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The interactions between the legislature and the judiciary in EU external relations

GEERT DE BAERE AND PANOS KOUTRAKOS

1 Introduction

This chapter explores the relationship between the judiciary and the legislature within the external relations of the European Union. It does so from two angles: on the one hand, it focuses on the interactions between the Court of Justice of the European Union (CJEU) and the drafters of the Treaties, the Union's primary law, and, on the other hand, it examines the interactions between the Court and the legislature proper, that is the institutions which adopt secondary legislation. In the context of the Union's external relations, this broad understanding of the term 'legislature' is necessary: the very genesis of this area of law owes its existence to the Court's creativity against the paucity of references to external action in primary law; as for the central position of external relations in the current constitutional arrangements, it is due to the gradual adjustment of the Treaties to the evolving legal landscape as shaped by case law. The analysis is structured in two parts. The first part examines the interactions between the judiciary and the masters of the Treaties and analyses the manner in which the CJEU's construction of the common commercial policy (CCP) and the Treaty drafters' reactions to that construction have moulded that policy into the bedrock of EU external relations that it is today. It also assesses how the CJEU reacted to the sparseness of explicit external relations competences in the original Treaty establishing the European Economic Community (EEC) by devising a doctrine of implied competences, which has been codified in the Treaty on the Functioning of the European Union (TFEU) after Lisbon. The second part focuses on three specific areas of EU external relations (investment, aviation, civil justice) and examines the procedural frameworks which the legislature has introduced (or suggested) in response to the Court's case law on competence. It explores the implications of the

legislature's responses for the management of the external competence of the Union, and the challenges these raise for both the Union and the Member States.

2 The interaction between the masters of the Treaty and the Court of Justice in EU external relations

The relationship between the judiciary and the legislature takes on a singular character when it appears in the guise of the interaction between the CJEU and the masters of the Treaty or the Treaty drafters, the '*noms de plume*' of the Member States. While the Court has the jurisdiction both to interpret and to assess the validity of Union acts adopted on the basis of the Treaties, its jurisdiction vis-à-vis the Treaties themselves is limited to interpretation. However, through its interpretation of Treaty norms, the Court can significantly affect their application without the 'legislature', in this case the Treaty drafters, being able to react easily. The cumbersome procedure to amend the Treaties[1] makes legislative 'correction' of the Court's interpretation of Treaty norms difficult and hence rare.[2] Even so, the interaction between the Court's interpretation and the eventual reaction by the Treaty drafters (through varying degrees of codification and correction) to these evolving interpretations have at times gradually but comprehensively shaped the external relations law of the EU.

That important role of the CJEU was partially the consequence of the fact that the original EEC Treaty contained few express external relations legal bases. It was, for example, clear from the outset that Article 9(1) EEC[3] on the customs union would have to be complemented by other provisions on external relations if that customs union or the common market was ever to work.[4] These other provisions were to be found in the chapter on the CCP.[5] In particular, Article 113(1) EEC provided that, after the expiry of a transitional period, the CCP was to be based on 'uniform principles, particularly in regard to tariff amendments, the conclusion of tariff or trade agreements, the alignment of measures of liberalisation,

1 Presently laid down in Article 48 TEU.

2 *Cf.* K. Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press, 2009), pp. 124–32.

3 Which became Article 23(1) EC and is now Article 28(1) TFEU.

4 *Cf.* M. Cremona, 'The External Dimension of the Single Market: Building (on) the Foundations', in C. Barnard and J. Scott (eds.), *The Law of the Single European Market: Unpacking the Premises* (Oxford and Portland, OR: Hart Publishing, 2002), p. 351; P. Eeckhout, *EU External Relations Law* (Oxford University Press, 2nd edn, 2011), p. 12.

5 Articles 110–16 EEC, which became Articles 131–4 EC and are now Articles 206–7 TFEU.

export policy and protective commercial measures including measures to be taken in cases of dumping or subsidies'. The rest of Article 113 EEC contained rather limited procedural provisions for the internal and external implementation of the CCP. Significantly, the Court held 'the proper functioning of the customs union' to justify 'a wide interpretation of [*inter alia*, Article 113 EEC] and of the powers which these provisions confer on the institutions to allow them thoroughly to control external trade by measures taken both independently and by agreement'.[6] It is through the interpretation of the Treaty provisions on the CCP in general, but of the simultaneously terse and fundamental Article 113 EEC in particular, that the CJEU shaped the CCP.

Furthermore, all the Articles in the EEC Treaty referring to external relations specifically granted the Community a competence that could only be exercised on the external plane, as opposed to external complements of internal competences.[7] This implies that none of the core legal bases in policy areas fundamental for the full articulation of the common market were expressly equipped by the EEC Treaty with any possibility for external action. Attempts to address this lack of explicit legal bases for external action were made in two ways: by Treaty amendment and through creative interpretation by the CJEU of the existing Treaty provisions, such as to make a viable external policy in a number of areas possible. The latter results in what is mostly referred to as 'implied external competences'.

The interaction between the Court and the Treaty drafters as regards the CCP and the doctrine of implied competences will now be examined in turn.

2.1 The shaping of the common commercial policy

2.1.1 The foundations

The Court's reaction to the not very helpful Article 113 EEC was to define the CCP in a manner that was both wide and dynamic in Opinion 1/75. The Court held the concept of 'commercial policy' to have 'the same content whether it is applied in the context of the international action of a state or to that of the Community' and affirmed international trade practice as a factor for determining the scope of the CCP,[8] thereby

6 Case 8/73 *Hauptzollamt Bremerhaven* v. *Massey Ferguson* [1973] ECR 897 at [4].

7 *Cf.* A. Dashwood, 'The Attribution of External Relations Competence', in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000), p. 121.

8 Opinion 1/75 [*OECD Local Cost Standard*] [1975] ECR 1355, at 1362–3.

confirming its essential flexibility and positioning itself as the ultimate arbiter of that scope.[9]

However, the Court also held that the CCP 'is conceived . . . in the context of the operation of the Common Market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other'. The Court took the view that this conception was incompatible with a concurrent power for the Member States.[10] The Court held that unilateral action by the Member States would inevitably lead to disparities in the conditions for the grant of export credits. This would distort competition between undertakings of the various Member States in external markets. It would also endanger the entire internal market structure of the Community.[11]

It does not follow necessarily from the fact that the Member States would retain competences in external trade concurrently with the Community that they would not act in accordance with the Community's common interest, though, of course, they could. The Court's conclusion that the Community was exclusively competent with regard to external trade is nonetheless sound from a legal, political and economic perspective.[12] Why, however, did the Court conclude that *a priori* exclusivity was necessary for the CCP instead of relying on the *ERTA* principle, the application of which leads to a competence becoming exclusive through the Community exercising it?[13] In other words, why did the Court believe that it needed to exclude *a priori* and in principle Member States' competence regardless of whether the Community's competence in the CCP had been exercised? The answer lies in the nature of the activity. It is impossible to have a properly functioning single market if the Member States are free, in the absence of legislation at the Union level, to enter into international agreements with third countries. In Opinion 1/75, the Court based its reasoning on the notion of 'common interest of the Community', which leads to the question why this interest could not be sufficiently protected by application of the *ERTA* principle. The Court could have made this

9 P. Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing, 2006), p. 34.

10 Opinion 1/75, n8 above, at 1363–4.

11 See P. Eeckhout, *The European Internal Market and International Trade: A Legal Analysis* (Oxford University Press, 1994), pp. 186–246.

12 See Eeckhout, n4 above, at p. 17, pointing out that the Court could also have found support in Article XXIV:(8)(a) General Agreement on Tariffs and Trade, 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700 (GATT(1947)).

13 Derived from Case 22/70 *Commission* v. *Council ('ERTA')* [1971] ECR 263. See further below.

question redundant by clearly spelling out the pragmatically convincing argument that once the Community is a single market, it has to have an exclusive CCP.[14]

The dynamic nature of the CCP was further elaborated in Opinion 1/78. There, the Court adapted the CCP to the fact that international trade was increasingly based on regulation rather than pure liberalisation, holding that a more restricted CCP 'would be destined to become nugatory in the course of time'. Moreover, it explicitly referred to the importance of the CCP for the internal market by holding that a restrictive interpretation of the concept of CCP would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.[15] In Opinion 1/78, therefore, the Court proved that it was serious about the dynamic nature of the CCP as expounded in Opinion 1/75, and drew the conclusions from the evolution in external trade regulation for the scope of the CCP.[16] However, the Court equally displayed the necessary pragmatism. In Opinion 1/78, it reasoned that, if the financing was to be done by the Member States, that would imply their participation in the decision-making machinery or, at least, their agreement with regard to the arrangements for financing envisaged and consequently their participation in the agreement together with the Community. In that case, the competence of the Community could not be exclusive.[17] Furthermore, in *Donckerwolke*, while explicitly affirming the link between the CCP and the common market, the Court also acknowledged that the fact that at the expiry of the transitional period the CCP was not fully achieved implied a flexible approach to the principle of uniformity.[18]

2.1.2 From Maastricht via Opinion 1/94 to Amsterdam

During the negotiations leading up to the Maastricht Treaty and against the background of the Uruguay Round negotiations, the Commission had

14 G. De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008), at pp. 41–2.

15 Opinion 1/78 [*International Agreement on Natural Rubber*] [1979] ECR 2871, at [43]–[45].

16 See also Case 45/86 *Commission* v. *Council* [1987] ECR 1493, at [16]–[19].

17 Opinion 1/78, n15 above, at [60]. Compare, however, Opinion 1/94 [*Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*] [1994] ECR I-5267, at [21].

18 Case 41/76 *Donckerwolke and others* v. *Procureur de la République and Others* [1976] ECR 1921, at [27]–[29].

put forward very ambitious proposals for amendments to the Treaty in the field of the CCP. These proposals included an extension of the CCP (which was to be renamed 'external economic policy') to cover the external aspects of trade in services, intellectual property, capital, investment, establishment and competition policy. Significantly, the Commission took the view that this was intended not as a change of the scope of the CCP, but as a necessary codification of the Court's case law, or at least of the dynamic aspect of that case law. These proposals were, however, never truly taken seriously by the Member States, which left the scope of the CCP largely untouched except for services closely related to trade. By the same token, their unwillingness to adopt the Commission's proposed codification of the Court's case law showed the disagreement among the Member States over the scope of that case law.

After the disappointment of the Maastricht Treaty, the Commission arguably attempted to achieve judicially what it had not been able to achieve at the intergovernmental conference (IGC): the extension of the CCP essentially to encompass all matters covered by the WTO Agreements and more particularly all trade in services and all aspects of trade in intellectual property rights contained in the TRIPS Agreement.[19] The Commission therefore requested an Opinion of the Court pursuant to Article 228(6) EC (now Article 218(11) TFEU) on whether or not the Community had exclusive competence to conclude the Multilateral Agreements on Trade in Goods, insofar as those Agreements concern ECSC products and Euratom products. The Commission's questions further related to the exclusive competence the Community may enjoy by virtue of either Article 113 EC, or the parallelism of internal and external competence, or Articles 100a or 235 EC,[20] to conclude GATS and TRIPS.[21] The following will focus on the contentious issues as regards the competence to conclude GATS and TRIPS.

The Commission based its plea for exclusivity on the fact that in certain developed countries the services sector had become the dominant sector of the economy. The Court, however, drew from 'this trend in international trade' and from the open nature of the CCP the more cautious conclusion that trade in services could not 'immediately, and as a matter

19 M. Cremona, 'EC External Economic Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders', in J. H. H. Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* (Oxford University Press, 2000), pp. 8–9.

20 Now Articles 114 and 352 TFEU, respectively. 21 Opinion 1/94, n17 above, at [1].

of principle, be excluded from the scope of Article 113'. The Court then relied specifically on Article I:(2) of GATS, according to which trade in services is defined, for the purposes of that agreement, as comprising four modes of supply of services. As regards cross-frontier supplies (mode 1), the Court held that because neither the supplier nor the consumer move to the other's country, that situation was not unlike trade in goods, which was unquestionably covered by the CCP. There was thus no particular reason why such a supply should not fall within the CCP. However, the Court excluded from the CCP the other three modes of supply of services covered by GATS, namely, consumption abroad, commercial presence and the presence of natural persons.[22] As regards TRIPS, the Court was concerned that an exclusive competence to conclude the agreement might distort the internal institutional balance. It noted that, since TRIPS lays down rules in fields in which there were no Community harmonisation measures, its conclusion would have made it possible at the same time to achieve harmonisation within the Community and thereby to contribute to the establishment and functioning of the common market. If the Community were to be recognised as having exclusive competence to enter into agreements with non-Member countries to harmonise the protection of intellectual property and, at the same time, to achieve harmonisation at Community level, the Community institutions would be able to escape the internal institutional constraints.[23] The Court was therefore acutely aware of the potential implications of the exclusivity of an external policy on the corresponding internal policies.[24] At the hearing, the Commission drew the Court's attention to the problems which would arise if the Community and the Member States were recognised as sharing competence to participate in the conclusion of GATS and TRIPS. It referred to interminable discussions on competence and to the Community's unity of action vis-à-vis the rest of the world being undermined and its negotiating power greatly weakened. The Court, however, held that that concern was 'quite legitimate', but emphasised that any problems which might arise in implementation of the WTO Agreement and its Annexes as regards the co-ordination necessary to ensure unity of action where the Community and the Member States participate jointly could not modify the answer to

22 *Ibid.*, at [40]–[47]. 23 *Ibid.*, at [58]–[60].

24 P. Koutrakos, 'The Elusive Quest for Uniformity in EC External Relations' (2001) 4 *The Cambridge Yearbook of European Legal Studies* 250. *Cf.* Cremona, n4 above, at p. 353 arguing that the Court here asserted its credentials as a constitutional court concerned to ensure that 'the law is observed'.

the question of competence, that being a prior issue. Crucially, resolution of the issue of the allocation of competence could not depend on problems which might possibly arise in administration of the agreements.[25] It therefore rejected any reliance on the practical difficulties that might arise for the Union within the WTO framework as a ground for a wider interpretation of the CCP. It would do so again in Opinion 2/00[26] and in Opinion 1/08.[27]

While Opinion 1/94 was strongly criticised by quite a few commentators,[28] the Court was arguably merely performing its role as a constitutional adjudicator and placing the CCP within the context of the overall system of EU external relations.[29] It was probably reluctant to effect through judicial pronouncement rather than political decision-making what it perceived to be a significant transfer of competences from the Member States to the Community. The Court not only recognised the Member States' sensitivity as regards the movement of persons across frontiers, but equally confirmed that the Treaty can only be changed by the Member States and not by the Court.

The Court had thus displayed judicial caution in Opinion 1/94. Nevertheless, the drafters at the Amsterdam IGC decided they did not wish to gamble over whether on a future occasion the Court might reach a different solution based, for example, directly on the evolution of international trade law. They took no chances and wrote the exclusion of intellectual property and certain categories of services into Article 133(5) EC, with a possibility for the Council to integrate them into the regular CCP, thereby shifting the power to take into account possible evolutions in international trade law from the Court to the Treaty drafters and, partially, to the Council.[30] Article 133(5) EC in its Amsterdam version indicated a degree of willingness of the Member States to respond to challenges highlighted by the Court in Opinion 1/94.[31] Nonetheless, it also indicated the discomfort of the Member States with the precise limits of the scope of the CCP, in particular as regards agreements covering certain categories of services and intellectual property rights.

25 Opinion 1/94, n17 above, at [106]–[107].
26 Opinion 2/00 [*Cartagena Protocol*] [2001] ECR I-9713, at [41].
27 Opinion 1/08 [*GATS Schedules*] [2009] ECR I- 11129, at [127].
28 Notably P. Pescatore, '*Opinion 1/94* on the Conclusion of the WTO Agreement: Is there an Escape from a Programmed Disaster?' (1999) 36 *Common Market Law Review* 387.
29 Koutrakos, n9 above, at pp. 47–8.
30 Cremona, n19 above, at pp. 11–13 and 18–19.
31 Koutrakos, n9 above, at p. 60.

2.1.3 From Nice via Opinion 1/08 to Lisbon

The Member States' unease eventually produced the rather cabalistic amendments made to Article 133 EC by the Nice Treaty. The amendments were again meant to take into account the evolution in international trade as reflected in the case law of the CJEU, but they did so in a disconcertingly cryptic manner. The Court was given the opportunity to let its light shine on the matter in Opinion 1/08, rendered on 30 November 2009, the day before the provisions at issue would become defunct through the entering into force of the Lisbon Treaty. The Commission had requested the Opinion of the Court on the conclusion of agreements under GATS concerning the modification and withdrawal of certain commitments and the provision of certain compensations necessary as a result of the enlargement of the EU. The Court was consulted on whether the conclusion of the agreements at issue with the affected WTO members fell within the sphere of exclusive competence of the Community or within the sphere of shared competence of the Community and the Member States and on the appropriate legal basis for the act concluding those agreements.

In its submissions, the Commission argued that the agreements at issue fell within the CCP and, therefore, within a sphere of Community competence, which is by definition exclusive. That policy, the Commission continued, is 'open and dynamic' and requires 'constant adjustment to take account of any changes of outlook in international relations, and requires a non-restrictive interpretation so as not to become nugatory in the course of time'. What about the fact that the Court had clearly held in Opinion 1/94 that only services provided under 'mode 1' fell within exclusive Community competence in commercial matters? In a rather adventurous interpretation of Article 133 EC in its post-Nice form, the Commission argued that the Court's dicta in Opinion 1/94 had been superseded in view of the changes made by the Treaty of Nice.[32] In other words, the Court did not need to adapt the scope of the CCP to the evolution of international trade purely on its own motion: the drafters of the Treaty of Nice had done most of the work for the Court. That interpretation appeared rather difficult to sustain. Indeed, the Member States in Nice had specifically moved away from the conception of the CCP as a wholly exclusive policy by adding aspects that would clearly fall within non-exclusive competences and by heavily circumscribing the

32 Opinion 1/08, n27 above, at [44]–[48].

competence conferred.[33] At the heart of this issue was the question whether the participation of the Member States was necessary, which depended, *inter alia*, on 'whether, by virtue of the amendments made to Article 133 EC by the Treaty of Nice, external Community competence has evolved in such a way as to justify the Community alone concluding the agreements at issue'.[34]

The Court did not accept the Commission's arguments. It concluded that the conclusion of the agreements fell within the sphere of shared competence of the European Community and the Member States, and that the Community act concluding those agreements had to be based on Article 133(1), (5) and (6), second subparagraph, EC[35] and on Articles 71 TEC and 80(2) EC,[36] in conjunction with Article 300(2) and (3), first subparagraph, EC. The Court made a point of explicitly affirming that it was necessary to preserve for the Member States an effective external competence in the particularly sensitive areas of culture, education and social and human health services, in accordance with the specific provisions of Article 133(6) EC.[37]

Opinion 1/08 therefore features the Court as a constitutional court willing to adjudicate on the vertical division of competences,[38] as it had done, for example, in Opinion 1/94 and indeed in the first *Tobacco Advertising* judgment.[39] Those decisions convey the key point that Union competence in the internal market and in the CCP is subject to limitations.[40] Furthermore, the Court shows its willingness to put aside considerations of optimal unified external representation in external trade when the constraints thereon are imposed by the Treaties. As Advocate General Kokott put it in her Opinion in the *Vietnam's Accession to the WTO* case: 'No doubt this legal position is not exactly conducive to the effective representation

33 Koutrakos, n9 above, at p. 71; M. Cremona, 'Balancing Union and Member State Interests: Opinion 1/2008, Choice of Legal Base and the Common Commercial Policy under the Treaty of Lisbon' (2010) 35 *European Law Review* 679.

34 Opinion 1/08, n27 above, at [116].

35 Article 133(1)–(4) EC contained the core exclusive parts of the CCP, while Article 133(5)–(6) concerned the new non-exclusive aspects, i.e. trade in services and the commercial aspects of intellectual property.

36 On transport policy.

37 Opinion 1/08, n27 above, at [139].

38 See E. Sharpston and G. De Baere, 'The Court of Justice as a Constitutional Adjudicator', in A. Arnull, C. Barnard, M. Dougan and E. Spaventa (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford and Portland, OR: Hart Publishing, 2011), p. 123.

39 Case C-376/98 *Germany* v. *Parliament and Council* [2000] ECR I-8419.

40 Koutrakos, n24 above, at 264.

of Community interests in the area of external trade, particularly and precisely in the framework of the WTO. However, this disadvantage must be accepted as the Treaties stand at present', adding that in 'interpreting Treaty provisions, the Court may not exceed the limits on amending the Treaties laid down by Article 48 EU'.[41] While rather obvious, it is also a crucial point to make if one is to understand the Court's approach towards the CCP.

Remarkably, none of Opinions 1/94, 2/00 or 1/08 contain a reference to the parallelism between the CCP and the external trade policy of a State, as Opinion 1/75 and the earlier case law had done. Has the Court abandoned the idea of a dynamic and flexible CCP able to adapt to developments in international trade? Arguably, it has not. The CCP's dynamic development requires accommodating developments in international trade and maintaining loyalty to the EU's constitutional principles. Effectively, the Court has displayed judicial pragmatism, adapting principles to subsequent internal and external evolutions.[42] Moreover, the Court's case law on implied external competences[43] had given rise to an external relations policy comprehensive enough for the Court to see a less pressing need further to buttress the CCP. In Opinion 1/08, the Court showed that it understood the Nice amendments to Article 133 EC as a reaction to Opinion 1/94 by the creation of a set of rules different from the general CCP system.[44] If the position was to be altered, it was to be done by the

41 Opinion of AG Kokott in C-13/07 *Commission* v. *Council*, removed from the register on 10 June 2010, at [124]. On the limits of what the Court can achieve through interpretation, see also: Case C-354/04P *Gestoras Pro Amnistía and Others* v. *Council* [2007] ECR I-1579, at [50], and Case C-355/04 *SEGI and Others* v. *Council* [2007] ECR I-1657, at [50]: 'While a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties can indeed be envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU'; and, very similarly, Case C-50/00 P *Unión de Pequeños Agricultores* v. *Council* [2002] ECR I-6677, at [45]: 'While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.' More in general on the proper limits of the judicial role, see, for example, the Opinions of Advocate General Sharpston in Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, at [91]–[95], and in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000, at [171]–[173].

42 Koutrakos, n9 above, at pp. 55 and 59. 43 See below.

44 Cremona, n33 above, at 691. *Cf.* also M. Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy After Nice' (2001) 4 *The Cambridge Yearbook of European Legal Studies* 89, noting that for many commentators, the Nice redraft's acceptance and reflection of Opinion 1/94 constituted the fundamental flaw in its approach.

Member States through an amendment of the Treaty and not by the Court through interpretation of it. That is precisely what happened at Lisbon.

Article 207 TFEU considerably expands the Union's exclusive competence in the CCP, and appears to be intended to cover essentially the full scope[45] of the WTO covered agreements.[46] Not only 'trade in goods and services, and the commercial aspects of intellectual property' are now covered, but also 'foreign direct investment'. Noteworthy is also the fact that one of the (limited) categories of cases in which the Council is to act unanimously under Article 207 TFEU, viz. for the negotiation and conclusion of agreements 'in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them',[47] appears to be inspired by the Court's internal market case law on the relevant aspects of freedom of movement for persons.[48] It is, however, specified that the exercise of the competences within the sphere of the CCP cannot affect the delimitation of competences between the Union and the Member States, nor will it lead to harmonisation of the law of the Member States insofar as the Treaties exclude such harmonisation.[49]

Article 3(1)(a) TFEU declares the original core of the Community, the customs union, to be an exclusive competence of the Union. The CCP is similarly listed among the Union's exclusive competences in Article 3(1)(e) TFEU, which thereby codifies the Court's settled case law on the matter. The Treaty of Lisbon also codifies the extensive and complex case

45 With the notable exception of transport: Article 207(5) TFEU.

46 P.-C. Müller-Graff, 'The Common Commercial Policy Enhanced by the Reform Treaty of Lisbon?', in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, 2008), at pp. 188–201. Further on the mutual adaptation of the EU and the WTO and the Court's role in that process: G. De Baere and I. Van Damme, 'Co-adaptation in the International Legal Order: The EU and the WTO', in J. Crawford and S. Nouwen (eds.), *Select Proceedings of the European Society of International Law*, Vol. 3, 2010 (Oxford and Portland, OR: Hart Publishing, 2012) at pp. 311–325.

47 Art 207(4), third subparagraph, sub (b) TFEU.

48 See, for example, Case C-490/09 *Commission* v. *Luxembourg* [2011] ECR I-0000, at [43] and the case law cited there. *Cf.* S. Adam and N. Lavranos, 'Opinion 1/08 of the Court (Grand Chamber), *Schedules of specific commitments – Conclusion of agreements on the grant of compensation for modification and withdrawal of certain commitments following the accession of new Member States to the European Union,* 30 November 2009, not yet reported' (2010) 47 *Common Market Law Review* 1538.

49 Article 207(6) TFEU.

law of the Court of Justice as regards implied external competences. It is to that aspect that the present chapter now turns.

2.2 The codification of the implied external competences case law

Recognising that a strict interpretation of the Treaty would not suffice for the attainment of the ambitious market integration goals that the Community had set itself, the Court inferred the necessary external competences from the wording of the Treaty provisions regulating internal Community action. It did so mainly on the basis of two principles.[50] First, the *ERTA* principle, which follows the logic of the principle of primacy: the Member States are not allowed to act internationally in a way that would affect existing EU law, because the situation cannot be remedied by merely disapplying the infringing national rule. The Member States' competence is thus excluded, which necessitates the existence of EU competences to compensate for the Member States' inability to act. Second, whenever EU law has conferred internal competences on the institutions to attain a specific objective, the Union can enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect.[51] This is the case when the internal Union competences cannot reasonably be expected to be effectively exercised without the possibility for the Union to enter into international agreements with third countries on the same subject-matter.

The TFEU has attempted to codify the body of case law on the existence and the nature of implied external competence. Article 216 TFEU provides that the Union may conclude an agreement with one or more third countries or international organisations (1) where the Treaties so provide or (2) 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'. The first part of this provision is therefore a (rather unnecessary) confirmation of the fact that, if the Treaties provide for the possibility to conclude an international agreement, such an agreement is indeed possible, while the second part is a codification of the Court's case law on the existence of implied external competences. As a codification, it is lacking in nuance

50 See De Baere, n14 above, at pp. 16–29.

51 Opinion 1/76 [*Draft Agreement establishing a European laying-up fund for inland waterway vessels*] [1977] ECR 741, at [3].

and does not capture the subtlety and the dynamic aspect of the Court's incrementally developed competence analysis.[52] The same can be said of Article 3(2) TFEU, which is intended as a codification of the Court's case law on the nature (exclusive or not) of implied external competences. It provides that the Union will have exclusive competence for the conclusion of an international agreement in three circumstances: (1) when its conclusion is provided for in a legislative act of the Union; or (2) when its conclusion is necessary to enable the Union to exercise its internal competence; or (3) insofar as its conclusion may affect common rules or alter their scope.

The first of these might seem uncontroversial, but closer inspection reveals its potentially problematic character. Does the wording mean that *any* international agreement, the conclusion of which is provided for in a legislative act of the Union, would automatically give the Union *exclusive* competence for its conclusion, even if the legislative act does not provide explicitly for this competence to be exclusive? Surely, this cannot count in the case of an agreement pursuant to a legislative act on development co-operation and humanitarian aid, for which the TFEU explicitly provides that the Member States should retain their competence.[53] Problems continue with the second instance of external competence, which is said to arise when the conclusion of an international agreement is 'necessary to enable the Union to exercise its internal competence'. This should probably be considered as an attempt to codify the principles set out by the Court in Opinion 1/76, or more precisely, the Court's interpretation of Opinion 1/76 in Opinion 1/94. In the latter, the Court made clear that the external competence of the Community may become exclusive in the extraordinary circumstance that an internal Community objective cannot possibly be attained by simply enacting autonomous Community rules, but necessarily has to involve third parties through an international agreement, because the internal and external aspects of the competence at issue are 'inextricably linked'.[54] While the phrase 'necessary to enable the Union to exercise its internal competence' in Article 3(2) TFEU could be suitably stretched to mean just that, it does seem like a rather inaccurate rendition of the principle put forward by the Court. The CCP is in fact an example of this principle at work. It is the external aspect of

52 P. Koutrakos, 'Primary Law and Policy in EU External Relations: Moving Away from the Big Picture' (2008) 33 *European Law Review* 683–4; P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press, 2010), p. 167.

53 Article 4(4) TFEU. 54 Opinion 1/94, n17 above, at [85]–[86].

the internal market competences of the Union, which clearly belong to the area of shared competences.[55] However, one of the goals of the internal market is the removal of internal border controls and this cannot be effectively achieved without a common external commercial policy. The effective organisation of the latter demands the exclusive competence of the Union and hence the exclusion of the Member States.[56] The Union also has exclusive competence to conclude an international agreement insofar as its conclusion 'may affect common rules or alter their scope'. That is clearly intended as a codification of the complex *ERTA* case law. However, really the only thing it achieves is to codify the core of the principle as set out in *ERTA* itself, without even attempting to address the many nuances and intricacies added by the ensuing case law.

Furthermore, the contrast between when the Union acquires external competence under Article 216(1) TFEU and when such competence becomes exclusive under Article 3(2) TFEU is unclear. That contrast was also never very clear from the Court's case law, and the drafters of the Lisbon Treaty appear to have imported that lack of clarity into the TFEU. Neither Article 216(1) nor Article 3(2) TFEU is in fact of much use in clarifying *ex ante* the extent of the Union's implied external competences, because the criteria listed appear to be liable to appear contestable and hence in need of further judicial clarification.[57] Moreover, they risk introducing generalisations where none are warranted and may therefore have unwanted ramifications on crucial competence questions. They are, at any rate, unlikely to reduce the crucial role of the CJEU in shaping EU external relations law in the future.[58]

3 Managing external competence

So far, this chapter has focused on the interactions between the judiciary and the drafters of the Union's primary law by examining two areas, namely the construction of the CCP and the ways in which it has evolved up to the Lisbon amendments laid down in Article 207 TFEU, and the formalisation of the circumstances under which the Union enjoys exclusive competence to negotiate and conclude international agreements. It

55 Article 4(2)(a) TFEU.

56 M. Cremona, 'The Draft Constitutional Treaty: External Relations and External Action'(2003) 40 *Common Market Law Review* 1363.

57 De Baere, n14 above, at pp. 20 and 70.

58 Koutrakos, n52 above, at 683–4; A. Rosas and L. Armati, *EU Constitutional Law: An Introduction* (Oxford and Portland, OR: Hart Publishing, 2010), p. 207.

shed light on the constant dialogue these developments entail, its repercussions for the content and form of the Union's external action, and the questions which the formalisation of the outcomes of this dialogue may raise.

The remainder of the chapter adds another perspective to this interaction: it focuses on the relationship between the CJEU and the legislature proper (that is, the bodies adopting secondary legislation) and examines the ways in which they provide for the management of the external competence of the Union, and the challenges these raise for both the Union and the Member States. This analysis reveals threads which bring this area together with other areas of EU external relations as well as the internal market.

3.1 Investment policy and bilateral treaties

The area of foreign investment provides an interesting example of the interaction between the legislature and the executive. On the one hand, in terms of primary law, the locus of investment policy in the Union's external relations in general and the CCP in particular has been the subject of controversy since the amendments of the Treaty which followed the ruling in Opinion 1/94. Neither the limited changes introduced at Amsterdam, nor the drastic, albeit disconcertingly convoluted, ones introduced at Nice referred to investment.[59] However, the revamped CCP set out in Article 207 TFEU refers specifically to foreign direct investment (FDI), therefore rendering this area within the exclusive competence of the Union.[60] Whilst the reference to FDI raises questions as to the regulation of investment policy generally in the context of EU external relations,[61] the new provision of Article 207 TFEU adds a new dimension to the Union's investment policy.

On the other hand, the CJEU has emerged as a significant player in the field in a series of judgments which it rendered in 2009 on the consistency of Bilateral Investment Treaties (BITs) concluded by Member States with third countries prior to their accession to the Union. It is

59 See Cremona, n44 above, C. W. Herrmann 'Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job' (2002) 39 *Common Market Law Review* 7; H. G. Krenzler and C. Pitschas, 'Progress or Stagnation? The Common Commercial Policy After Nice' (2001) 6 *EFA Review* 291.

60 Article 3(1)(e) TFEU.

61 For instance, about portfolio investment. On the new provision, see A. Demopoulos, 'The Effects of the Lisbon Treaty in the Principles and Objectives of the Common Commercial Policy' (2010) 15 *EFA Review* 153.

recalled that, under Article 351(2) TFEU, Member States 'shall take all appropriate measures' to eliminate any incompatibilities between international agreements which they concluded prior to the accession to the Union and EU law.[62] In three enforcement actions brought by the Commission, the Court ruled that the transfer clause set out in such agreements was contrary to the freedom of the Union to impose restrictions on the movement of capital from a third country to the Union under Articles 64(2), 66 and 75 TFEU.[63] It, then, concluded that the failure of the three Member States to adjust this incompatibility violated Article 351 TFEU.

These two developments suggest that the regulation of external investment policy in the post-Lisbon environment faces a dilemma: on the one hand, the existence of exclusive competence in the CCP is at odds with the application of agreements concluded by Member States; on the other hand, there are more than 1,200 BITs concluded by Member States,[64] and the management of the obligations assumed by them needs careful handling, not least because it is dependent on the adoption, development and pace of the Union's investment policy towards the countries with which Member States have existing arrangements.

Introduced and shaped in the Union legal order by the Court, how is the exclusive nature of the Union's competence to be applied in an area rendered into its scope only recently by the drafters of the Treaty, given the policy implications of the web of existing relationships between individual Member States and third countries? The Commission answered this question by combining pragmatism with intense proceduralisation. In July 2010, it adopted a proposal for a regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries.[65] This measure sets out a Union law mechanism for

62 See J. Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2009), Chapter 6, and Koutrakos, n9 above, Chapter 8.

63 Case C-249/06 *Commission* v. *Sweden* [2009] ECR I-1335; Case C-205/06 *Commission* v. *Austria* [2009] ECR I-1301; and Case C-118/07 *Commission* v. *Finland* [2009] ECR I-10889. For a comment, see E. Denza, 'Bilateral Investment Treaties and EU Rules on Free Transfer – Comment on *Commission* v. *Austria*, *Commission* v. *Sweden*, and *Commission* v. *Finland*' (2010) 35 *European Law Review* 263; and P. Koutrakos, 'Annotation of Case C-205/06 *Commission* v. *Austria* and Case C-249/06 *Commission* v. *Sweden (re: Bilateral Investment Treaties)*' (2009) 46 *Common Market Law Review* 2059.

64 See COM(2010)343 final, 'Towards a Comprehensive European International Investment Policy' (Brussels, 7 July 2010), at p. 4.

65 COM(2010)344 final, 'Proposal for a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries' (Brussels, 7 July 2010).

the maintenance in force and amendment of existing, as well as the negotiation and conclusion of new, BITs.

The main rationale for the proposal is that the shaping of the Union's foreign investment policy is an incremental process which could not happen overnight. As the existing BITs concluded by Member States grant investor rights, it is essential that legal certainty is provided as to the status of these rights – indeed, legal certainty is a constant in the Commission's document. Therefore, the proposal is pragmatic in its approach. This is also illustrated by a document adopted by the Commission on the same day, setting out the main parameters within which the Commission envisages the development of the Union's international investment policy.[66] In this document, the Commission views this development as 'gradual and targeted'.[67]

The thrust of the proposal is the achievement of the above objective pursuant to a procedural framework controlled by the Commission itself which considers its role as an illustration of its responsibilities as the guardian of the Treaty. This revolves around two procedures dealing with the authorisation of existing agreements, as well as the amendment of existing or the conclusion of new agreements respectively. The authorisation of existing BITs would be granted following their notification by all the Member States to the Commission. Such authorisation would be granted notwithstanding the Union's competence in the area, and without prejudice to other EU law obligations of the Member States. The Commission would review the agreements in order to assess whether they are compatible with EU law, they overlap with an agreement which the Union concluded with the third countries concerned or they constitute an obstacle to the development and implementation of the Union's investment policies. These would also constitute grounds for withdrawal of an authorisation by the Commission.

As for the authorisation to amend existing or conclude new BITs, this would follow a notification by the Member State concerned (covering the provisions to be addressed in the negotiations, the objectives of the negotiations and any other relevant information) at least five months prior to the commencement of the negotiations. This information would be disseminated, then, to the other Member States, and, within three months, the Commission would ascertain whether the authorisation to open formal negotiations would be granted. Such an assessment would

66 'Towards a Comprehensive European International Investment Policy', n64 above.
67 *Ibid.*, p. 2.

depend on whether the opening of negotiations would be in conflict with EU law, undermine the objectives of negotiations between the EU and the third country concerned, or would constitute an obstacle to the development and implementation of the Union's investment policies.

The Commission's proposal is noteworthy for the considerable intensity and scope of the interaction between Member States and the Commission. It refers not only to the opening of negotiations, and the signing and conclusion of BITs, but also the application of such agreements. In relation to the first two, separate authorisations would be required, each of which would depend on two separate assessments pursuant to the information provided by the notifying Member State. In the process of the negotiation of a BIT, the Commission could require the Member State to include any appropriate clauses, and could request to participate in the negotiations. As for the application of the agreement, the Commission proposes specific obligations on Member States. For instance, it would be kept informed without undue delay of all meetings under existing BITs and would be entitled to require that the Member State concerned take a particular position. Similarly, any dispute which might arise about the application of a BIT would have to be notified to the Commission which may even go as far as to require that it participate in any settlement procedure. Its agreement would also be required prior to the activation of any dispute settlement mechanisms included in the BIT by the Member State concerned.

Rather than reserving for itself the role of a distant and neutral assessor, the Commission enables itself to be quite intrusive in all phases of the negotiation, conclusion and application of BITs concluded by Member States. Any assessment of this proposal should take into account its very specific context, that is the exercise of an exclusive competence bestowed upon the Union on 1 December 2009, which the latter is not in a position to exercise immediately. Therefore, the proposal sets out a Union law framework within which the Member States are expected to carry out their external investment policy as a matter of Union law, as their competence has been superseded by that of the Union. Viewed from this angle, the apparently intrusive powers by the Commission merely define the ways in which the Member States are to use a competence to which they can no longer lay any claim.

The Commission's proposals have not been met with enthusiasm by either the Member States or the European Parliament. The former argue that the right of the Commission to withdraw an authorisation undermines legal certainty. The latter objects to the absence of any time limit for

the existence of BITs pending the development of the EU investment policy. This is seen as enabling the emergence of parallel investment regimes which would undermine the very objective of the authorisation system, namely legal certainty. To that effect, the Parliament suggests an eight-year time line for the agreements, following which all should be replaced by Union agreements, and a shorter deadline for the Commission to report on the application of the proposed Regulation.[68] In addition, references to the temporary nature of the arrangement are scattered throughout the amendments suggested by the Parliament. There are two other interesting features in the Parliament's amendments. On the one hand, it suggests an obligation of the Commission to report annually to the Parliament and the Council on the application of the proposed Regulation. On the other hand, it places greater emphasis on the participation of the Commission in the dispute settlement procedures which may be relied upon in the context of BITs, as the rulings of any international arbitration tribunals could have a decisive impact on the development of the Union's own investment policy.

3.2 Other cases of proceduralisation in EU external relations

The emergence of an EU procedural framework within which Member States are expected to act on the international scene is not a novelty associated with investment policy. Two other examples are noteworthy. The first is in the area of international aviation where the interaction between the judiciary and the legislature is both direct and striking. In 2002, the Court rendered a series of judgments on the legality of Open Skies Agreements concluded by Member States with the United States.[69] An analysis of these judgments is beyond the scope of this chapter.[70] Suffice it to recall that the Court held that only in certain areas did the

68 See Doc. 2010/0197(COD) 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries' (18 November 2010).

69 Case C-467/98 *Commission* v. *Denmark* [2002] ECR I-9519; Case C-468/98 *Commission* v. *Sweden* [2002] ECR I-9575; Case C-469/98 *Commission* v. *Finland* [2002] ECR I-9627; Case C-471/98 *Commission* v. *Belgium* [2002] ECR I-9681; Case C-472/98 *Commission* v. *Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission* v. *Austria* [2002] ECR I-9797; Case C-476/98 *Commission* v. *Germany* [2002] ECR I-9855. In addition, the Court ruled in Case C-466/98 *Commission* v. *UK* [2002] ECR I-9427. Its conclusions were reaffirmed in Case C-523/04 *Commission* v. *Netherlands* [2007] ECR I-3267.

70 See Eeckhout, n4 above, at pp. 101–108; Koutrakos, n9 above, at pp. 117–28.

Union have exclusive competence to conclude such agreement. Therefore, in other areas covered by Open Skies Agreements, the Member States still had competence which they shared with the Union.

The Commission welcomed this line of judgments,[71] and was given a mandate to negotiate an agreement with the United States on behalf of the Union.[72] As for the Council, it adopted Regulation 847/2004/EC on the negotiation and implementation of air services agreements between Member States and third countries.[73] Based on ex-Article 80(2) EC (now Article 100(2) TFEU), this measure establishes a system of co-operation between the Commission and Member States aiming at the co-ordination of negotiations with third countries, the achievement of a harmonised approach in the implementation and application of air services agreements and the verification of their compliance with Union law.

Regulation 847/2007 aims to address a problem which is distinct from that tackled by the Commission's proposal on BITs concluded by Member States examined above. The latter authorise the Member States to act in areas where they have ceased to enjoy any competence; the former authorises the Member States to act in areas where their competence may coincide partly with that of the Union.[74] Therefore, Regulation 847/2004 aims to ensure that the Union's external action would not be undermined by unilateral Member State action, whilst the Commission's proposal on BITs aims to ensure legal certainty for investors protected by BITs concluded by Member States pending an assessment by the Union as to how best to carry out its investment policy.

Regulation 847/2004 sets out a framework of interaction between the Commission and the Member State negotiating an air services agreement. This consists of the imposition of substantive and procedural duties. In

71 See COM(2002)649 final, 'Communication from the Commission on the Consequences of the Court Judgements of 5 November 2002 for European Air Transport Policy.' (Brussels, 19 November 2002). It was indicative of the significance of these rulings that the Commission should have responded with such speed in order to set out its understanding of their impact. Another case in relation to which it had responded in a similar manner was Case 120/78 *Cassis de Dijon* [1979] ECR 649: 'Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ("Cassis de Dijon")' OJ 1980 C256/2.

72 For the text of the agreement, see OJ 2007 L134/4. 73 OJ 2004 L157/7.

74 Following the judgments, the Commission has also argued that the Union's exclusive competence also extends to a range of other issues, which may be addressed in bilateral air services agreements, including safety issues, commercial opportunities, customs duties, taxes and (user) charges, restrictions on aircraft for environmental reasons: 'Communication from the Commission on the Consequences of the Court Judgements of 5 November 2002 for European Air Transport Policy', n71 above, at pp. 7–8.

terms of substantive duties, Member States must include in their negotiations any relevant standard clauses, developed and laid down jointly between Member States and the Commission (Article 1(1)). Furthermore, Regulation 847/2004 sets out a prohibition on the introduction of more restrictive arrangements regarding the number of Union air carriers designated to provide services,[75] and imposes a duty of non-discriminatory and transparent distribution of traffic rights should these, or the number of Union air carriers eligible to be designated to take advantage of them, be limited.[76]

In terms of procedural duties, a Member State must notify its intention to enter into negotiations to the Commission at least one calendar month prior to the commencement of formal negotiations (or, due to exceptional circumstances, as soon as possible) (Article 1(2)). The Commission, then, makes the notification (and, on request, the accompanying documentation) available to the other Member States, which may make comments to the notifying Member State. The Commission, then, has fifteen (15) days to approach the Member State in cases where it concludes that the negotiations 'are likely to undermine the objectives of Community negotiations underway with the third country concerned, and/or lead to an agreement which is incompatible with Community law' (Article 1(4)).

There is another procedural duty imposed on Member States, namely to notify the Commission of the outcome of the negotiations upon signature of an agreement. Furthermore, in cases where an agreement does limit the use of traffic rights or the number of Union air carriers to be designated to take advantage of traffic rights, the relevant Member State must inform the Commission without delay of the procedures which it shall apply in order to ensure the non-discriminatory distribution of traffic rights (Article 6).[77] These procedures are published by the Commission in the *Official Journal*.[78]

75 In accordance with Article 3, a 'Member State shall not enter into any new arrangement with a third country, which reduces the number of Community air carriers which may, in accordance with existing arrangements, be designated to provide services between its territory and that country, neither in respect of the entire air transport market between the two parties nor on the basis of specific city pairs'.

76 Article 5.

77 The same applies to any new procedures and subsequent changes to existing procedures which must be communicated to the Commission at least eight weeks prior to their entry into force (Article 6).

78 For a recent example, see Cypriot national procedure for the allocation of limited air traffic rights, OJ 2009 C56/08.

The nature of the duties which Regulation 847/2004 imposes on Member States and the language in which these are couched are noteworthy. A Member State may not enter into negotiations unless it has agreed to include any relevant standard clauses. Indeed, once these have been incorporated in the agreement, that Member State 'shall be authorised' to conclude it, 'provided that this does not harm the object and purpose of the Community transport policy' (Article 4(2)).[79] Furthermore, the procedural duties are couched in unequivocal terms – indeed, the Member State concerned 'shall take' comments made by other Member States into account 'as far as possible in the course of the negotiations'.

And yet, it is not entirely easy to gauge either the precise scope of the obligations imposed on the Member States or the specific repercussions from the conduct of the individual actors. For instance, in cases where the Commission concludes that the negotiations are likely to undermine the objectives of the Union negotiations under way with a third country or lead to incompatibilities with Union law, Article 1(4) merely states that the Commission 'shall inform the Member State accordingly'. One would assume that the Member State would, then, have to make the necessary inferences and amend its negotiating strategy in order to achieve the incorporation of the relevant clauses. However, even if such clauses did not find their way into the agreement, the Member State could still be authorised to conclude it 'provided that this does not harm the object and purpose of the Community transport policy' (Article 4(2)). This seems to suggest that non-incorporation of the relevant clauses does not in itself run counter to the Union's transport policy.

Their different objectives and subject-matter notwithstanding, Regulation 847/2004 and the Commission's proposal on the authorisation of BITs concluded by Member States have a number of features in common. First, both aim to achieve their different objectives by setting out rules and procedures which are based on the constant interaction between the Commission and the national authorities of individual Member States (and, in certain cases, the authorities of the other Member States too). Second, they constitute the response of the Union's legislature to the assessment of the CJEU as to how competence should be distributed in the Union's constitutional order. As this chapter has highlighted, the above provisions constitute the product of a continuous dialogue between

79 Article 4(3). Such authorisation is to be granted pursuant to Articles 3 and 7 of Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999 L184/23.

the Union's judges and the drafters of primary and secondary rules. For instance, a chain of developments is worth recalling: the ruling in Opinion 1/94 relies repeatedly upon the limits of the Community's competence set out in primary law; the last three constitutional amendments of the CCP clearly draw upon this and the subsequent rulings of the Court; Opinion 1/08 responds to the new environment shaped by the hapless Nice amendment; and, finally, the Commission's 2010 proposals seek to reconcile the Lisbon amendment of the CCP and the rulings of the Court on the Austrian, Swedish and Finnish BITs with the reality of the web of such agreements.

Third, both sets of rules and procedures draw upon the duty of co-operation. Regulation 847/2004, for instance, states in its Preamble that '[i]t is essential to ensure that a Member State conducting negotiations takes account of Community law, broader Community interests and ongoing Community negotiations'.[80] Similarly, the Commission's 2010 proposals on BITs suggest that any authorisation to open formal negotiations and then to sign and conclude an agreement would depend on an assessment of, amongst other things, whether such an agreement would undermine the objectives of negotiations under way or imminent between the Union and the third country concerned. Such provisions are hardly surprising, as failure by a Member State to take into account a mandate for the Commission to negotiate on international agreement had already been held by the Court to be contrary to the duty of co-operation.[81]

There is another area in EU external relations where the Union legislature has responded to the Court's case law by setting out a Union procedural framework within which national action may be authorised. This is the area of civil justice where two measures were adopted in 2009. The first measure is Regulation 662/2009 dealing with agreements concluded by Member States on particular matters concerning the law applicable to contractual and non-contractual obligations.[82] The second measure is Regulation 664/2009 on agreements concluded by Member States on jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and applicable law in matters relating to maintenance obligations.[83]

80 Recital 8.

81 See Case C-266/03 *Commission* v. *Luxembourg* [2005] ECR I-4805 and Case C-433/03 *Commission* v. *Germany* [2005] ECR I-6985.

82 OJ 2009 L200/25. 83 OJ 2009 L200/46.

The origin of both measures is the ruling of the Court in Opinion 1/03 where it was held that the Union had exclusive competence on matters affecting rules set out in the Brussels I Regulation, in particular regarding jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[84] In other words, this is a case of a competence which has been deemed to be enjoyed by the Union exclusively, and yet Member States are authorised to act in specific cases as the Union has not exercised its competence. Therefore, the rationale for the introduction of a Union law procedural framework in this case is similar to that underpinning the Commission's proposal on BITs concluded by Member States, except that, in the former case, what triggered the adoption of Regulations 662/2009 and 664/2009 was solely a ruling of the CJEU.

The provisions set out in the above Regulations are noteworthy for their strong wording and the set of tight obligations they impose on the Member States. Indeed, the whole procedure is couched in terms of 'an application' to negotiation to be submitted by a Member State wishing to negotiate with a third country. If the Commission concludes that there are obstacles to the agreement, the Member State is not authorised to open negotiations with the third country. Again, there is a notification procedure which should be relied upon by the Member State at least three months before formal negotiations are scheduled to commence, and which would give the Commission six months to decide.

Regulations 662/2009 and 664/2009 provide that the Commission 'shall assess whether the Member State may open formal negotiations'.[85] In the presence of a Union agreement in the area, the application is rejected automatically. In the absence of such an agreement, the Commission would check whether any relevant Union agreement with the third country concerned is expected in the near future. If this is not the case, the Commission may grant the authorisation, provided that two conditions are met: on the one hand, the Member State concerned establishes a specific interest in the conclusion of the bilateral sectoral agreement with the third country, related in particular to the existence of economic, geographical, cultural or historical ties between the Member State and that third country; on the other hand, the agreement does not render Union

84 Opinion 1/03 [*re: Lugano Convention*] [2006] ECR I-1145.

85 Article 4(1) of Regulation 662/2009, n82 above, and Article 4(1) of Regulation 664/2009, n83 above.

law ineffective and does not undermine the proper functioning of the system established by that law, neither does it undermine the object and purpose of the Union's external relations policy.

And even in cases where an authorisation is granted, the Commission maintains the right to propose negotiating guidelines and request the inclusion of particular clauses in the proposed agreement. The agreement would also need to include a denunciation clause which the Member State would invoke when the EC concludes an agreement with the third country in question on the same subject-matters of civil justice. Furthermore, the Commission is given the right to participate as an observer in the negotiations between the Member State and the third country and, in the alternative, to be kept informed of the progress and results throughout the different stages of negotiations.

3.3 Different points of departure, common features

The above sections have offered an overview of different legislative responses to the dialogue between the Union's judges and the legislature in the area of EU external relations. All are about setting out a procedural framework which would manage the repercussions of this dialogue by establishing channels of communication between the Member States and the Union's executive. These responses deal with different cases: they authorise the Member States to act in cases where they have ceased to enjoy any competence pursuant to an amendment of primary law (Commission's 2010 proposals on BITs); they authorise the Member States to act in areas where their competence may coincide partly with that of the Union (Regulation 847/2004 on air services agreements); they authorise the Member States to act in areas where their competence has been superseded by the Union, but where the latter has not acted yet (Regulations 662/2009 and 664/2009).

The different circumstances under which these frameworks come about have an impact on their content. For instance, the set of procedures set out in the area of civil justice is considerably tighter than that set out in the area of air services. However, this is explained by the exceptional nature of any national action in areas where the Union is endowed with exclusive competence. Therefore, this procedure enables the Commission to manage the exercise of Union competence through the medium of Member States whilst considering whether it would be more expedient for that competence to be exercised by the Union itself.

However, the different contexts and intensity of obligations notwithstanding, these measures have a number of features in common. First, the starting point for these arrangements is pragmatism. It is accepted, for instance, that international aviation has been traditionally governed by bilateral agreements between Member States and third countries; it is also accepted that any agreements in the area would cover issues of both national and Union competence: the question, then, is how to deal with these facts whilst seeking to ensure the Union interest. The same consideration applies to the rights granted to international investors by means of Treaties between States. There is another aspect of pragmatism which underlies these arrangements: in addition to the reality of the existence of agreements concluded by the Member States, the Union institutions acknowledge that the emergence of exclusivity either pursuant to Treaty amendment (in the area of investment) or a judicial pronouncement (in the areas of international aviation and civil justice) by no means gives rise to a Union policy. The latter requires a period of reflection during which the Union institutions are to assess a number of economic, political and legal considerations and interact with various actors which pursue different, often conflicting, interests. It is this leap between the emergence of competence and the development of policy which the above arrangements seek to manage by striking the balance between maintaining the *status quo* whilst ensuring that the Union's interest to determine how best to exercise its own competence would not be undermined.

Second, whilst constituting a specific example of what the duty of loyal co-operation entails in the area of EU external relations, the procedural model set out in this chapter is by no means unique to this area. In the area of internal market law, for instance, one recalls the system set out in Directive 83/189 on technical specifications.[86] This measure imposes a notification duty on Member States envisaging introducing rules on

86 OJ 1983 L109/8, replaced by Directive 98/34 of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services, OJ 1998 L 204/37. This applies to technical specifications, that is 'a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labeling and conformity assessment procedures'. For an analysis, see S. Weatherill, 'Compulsory Notification of Draft Technical Regulations: The Contribution of Directive 83/189 to the Management of the Internal Market' (1996) 16 *Yearbook of European Law* 129.

technical specifications, as well as a standstill duty, pending an assessment by the Commission as to whether the envisaged measures are compatible with EU law. The objective of this system is to set up a preventive control mechanism aiming to ensure free movement of goods whilst also enabling the Commission to ascertain whether it might be necessary or desirable for a Union measure to be promulgated in order to deal with the subject-matter of the envisaged national measure.[87] Therefore, achievement of free movement of goods is envisaged pursuant to a system which would provide for both *ex ante* control (on the basis of the procedural framework set out in Directive 83/189) and *ex post* control (on the basis of enforcement of the relevant Union rules by national courts and the CJEU). Therefore, it appears that the management of both the EU external relations and the internal market may entail recourse to a heavily proceduralised set of rules in order to ensure that, in the constitutionally idiosyncratic Union legal order, often disparate policy needs are addressed within a unified framework which relies upon the constant interaction between its institutions as well as them and the Member States.

This parallel raises the question of the role of the CJEU and its response to the management of the proceduralisation chosen by the Union's legislature. It is recalled that, in the context of technical standards, the role of the Court has been crucial: not only has it ruled that a violation of either the notification requirement or the standstill clause would render the national measure inapplicable, but it has also accepted that these consequences could be invoked in disputes between individuals before national courts.[88] In doing so, it has enhanced the effectiveness of the regime considerably. In the context of the procedural framework adopted in EU external relations and outlined in this chapter, on the other hand, there has been no case law. Whilst any temptation to conjecture should be resisted, it is worth recalling not only that the Court has assumed a central role in the genesis and development of the whole corpus of EU external relations case law, but also that it has proved rather rigorous in the last few years in spelling out and enforcing the implications of the

87 See Case C-194/94 *CIA Security* v. *Signalson* [1996] ECR I-2201 (annotated by J. Cappel, 'Horizontal Direct Effect of Directives' (1997) 26 *Industrial Law Journal* 69 and P. J. Slot, 'Case C-194/94: *CIA Security International SA* v. *Signalson SA and Securitel SPRLs*' (1996) 33 *Common Market Law Review* 1035); and Case C-443/98 *Unilever Italia SpA* v. *Central Food SpA* [2000] ECR I-7535, annotated by S. Weatherill, 'Breach of Directives and Breach of Contract' (2001) 26 *European Law Review* 177.

88 See *CIA Security*, n87 above, and *Unilever*, n87 above.

duty of co-operation which binds the Member States, as well as the EU institutions, in the context of the Union's external relations.[89]

Third, the arrangements set out in this chapter do not draw dogmatic conclusions as to the implications of the existence of the Union's exclusive competence. Instead, they focus on the practice of external relations and the choices which need to be made in the light of the specific policy context set in different areas of activity. This bottom-up approach is a refreshing antidote to the tiresome disputes between the Union institutions about allocation of competence.[90] By disentangling the question of competence from that of its exercise, the Union channels its energy to enabling itself to address specific policy imperatives on the basis of practical and mutually acceptable arrangements. In fact, the arrangements in the area of BITs and civil justice go even further, as they rely upon Member States for the exercise of a Union competence, hence rendering them trustees of the Union interest.[91] In principle, this is not novel, as objective reasons, such as the constitutive document of international organisations, which confine membership to States, may prevent the Union from exercising its competence, in which case this is exercised through the medium of Member States as a matter of EU law.[92] However, the arrangements discussed in this chapter illustrate a choice which the Union institutions have made. It is a sign of maturity that the Union legal order should develop mechanisms to rely upon its coexistence with the Member States, and manage it in order to further the Union interest, the existence of its competence notwithstanding. This would also enable the Union and the Member States to focus on substantive issues about policy, rather than theological debates about competence. In this respect, it is noteworthy that, in the area of international investment policy, the Commission points out the active role of the Member States in promoting inward

89 See Case C-459/03 *Commission* v. *Ireland (re: Mox Plant)* [2006] ECR I-4635; Case C-266/03 *Commission* v. *Luxembourg* [2005] ECR I-4805; Case C-246/07 *Commission* v. *Sweden (re: PFOs)* [2010] ECR I-3317.

90 See P. Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations', in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford: Hart Publishing, 2008), p. 171.

91 See 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 and E. Spaventa (eds.), *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood* (Oxford: Hart Pubishing, 2011), p. 435.

92 See Opinion 2/91 [*Convention No. 170 ILO on safety in the use of chemicals at work*] [1993] ECR I-1061, at [5]; and Case C-45/07 *Commission* v. *Greece (re: International Maritime Convention)* [2009] ECR I-1701, at [31].

and outward investment, and points out that 'while it is the Union's responsibility to promote the European model and the single market as a destination for foreign investors . . . it seems neither feasible nor desirable to replace the investment promotion efforts of Member States, as long as they fit with the common commercial policy and remain consistent with EU law'.[93]

4 Conclusion

This chapter provided an overview of the dialogue between the judiciary and the legislature in the area of external relations. This dialogue has been broad in scope, involving both the drafters of primary law and the institutions adopting secondary rules, and steady in its intensity. It has also been constant, lasting from the early 1970s when the Court started shaping the contours of the Union's external action to the current date when Lisbon provisions draw directly upon much discussed judgments.

What emerges from this dialogue is a relationship which is less antagonistic than one might assume.[94] The example of the CCP is a case in point, as it illustrates a genuine legal debate over the correct construction of the emerging policy. This characteristic may be explained not only in the light of the essential role of the Court in the genesis of the Union's external relations, but also the pragmatism which this institution has exhibited over the years in its efforts to define the contours of the Union's competence in the light of the idiosyncratic constitutional arrangements set out in the Treaties. As relationships are about osmosis, this chapter suggested that pragmatism was not confined to the Court's case law, but also informed the legislature's approach to the practical implications of the emergence of the Union's exclusive competence and its readiness to rely upon the Member States in the exercise of this competence, albeit within a clearly set out procedural framework.

93 COM(2010)343 final, 'Towards a Comprehensive European International Investment Policy' (Brussels, 7 July 2010), at p. 6.

94 As it arguably was as regards the 'Danish second home protocol' (now Protocol No. 32 on the Acquisition of Property in Denmark, OJ 2010 C83/318), the 'Barber protocol' (now Protocol No. 33 concerning Article 157 of the Treaty on the Functioning of the European Union, OJ 2010 C83/319) and the 'Grogan protocol' (now Protocol No. 35 on Article 40.3.3 of the Constitution of Ireland, OJ 2010 C83/321), on which see D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *Common Market Law Review* 46–52; and specifically on the Barber protocol: Alter, n2 above, at pp. 128–9.

However, osmosis in itself by no means guarantees success. The quality of the outcomes of the interactions between the judiciary and the legislature is undermined in cases where the fundamentally distinct roles of these institutions are not being taken into account. This is illustrated in the area of the Union's implied competences, where the attempt to codify the Court's pronouncements in primary law fails to convey the subtleties of principles developed over decades of incrementally growing case law. The Court is therefore now faced with the task of interpreting a Treaty text that is in fact a slightly blurred image of its own earlier case law. It remains to be seen whether this interpretation by the Court of an interpretation by the Treaty drafters of the Court's evolving interpretation in its case law of Treaty language will be any different from that existing case law.

It is telling that this chapter, and the story of the dialogue between the judiciary and the legislature which it has told, should finish where it started, namely the role of the CJEU. To point out the pivotal role of Europe's judges to the development of Union law is a truism bordering on banality. However, the central role of the CJEU in the area of external relations has not been affected by the intensity of the legislature's intervention. If anything, Europe's judges continue to have a profound impact on every step of the development of the Union's external action. And the Lisbon Treaty will by no means change this.