

Stefan Lorenzmeier
Roman Petrov
Christoph Vedder *Editors*

EU External Relations Law

Shared Competences and Shared Values
in Agreements Between the EU and Its
Eastern Neighbourhood

 Springer

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Foreword

In 2010, Christophe Hillion and Panos Koutrakos published their impressive edited volume *Mixed Agreements Revisited*.¹ The preparation of this book, which had in itself been a long and complicated matter, had taken place during and in the aftermath of the Lisbon Process. No doubt, the objective of the initiators of the project was a noble one, namely to bring clarity in the utterly complex labyrinth of EU external competences. But nothing in this world is easy, certainly not when it deals with mixed agreements. In his disconcerting conclusions on the future of mixed agreements, Allan Rosas observed that mixity was ‘here to stay’ and that, after all, we had to learn ‘to live with mixity’ while leaving, where possible, the door open for pragmatic approaches.²

Ten years have passed since the publication of *Mixed Agreements Revisited* and this creates a momentum for renewed stocktaking, evaluation and reassessment of the practice of mixity. Certainly, during the last decade, a number of scholarly academic contributions, often in the form of in-depth case-law annotations, have been published, but only occasionally have a more comprehensive format for publication on this fascinating topic been chosen.³ *Contemporary Issues of EU External Relations Law: From Shared Competences to Shared Values*, the volume edited by Stefan Lorenzmeier, Roman Petrov and Christoph Vedder provides a welcome opportunity to contribute to achieve this goal.

It must be stressed that the book we have today in front of us is considerably broader in scope than being exclusively dedicated to the question of mixity. Already the first contribution goes far beyond this question and deals with the place and role

¹ C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World*, Hart Publishing, Oxford and Portland, Oregon, 2010. Further to note is the 2014 conference “Internationale Handlungsfähigkeit der EU durch gemischte Abkommen”, organised by Christoph Vedder.

² See A. Rosas, *The Future of Mixity*, in C. Hillion and Koutrakos (eds), mentioned previous note, pp. 367–374.

³ For another recent project on mixity, see M. Chamon and I. Govaere (eds), *EU External Relations Post-Lisbon. The Law and Practice of Facultative Mixity*, Brill, *Studies in EU External Relations*, vol. 16, 2020.

of ‘common values’ and general principles in EU external relations. This, in itself, is of course a good thing and explains why the concept ‘common values’ (Müller-Graff) or ‘shared values’ (title of the book) runs like a thread through the various contributions. It is not made totally clear in the book whether these concepts are identical. Be it as it may, the ‘values dimension’ is indeed of crucial importance in a volume which also aims to explore the state of bilateral relations between the EU and the Eastern neighbourhood.

That said, the question of the place of law and practice of mixed agreements cannot be swept under the carpet. This explains why *Opinion 2/15* receives such a royal treatment in the series of essays and why it is analysed in not less than three different contributions. They offer historical insight, draw attention to the practical impact of the so-called EU-only agreements and add relevant reflections from a German constitutional law perspective. At the end of the day, almost everybody seems to plead for pragmatism and a degree of flexibility, but the well-known tribulations with regard to the Dutch ratification saga concerning the Association Agreement with Ukraine are there to remind us of the possibilities but also of the limits of what is feasible in a given historical context. Switzerland, which at first sight, is not directly concerned with the ongoing debate on mixity in the EU and which is not part of the EU’s Eastern neighbourhood, has a somewhat unexpected presence in this book. Switzerland is often perceived as an attractive bilateral neighbourhood model, certainly from a comparative perspective. But, also warnings from Switzerland should not be ignored: the Swiss model cannot easily be transposed or used as a source of inspiration for other neighbours of the EU.

The second part of this book has a variety of most interesting contributions. First, the position of the Association Agreement with Ukraine is examined. However, since the 2014 crisis in Ukraine, there is, unfortunately, little or no evolution towards a solution in the relations with Russia and there is probably little scope for improvement in the near future is to be expected. Of course, this should not prevent Ukraine to concentrate on the effective operation of the Association Agreement and that is what it does. But everybody knows that the concrete outcome of this exercise is not something which is exclusively in the hands neither of the EU nor Ukraine. The approximation methodology followed for the Georgian legal system is to a large extent comparable to that followed in the other associated countries of the Eastern Partnership. The specificity of the Georgian model is, on the whole, less detailed and precise compared to the Ukrainian one; the same impression prevails regarding the application of the competition rules in the Association Agreements.

Finally, the three last essays in this book focus on the absence of contractual relations with the Eurasian Economic Union, Russia and Belarus. It is easy to summarise the present state of affairs. The prospect of quick developments in these relationships is, under the present circumstances, practically non-existent. While the various contributions, also in this part of the book, remain very useful, the interested reader cannot do much more than take note of the dire state of these relations and hope that all the sides concerned will be able to change the turn of events.

Acknowledgements

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The present volume is the result of in-depth discussions on draft papers presented during those events. The organisers of the international conferences, also being the editors of this book, would like to express their deep appreciation to all the contributors for their cooperation and commitment.

This project would not have been possible without the support of the Alexander von Humboldt Foundation and Jean Monnet Programme of the European Commission. The idea to work together on the topic of EU shared competence and EU common values bore fruit in the wake of the annual Jean Monnet conferences in Brussels and the Alexander von Humboldt research linkage programme between the University of Augsburg and the National University of 'Kyiv-Mohyla Academy' in the period of 2016–2019.

Finally, the support from Jana Etzold in proofreading and editing cannot be overestimated. A special word of thanks goes to Dr. Brigitte Reschke from Springer, who guided us through the publication process. Last but not least, we would like to thank our families for kindly allowing us to concentrate our efforts on this publication.

Augsburg, Germany
Kyiv, Ukraine
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December 2020

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Introduction: EU External Relations Law—Shared Competences and Shared Values in Agreements with the EU and Its Eastern Neighbourhood



Stefan Lorenzmeier, Roman Petrov, and Christoph Vedder

1 New Horizons or Old Shores?

The Treaty of Lisbon¹ not only codified to a large extent the evolutionary and pre-existing case law of the European Court of Justice² regarding the Union's external competences in its art. 3 and 216 Treaty on the Functioning of the European Union (TFEU). It also added new layers to its external action by referring to the Union's common values in art. 21 Treaty on European Union (TEU), art. 206 TFEU which the EU shall uphold in its dealing with third countries and international organizations. Thus, external and internal issues are determining the Union's external action, and the question arises whether these additions are enabling the Union to set sail for expanding to new horizons in its external actions or whether it is bound by the old, already known shores for its international activities.

This volume tries to explore some of the remaining legal and practical challenges for the EU of these two additions to the text of the EU founding treaties. First, the Union's external treaty-making power will be analysed. According to the principle of conferral as embodied in art. 4 (1), 5 (1) TEU, the EU is only entitled to act if the Member States have entrusted it with a competence to do so. If not, the Member States remain competent to act internationally. Over the years and with the aim to

¹Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, O.J. C 306, 17.12.2007, pp. 1–271.

²Throughout the volume the abbreviation “ECJ” is used for the Court of Justice of the European Union.

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avoid conflicts of competence between the Union and its Member States, this led to the conclusion of mixed agreements which became the foremost legal tool for the EU's exercise of its external trade power. In its already famous Opinion 2/15,³ the Court of Justice of the EU (CJEU) examined the external competences of the Union post-Lisbon but was unable to solve all open matters. A side look will be given to the very special relations of the EU with Switzerland which deserve further scrutiny. Secondly, a closer look will be given to the EU's actions in regard to its Eastern Neighbourhood, because the relations to the countries of the Eastern Partnership are largely drawn after the entry into force of the Treaty of Lisbon and are driven by the EU's new legal portfolio and serve as a perfect example for the exercise of its newly acquired powers in the domain of external relations. The post-Soviet states of the Eastern Neighbourhood are culturally deeply linked to the EU but face peculiar difficulties in transforming their societies. The third chapter of the book is devoted to the Union's far lesser relations with the countries of the Eurasian Economic Union, the second block of post-Soviet countries.

2 Evolution and Current Challenges of the Union's External Action

Therefore, the first part of this volume is devoted to the evolution and current challenges of the EU external actions by scrutinizing the issues associated with shared competences and shared values. The chapter is opened by *Peter-Christian Müller-Graff's* contribution on "New Challenges for the Union's Treaty Making Powers and Common Values in Implementing its Agreements".⁴ He deals with the political and legal issues stemming from the role of the EU in the world as laid down in the 2017 Rome Declaration of the Union. There, the leaders of 27 Member States pledged to work towards "a stronger Europe on the global scene: a Union further developing existing partnerships, building new ones and promoting stability and prosperity in its immediate neighbourhood to the east and south but also in the Middle East and across Africa and globally". The underlining politically relevant question is whether the Union has the clout for fulfilling this pledge, whereas the legally relevant question is how far the Union's competences match this intention. One of the analysed overarching questions is directed to exploring how far the Union's treaty-making powers carry in the new challenges of international relations.

The following works by *Lorenzmeier*, *Vedder*, *Kumin* and *van Elsuwege* are shedding light on the Union's external powers and mixed agreements, one of the main legal tools for solving the allocation of competence between the EU and its Member States. *Christoph Vedder* explores the Union's implied competences in his contribution "From ERTA to Singapore – Two Landmark Decisions on the Road to

³ECJ, Opinion 2/15, Singapore, ECLI:EU:C:2017:376.

⁴Müller-Graff, Chap. 2.

the Union's Powerful Foreign Policy".⁵ By providing an overview about the historical evolution of the Union's external powers, he is putting the 2017 Singapore Opinion 2/15 of the CJEU⁶ in context. In particular, *Christoph Vedder* delineates the evolution of the treaty-making powers with special emphasis on the exclusivity of the common commercial policy and, in a broad range of situations, the implied powers after their codification through the Treaty of Lisbon. The strive of the European Commission for the conclusion of "EU-only" instead of mixed agreement with the participation of the Member States led, in 2017, to the Singapore opinion of the CJEU, another landmark in the row CJEU judgments which elucidated the scope of the external powers of the Union.

This opinion and some of its implications are also analysed by *Stefan Lorenzmeier*. In "Exclusive and Shared Competences After the Singapore Opinion of the CJEU: 2/15 revisited",⁷ he scrutinizes the landmark decision of the CJEU in respect of the already established case law of the CJEU and the EU treaties. Therein, especially in light on new-generation EU trade agreements, it shows the impact of the decision on these agreements and how they have to be shaped after the decision, especially for avoiding the rather burdensome process of concluding mixed agreements. Additionally, by turning to the German national legal order, a further layer, the impact of the decision for the principle of democracy will be shown as well.

Andreas J. Kumin is taking a closer look at mixed agreements after Opinion 2/15 in his contribution "Mixed Agreements After ECJ Opinion 2/15 on the EU-Singapore Free Trade Agreement".⁸ The questions addressed by the CJEU in this Opinion have implications on the appropriate handling of concrete present and future comprehensive free trade agreements of the EU including provisions on trade in services, transport services, establishment, investment protection and investment dispute resolution, such as CETA with Canada, the EU-Japan Economic Partnership Agreement or TTIP with the United States, which are looked at by the author.

A final layer of mixed agreements is their ratification in the Member States. By using the problematic ratification of the association agreement between the EU and Ukraine in the Netherlands, *Peter Van Elsuwege* is elaborating on the lack of or delayed ratification in an EU Member State and the provisional entry into force of an agreement in his work entitled "The Ratification Saga of the EU-Ukraine Association Agreement: Some Lessons for the Practice of Mixed Agreements".⁹ In particular, the author emphasizes how domestic political agenda in one of the EU Member States may jeopardize the complicated process of the ratification of the EU framework agreement with a third country.

The first part of the volume concludes with *Christa Tobler's* elaboration of the very peculiar EU-Swiss relationship. Her contribution "The EU-Swiss Sectoral

⁵Vedder, Chap. 4.

⁶Opinion 2/15, Singapore, ECLI:EU:C:2017:376.

⁷Lorenzmeier, Chap. 3.

⁸Kumin, Chap. 5.

⁹Van Elsuwege, Chap. 6.

Approach Under Pressure – Not Least Because of Brexit”¹⁰ states that Switzerland’s unique legal relationship with the European Union experiences constant political pressure, both from the inside and the outside. This concerns notably the debate in Switzerland around the issue of migration from the EU to Switzerland and the demand of the EU for a renewed institutional framework for certain market agreements with the EU that has led to negotiations on this matter. Whilst Switzerland is seeking special solutions in both respects, the EU’s rhetoric is increasingly emphasizing the need for homogeneity in the internal market. Brexit has not made matters simpler and is itself influenced by the situation in relation to Switzerland.

3 The EU and Its Eastern Neighbourhood

The second part aims at having a closer look on the EU’s cooperation with its Eastern Neighbourhood as a case study that illuminates the impact of the EU’s regional policies on its external bilateral relations with third countries that pursue different geopolitical objectives. An emphasis of the second part is different assessments of debate between shared values on the one hand and the type of integration of the states of the Eastern Neighbourhood into the EU system. First, the association agreements with Ukraine, Georgia and Moldova will be looked at. This group of association agreements is distinguished by deep level of political and economic cooperation and profound desire of close integration with the EU of Ukraine, Georgia and Moldova. The second group of the enhanced partnership agreements with Armenia and Kazakhstan will be scrutinized. These agreements mirror the association agreements with Ukraine, Georgia and Moldova but lack deep trade cooperation and comprehensive legislative approximation due to participation of Armenia and Kazakhstan in the Eurasian Economic Union.

Roman Petrov analyzes the challenges of the effective implementation of the EU-Ukrainian Association Agreement in his work.¹¹ He looks at the progress of the implementation and application of the EU-Ukraine Association Agreement (AA) which triggered unprecedented political, economic and legal reforms in Ukraine. In particular, the paper focuses on the constitutional challenges that have aroused before Ukraine in the course of implementation of the AA into its legal system. There are two issues which found consideration in the chapter. The first issue is effective implementation and application of the AA within the Ukrainian legal order. The second issue is compatibility between the AA and the Constitution of Ukraine. Latest political and legal developments in Ukraine are being looked at through the prism of effective implementation of the EU-Ukraine Association Agreement and promotion of EU common values. In conclusion, it is argued that the EU-Ukraine AA enhanced the adaptability of the national constitutional order to the European integration project and EU common values.

¹⁰ Tobler, Chap. 7.

¹¹ Petrov, Chap. 8.

This is followed by *Gaga Gabrichidze's* work on “National and Bilateral Normative Framework for Legislative Impact of the EU Law on the Georgian Legal System”.¹² He explores the Association Agreement concluded between Georgia and the European Union in 2014 which raised the relevance of the EU law for Georgian legislation to a new level. However, long before the conclusion of the AA, the Georgian legislator has expressed its fascination for the EU law in the form of many self-imposed commitments. Gabrichidze's chapter deals with those obligations that Georgia has put on itself, whether on the basis of unilateral actions or under an international arrangement, which form a normative framework for legislative impact of the EU law on the Georgian legal system.

A third strain concerning the EU's association agreements with its Eastern Neighbourhood is looked at by *Kseniia Smyrnova*. Her contribution “Principles and Values of Fair Competition in the EU and Its Association Agreements with Ukraine, Moldova and Georgia”¹³ is dealing with the EU's sharing principles and values of fair competition included in the AAs with these countries. The preferential trade relations established by the AAs include rules on fair competition. However, the competition chapters are very diverse, and the provisions on competition rules include some important differences as the Moldovan and Georgian DCFTAs are less ambitious than the Ukrainian DCFTA. The chapter delves into these differences by analysing the legislative enforcement and judicial practice within the implementation of the AAs' competition rules in Moldova, Georgia and Ukraine.

The EU's Enhanced Partnership Agreements (EPAs) with Armenia and Kazakhstan do not establish as close political and economic cooperation with the EU regulatory space as in the AAs with Ukraine, Georgia and Moldova. Nevertheless, the EPAs play a role of almost equivalent “substitution” of the AAs for those post-Soviet countries that opted out to transfer part of their sovereignty to the Russia-led Eurasian Economic Union (EAEU). The EU-Kazakhstan Enhanced Partnership is depicted by *Zhenis Kembayev* in his contribution “The EU-Kazakhstan Enhanced Partnership: An Overview and Evaluation”.¹⁴ The author examines the development of the EU-Kazakhstan partnership, states its major problems and identifies the prospects of its future progress by discussing the applicable provisions of the EPA and comparing them with the PCA and the AAs, in particular the one concluded between the EU and Ukraine.

Anna Khvorostiankina looks into the EPA with Armenia, another post-Soviet state and its partnership with the EU. Her contribution is entitled “EU-Armenia Comprehensive and Enhanced Partnership Agreement: A New Instrument of Promoting EU's Values and General Principles of EU Law”.¹⁵ It deals with the EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA) as an instrument of promoting EU common values and general principles of EU Law. The

¹² Gabrichidze, Chap. 9.

¹³ Smyrnova, Chap. 10.

¹⁴ Kembayev, Chap. 11.

¹⁵ Khvorostiankina, Chap. 12.

contribution stresses that Armenia is a unique case of a state which is a member of the EAEU and, at the same time, is eager to strengthen its ties with the EU in frames of Eastern Partnership and to implement the required reforms. The author analyses the objectives and legal basis of the Agreement and assesses the potential influence of CEPA on Armenian legal order.

4 The EU and the Eurasian Economic Union

Thereby, we are turning to the third strain of the volume, the relationship of the EU with the EAEU and its Member States. The EAEU is partly replicating the EU legal order by establishing a common customs zone but is also very different from it. For instance, it is not build on shared values and stresses the untouchability of the sovereignty of its Member States.¹⁶ *Rilka Dragneva-Lewers* explores the said relations in her chapter called “Pork, Peace and Principles: the Relations Between the EU and the Eurasian Economic Union”¹⁷ by assessing the Eurasian integration against the dimensions of EU’s external policy. The analysis starts with a discussion of the status quo of EU’s relations with the Eurasian region and the tensions already observed before exploring the institutional nature and practice of the EAEU.

Paul Kalinichenko focuses on the interesting but challenging relationship between Russia and the EU. His contribution on “The EU and Russia: Old Legal Grounds for New ‘Selected Engagement’ Relations”¹⁸ analyses the modern legal aspects and political and legal circumstances surrounding the EU-Russia relations in the light of recent events and the deterioration of relations between Russia and the EU in general. In 2019, the EU and Russia celebrated the 25th anniversary of the EU-Russia Partnership and Cooperation Agreement (PCA), but most of the agreement’s provisions are not in force anymore, and most of them became mostly obsolete. Unfortunately, the negotiations on a new basic agreement between the EU and Russia have stagnated. In best-case scenarios, this situation has led to the increase of soft law instruments of the mutual cooperation. Interestingly, on another strain a certain Europeanization of Russian law can be detected.

Finally, the challenges of the Belarus-EU relations are explored by *Maksym Karliuk*. His chapter on “The EU and Belarus – Current and Future Contractual Relations”¹⁹ scrutinizes the contractual relations between the EU and Belarus as they stand today and the future possibilities given the rocky history of the bilateral relations. The main international agreement between the parties still comes from the Soviet era. Nevertheless, more engagement between parties has been happening, which has already led to new frameworks being established and interest in some

¹⁶ See <http://www.eaeunion.org/?lang=en>.

¹⁷ Dragneva-Lewers, Chap. 13.

¹⁸ Kalinichenko, Chap. 14.

¹⁹ Karliuk, Chap. 15.

continuation seems to be present. The author analyses the effect of international contractual obligations in Belarus, the peculiar case of WTO law being applicable in the country without membership thereof in the organization, the way the EAEU constrains possible deeper engagement of the country with the EU and the role of values.

5 New Shores?

The analyses collected in this volume have shown that the EU will remain a very active player at the international stage. Externally, its relations with the countries of the Eastern Partnership are structured differently, depending on the intention of the other party to integrate in or to accept parts of the Union's *acquis* in its domestic legal order. The range is from a rather deep approximation of laws as achieved by the AAs with Ukraine, Georgia and Moldova to rather loose contacts with Belarus and even more limited and strained relations with Russia. However, countries willing to establish closer relations with the EU have to agree to a shared set of values determined by the Union followed by close monitoring and conditionality by the EU institutions.

Internally, the EU's relation with its Member States is determined by the allocation and nature of powers enshrined in the founding treaties. These powers are a common battleground because questions of competence are barometers of power.²⁰ Thus, special attention has to be carried out by the EU institutions and its Member States. Issues of exclusive or shared competence and the challenge of mixity in all its forms will remain problematic and can only be solved in the course of time by the acting persons, if not the "society" of the Union and its Member States and the judiciary. The judicial organs of the Union and the Member States should use their entrusted internal powers carefully and in the spirit of cooperation because unresolvable conflicts and unexpected natural and health emergencies (COVID-19) would hamper the concept of European integration and its promotion externally,²¹ maybe even permanently. Thus, and all in all, the "post-Treaty of Lisbon" EU may have not been put in a position to explore new horizons of its internal and external competences, but it still may explore new shores and develop its policies gradually and not evolutionary.

²⁰ See Opinion of Advocate General Kokott in joined cases C-626/15 and C-659/15, AMP Antartique, ECLI:EU:C:2018:362, para. 2.

²¹ In this context see the rather problematic decision of the German Federal Constitutional Court of 5 May 2020, BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -, http://www.bverfg.de/e/rs20200505_2bvr085915en.html.

6 Post Scriptum

In the course of working on and editing this volume, we learned about sudden departure of our friend and colleague Prof. Zhenis Kembayev in early 2019. This is a sad and irrevocable loss for international and Kazakh academic legal community. Professor Kembayev was one of pioneers of promotion of EU Law and EU Studies in the entire post-Soviet area. He was the first Kazakh academic to be awarded prestigious Jean Monnet Chair in EU Law to be published in leading international books and journals. Zhenis will be remembered as a competent and prolific contributor on various issues of legal reform in Kazakhstan, Europeanization of post-Soviet countries, evolution of the EAEU and future of the Silk Road. This volume is designated to Prof. Zhenis Kembayev's memory.

Stefan Lorenzmeier is working at the University of Augsburg's (Germany) Law Faculty and researches and teaches in the areas of Public International Law and European Law. He is a lecturer at various universities and authored numerous works on European Union law.

Roman Petrov is a Jean Monnet Chair in EU Law and the Head of the Jean Monnet Centre of Excellence at the National University "Kyiv-Mohyla Academy" in Ukraine. Areas of Prof. Dr. Petrov's research and teaching include: EU Law, EU External Relations Law; Approximation and Harmonization of Legislation in the EU; Rights of Third Country Nationals in the EU, Legal Aspects of Regional Integration in the Post-Soviet Area.

Christoph Vedder is a professor emeritus who previously held the Chair of Public Law, Public International Law and European Law as well as Sports Law, a Jean Monnet Chair of European Law ad personam at the University of Augsburg, Germany. He studied law and history in Göttingen, Geneva, and Nice, graduated and earned his doctoral degree from the University of Göttingen. He has been appointed as an assistant professor at the Institute for Public International Law of the University of Munich where he also received his habilitation. He has been a visiting scholar at several universities and is a member of the conference of the State Parties of the OPCW and the author of numerous works on European Union law and its external relations.

Part I
Evolution and Current Challenges of the
External Action of the Union: From
Shared Competences to Shared Values and
the Special Case of Switzerland

New Challenges for the Union's Treaty-Making Powers and Common Values in Implementing Its Agreements



Peter-Christian Müller-Graff

“New challenges and options for the Union’s treaty-making powers” is a topic which relates to the pledge of the Rome Declaration of March 25, 2017, given by the leaders of 27 Member States of the European Union and the European Council, the European Parliament and the European Commission (“Rome Declaration”) to work towards “a stronger Europe on the global scene: a Union further developing existing partnerships, building new ones and promoting stability and prosperity in its immediate neighbourhood to the east and south, but also in the Middle East and across Africa and globally”.¹ The *politically relevant* question is whether the Union has the clout for fulfilling this pledge. The *legally relevant* question is how far the Union’s competences match this intention. This aim is, in its content, in line with the fourth operative objective the Union is mandated by Article 3 TEU,² namely, with the external action which is described by the words “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”. One of the overarching questions is directed to exploring how far the Union’s treaty-making powers carry in the new challenges of international relations.

Introducing into this question, a quartered conceptional systematisation of the subject area might be helpful: first, reminding the general legal principle of the

¹ See Council of the EU, Statements and Remarks 149/17, 25/03/2017.

² Müller-Graff (2017) Artikel 3 par. 43.

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Union's treaty-making power in external action (Sect. 1); second, assembling the legally stipulated tasks, competences and restrictions of the Union's treaty-making policy (Sect. 2); third, assessing the state of competences in view of the new challenges and options of association agreements and commercial treaties (Sect. 3); and, forth, evaluating the role of common values and general principles of Union law in effective implementation and application of the Union's external agreements (Sect. 4).

1 The General Legal Principle of the Union's Treaty-Making Power

Concerning the general legal principle of the Union's treaty-making power,³ it is evident that such action is governed by the same basic principle as any action of the Union, viz. the principle of conferral laid down in Article 5 (2) TEU. Under this principle 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. In addition, this Article explicitly states that competences not conferred upon the Union in the treaty remain with the Member States. This statement is of particular importance for the Union's *external* action, since its realm (which is not perfectly structured by primary law) stretches from the *exclusive* competence for the common commercial policy (Article 3 (1) lit. e TFEU) and for the agreements in the sense of Article 3 (2) TFEU with its threefold interpretation given by the ECJ: the application of a "risk" criterion,⁴ the inclusion of "not fully coincide" commitments⁵ and the exclusion of "extremely limited in scope" commitments⁶ through the *shared* competences of Article 216 TFEU (with the "necessity" criterion⁷) in conjunction with Article 4 (2) TFEU (as far as Article 3 (2) TFEU is not applicable) and the category under the shared competences misplaced, in fact *parallel* competences in development cooperation (Article 4 (4) TFEU), other economic, financial and social cooperation (Article 212 TFEU) and humanitarian aid (Article 4 (4) TFEU) to the categorically *undefined*, but arguably (due to Declaration 13) also *parallel* competence for agreements under Article 37 TEU in the area of the common foreign

³Parts 1 to 3 of this text are based on the author's introduction into the Conference on "New Challenges and Options for the Union's Treaty Making Powers" at Augsburg University at the occasion of *Christoph Vedder's* 70th birthday on 26 June 2017.

⁴ECJ, Case 22/70, ERTA, ECLI:EU:C:1971:32 para. 30; ECJ, Opinion 1/13, Hague Convention, ECLI:EU:C:2014:2303 para. 71; ECJ, Opinion 3/15, Marrakesh Treaty, ECLI:EU:C:2017:114 para. 105; ECJ, Opinion 2/15, Singapore, ECLI:EU:C:2017:376 para. 180.

⁵ECJ, Opinion 1/03, Lugano Convention, ECLI:EU:C:2006:81 para.126; ECJ, Opinion 1/13, Hague Convention, ECLI:EU:C:2014:2303 para. 72; ECJ, Opinion 2/15, Singapore, ECLI:EU:C:2017:376 para. 181.

⁶ECJ, Opinion 1/08, GATS, ECLI:EU:C:2009:739 para. 166; ECJ, Opinion 2/15, Singapore, ECLI:EU:C:2017:376 para. 217.

⁷ECJ, Opinion 2/15, Singapore, ECLI:EU:C:2017:376 para. 242.

and security policy and, eventually, the *implied* competences for coupling international agreements with ancillary institutional provisions.⁸

This complexity contrasts to the laconic wording of Article 32 (1) *Grundgesetz* which reads (in translation) “Relations with foreign states shall be conducted by the Federation” and to its Article 73 par. 1 number 1 which declares “foreign relations” as a matter under *exclusive* legislative power of the Federation. In the absence of such a general competence of the Union in foreign relations, the state of the Union's treaty-making power mirrors, in principle, the internal distribution of subject area competences (with the important exception of the transformative Article 3 (2) TFEU). The general linking of the external competences to the internal distribution of competences⁹ may be understood as a functional federative approach¹⁰ which is not totally alien to a certain feature inherent in the German type of Federation, where we find the competence of the Länder to conclude treaties with foreign states, insofar as they have power to legislate though only with the consent of the Federal Government (Article 32 (3) *Grundgesetz*¹¹ (e.g. the Agreement of the *Länder* and France on the TV channel ARTE¹²)). The internal power partition also pops up in the constitutional rules on the exercise of rights of the Federal Republic in the Union's Council, when legislative powers exclusive to the Länder concerning school education, culture and broadcasting are primarily affected by projects of the Union; in such a case, the exercise of the rights shall be delegated by the Federation to a representative of the Länder designated by the Bundesrat (Article 23 (6) *Grundgesetz*).¹³ Hence the recognition of the internal distribution of powers in external action is not even alien to a state federal community of law. It depends on the positive constitutional shape.

2 The Legally Stipulated Tasks, Competences and Restrictions of the Union's Treaty-Making Policies

In the case of the Union, the constitutional context (in the sense of primary Union law¹⁴) provides a multiform differentiation of tasks and competences and, so far not deepened, a potentially limiting principle for the content of free trade association agreements with countries in the sense of “any European State” of Article 49 TFEU.

⁸ECJ, Opinion 1/76, Inland Waterway Vessels, ECLI:EU:C:1977:63 para. 5; ECJ, Opinion 1/78, National Rubber, ECLI:EU:C:1979:224 para. 56; Opinion 2/15, Singapore, ECLI:EU:C:2017:376 par. 276.

⁹Müller-Graff (2006), pp. 11ff, 24.

¹⁰For the functional federative approach, see Müller-Graff (2005), pp. 103, 105 et seq.

¹¹Müller-Graff (2007c), pp. 387 f.

¹²ARTE-Staatsvertrag (Vertrag zum Europäischen Fernsehkanal) v. 2.10.1990.

¹³Müller-Graff (2007b), pp. 705 ff., 716ff.

¹⁴See, for primary law as a constitution in a functional sense, e.g. Bundesverfassungsgericht vol. 123, 267 para. 231; Müller-Graff (2007a), pp. 223, 235 ff.; Müller-Graff (2003), pp. 11 ff.

2.1 Tasks

Concerning the Union's *tasks* in external action, the overarching Article 3 (5) TEU only condenses the more detailed, partially repetitive objectives attached to the different, partially overlapping parts of the Union's external action. Article 21 TEU, the general provision for any external activity, unfolds a panoply of abstract guiding principles and an extensive catalogue of more concrete objectives such as safeguarding its values, fundamental interests, security, independence and integrity; fostering the sustainable economic, social and environmental development of developing countries; encouraging the integration of all countries into the world economy, including through the progressive abolition of restrictions of international trade; and helping international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources. The concretising objectives of all the diverse external policies neatly fit into this web of aims: the common foreign and security policy with its prime target to develop mutual political solidarity among Member States in all areas of foreign policy and all questions relating to the Union's security, to identify the questions of general interest and to achieve an ever-increasing degree of convergence of the Member States' actions;¹⁵ the common security and defence policy with its mandate to provide the Union with an operational capacity drawing on civilian and military assets;¹⁶ and the common commercial policy with its mission to contribute to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment and the lowering of customs and other barriers.¹⁷ This is also true for the development cooperation;¹⁸ the economic, financial and social cooperation with other countries;¹⁹ and the humanitarian aid activities.²⁰ The specifically regulated neighbourhood policy contains no exception to the general purposes but intensifies them for a certain group of third countries with the aim to establish an area of prosperity and good neighbourliness.²¹ Different from these policy descriptions, an association agreement in the sense of Article 217 TFEU is not fixed to a specific subject area but a specifically labelled instrument for realising the general objectives.

¹⁵ Article 24 TEU.

¹⁶ Article 42 TEU.

¹⁷ Article 206 TFEU.

¹⁸ Article 208 TFEU.

¹⁹ Article 212 TFEU.

²⁰ Article 214 TFEU.

²¹ Article 8 TEU.

2.2 Competences

Objectives are not yet *competences*. The coherent weave of the Union's external actions' mission is, as outlined, not paralleled nor accompanied by a comprehensive treaty-making power covering all the mentioned objectives alike. Rather the Union's competence depends on the concrete subject matter and its respective categorical attribution in the sense of Article 2 TFEU: exclusive, shared, parallel or supportive. Outside the exclusive competence of the Union, a coordinated policy of the Union and its Member States towards third countries is not rendered impossible but requires the consent and ratification of the respective part of an agreement with a third country by the Union and the Member States. Whether such necessity of mixity exists depends upon the precise delineation of the Union's competence. In this respect, the ECJ has delivered its Opinion 2/15 on the free trade agreement between the European Union and the Republic of Singapore.²² It contains carefully detailed deliberations on four Regulations and three Directives which relate to different services in the field of transport. The ECJ's opinion is scrupulously assessed in several contributions to this book.

2.3 Restrictions

The existence of competences is not yet the full story for the Union's capacity to act. The exertion of competences is *bound* to respect the objectives and principles of primary law. This is well known for the exertion principles of subsidiarity and proportionality (Articles 5 (3) and (4) TEU). In view of the content of treaties with third states, I submit that still another potentially limiting principle has to be taken into consideration. It derives from the very first objective listed in Article 21 (2) TEU, namely, safeguarding the Union's fundamental interests and integrity. This mission, in light of the Union's destiny, as expressed in Article 1 (2) TEU, "of creating an ever closer union among the peoples of Europe" can well be understood as excluding contents in international agreements of the Union which counteract this purpose, be it in association agreements, neighbourhood agreements or even trade agreements, if they are susceptible to loosen the cohesion of the Union. The integrity principle sets a primary law warning against weakening the inner dynamics of European cohesion.

²² ECJ, Opinion 2/15, Singapore, ECLI:EU:C:2017:376.

3 The State of Competences in View of New Challenges of Association Agreements and Commercial Treaties

Four observations may frame this question: the present tendencies of the Union's treaty-making policy (1), the issue of a "new generation" of association agreements (2), the topic of comprehensive trade agreements (3) and the speculations on a deep and comprehensive free trade area between the Union and Britain (4).

3.1 *Present Tendencies*

The first observation applies to the *present tendencies of the Union's treaty-making policy*. It seems that the times of pure free trade agreements are over. This is due to a *fundamental change* in the relevant primary law since the Lisbon amendment of 2009. Still one decade ago, the idea, originally shaped by the Constitutional Convention and then realised by Article 21 (3) TEU and Article 205 TFEU, that the common commercial policy should be made part of a coherent foreign policy encountered scepticism and opposition by those who feared impediments to the conclusion and content of free trade agreements²³—despite the fact that already the three-pillar construction of the Maastricht Union of 1993 had been overarched by the obligation that "the Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies".²⁴ Consistency means the absence of contradictions in pursuing different parts of the Union's external action.²⁵ It took some time to translate the consistency idea into practice.

This context is not neatly suited by the Agreement on the European Economic Area (EEA)²⁶ and the somewhat bizarre and problematic bilateral agreements' construction with Switzerland.²⁷ They are specific insofar as they establish a functionally full (EEA)²⁸ or a (so-called) sectoral participation²⁹ in the internal market with its respective necessary regulatory ramifications. The former enhanced free trade Europe Agreements with East Central European states, which were concluded in the 1990s,³⁰ may be understood as early birds of a new generation, though they were considered—according to their preamble—from the side of the respective East European country and (since the Summit of Copenhagen) also from the side of the

²³ See, for this discussion, e.g. Vedder (2011), pp. 121 ff.

²⁴ Article G TEU (Maastricht).

²⁵ Müller-Graff (1993), pp. 147 ff.

²⁶ Müller-Graff and Selvig (1997).

²⁷ Breuss et al. (2008).

²⁸ See *supra* note 26.

²⁹ Müller-Graff (2014a), pp. 283 ff.

³⁰ See, e.g. Müller-Graff (1997), pp. 9, 15 ff.; Maresceau (1997), pp. 3, 6 ff.

Union as a preparatory step towards full membership in the Union.³¹ The seven Stabilisation and Association Agreements concluded between 2004 and 2016 with the Balkans³² develop this line of pre-accession agreements.

In recent years the seed of the Treaty of Lisbon's comprehensive approach to external relations rises in all forms of agreements: in particular the EU Association Agreement with Ukraine,³³ Moldova³⁴ and Georgia,³⁵ the Comprehensive Economic and Trade Agreement with Canada,³⁶ and the Trade Agreements with Columbia and Peru,³⁷ Singapore,³⁸ Vietnam³⁹ and Japan.⁴⁰ While the substantive subject basis of all these agreements is trade, the scope of the additional matters varies but is usually inspired by elements which proved to be necessary or helpful for the functioning of the Union's internal market: among them in particular competition relevant aspects of social and environmental policy⁴¹ and the competition relevant protection of intellectual property.⁴² With the extension of the Union's exclusive competence to foreign direct investment (Article 207 (1) TEU), also this subject matter has become part of the Union's treaty policy and concern.

3.2 *New Generation of Association Agreements*

As an offspring of this development, a so-called new type (or generation) of *Association Agreements* has emerged within the Eastern Partnership of the Neighbourhood Policy. Its features are outlined in detail in other contributions to this book. To introduce it can be recalled that the term "association" is not alien to the terminology of primary law. However, its substantive content is rather abstract

³¹ Maresceau and Montaguti (1995); Müller-Graff (2002), pp. 21, 26.

³² See Rodin (2014), pp. 985 ff.

³³ O.J. EU 2014 L 161/3; see Petrov and Braun (2014), pp. 1001 ff.

³⁴ O.J. EU 2014 L 260/4.

³⁵ O.J. EU 2014 L 261/4.

³⁶ See European Commission (2018a) <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> (24 August 2018).

³⁷ O.J. EU 2012 L 354/3; European Parliament EPRS, Trade agreement between the European Union and Colombia and Peru – European Implementation Assessment, July 2018.

³⁸ European Commission (2018d) Singapore <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (18 April 2018).

³⁹ European Commission (2018b) Vietnam <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1921> (17 October 2018).

⁴⁰ European Commission (2018c) Japan <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684> (18 April 2018).

⁴¹ Well observed by ECJ, Opinion 2/15, Singapore, ECLI:EU:C:2017:376 para. 159.

⁴² Well observed by the ECJ, Opinion 2/15, Singapore, ECLI:EU:C:2017:376 paras. 125, 130.

and hence open for different types of political arrangement.⁴³ Article 217 TFEU leaves the label “association” available to political discretion as long as such an agreement “involve(s) reciprocal rights and obligations, common action and special procedure”. In fact, this qualification has been flexibly used in the wide range of different purposes once described by *Walter Hallstein* as a vehicle between trade agreements plus 1 and membership minus 1:⁴⁴ in particular for pre-accession (Greece, Turkey, East Central European States, Balkans) and for development (Yaoundé, Lomé, Cotonou). Since the substance of such reciprocal rights and obligations, common action and special procedure is left undefined, it is far from clear why enhanced trade agreements, e.g. the CETA or a potential TTIP, would not fulfil these requirements.

Therefore, the label “new type” or “new generation” inside or outside the Eastern Partnership or the Neighbourhood Policy is subject to political preference and gets its meaning only in comparison with older agreements which had been baptised as an association such as the EEC-Turkey Association Agreement of 1963.⁴⁵ Compared to that rather short accession association text of 33 Articles, the 1,200 pages of the EU-Ukraine Association Agreement contain a very distinct richness of additional elements which thematise all main matters of Union law: trade and trade-related matters in the sense of a Deep and Comprehensive Free Trade Area which mirror competition relevant elements and regulatory ramifications of the internal market (in particular harmonisation of laws in trade-related sectors); additionally economic and sector cooperation in more than 30 areas (such as energy, transport, industry, consumer, social and environmental protection); further “justice, freedom and security” as well as financial cooperation with anti-fraud provisions; furthermore political cooperation in foreign and security policy and also general principles (such as the respect for democratic principles, human rights, fundamental freedoms and the rule of law as well as the principles of a free market economy and good governance) and eventually institutional provisions. Its content amounts to a special relationship in form of a specific status of the associated country Ukraine—not the least being the ECJ’s power of binding interpretation of certain provisions of the Agreement in the arbitration panel procedure⁴⁶ and the role of common values and general principles of EU law in effective implementation and application of these agreements (which is looked at *infra* IV).

An association agreement of this type in the light of the Union’s general treaty-making power has the potential to transgress the area of the Union’s exclusive competences for common commercial policy with its requirement of a specific link to

⁴³ See for the three types (accession associations, free trade associations, development associations) Bungenberg (2015) Artikel 217 AEUV para. 90 et seq.; Boysen (2017) Artikel 217 para. 25 et seq.; Mögele (2018) Artikel 217 para. 4 et seq.

⁴⁴ Schweitzer et al. (2007), para. 1049.

⁴⁵ Güney (2014), pp. 1029 ff.

⁴⁶ Article 322 par. 2 EU-Ukraine Association Agreement.

trade having direct and immediate effect on it⁴⁷ and for agreements in the sense of Article 3 (2) TFEU, as far as the agreement encompasses areas of shared, parallel or supportive competences of the Union or even exclusive competences of the Member States. Article 207 (6) TFEU explicitly prohibits effects of the exercise of competences of Article 207 TFEU on the delimitation of competences between the Union and the Member States. Hence, such an agreement requires the consent and ratification of the Member States. As far as it is feasible and/or desirable to precisely delineate the matters of exclusive and non-exclusive competences and bring them neatly split into separate treaties, the need for a mixed agreement ceases.

3.3 *Comprehensive Commercial Agreements*

This is also true for the “new” type (or generation) of *comprehensive commercial agreements*, which are not named “association agreement” (such as the (former) Singapore Agreement). This distinction is blurred as a consequence of the abstract modesty of Article 217 TFEU. That new generation can be generally understood as a trade agreement including elements in addition to the classical elements of free trade agreements.

The most far-reaching example of this gradually developing treaty policy of the Union is the CETA with its 1589 pages.⁴⁸ It draws inspiration for its topics both from the WTO and the Union's own development in line with the mandate of Article 21 (1) TEU. CETA establishes a free trade area in accordance with Article XXIV GATT and Article V GATS and comprises mutual obligations and rights. It thereby lays open the pattern of the demanding requirements for free and fair trade and competition and for more intense economic interweaving in the twenty-first century.⁴⁹ In detail it stipulates national treatment and market access for goods (ch. 2) and deals with trade remedies such as anti-dumping and countervailing measures and global safeguard measures (ch. 3), technical barriers to trade (ch. 4), sanitary and phytosanitary measures (ch. 5), customs and trade facilitation (ch. 6), subsidies (ch. 7) and investment (without distinction of direct or portfolio)—including rules on compensation for expropriation (ch. 8) and on the resolution of investment disputes between investors and states by a specific tribunal (ch. 8.18 and 8.27) and appellate tribunal (ch. 8.28). The CETA goes on providing rules on cross-border trade in services (ch. 9); temporary entry and stay of persons for business purposes (ch. 10); mutual recognition of professional qualifications (ch. 11); domestic regulation (ch. 12); financial services (ch. 13); international maritime transport services (ch. 14); telecommunications (ch. 15); electronic commerce (ch. 16); competition policy (ch.

⁴⁷ ECJ, Case C-414/11, Daiichi Sankyo, ECLI:EU:C:2013:520 para. 51; ECJ, Case C-137/12, Commission/Council, ECLI:EU:C:2013:675, para. 57; ECJ, Opinion 3/15, Marrakesh Treaty, ECLI:EU:C:2017:114 para. 61.

⁴⁸ See *supra* note 36.

⁴⁹ See for this necessity Müller-Graff (2015), pp. 21 ff.

17); state enterprises, monopolies and privileged enterprises (ch. 18); government procurement (ch. 19); intellectual property (ch. 20); regulatory cooperation (ch. 21) as well as trade and sustainable development (ch. 22); labour (ch. 23) and environment (ch. 24). In addition CETA contains provisions on bilateral dialogue and cooperation (ch. 25), administrative and institutional issues (ch. 26—CETA Joint Committee) and dispute settlement (ch. 29: with arbitration panel).

A comprehensive commercial agreement of this type in the light of the Union's general treaty-making power falls under the exclusive power of the Union as far as the substance of its provisions is identical to those in the Singapore Agreement which the ECJ acknowledged in its Singapore opinion.⁵⁰ However, it transcends the Union's exclusive competences in particular, if it contains provisions on investment protection in so far as they relate to non-direct investment, to provisions on investor-state dispute settlement and to provisions which relate to the investment provisions and to the extent that the latter fall within a shared competence.

3.4 Limits to a Future Agreement with the United Kingdom

A possible future agreement for the relations between the Union and the United Kingdom will be subject to the same rules on the Union's treaty-making power. However, in the case of Britain, a specific question of the exertion of the Union's competences may gain importance in identifying the scope and content of such an agreement if it is going to head for a deep and comprehensive free trade area. The mentioned principle of safeguarding the Union's fundamental interests and integrity (Article 21 (2) lit. a TEU) and the objective of creating an ever-closer union among the peoples of Europe (Article 1 (2) TFEU) may unfold limits to the content of such an agreement. These normative orientations exclude contents of an international agreement which counteract the cited provisions. They set at least a warning against weakening the inner cohesion and dynamics of the Union's *acquis* by offering "cherry conditions" for a state that has withdrawn from the Union. This is not an issue of punishment but one of self-assertiveness of the Union in its conceptional and supranational achievements. This requirement is met by the "Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom"⁵¹ with its emphasis that the future relationship "must ensure the autonomy of the Union's decision making and be consistent with the Union's principles, in particular with respect to the integrity of the Single Market and the Customs Union and the indivisibility of the four freedoms".⁵² While the integrity principle is of specific importance for agreements with states in the sense of Articles 49 and 50 TEU, it also presents a guideline for shaping

⁵⁰ ECJ, Opinion 2/15, Singapore, ECLI:EU:C:2017:316.

⁵¹ See: European Commission, 22 November 2018.

⁵² Recital 4 of the Political Declaration.