policy covered the 'triple C-principles',³⁸ corresponding to the different dimensions of coherence identified above. These are: (i) coherence between policies that have an impact on developing countries and the attainment of the objectives of development cooperation, by requiring to take into account the development cooperation objectives when implementing these other policies; (ii) complementarity between EU and Member States' policy in development cooperation; and (iii) coordination of EU and Member State policy in the field of development cooperation. Moreover, Article C of the Maastricht Treaty introduced the general principle on coherence and consistency by stating that the single institutional framework had to ensure consistency of Union action, in

³² Article 18 (4) TEU.

³³ C. Tietje, 'The concept of coherence in the TEU and the CFSP', 2 EF Rev. (1997), p. 212; R. Wessel, 'The inside looking out: Consistency and delimitation in EU external relations' 37 CML Rev. (2000), p. 1150; P. Koutrakos, *Trade, foreign policy and defence in EU constitutional law*, (Hart 2001), p. 39; L. den Hertog, S. Stross, 'Coherence in EU external relations: Concepts and legal rooting of an ambiguous term', 18 European Foreign Affairs Review (2013), p. 376-377.

³⁴ P. Koutrakos, *Trade, foreign policy and defence in EU constitutional law*, (Hart 2001), p. 39; C. Hillion, 'Tous pour un, un pour tous! Coherence in the external relations of the European Union' in M. Cremona (ed.), *Developments in EU External Relations Law*, (OUP 2008), p. 17.

³⁵ S. Nutall, 'Coherence and consistency' in C. Hill and M. Smith (eds.) *International relations and the European Union* (OUP 2005), p. 92; C. Hillion, 'Tous pour un, un pour tous! Coherence in the external relations of the European Union' in M. Cremona (ed.), *Developments in EU External Relations Law*, (OUP 2008), p. 17.

³⁶ C. Hillion, 'Tous pour un, un pour tous! Coherence in the external relations of the European Union' in M. Cremona (ed.), *Developments in EU External Relations Law*, (OUP 2008), p. 18-35; M. Cremona, 'Coherence through law: What difference will the Treaty of Lisbon make?', 3 Hamburg Review of Social Sciences (2008), p. 13-16; B. Van Vooren, footnote 29, p. 67-71.

³⁷ Article 2 EU Treaty.

³⁸ M. Holland, M. Doidge, *Development policy of the European Union* (Palgrave Macmillan 2012), p. 157; M. Carbone, 'Preserving policy autonomy: EU development cooperation from Maastricht to Lisbon', in F. Larusen (ed.), *The EU's Lisbon Treaty. Institutional choices and implementation* (Ashgate 2012), p. 231.

particular of the Union's external relations, security, economic, and development policies. This refers back to the interrelationship between the different areas, as equally expressed in the policy documents.

These three principles can still be found in the current Treaty articles 208-211 TFEU on development cooperation policy with Article 208(1) TFEU holding that "The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries". This inclusion of PCD in the Treaty has received criticism as being too weak. There is no explicit reference to coherence, while PCD is formulated as to merely take account of the objectives of development cooperation. The focus is on the process rather than on the results, which makes development cooperation policy vulnerable to more powerful interests such as trade and agriculture.³⁹ At first sight, the formulation of PCD indeed relates more to an integration requirement, similar to the one on environmental protection in article 11 TFEU (see below). Before examining the application of this principle in the case-law of the Court and the relationship with environmental protection and the CCP, a light has to be shed on the other founding principle that comes into play when assessing the legal scope of development cooperation policy: the principle of conferral.

2.3 The Principle of Conferral

The principle of conferral refers to the particular conferment of powers to which the EU is subject. The principle governs the limits of Union competences and is currently formulated in Article 5 TEU, which states that 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'. The EU therefore only has those powers attributed to it by the Member States in the Treaties. The principle has been referred to as an 'organising principle of the constitutional order' of the EU, as it expresses the classic characteristic of the EU legal order, namely that it is not so-called 'self-authenticating'.⁴⁰ This entails that competences cannot originate from within the order itself but always necessarily follow from conferment by the Member States through the Treaties. In *Opinion 2/94* the Court underlined that the principle not only applies to the internal EU order but also in the area of external action, which means that also in this area the Union has only those powers which have been conferred upon it.⁴¹ In the primary law of the EU, Article 7 TFEU further expresses the relationship between conferral and coherence by stating 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'. This relationship is further underlined in the institutional context, in particular in both paragraphs of Article 13 TEU. Paragraph 1 holds that the institutional framework aims to promote the Union's values, advances its objectives, serves its interests, those of its citizens and those of the Member States, and ensures the consistency, effectiveness and continuity of its policies and actions, while Article 13(2) TEU underlines that each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.

A very concrete consequence that the principle of conferral brings about is the requirement that each EU legal measure needs to be based on the correct legal basis, which has to be found in the Treaties. The Court determined that the choice of the appropriate legal basis for a Union measure has constitutional significance.⁴² As a consequence, the determination of the correct legal basis is subject to rigorous rules and criteria. The classic case-law of the Court on the choice

³⁹ M. Carbone, 'Mission impossible: the European Union and Policy Coherence for Development', 30 *Journal of European Integration* (2008), p. 330.

⁴⁰ A. Dashwood, 'The attribution of external relations competence', in A. Dashwood and C. Hillion, *The General Law of E.C. External Relations* (London, Sweet & Maxwell 2000), 116.

⁴¹ *Opinion 2/94*, Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECLI:EU:C:1996:140, para. 23-24; *Opinion 2/00* Cartagena Protocol on Biosafety [2001] ECLI:EU:C:2001:664, para. 5.

⁴² *Opinion 2/00*, para. 5.

of legal basis clarifies that the choice of legal basis cannot depend on an institution's conviction as to what the correct legal basis is, but that it has to be based on 'objective factors amenable to judicial review, such as purpose and content'.⁴³ If the measure pursues a twofold purpose or a twofold component, and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure has to be founded on a single legal basis, namely that required by the main or predominant purpose or component.⁴⁴ By way of exception, if it is established that the measure simultaneously pursues several objectives that are inseparably linked without one being secondary and indirect in relation to the other, the measure should be founded on the corresponding legal bases.⁴⁵ It has been argued that the strict conferral of powers on the EU might affect the coherence and efficiency of the EU's actions, especially on the international scene: it follows from the principle of conferral that when the EU aims to respond to an international (emergency) situation it first has to determine whether and how, on what legal basis and through which institution, it is competent to act, therefore giving 'precedence to considerations of competence over considerations of effectiveness in its international action'.⁴⁶ This is a particular concern for the EU, as opposed to a national state (such as the US for example) that is able to swiftly respond to international crises in a comprehensive manner, even combining military and civilian elements. The question can thus be raised whether the principle of conferral might form an obstacle to coherent external action.

It has been argued in legal scholarship that there is not necessarily a contradiction between conferral on the one hand and coherence on the other hand. On the contrary, conferral is necessarily linked to the attainment of the more negative dimension of consistency: delimitation rules are designed to ensure coherence in the sense that they aim to avoid duplications, gaps and contradictions.⁴⁷ Hillion describes the relationship as 'guaranteeing consistency *stricto sensu* between the external activities of the Union contributes to achieving the coherence of its external action'.⁴⁸ Consistency in EU law is then achieved only when the EU is acting 'intra vires'. In that sense, Article 7 TFEU aims to tackle 'complexity and legitimacy gaps'.⁴⁹ In its broader sense, coherence indeed covers the principle of conferral, expressed in its particular form covering delimitation rules. Conferral is therefore necessary to attain coherence. However, it is clear that tensions are possible with the other dimensions of coherence, namely the more positive dimension of cooperation and complementarity.⁵⁰ On the one hand the EU needs to develop a comprehensive approach in order to tackle complex international issues, which equally entails that the EU's different actors need to cooperate in order to attain coherence, while on the other hand the actors always need to take into account that they can only act within the powers conferred upon them, making it difficult for them to meet the requirements of coherence and delimitation at the same time.⁵¹ The refugee crisis is a topical example of this issue. The response to this crisis requires a complex comprehensive strategy, covering issues of both internal and external action, as well as political and legal considerations. However, the division of

⁴³Case 45/86, *Commission v Council*, ECLI:EU:C:1987:163.

⁴⁴ Opinion 2/00, referring to Case C-155/91, *Commission v Council*, ECLI:EU:C:1993:98, para. 19-21; Case C-42/97, *Parliament v Council*, ECLI:EU:C:1999:81, para. 39-40; Case C-36/98, *Spain v Council*, ECLI:EU:C:2001:64, para. 59.

⁴⁵ Opinion 2/00, C-300/89, *Commission v Council*, ECLI:EU:C:1991:244, para. 13-17; Case C-42/97, *Parliament v Council*, ECLI:EU:C:1999:81, para. 38.

⁴⁶ G. De Baere, *Constitutional principles of EU external relations* (OUP 2008), p. 10.

⁴⁷ M. Cremona, 'Coherence through law: What difference will the Treaty of Lisbon make?', 3 *Hamburg Review of Social Sciences* (2008), p. 15.

⁴⁸ C. Hillion, 'Tous pour un, un pour tous! Coherence in the external relations of the European Union' in M. Cremona (ed.), *Developments in EU External Relations Law*, (OUP 2008), p. 17

⁴⁹ E. Herlin-Karnell, T. Konstadinides, 'The rise and expression of consistency in EU law: Legal and strategic implications for European integration', 12 *Cambridge Yearbook of European Legal Studies* (2013), p. 145.

⁵⁰ M. Cremona, 'Coherence through law: What difference will the Treaty of Lisbon make?', 3 *Hamburg Review of Social Sciences* (2008), p. 16.

⁵¹ R. Wessel, 'The inside looking out: Consistency and delimitation in EU external relations' 37 *CML Rev.* (2000), p. 1169.

competences between the different areas of action, as well as between the different actors, make it difficult for the EU to respond to the crisis in a swift and coherent manner.

The next section will examine the legal scope of EU development cooperation policy, as well as the delimitation between development cooperation policy and other areas of Union action, namely the environmental competence and the common commercial policy competence.

3. The Scope of Development Cooperation: Horizontal Division of Competences Between Development Cooperation and Environment and the Common Commercial Policy

3.1 The Legal Scope of EU Development Cooperation Policy

The Maastricht Treaty first introduced an explicit legal basis for development cooperation in the Treaties, including a set of specific objectives. Pursuant to Articles 130u-130y TEC (later renumbered as Articles 177-181 TEC), EU development cooperation had to foster (i) the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them, (ii) the smooth and gradual integration of the developing countries into the world economy and (iii) the campaign against poverty in the developing countries. Moreover, Union development cooperation policy had to contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms. The objectives in Articles 130u-130y and Articles 177-181 TEC therefore express a concept of development cooperation which is not confined to its economic aspect: the trade aspect as well as the environmental, human rights and peace and security aspect are represented in the Treaty objectives,⁵² corresponding to the multidimensional concept of development cooperation policy put forward in the basic policy documents (see above).

The wide ambit of these objectives was confirmed in pre-Lisbon case-law. Rendered a few years after the entry into force of the Maastricht Treaty, the *Portugal/Council* case was the first case which gave the Court the opportunity to interpret the new Treaty title on development cooperation policy and to clarify its scope. In this case Portugal had brought an action for annulment of Council Decision 94/578/EC concerning the conclusion of the Cooperation Agreement between what was then the European Community and the Republic of India on Partnership and Development.⁵³ The contested decision was based on the development cooperation and CCP legal bases, while Portugal argued that the inclusion in the agreement of specific clauses on human rights, energy, tourism, culture, intellectual property and drug abuse control could not be covered by the development cooperation legal basis and therefore required the addition of supplementary legal bases. The Court lays down a two-pronged test to determine the scope of development cooperation agreements. The Court decided that first, in order to qualify as a development cooperation agreement, the agreement must pursue development cooperation objectives, at the time referred to in Article 130u EC Treaty. These objectives are broad enough that measures required for their pursuit can concern a variety of specific matters. This is particularly the case when an agreement establishes the framework of cooperation. The Court underlines that requiring a development cooperation agreement to be based on additional legal bases each time it touches on a specific matter, would render the development cooperation competence and procedures 'devoid of substance'. A development cooperation agreement can therefore contain clauses concerning various specific matters without altering the characterization of the agreement. Second, the characterization of the agreement has to be determined having regard to its essential object and not in terms of individual clauses, provided that these did not impose

⁵² K. De Feyter, *World development law. Sharing responsibility for development* (2001 Intersentia), p. 128.

⁵³ Council Decision 94/578/EC of 18 July 1994 concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development (1994 OJ L223/23).

such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation.⁵⁴ The Court found on the merits that the cooperation provided for by the agreement takes particular account of the needs of a developing country and thus contributes to furthering the development cooperation objectives.⁵⁵ The provisions of the agreement were moreover limited to determining the areas for cooperation and to specifying certain of its aspects and actions and were therefore limited to establishing the framework of cooperation. They did not prescribe in concrete terms the manner in which cooperation in each specific area envisaged was to be implemented. As a result, provisions on energy, intellectual property, tourism, culture and the control of drug abuse could form part of an integrated development cooperation agreement between the EU and India.

The judgment in *Portugal v Council* clarifies several aspects of the scope of EU development cooperation policy and provides a clear test to determine whether an agreement remains within the limits of development cooperation policy. By underlining the specific competence the Union has to conclude development cooperation agreements with non-member countries, the Court recognizes the significance of the fact that development cooperation had been given its own legal basis in the Maastricht Treaty by recognizing that it was now entitled to its own specific scope.⁵⁶ In the *Small Arms and Light Weapons* case the Court further clarified that the objectives of Union development cooperation policy should not be limited to measures directly related to the campaign against poverty. Nevertheless, if a measure was to fall within development cooperation policy, it had to contribute to the pursuit of that policy's economic and social development objectives.⁵⁷ The aims of development cooperation therefore go beyond poverty reduction or poverty eradication, but also cover broader economic and social development objectives.

In the post-Lisbon era, the primary legal framework on development cooperation policy is covered by Articles 208-211 TFEU. Article 208(1) TFEU identifies the reduction, and in the long term, the eradication of poverty as the primary objective of EU development cooperation. Apart from this primary objective, the provisions on EU development cooperation remain silent about the other development objectives, which were mentioned in the old Articles 130u-130y EC Treaty and Articles 177-181 EC Treaty. Article 208(1) TFEU nevertheless also underlines that development cooperation has to be conducted within the framework of the principles and objectives of the Union's external action. This inevitably leads to the question whether the new formulation of the Treaty articles on development cooperation with the clear identification of poverty reduction and eradication as the primary objective of development cooperation has limited the scope of the EU development cooperation competence to measures aimed at poverty reduction or eradication.⁵⁸

The Treaty Articles' reformulation has led certain authors to conclude that the Treaty of Lisbon limited the scope of the EU development cooperation competence to measures aimed at poverty reduction or eradication, in line with the specific development cooperation objective in Article 208 (1) TFEU. The most far-reaching view is the one formulated by Schütze, who believes that the new formulation of the provisions on development cooperation policy in the post-Lisbon Treaties with poverty eradication as the primary objective of development cooperation has considerably limited the scope of article 209 TFEU to the pursuance of this primary objective. According to this view, as the general external action objectives have become secondary or incidental to poverty reduction as development cooperation's primary aim, the scope of Article 209 TFEU is confined to measures aimed at poverty reduction and eradication.⁵⁹ He nevertheless nuances this approach by concluding that the post-Lisbon scope of EU development cooperation policy will

⁵⁴ Case C-268/94, para. 37-39.

⁵⁵ Case C-268/94 para. 44.

⁵⁶ See also: M. Broberg, R. Holdgaard, EU external action in the field of development cooperation policy. The impact of the Lisbon Treaty. Swedish Institute for European Policy Studies, p. 26.

⁵⁷ Case C-91/05, para. 67.

⁵⁸ Opinion of AG Bot, Case C-658/11, point 126.

⁵⁹ R. Schütze, 'EU Development Policy: Constitutional and legislative foundations', *Cambridge Yearbook of European Legal studies* (2013), p. 707.

depend on how broadly the Court will interpret the primary aim of poverty reduction and eradication.

The argument that the general external action objectives, including the 'old' development cooperation objectives, have become secondary or incidental to poverty reduction as development cooperation's primary aim cannot be followed. Such explanation would neutralize the common EU external action objectives in Article 21 (2) TEU, inserted by the Treaty of Lisbon, as well as negate Article 208(1) TFEU which requires that development cooperation be conducted in the framework of the common EU external action objectives. A more balanced view formulated by Koutrakos provides a better approach,⁶⁰ which also appears to be in line with the approach adopted by the Court (see below). Koutrakos argues that the identification of poverty reduction and eradication as the primary objective of development cooperation means that development cooperation measures can only pursue the other objectives referred to in Article 21(2) TEU when these are secondary or incidental.⁶¹ Article 208(1) TFEU serves a two-fold function in this respect. On the one hand it establishes a bridge with the general external action objectives formulated in Article 21 TEU, while on the other hand it avoids overuse of the development cooperation legal basis as it rules out reliance on the development cooperation legal basis for measures mainly concerned with objectives other than the fight against poverty.⁶² Confining the scope of development cooperation policy to a limited interpretation of the objective 'poverty eradication' would hollow out the competence. On the other hand, it is clear that a too broad definition of the development cooperation policy competence is not desirable either, as this potentially leads to the situation where this competence invades other areas of EU external action, precisely because of its multidimensional nature and broad objectives. It is particularly this balance that the Court of Justice is seeking in its post-Lisbon case-law on the scope of development cooperation policy.

In the *Philippines PCA* case⁶³ the Court had the opportunity to clarify the scope of development cooperation policy post-Lisbon. In this case the Commission asked the Court to annul the Council decision on the signing of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part. The Commission had based the proposal for this decision on the legal bases Article 207 TFEU, relating to the common commercial policy, and Article 209 TFEU, relating to development cooperation.⁶⁴ The Council, however, adopted the contested decision authorizing the signing of the Framework Agreement, adding legal bases on readmission of third-country nationals (Article 79(3) TFEU), transport (Articles 91 and 100 TFEU) and the environment (Article 191(4) TFEU). The Commission asked the Court to annul the contested decision in so far as the Council added these additional legal bases. The Court recalled and confirmed its two-pronged test developed in *Portugal v Council* to determine the appropriate scope of development cooperation agreements and to assess whether the provisions relating to readmission, transport and the environment also fell within development cooperation policy or whether they required the addition of supplementary legal bases. First, the Court considered that the agreement as a whole contributes to furthering the pursuit of the objectives referred to in Articles 21(2)(d) TEU and 208(1) TFEU on development cooperation.⁶⁵ With regard to the specific provisions, the Court concluded that the provisions relating to readmission, transport and the environment, consistently with the European Consensus, contribute to the pursuit of the objectives of development

⁶⁰ For other nuanced perspectives: P. Eeckhout, *EU external relations law*, (2011 OUP), p. 139-140; M. Broberg, R. Holdgaard, EU development cooperation post-Lisbon: main constitutional challenges, *European Law Review* (2015), p. 352.

⁶¹ P. Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013), p. 211-212.

⁶² P. Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013), p. 211-212.

⁶³ Case C-377/12, *Commission v Council*, EU:C:2014:1903.

⁶⁴ Proposal for a Council Decision on the signing of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part (COM(2010) 460 final).

⁶⁵ Case C-377/12, paras. 45-47.

cooperation.⁶⁶ Second, the provisions of the PCA relating to readmission of nationals of the contracting parties, to transport and to the environment did not contain obligations so extensive that they could be considered to constitute objectives distinct from those of development cooperation, according to the Court.⁶⁷ The Council should therefore not have added Articles 79(3), 91, 100 and 191(4) TFEU as legal bases for the contested decision.

The Court therefore confirms the potentially broad scope of development cooperation policy by confirming the policy's broad objectives. It does so by referring to the provisions on coherence formulated in Article 208(1) TFEU and Article 21 (2) TEU in order to conclude that EU development cooperation is not limited to measures directly aimed at the eradication of poverty.⁶⁸ Consequently, the Court reinforces the notion of policy coherence for development in this judgment. At the same time, the Court therefore does not seem to follow the argument that the general EU external action objectives are only incidental to the objectives mentioned in the specific provisions on each policy area. As already indicated above, such reasoning would indeed make the common EU external action objectives in Article 21 (2) TEU, as well as the coherence requirement in Article 208(1) TFEU redundant. In reaching its conclusion, the Court moreover refers to the broad definition of 'poverty eradication' as formulated by the non-legally binding policy documents on Union development cooperation, as well as secondary EU law, using them as an interpretative tool to support the wide scope of EU development cooperation policy.⁶⁹ The Court discusses the European Consensus on Development as well Regulation 1905/2006,⁷⁰ and the Development Cooperation Instrument. The European Consensus, the leading policy document on the EU's perspective on development cooperation policy, interprets poverty eradication as a multidimensional concept, which reflects a broader understanding of poverty eradication possibly encompassing different areas of EU action.⁷¹ In line therewith, the Court in *Philippines PCA* referred to the broad notion of development cooperation and poverty eradication as a multifaceted concept as upheld by the European Consensus and the DCI I.⁷² It therefore used a non-legally binding instrument, in combination with a pre-Lisbon legislative instrument, as the basis to determine the objective and appropriate legal basis of a measure.⁷³ The fact that the Court also relied on policy documents in the *Philippines Borders Management*⁷⁴ and the *Small Arms and Light Weapons* cases⁷⁵ seems to indicate that the Court's reliance on policy documents in order to support the choice and scope of a legal basis is particularly prominent in cases concerning development cooperation.⁷⁶ The Court therefore establishes a link between the legal scope of EU development cooperation policy and what constitutes EU development cooperation policy following the policy's documents. However, it needs to be underlined that the Court indeed uses the policy instruments to further *support* its choice of legal basis for the specific measure at

⁶⁶ Case C-377/12, paras. 49-55.

⁶⁷ Case C-377/12, paras. 56-59.

⁶⁸ Case C-377/12, *Commission v Council*, ECLI:EU:C:2014:1903, para. 36-37.

⁶⁹ See in the same sense B. Van Vooren as regards the Small Arms and Light Weapons case: B. Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil', 14 *Foreign Affairs Review* (2009), p. 235; M. Cremona, footnote 46, p. 19.

⁷⁰ Regulation 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation ('DCI I') (2006 OJ L378/41); replaced by Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 ('DCI II') (2014 OJ L77/44).

⁷¹ European Consensus, points 11-12.

⁷² Case C-377/12, para. 42.

⁷³ Broberg and Holdgaard, p. 562-563.

⁷⁴ The Court referred to the European Consensus to link development cooperation and security: Case C-403/05, *Parliament v Commission*, para. 57.

⁷⁵ The Court relied extensively on the European Union strategy to combat illicit accumulation and trafficking of small arms and light weapons adopted by the European Council on 15 and 16 December 2005 (Council document No 5319/06 PESC 31 of 13 January 2006) as well as on the European Consensus: Case C-91/05, paras. 66, 69, 90-91.

⁷⁶ P. Eeckhout, *EU external relations law* (OUP 2011) p. 138.

hand. Using soft law policy documents and secondary law to define the limits of primary law competences arguably would be in conflict with the hierarchy of norms.⁷⁷

A confirmation of the broad nature of the objectives of development cooperation policy, as well as a recognition of a corresponding broad policy notion, in the *Portugal/Council* and the *Philippines PCA* case leads to a comprehensive scope of development cooperation policy. The Court's broad interpretation of poverty eradication as the principal objective of development cooperation policy leaves room for an extensive scope of measures, even if the development cooperation competence were to be limited solely to the explicitly formulated primary objective of 'poverty eradication'. However, because of the nature of the development cooperation policy objectives, a too broad interpretation of development cooperation objectives is problematic as this might lead to the situation where this policy potentially covers nearly any area of Union external action, therefore raising problems under the principle of conferral.⁷⁸

Determining the limits of development cooperation policy solely on the basis of its objectives is therefore problematic. The test formulated in *Portugal/Council* and the *Philippines PCA* case contains, however, a two-fold criterion. Not only do the provisions have to contribute to the pursuit of development cooperation objectives, they may not contain obligations so extensive that they may be considered to constitute objectives distinct from those of development cooperation that are neither secondary nor indirect. In order to determine whether this second aspect of the test is fulfilled, the Court uses a content-based criterion, contrary to the objective-focused first aspect. In the *Portugal v Council* case the Court held that the provisions of the agreement which relate to specific matters establish the framework of cooperation between the contracting parties: they are limited to determining the areas for cooperation and to specifying certain of its aspects and various actions to which special importance is attached. By contrast, they did not prescribe in concrete terms the manner in which cooperation in each specific area envisaged was to be implemented.⁷⁹ After *Portugal v Council* it was believed that this criterion developed by the Court essentially involved the question whether the EU had to commit to a concrete obligation in a specific field.⁸⁰ It was argued that when an agreement gives rise to clear rights and obligations in specific fields⁸¹ or when the future negotiation of specific agreements is mandatory rather than permissive,⁸² additional legal bases need to be added. The provisions on the environment and transport in the *Philippines PCA* case follow the same line of reasoning. However, with regard to the provisions on readmission of third country nationals the Court recognizes that Article 26(3) PCA contains specific obligations, as the parties *shall* admit back their nationals, they *will* provide their nationals with required documents and they *agree to conclude* as soon as possible an agreement for the admission/readmission of their nationals.⁸³ However, the Court still concluded that these provisions do not contain obligations so extensive that they may be considered to constitute objectives distinct from those of development cooperation. This is so because, according to the Court, although the provisions on readmission do contain specific obligations and that they are to some extent concrete as to how the readmission is to be carried out, they still need to be implemented further by concluding a readmission agreement. The provisions in the PCA itself do not cover in a detailed manner the cooperation in the area of readmission so as to enable its immediate and concrete implementation. A readmission agreement is needed to further implement the commitments and such agreement will, by contrast, cover such detailed provisions on the readmission of nationals.

⁷⁷ Broberg, Holdgaard, *European Law Review*, 353-354.

⁷⁸ Opinion of AG Mengozzi in Case C-377/12, point 29.

⁷⁹ Case C-268/94, para. 45; 56.

⁸⁰ S. Peers, 'EC frameworks of international relations: Co-operation, partnership and association', in A. Dashwood, C. Hillion (eds.), *The general law of E.C. external relations* (Sweet & Maxwell 2000), p. 172.

⁸¹ N. Burrows, *Development cooperation defined*, *European Law Review* (1997).

⁸² S. Peers, 'EC frameworks of international relations: Co-operation, partnership and association', in A. Dashwood, C. Hillion (eds.), *The general law of E.C. external relations* (Sweet & Maxwell 2000), p. 173.

⁸³ Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the One Part, and The Republic of the Philippines, of the Other Part, 2013, p. 21.

The second aspect of the test therefore focuses rather on the content of the provisions than on the objectives. By focusing more on the content of the provisions, the Court addresses the problem that by applying solely an objectives-based approach to determine the scope of development cooperation policy, in combination with a wide interpretation of its objectives, this area potentially occupies nearly all other areas of EU external action.⁸⁴ The addition of a content-based criterion indeed seems to be the only viable solution to determine the scope of development cooperation policy.⁸⁵ There has been a slight shift in the way the Court assesses the second aspect of the test. The criterion shifted from the question whether the cooperation was prescribed in concrete terms in *Portugal/Council* to the question whether the provisions still need implementation in *Philippines PCA*.

The more flexible implementation criterion in *Philippines PCA* has been criticized in the light of the principle of conferral, as the Court accepts clear legal obligations in the area of readmission, which has its own treaty-making competence and a specific decision-making procedure which differs from development cooperation.⁸⁶ However, the initial test developed by the Court in *Portugal v Council* may also restrict the scope of development cooperation policy. In particular, the requirement that the provisions with respect to the other areas of cooperation must not entail extensive obligations and must be restricted to identifying the aims and subjects of the cooperation, could lead to the situation where development cooperation agreements can only provide the most general of frameworks for cooperation in specific areas. A too narrow scope of development cooperation in this sense may in turn hamper the effective development of this area,⁸⁷ and appears to contradict the broad notion of development cooperation policy espoused by the EU. The Court itself has expressed this concern both in *Portugal v Council* as in *Philippines PCA* by underlining that it should be ensured that the development cooperation competence is not rendered 'devoid of substance',⁸⁸ showing the concern that is shared by the author that development cooperation policy remains a distinct competence of EU external action and not merely a policy objective. Therefore, the slight shift in the test in *Philippines PCA* is necessary to retain the space that the development cooperation competence occupies in the general system of EU external relations law and it ensures that this competence is not limited to the most general of cooperation forms. The latter entails the risk that the development cooperation objectives are reduced to an overall principle or value of EU external action, rather than respecting the fact that development cooperation policy is a competence of EU external action on its own. Moreover, development cooperation may not be reduced to the mere grant of financial assistance to developing countries.⁸⁹ The shift in the test in *Philippines PCA* arguably even creates the opportunity to take more integrated measures, enabling a more comprehensive approach to development cooperation policy. This is in line with the policy objectives the EU sets itself, as well as with the arguments in development studies that only a comprehensive approach will help meet the needs of developing countries.⁹⁰ While the test makes more integrated measures possible, it is clear that a detailed agreement in a specific field on the other hand, such as the

⁸⁴ See also: A. Ott, 'The legal bases for international agreements post-Lisbon; Of pirates and The Philippines', 21 *Maastricht Journal of European and Comparative Law* (2014), p. 744.

⁸⁵ As well as to determine the scope of the CFSP. See G. De Baere, T. Van den Sanden, 'Pirates of the European Parliament on Stranger Tides and Gravity in Development Cooperation: the Constitutional Significance of the Choice of Legal Basis in Post-Lisbon External Action', 12 *European Constitutional Law Review* (2016) p. 103.

⁸⁶ M. Broberg, R. Holdgaard, 'EU development cooperation post-Lisbon: main constitutional challenges', *European Law Review* (2015), p. 354.

⁸⁷ See also: P. Eeckhout, *EU external relations law*, (OUP 2011), p. 136; S. Peers, 'Fragmentation or evasion in the Community's development policy? The impact of Portugal v. Council', in A. Dashwood and C. Hillion (eds.), *The General laws of E.C. external relations* (Sweet and Maxwell 2000).

⁸⁸ Case C-268/94, para. 38; Case C-377/12, para. 38.

⁸⁹ Opinion of A-G Mengozzi in C-377/12, point 22.

⁹⁰ Joint Communication to the European Parliament and the Council. The EU's comprehensive approach to external conflict and crises. JOIN(2013) 30 final.

readmission agreement in *Philippines PCA*, will have to be adopted under another legal basis.⁹¹ Concerns in light of the principle of conferral therefore need to be rebutted.

Because of the nature of the development cooperation competence and its objectives, it is necessary to find an appropriate balance between conferral and coherence. The test used by the Court seems to strike a good balance. The first objectives-based criterion of the test confirms the broad notion of EU development cooperation policy and its objectives. By formulating the second criterion of the test as a content-based criterion, on the other hand, the Court limits the potentially too encompassing scope of development cooperation policy, causing concerns under both the principle of conferral and the institutional balance. The Court therefore balances the aim and content aspect of the choice of legal basis theory in relation to development cooperation policy, which leads in this case to a balanced scope of development cooperation policy.

It becomes clear that determining the scope of EU development cooperation policy is a precarious balancing act. Because of the nature of the competence and the formulation of the policy concept behind the competence, development cooperation policy has the risk of either being formulated too narrowly, with the risk of being confined to a mere principle of EU external action, or too broadly, possibly invading nearly any other area of EU external action. The latter might be the effect of applying the so-called 'centre of gravity test', a test commonly used by the Court to determine the choice of legal basis, in a too narrow sense to development cooperation policy (see below). With its potentially broad scope on the one hand, but its narrow one on the other hand, we might refer to the 'development cooperation paradox'. Because of this paradox it is a challenge for development cooperation policy to find its place in the general framework of EU external action. This will be further underlined in the next section, when discussing the delimitation between development cooperation policy and other areas of EU external action, environment and the CCP in particular. Both competences have a different demarcation towards the development cooperation competence: the relationship between development cooperation policy and environment is characterized by the dominance of development cooperation over the environmental competence, while the relationship between development cooperation policy and the CCP can rather be described by referring to the dominant role of the CCP.

3.1 The Delimitation with Environment and the Common Commercial Policy

The consequence of the abovementioned case-law formulated in *Portugal/Council* and *Philippines PCA* is that provisions on other areas of Union action such as on the environment, transport, migration, energy, intellectual property, tourism, culture and the control of drug abuse and presumably also on other areas can, within certain limits, fall under the scope of development cooperation policy. Remarkably, as will be further discussed in detail, this does not seem to be the case for the CCP.

Development cooperation and environmental protection are strongly intertwined issues as developing countries are disproportionately impacted by climate change and natural disasters, while lacking the resources to deal with the negative effects. They are also often particularly dependent on natural resources, aggravating their vulnerability to degradation and depletion of the environment. On the other hand, development and growth contribute to prosperity but they also cause environmental challenges.⁹² The concept of 'sustainable development' was launched by the World Commission on Environment and Development in the report *Our Common Future*, led by the former Prime minister of Norway, Gro Harlem Brundtland, and therefore also known as the Brundtland Commission.⁹³ This report had in turn significant influence on the 1992 Rio Declaration, which embedded development and environment further in the UN agenda.⁹⁴ The link

⁹¹ Opinion of AG Mengozzi, Case C-377/12, point 77.

⁹² Communication 'A decent life for all', p. 4.

⁹³ World Commission on Environment and Development, *Our Common Future*, www.un-documents.net, 1987.

⁹⁴ UN General Assembly, Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992)

between the environment and development was further confirmed in the MDGs, the seventh of which aims to ensure environmental sustainability. At the EU level the link is emphasized in all documents guiding the EU's vision on development. The European Consensus in particular builds on the MDGs and identifies the eradication of poverty in the context of sustainable development as the primary and overarching objective of EU development cooperation. Sustainable development with a view of eradicating poverty lies moreover at the heart of the discussions on the successor of the Millennium Development Goals, the Sustainable Development Goals (SDGs).⁹⁵ Poverty eradication is seen as an essential requirement for and one of the overarching objectives of sustainable development.⁹⁶ The EU not only claims to comply with the commitments and take account of the objectives approved in the context of the United Nations and other competent international organisations in line with Article 208(2) TFEU, but also argues to be one of the most committed partners in the formation of the post-2015 SDGs.⁹⁷

In the Treaties development cooperation and environment are linked through several articles. Firstly, since the entry into force of the Treaty of Lisbon, the link between EU external environmental policy and EU development cooperation policy is made explicit in Article 21(2) TEU. This article provides for the Union to define and pursue common policies and actions, and to work for a high degree of cooperation in all fields of international relations, in order to 'foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty' and to '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'.⁹⁸ Secondly, Article 208(1) TFEU reaffirms that Union policy in the field of development cooperation is to be conducted 'within the framework of the principles and objectives of the Union's external action'⁹⁹ and to 'comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations'.¹⁰⁰ These principles, objectives, and commitments all contain important environmental obligations.

Following the case-law in *Portugal v. Council* and *Philippines PCA*, provisions on environmental protection can, to a certain extent, be included in a development cooperation policy agreement, without the need to add the legal basis on environment. However, as soon as they reach the threshold of the second aspect of the test, an additional legal basis is needed. In the *Portugal v. Council* and *Philippines PCA* cases the Court applied a so-called 'centre of gravity' test in order to determine whether the use of the additional legal base was justified. The test formulated by the Court is the expression of the centre of gravity test. The determination of the essential object of the development cooperation measure refers to the identification of the main aim in the general theory, while the requirement that the specific provisions may not contain obligations so extensive that they in fact constitute distinct objectives refers to their incidental or secondary nature, which makes the environmental legal basis subordinate to the main development cooperation competence. The Court used more specifically a particular form of the centre of gravity test, 'the absorption doctrine' as identified by Maresceau: the main objective 'absorbs' the other provisions relating to distinct objectives.¹⁰¹

⁹⁵ Outcome document of the special event to follow up efforts made towards achieving the Millennium Development Goals, A/68/L.4, 1 October 2013; Synthesis Report of the Secretary-General on the post-2015 Agenda, The road to dignity by 2030: Ending poverty, transforming all lives and protecting the planet, 4 December 2014.

⁹⁶ Resolution adopted by the General Assembly, The future we want, A/RES/66/288, 27 July 2012, p. 2.

⁹⁷ Council Conclusions, The overarching post-2015 agenda, 25 June 2013, p. 1; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A decent life for all: from vision to collective action', COM(2014) 335 final.

⁹⁸ Art. 21(2)(d) and (f) TEU.

⁹⁹ Art. 208(1) TFEU.

¹⁰⁰ Art. 208(2) TFEU.

¹⁰¹ M. Maresceau, 'Bilateral agreements concluded by the European Community', *Académie de Droit International – Recueil des Cours* (2004) p. 156-157.

A crucial provision to understand the relationship between environment and development cooperation is Article 11 TFEU, which states that “Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development”. Article 11 TFEU therefore requires environmental protection measures to be integrated or ‘mainstreamed’ into the definition and implementation of the Union’s policies, in particular with a view to promoting sustainable development. Development cooperation and environmental protection therefore contain both an integration requirement. Environmental as well as development concerns have to be taken into account when conducting other policies. However, when comparing both integration requirements it becomes apparent that the wording of the requirement in the field of development cooperation policy is weaker (‘shall’, ‘take account’, ‘objectives’, ‘likely to affect developing countries’) than the one with regard to environmental protection (‘must’, ‘requirements’).¹⁰² It therefore seems that because of the strongly formulated environmental integration requirement, the Court accepts more easily the inclusion of environmental aspects in measures, without necessitating the addition of the environmental legal basis. Merely taking account of environmental concerns does not suffice to bring a measure under the environmental competence, as this is exactly what the environmental integration requirement demands. The Court’s case-law therefore seems to strike a fair balance between the development cooperation and the environmental competence: environmental provisions can form part of an international agreement under the development cooperation legal basis, as long as the obligations are not so extensive as to constitute distinct objectives. It corresponds, moreover, with the EU’s policy vision on the integration of environmental and development concerns.

The case is different with regard to trade provisions in development cooperation agreements. While the development cooperation legal basis can absorb provisions on other substantive areas of cooperation, provisions on trade appear to require their own CCP legal basis.¹⁰³ In *Portugal/Council*, Portugal had argued that then Article 113 TEC was ‘redundant as a legal basis for the conclusion of the Agreement’, as then Article 130y constituted ‘a sufficient basis for the provisions in the Agreement concerning commercial policy, since the principal objective of the Agreement is development cooperation and the Community possesses specific powers of action in the sphere of the common commercial policy’. The Court did not go into the point, arguing that the deletion of Article 113 EC would not influence the decision-making procedure and hence not the content of the act.¹⁰⁴ In *Philippines PCA* the scope of the development cooperation legal basis to cover other provisions was disputed, while the presence of the CCP legal basis was not the subject of the dispute. When examining Title III ‘Trade and Investment’ of the Framework Agreement with the Philippines, however, the provisions in this title do not seem to go beyond the test formulated to assess whether additional legal bases on environment, transport and readmission are necessary. The provisions on trade and investment do not seem to go beyond declarations on the aims and subjects of the cooperation and therefore do not contain obligations so extensive that they form distinct objectives. Another explanation must therefore be sought. The relationship between the CCP and development cooperation can be explained by both the specific nature of the CCP competence and by historical reasons.

Like development cooperation, the common commercial policy is characterized by a very broad scope. An EU act falls within the CCP 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.¹⁰⁵ In relation to the, likewise broad, development cooperation competence this leads

¹⁰² N. Schrijver, ‘When will the new emperor wear tis clothes? The efforts of the European Union towards a common development cooperation policy’, in M. Bulterman, L. Hancher, A. McDonnell, H. Sevenster (eds.), *Views of European law from the mountain: Liber Amicorum for Piet Jan Slot* (Kluwer 2009), p. 385.

¹⁰³ M. Maresceau, ‘Bilateral agreements concluded by the European Community’, *Académie de Droit International – Recueil des Cours* (2004), p. 176-177.

¹⁰⁴ Case C-268/94, paras. 78-79.

¹⁰⁵ Opinion 2/00, *Cartagena Protocol*, ECLI:EU:C:2001:664, para. 40; Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA*, ECLI:EU:C:2005:285, para. 75; Case C-411/06 *Commission v Parliament*

to the situation where the CCP is able to invade development cooperation, whereas development cooperation in turn is capable to do so in relation to other areas of cooperation, which is demonstrated by the *Philippines PCA* and the *Portugal/Council* cases. In *Opinion 1/78* the Court made it clear that a broad interpretation of the CCP should be maintained, as a restrictive interpretation would risk disturbing intra-Community trade.¹⁰⁶ Therefore, commodity agreements which regulate trade agreements drafted in the framework of UNCTAD and which also have a clear development cooperation aim, are covered by the CCP competence. Trade measures are said to be the clearest example of instruments which are used to attain aims which are incidental to the policies corresponding to their legal basis. Trade measures have been used to pursue development cooperation objectives (e.g. in the context of the Generalised System of Preferences) but also to attain environmental aims and foreign policy objectives.¹⁰⁷ As Eeckhout describes it: 'trade measures are trade measures, whatever the objectives pursued, even if their objective is wholly unrelated to commercial or economic considerations'.¹⁰⁸ It therefore seems that as soon as a development cooperation agreement contains provisions related to the CCP objectives - which it mostly does - the CCP legal basis needs to be added.¹⁰⁹

From a historical perspective, the CCP predates development cooperation as an express EU competence and the relationship between the EU and the developing countries has always been based on a trade and aid rationale. The EU agreements with developing countries can be categorized in different 'generations of agreements'. The 'first-generation' agreements contained only provisions on trade, whereas the 'second-generation' agreements extended to limited areas of economic cooperation as well, while the 'third-generation' agreements cover a variety of areas of cooperation, aimed at a comprehensive framework of cooperation.¹¹⁰ Before Maastricht these 'third-generation' agreements were based on the CCP and the flexibility clause, as an express development cooperation legal basis in the Treaties was lacking.¹¹¹ After the Maastricht Treaty they were based on the CCP and development cooperation legal bases.¹¹² The CCP legal basis was therefore consistently present in the agreements that the EU concluded with developing countries, which could provide another explanation why the provisions in international agreements on CCP bring about the addition of their own legal basis. Maresceau refers in this regard to the 'classical pattern' following which development cooperation policy agreements are traditionally based on both the development cooperation policy and CCP legal bases.¹¹³

and Council, ECLI:EU:C:2009:518, para. 71; Case C-137/12 *Commission v Parliament*, ECLI:EU:C:2013:675, para. 57.

¹⁰⁶ *Opinion 1/78, International Agreement on Natural Rubber*, ECLI:EU:C:1979:224, para. 45.

¹⁰⁷ M. Cremona, 'Coherence through law: What difference will the Treaty of Lisbon make?', 3 *Hamburg Review of Social Sciences* (2008), p. 20.

¹⁰⁸ P. Eeckhout, *EU external relations law*, (OUP 2011), p. 39.

¹⁰⁹ Maresceau, 'Bilateral agreements concluded by the European Community', *Académie de Droit International – Recueil des Cours* (2004), 170.

¹¹⁰ M. Maresceau, 'Bilateral agreements concluded by the European Community', *Académie de Droit International – Recueil des Cours* (2004),, p. 160-165, S. Peers, 'EC frameworks of international relations: Co-operation, partnership and association', in A. Dashwood, C. Hillion (eds.), *The general law of E.C. external relations* (Sweet & Maxwell 2000), p. 160-165.

¹¹¹ E.g.: Council Regulation (EEC) No 2616/85 of 16 September 1985 concerning the conclusion of a Trade and Economic Cooperation Agreement between the European Economic Community and the People's Republic of China; OJ L250 of 19/09/1985, p.1.

¹¹² E.g.: Council Decision of 23 February 1998 concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of Yemen; OJ L72 of 11/03/1998, p.17.

¹¹³ M. Maresceau, 'Bilateral agreements concluded by the European Community', *Académie de Droit International – Recueil des Cours* (2004), 176-177. There is, however, one example of a development cooperation agreement which is solely based on the development cooperation policy legal basis: Council Decision 2014/211/EU of 14 April 2014 on the conclusion on behalf of the European Union of the Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, of the other part, with the exception of Article 49(3) thereof (2014 OJ L111/4). It is, however, unclear why the CCP legal basis is absent.

4. Conclusion

The EU formulates its development cooperation policy as a multidimensional notion, which is interlinked with several other areas of EU (external) action. This inherent intertwinement brings about a reinforced demand for coherence in the area of development cooperation policy referred to as 'policy coherence for development'. This is more than a policy concept, as this demand for increased coherence is enshrined in the Treaty as well. Since the Treaty of Lisbon this coherence requirement is more firmly embedded in the constitutional structure of the EU, with the common external action objectives formulated in Article 21 (2) TEU and the specific demand for coherence in development cooperation policy in Article 208 TFEU. However, the scope of development cooperation policy is also governed by the principle of conferral, requiring the EU to act only within the limits of the competences conferred upon it. This entails that the legal development cooperation policy competence cannot simply invade all other areas of EU external action. Otherwise every measure taken towards a developing country would automatically fall under the scope of the development cooperation policy competence. This paper examined how the coherence-conferral relationship defines the scope of the development cooperation competence and how a balance is struck between both principles in defining the scope of EU development cooperation policy.

First, the Court does take account of the policy concept of what constitutes EU development cooperation policy, referring to policy documents in the area in order to support its definition of the legal scope of development cooperation policy. As the Court has applied this technique in several cases in this area, it seems that it considers this approach particularly relevant in development cooperation policy. Second, the Court does strike a balance between coherence demands and conferral restrictions when defining the legal scope of development cooperation policy, avoiding that the competence would be defined too narrowly or too broadly. The two-pronged test to determine the scope of development cooperation policy, its agreements in particular, developed in the case-law of the Court of Justice strikes a balance between coherence and conferral. The first objectives-based criterion of the test confirms the broad notion of EU development cooperation policy and its objectives, ensuring the need for coherence, as the development cooperation policy competence can cover other issues as well. By formulating the second criterion of the test as a content-based criterion, on the other hand, the Court limits the potentially too broad scope of development cooperation policy, avoiding that the development cooperation policy competence oversteps its limits and potentially invade nearly every other area of EU external action. The latter ensures respect for both the principle of conferral and the institutional balance.

The difficulty to ensure a balanced scope of the development cooperation competence is further illustrated by assessing its delimitation with two related areas of Union action: environment and the common commercial policy. Both these areas, however, relate differently to the development cooperation competence. The relationship between development cooperation policy and environment is characterized by the dominance of development cooperation over the environmental competence, as the development cooperation competence can, within certain limits, cover environmental protection provisions, which is the case in the agreement between the EU and the Philippines. With its balanced test, however, the Court ensures that 'pure' environmental measures taken vis-à-vis a particular developing country can still be based on the environmental protection competence, while avoiding that every measure taken towards a developing country would fall under the development cooperation competence. As pointed out while discussing the case-law on the scope of the development cooperation policy competence, the same is true for other areas of EU action as well, such as the protection of human rights, provisions on transport, energy, tourism, culture, intellectual property and even readmission of third country nationals. The limit of the invasion by development cooperation policy of other areas of EU external action can apparently be found with the CCP: while the development cooperation legal basis can absorb provisions in international agreements on other substantive areas of

cooperation, provisions on trade always seem to require their own CCP legal basis. Different explanations are possible but these can rather be found in the nature of the CCP itself, which is the dominant competence in relation to the development cooperation competence, or in historical and pragmatic reasons, rather than through applying the test on the choice of the development cooperation legal basis formulated by the Court. The scope of the EU external action competences is still the subject of inter-institutional disputes. The future case-law of the Court will therefore be of further use to determine the exact boundaries between the different areas of action, ensuring the fundamental principle of conferral, while the increased demands for coherent external action as inserted by the Treaty of Lisbon need to be respected as well.

APPENDIX: COLLOQUIUM PROGRAMME



ACIM
Institutions & Multilevel Politics
University of Antwerp



Interdisciplinary Doctoral Colloquium: The European Union as a Global Actor

8 May 2015, Leuven

Concept and Programme

1. Concept

Establishing the EU as a more visible, more effective and stronger global actor was one the key objectives of the Treaty of Lisbon, which has now been in force for more than five years. This has led the EU to take initiatives in many different areas of international law and relations. The area of EU external action has therefore increasingly been the subject of research in law and political science. This interdisciplinary doctoral colloquium aims to encompass different topics in this wide area of research. Doctoral researchers in law and political science will present their research in a conference style format. Guests from the European institutions and from academia have been invited to be discussants on the panels. The event is aimed to provide researchers with the opportunity to present their work among colleagues from different disciplines who are working on issues related to the EU's role as a global actor.



Vlaamse
overheid



2. Programme

PLENARY SESSION (Faculty of Law, DV3.01.13, Tiensestraat 41)

9.00-9.15: Welcome by Prof. Dr. **Jan Wouters**, KU Leuven

9.15-10.45: **Keynotes and discussion**

- *The Federalisation of EU External Competences after Lisbon*
Prof. Dr. **Piet Eeckhout**, University College London
- *The EU in International Trade: A Tale of Multilateralism, Bilateralism and Unilateralism*
Prof. Dr. **Sieglinde Gstöhl**, College of Europe

10.45-11.00: **Coffee and tea break**

PARALLEL PANEL SESSIONS (GGS, Meeting Room Dorlodot / Seminar Room Premonstreit)

11.00-12.15: **Panel 1: The EU as a Trade Actor** (Premonstreit)

Chair: Prof. Dr. **Bart Kerremans**, KU Leuven

Discussants: **James Flett**, European Commission, Legal Service and Prof. Dr. **Sieglinde Gstöhl**, College of Europe

- *The Transparency-Secrecy Trade-off in EU Trade Policy: Explaining Informalisation and Transparency in EU Decision-making on International Negotiations*
Evelyn Coremans, KU Leuven (doctoral seminar)
- *A Comparison of Trade Policy-Making in Federations*
Christian Freudsperger, Berlin Graduate School for Transnational Studies

Panel 2: The EU as a Sustainable Actor (Dorlodot)

Chair: Prof. Dr. **Geert Van Calster**, KU Leuven

Discussants: Prof. Dr. **Morten Broberg**, University of Copenhagen and Dr. **Simon Schunz**, College of Europe

- *The EU & Fair Trade: Mapping the field*
Deborah Martens, Ghent University
- *The EU's External Forest Policy in the International Forest Regime Complex*
Pauline Pirlot, Université catholique de Louvain
- *The EU as a Global Environmental Actor: Extraterritoriality and Climate Change*
Natalie Dobson, Utrecht University

12.15-13.15: **Lunch**

13.15-14.45:	<p>Panel 3: The EU as a Development and Security Actor (Premonstreit)</p> <p>Chair: Prof. Dr. Peter Van Elsuwege, Ghent University</p> <p>Discussants: Prof. Dr. Cedric Ryngaert, Utrecht University, Yole Tanghe, KU Leuven and Matthieu Burnay, KU Leuven</p> <ul style="list-style-type: none"> ▪ <i>The Odd One Out: The Legal Scope of EU Development Cooperation Policy</i> Tina Van den Sanden, KU Leuven (doctoral seminar) ▪ <i>The EU and the Security-Development Nexus: Bridging the Legal Divide</i> Hans Merket, Ghent University 	<p>Panel 4: The EU as an Investment Actor (Dorlodot)</p> <p>Chair: Prof. Dr. Hans van Houtte, KU Leuven</p> <p>Discussants: Prof. Dr. Geert Van Calster, KU Leuven, Prof. Dr. Dirk De Bièvre, University of Antwerp, and Nicolas Hachez, KU Leuven</p> <ul style="list-style-type: none"> ▪ <i>Understanding the history of investment protection to better understand the challenges of the EU's investment competence</i> Govert Coppens, KU Leuven (doctoral seminar) ▪ <i>The EU as an Actor in Investor-State Dispute Settlement</i> Hannes Lenk, University of Gothenburg
14.45-16.00:	<p>Panel 5: The Law of the EU as an International Actor (Premonstreit)</p> <p>Chair: Prof. Dr. Geert De Baere, KU Leuven</p> <p>Discussants: James Flett, European Commission, Legal Service and Prof. Dr. Peter Van Elsuwege, Ghent University</p> <ul style="list-style-type: none"> ▪ <i>Constructing a Dam to Resist a River Bursting its Banks: Looking for the Borders of the EU's External Competence in the Field of IP</i> Yole Tanghe, KU Leuven ▪ <i>European Union Competence on Foreign Investment: Limitations of the Past and Future</i> Dominik Moskvan, University of Antwerp ▪ <i>The EU and Member States International Agreements</i> Stefano Saluzzo, University of Palermo 	<p>Panel 6: The EU as a Social Actor (Dorlodot)</p> <p>Chair: Prof. Dr. Jan Orbie, Ghent University</p> <p>Discussants: Prof. Dr. Simon Schunz, College of Europe, and Prof. Dr. Dirk De Bièvre, University of Antwerp</p> <ul style="list-style-type: none"> ▪ <i>The Framing of 'Social Trade': Labour Issues under the EU-Colombia/Peru Free Trade Agreement</i> Lore Van den Putte, Ghent University ▪ <i>The External Conditions of the EU as a Global Actor: Interactions with China on Social Issues</i> Hang Yuan, Ghent University ▪ <i>The EU as a Coordinator in Global Health: Towards Convergence or Complementarity?</i> Lies Steurs, Ghent University
16.00-16.15:	Coffee and Tea Break	

16.15-17.30:

Panel 7: The EU as a Human Rights Actor (Premonstreit)

Chair: Prof. Dr. **Jan Wouters**, KU Leuven

Discussants: Prof. Dr. **Piet Eeckhout**, University College London, and Prof. Dr. **Morten Broberg**, University of Copenhagen and Dr. **Frederik Naert**, Legal Service of the Council

- *Assessing the EU's Role at the UN Human Rights Council*
Anna-Luise Chané and **Arjun Sharma**, KU Leuven
- *"Europeanization" of international human rights law: sanctions as a case study*
Isabella Querci, Università degli Studi di Genova
- *Spring as a New Beginning? An Investigation into the EU's Sanctions Practice Following the Arab Spring*
Andreas Boogaerts, KU Leuven

Panel 8: The EU as a Normative Power (Dorlodot)

Chair: Prof. Dr. **Stephan Keukeleire**, KU Leuven

Discussants: Dr. **Ricardo Passos**, Director of the Legal Service of the European Parliament and **Dr. Kolja Raube**, KU Leuven

- *Beyond Parliamentarisation: Towards a Conceptual Framework for the Study of the European Parliament's Diplomacy*
Daan Fonck, KU Leuven (doctoral seminar)
- *The Extraterritorial Effects of EU Data Protection Law in the Data Protection Directive and the Proposed General Data Protection Regulation*
Mistale Taylor, Utrecht University

CLOSING PLENARY (Premonstreit)

17.30-18:30:

Discussion of Findings from the Panels by **Jed Odermatt** and Dr. **Kolja Raube**, KU

Leuven Concluding Remarks by Prof. Dr. **Stephan Keukeleire**, KU Leuven

Reception (Dorlodot)





KU LEUVEN



The **Leuven Centre for Global Governance Studies** is an interdisciplinary research centre of the Humanities and Social Sciences recognized as a Centre of Excellence at the KU Leuven. It hosts researchers from law, economics, political science, history, philosophy and area studies. The Centre initiates and conducts interdisciplinary research on topics related to globalization, governance processes and multilateralism, with a particular focus on the following areas: (i) the European Union and global governance; (ii) human rights, democracy and rule of law; (iii) trade and sustainable development; (iv) peace and security; (v) global commons and outer space; (vi) federalism and multi-level governance; (vii) non-state actors and emerging powers. It hosts the InBev Baillet-Latour Chair EU-China and the Leuven India Focus.

In addition to its fundamental research activities the Centre carries out independent applied research and offers innovative policy advice and solutions to policy-makers.

In full recognition of the complex issues involved, the Centre approaches global governance from a multi-level and multi-actor perspective. The multi-level governance perspective takes the interactions between the various levels of governance (international, European, national, subnational, local) into account, with a particular emphasis on the multifaceted interactions between the United Nations System, the World Trade Organization, the European Union and other regional organizations/actors in global multilateral governance. The multi-actors perspective pertains to the roles and interactions of various actors at different governance levels, which includes public authorities, formal and informal international institutions, business enterprises and non-governmental organizations.

For more information, please visit the website www.globalgovernancestudies.eu

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