

Fordham International Law Journal

Volume 38, Issue 4

2015

Article 6

EU External Relations: Exclusive Competence Revisited

Allan Rosas*

*European Court of Justice

Copyright ©2015 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

EU External Relations: Exclusive Competence Revisited

Allan Rosas

Abstract

This Article will focus on the question of exclusive competence in the field of EU external relations, especially in the light of recent developments. After a brief discussion on the origins and development of exclusive competence, a distinction will be made between common commercial policy, which has traditionally been the most important area of an explicit “a priori” exclusive competence, and what is often called an implicit exclusive competence, which, as it is today based on some general criteria enshrined in TFEU Article 3(2), may be called “supervening” exclusive competence. With regard to both categories, the main focus will be on recent developments, notably the impact of the Treaty of Lisbon, which introduced the TFEU and its Articles 2 and 3, as well as the case law of the European Court of Justice (“ECJ” or the “Court”) following the entry into force of the Treaty of Lisbon, on December 1, 2009.

KEYWORDS: International Law, EU, international agreements, TFEU, Article 3, European Court of Justice

ARTICLE
EU EXTERNAL RELATIONS: EXCLUSIVE
COMPETENCE REVISITED

*Allan Rosas**

INTRODUCTION	1073
I. ORIGINS AND DEVELOPMENT	1076
II. COMMON COMMERCIAL POLICY	1079
III. THE AETR/ERTA PRINCIPLE.....	1084
CONCLUSION.....	1094

INTRODUCTION

One of the features which distinguishes the European Union from intergovernmental organizations is the fact that the European Union, in some areas, has so-called exclusive competence, excluding a parallel competence for its Member States.¹ According to Article 2(1) of the Treaty on the Functioning of the European Union (“TFEU”),² “[w]hen the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”

As can be seen from TFEU Article 3, the exclusive competence also exists with regard to EU *external* relations, that is, the treaty and other relations of the European Union with third states. Article 3(1)

* Judge at the European Court of Justice. Dr.Jur., Dr.Jur. h.c., Dr.Pol.Sc. h.c. Senior Fellow of the University of Turku, Visiting Professor, College of Europe and University of Helsinki.

1. On the differences in competence and powers between the EU and intergovernmental organizations in general, see ALLAN ROSAS & LORNA ARMATI, *EU CONSTITUTIONAL LAW: AN INTRODUCTION* 15-17 (2d rev. ed. 2012).

2. Consolidated Version of the Treaty on the Functioning of the European Union art. 2, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

provides for “*a priori* exclusivity”³ in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; and (e) common commercial policy. Points (d) and (e) especially are highly relevant in the context of EU external relations. Article 3(2), for its part, adds to the categories of exclusive external competence three general criteria for determining whether the conclusion of an international agreement falls under an exclusive competence even if the agreement does not belong to any of the categories enumerated in Article 3(1).

The question of exclusive competence should be seen in the broader context of the competence and powers of the European Union in external relations and its treaty relations with third states in particular. If an EU competence is not exclusive, it is in most cases *shared* with the Member States.⁴ Agreements concluded under a shared competence usually become *mixed*, which means that they will be open for conclusion by not only the European Union but also its Member States. In addition, EU Member States continue to conclude international agreements in their own names, without the participation of the European Union as a contracting party, including sometimes on matters which belong to an EU exclusive or shared competence.

One should thus distinguish between the following three categories of international agreements: (1) agreements concluded by the European Union alone; (2) agreements concluded by the European Union and one or more of its Member States (mixed agreements); and (3) agreements concluded by one or more Member States. Agreements concluded by the EU, including mixed agreements, are binding upon both the EU institutions and the Member States.⁵ Whilst the agreements concluded by Member States without formal EU participation are, in principle, part of the *national* law of the Member States that have concluded them and are not part of EU law, such agreements may become relevant for EU law purposes as well,

3. Alan Dashwood, *Mixity in the Era of the Treaty of Lisbon*, in *MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD* 351, 356 (Christophe Hillion & Panos Koutrakos eds., 2010).

4. *See, e.g.*, Dashwood, *supra* note 3.

5. TFEU, *supra* note 2, art. 216(2), 2010 O.J. C 83, at 144.

especially if the agreement in question concerns matters falling under an EU competence.⁶

The practical importance of the distinction between exclusive and shared competence should not be exaggerated.⁷ Even in an area of exclusive competence, the European Union may be barred from becoming a party to an international convention or member of an international organization by an adherence clause that is limited to Member States. In such situations and some others, the European Union may have to authorize the Member States to act in the interest of the Union. In areas of shared competence, again, the so-called duty of cooperation may require that the EU institutions and the Member States act jointly, and may in some instances prevent the Member States from acting alone.⁸

Yet, the question of whether the European Union can act alone, notably in concluding international agreements, or whether Member States' participation is allowed or called for, does have significance both in theory and in practice—not only for the relations between the European Union and its Member States, but also for its relations with third states. The latter will normally prefer EU agreements to mixed agreements, wishing to avoid the complexities and uncertainties stemming from mixed agreements—who, on the EU side, is responsible for what?⁹

This Article will focus on the question of exclusive competence in the field of EU external relations, especially in the light of recent developments. After a brief discussion on the origins and development of exclusive competence, a distinction will be made between common commercial policy, which has traditionally been the most important area of an explicit “*a priori*” exclusive competence, and what is often called an implicit exclusive competence, which, as it is today based on some general criteria enshrined in TFEU Article 3(2), may be called “supervening” exclusive competence.¹⁰ With regard to both categories, the main focus will be on recent

6. Allan Rosas, *The Status in EU Law of International Agreements Concluded by EU Member States*, 34 *FORDHAM INT'L L.J.* 1304, 1310 (2011).

7. See Allan Rosas, *Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?*, in *THE EUROPEAN UNION IN THE WORLD: ESSAYS IN HONOUR OF MARC MARESCEAU* 17 (Inge Govaere et al. eds., 2013).

8. See *Commission v. Sweden*, Case C-246/07, [2010] E.C.R. I-03317.

9. See Peter Olson, *Mixity from the Outside: The Perspective of a Treaty Partner*, in *MIXED AGREEMENTS REVISITED*, supra note 3, at 331.

10. See Dashwood, supra note 3, at 360.

developments, notably the impact of the Treaty of Lisbon,¹¹ which introduced the TFEU and its Articles 2 and 3, as well as the case law of the European Court of Justice (“ECJ” or the “Court”)¹² following the entry into force of the Treaty of Lisbon, on December 1, 2009.

I. *ORIGINS AND DEVELOPMENT*

The idea that the European Union may in certain areas of external relations have an exclusive competence is no novelty. As the aims of the Treaty of Rome establishing the European Economic Community included the creation of a customs union as well as an internal market, it became almost inevitable to provide for a common commercial policy as well. What are today TFEU Articles 206–207 on common commercial policy were included already in a different form in Articles 110–116 of the original Treaty of Rome. A common customs tariff was established during the 1960s while some import restrictions maintained by individual Member States were abolished only much later.¹³

In an Opinion of 1975, the ECJ for the first time explicitly confirmed that the common commercial policy belonged to the area of exclusive competence.¹⁴ After having considered that export credits are covered by the notion of export policy and more generally by the common commercial policy, the Court held that in the field of export credits, accepting a concurrent competence of the Member States would distort competition between undertakings of the various Member States and would, *inter alia*, prevent the Community “from fulfilling its task in the defence of the common interest.”¹⁵ In subsequent case law, the Court, as far as the trade in goods is concerned, confirmed its fairly broad understanding of the concept of common commercial policy, including various sorts of restrictions or

11. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

12. The Court of Justice of the European Union, according to Article 19 of the Treaty on European Union, 2010 O.J. (C 83) 13 [hereinafter “TEU”], includes the Court of Justice, the General Court, and specialized courts.

13. PIET EECKHOUT, *EU EXTERNAL RELATIONS LAW* 11-13 (2d ed. 2011). On the origins of the notion of common commercial policy as an exclusive competence, see MOSHE KANIEL, *THE EXCLUSIVE TREATY-MAKING POWER OF THE EUROPEAN COMMUNITY UP TO THE PERIOD OF THE SINGLE EUROPEAN ACT* 17-19, 67-79 (1996).

14. Opinion 1/75, *Understanding on a Local Cost Standard*, [1975] E.C.R. 1355.

15. *Id.* at 1364.

regulations such as technical, sanitary and other barriers to trade, export credits, and tariff preferences in favor of developing countries.¹⁶ The question as to whether also to include the trade in services and the trade aspects of intellectual property rights, as well as the question of the borderline between trade in goods and measures affecting trade but having non-trade objectives, will be considered below.

Whilst the common commercial policy has from the beginning been based on an explicit Treaty provision—although the exclusive nature of that competence was, perhaps, not crystal clear before Opinion 1/75—the ECJ already was faced in 1971 with the question as to whether the Community’s external competence could also be founded on considerations other than an explicit Treaty provision to that effect. In what has become known as the AETR/ERTA judgment (after the European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport), the Court held that a competence to conclude international agreements may not only arise from an explicit provision to that effect in the Treaties but may “equally flow from other provisions of the Treaty and from measures adopted . . . by the Community institutions.”¹⁷ This assertion of competence was immediately followed by an assertion of exclusive competence, sometimes referred to as an “implicit” exclusive competence. The Court famously held that each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, “the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.”¹⁸

The AETR/ERTA approach was supplemented in 1976 by another principle formulating an implied competence in the external field. In Opinion 1/76 the ECJ held that there may be a Community competence to conclude an international agreement even if an internal competence had not yet been exercised and thus no Community

16. See, e.g., Opinion 1/78, International Agreement on Natural Rubber, 1979 EU:C:1979:224 (which concluded, on the other hand, that Member States’ participation in a financing scheme would imply a mixed agreement); Case C-45/86, Comm’n v. Council, 1987 EU:C:1987:163; Case C-62/88, Greece v. Council (“Chernobyl”), 1990 EU:C:1990:153; see also ECKHOUT, *supra* note 13, 18-25.

17. Case C-22/70, Comm’n v. Council, 1971 EU:C:1971:32, ¶ 16; see also, e.g., ECKHOUT, *supra* note 13, 71-82.

18. Comm’n v. Council, ¶ 17.

legislation adopted, namely if that was “necessary” for the attainment of a specific Treaty objective and that objective could not be attained by adopting internal measures.¹⁹ There has been disagreement as to whether the Court by this so-called 1/76 dictum intended to assert an exclusive competence, or whether it was merely a confirmation of the fact that in some instances, the Community could exercise an external competence even if the substantive competence had not yet been exercised internally.²⁰ Today the 1/76 dictum is expressed in TFEU Article 3(2) and it is thus beyond doubt that it may constitute a ground for an exclusive competence. Its precise scope and content remain to be clarified by the ECJ or otherwise.

As to the common fishery policy, the ECJ in 1976 held that as a combined effect of Treaty provisions on the common agricultural policy, regulations adopted by the Council, and a provision of the Act of Accession of 1973—when Denmark, Ireland, and the United Kingdom acceded to the Communities—the Community had acquired a competence to enter into international commitments for the conservation of the resources of the sea.²¹ As the provision of the Act of Accession, according to which the Council had an obligation to determine conditions for fishing, with the view to ensuring protection of fishing grounds and conservation of the biological resources of the sea, became applicable on January 1, 1979, the Court in a case decided in 1981 held that the Member States were “no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction”²² and that the competence has thus become “exclusive.”²³ This development may be seen as a combination of the explicit Treaty-based competence approach and the “implicit” competence introduced by the AETR/ERTA judgment.

In the following, I shall focus on the subsequent developments first, of the *common commercial policy*, and then, of the *AETR/ERTA*

19. Opinion 1/76, European Lay-Up Fund for Inland Waterways Vessels, 1977 EU:C:1977:63, ¶¶ 2-5.

20. See, e.g., Piet Eeckhout, *Exclusive External Competences: Constructing the EU as an International Actor*, in *THE COURT OF JUSTICE AND THE CONSTRUCTION OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW*, 611 at 628-30 (2012); EECKHOUT, *supra* note 13, at 76-82.

21. Kramer and Others, Joined Cases 3, 4, & 6/76, EU:C:1976:114, ¶ 33; see also Case C-32/79, *Comm’n v. United Kingdom*, 1980 EU:C:1980:189.

22. Case C-804/79, *Comm’n v. United Kingdom*, 1981 EU:C:1981:93, ¶ 18.

23. *Id.* ¶ 27.

principle, while leaving aside other situations or contexts where an exclusive competence could arise, such as the “necessity” criterion first launched in Opinion 1/76, the common fisheries policy, or some other grounds for an exclusive competence now recognized in TFEU Article 3(1)—for instance, monetary policy. The common commercial policy and the AETR/ERTA principle have been chosen because it is in these two contexts that recent developments in Treaty law and case law have brought new elements to the debate about exclusive external competence.

II. COMMON COMMERCIAL POLICY

As explained above, the ECJ already at an early stage adopted a fairly broad understanding of what constitutes *trade in goods* and thus falls under the common commercial policy. In Opinion 1/94,²⁴ the Court confirmed that not only the General Agreement on Tariffs and Trade (“GATT”), but also all the multilateral agreements on trade in goods provided for in Annex 1A of the Marrakesh Agreement establishing the World Trade Organization (“WTO”) of 1994,²⁵ fall under the common commercial policy and thus belong to the sphere of exclusive competence. There also appeared indications in the Court’s case law that measures regulating international trade may belong to the sphere of exclusive competence even if they pursue other ultimate objectives (development, environment, political objectives, and so on).²⁶ On the other hand, some later decisions are based on the idea that measures affecting trade may escape the realm of common commercial policy if the predominant objectives and components of the agreement are to be seen elsewhere, notably in the protection of the environment.²⁷

24. Opinion 1/94, WTO Agreement, 1994 EU:C:1994:384.

25. 1994 O.J. L 336/3.

26. See, e.g., Allan Rosas, *Les relations internationales commerciales de l’Union européenne – Un aperçu juridique et développements actuels*, in LIBER AMICORUM BENGT BROMS: CELEBRATING HIS 70TH BIRTHDAY 16 OCTOBER 1999 428, 430-433 (Finnish Branch of the Int’l L. Ass’n, 1999).

27. See, e.g., Opinion 2/00, Cartagena Protocol, [2001] E.C.R. I-9713, ¶ 40; Case C-94/03, *Comm’n v. Council*, [1996] E.C.R. I-01; Case C-411/06, *Comm’n v. Parliament and Council*, [2009] E.C.R. I-7585, ¶ 71; cf. *Comm’n v. Council* (“Energy Star”), [2002] E.C.R. I-12049 (where the Court held the commercial policy objective was predominant and that the agreement in question fell under an exclusive competence); see also EECKHOUT, *supra* note 13, at 39-57.

As to *trade in services* services and the *trade aspects of intellectual property* rights, the ECJ, in Opinion 1/94, famously ruled that matters dealt with in the WTO General Agreement on Trade in Services (“GATS”)²⁸ and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”)²⁹ fell, as a general rule, outside the realm of common commercial policy and thus exclusive competence. While after this Opinion a pragmatic way of dealing with WTO matters was found, giving the Commission the task of representing the Community and its Member States also in GATS and TRIPS contexts—albeit based on previous coordination between the Commission and the Member States,³⁰ the formal distinction between exclusive (GATT) and shared competence (GATS and TRIPS) continued to be a source of uncertainty and concern,³¹ and various initiatives were taken to bring the latter under the umbrella of common commercial policy.

One such effort was made in the context of the Treaty of Nice of 2001, which amended, *inter alia*, the EC Treaty, including its then Article 133 relating to common commercial policy. Whilst Article 133(5), as amended, provided that the conclusion of international agreements in the fields of trade in services and the trade-related aspects of intellectual property rights fell under paragraphs one to four of the same Article, in other words under the common commercial policy—and thus an exclusive competence, this was said to be “without prejudice” to paragraph six. And Article 133(6) stated that trade in certain sensitive service sectors (cultural and audiovisual services, educational services, and social and human health services) continued to fall under a shared competence and required joint conclusion by the Community and its Member States and added that

28. 1994 O.J. (L 336) 190; *see* Case C-360/93, *Parliament v. Council*, [1996], E.C.R. I-11954, where the Court, by referring to Opinion 1/94, observed that only services which are supplied across frontiers fall within the scope of the common commercial policy (¶ 29) and annulled the decision to conclude an agreement on public procurement as it had been based on Article 113 of the EC Treaty (now TFEU Article 207) alone.

29. 1994 O.J. (L 336) 213.

30. *See, e.g.*, Joni Heliskoski, *Joint Competence of the European Community and its Member States and the Dispute Settlement Practice of the World Trade Organization*, 2 CAMBRIDGE Y.B. EUR. L. 61 (1999).

31. As TRIPS was considered to fall under a shared competence, the ECJ was in many cases confronted with the question of the division of competence between the Community and the Member States in order to ascertain which parts of the Agreement formed part of Community law. *See, e.g.*, Case C-431/05, *Merck Genéricos - Produtos Farmacêuticos Lda v. Merck & Co. Inc.*, [2007] E.C.R. I-7001.

transport agreements continued to fall under some other parts of the Treaty—not providing for any explicit exclusive competence.

In Opinion 1/08, given the day before the entry into force of the Treaty of Lisbon, containing yet another version of Article 133 (now TFEU Article 207), the ECJ refuted the thesis of the Commission and the European Parliament according to which the exception contained in Article 133(6) only concerned agreements which exclusively or predominantly covered the services belonging to the sensitive sectors listed in Article 133(6). The Court also confirmed that the transport aspects of such an agreement were not covered by Article 133 at all.³² The conclusion of the agreements made in the context of GATS thus fell within the sphere of shared competence of the Community and its Member States.

The entry into force of the Lisbon Treaty changed the legal landscape in a significant manner. The former Article 133 of the EC Treaty became TFEU Article 207, and its first paragraph now lists measures relating not only to trade in goods but also to trade in services as well as the commercial aspects of intellectual property. What is more, “foreign direct investment” is mentioned as well. It thus became clear that these areas are included in the concept of common commercial policy and thus are covered by TFEU Article 3(1)(e), providing for an exclusive competence in the area of “common commercial policy.”

That this new provision did not settle all possible disagreements to which the question of the exact scope of the common commercial policy could give rise became clear in the context of a request for a preliminary ruling submitted to the ECJ in 2011. The national (Greek) judge wanted to know whether a provision of TRIPS (Article 27) setting out the framework for patent protection fell within an area for which the Member States continued to have primary competence—in which case they would have been free to decide on the possible direct effect of the provision in question—and also put some questions relating to the interpretation of this and another provision of TRIPS.³³ The Court answered the first question in the negative, concluding that

32. Opinion 1/08, 2009 E.C.R. I-11129, concerned the conclusion of agreements on the grant of compensation for modification and withdrawal of certain GATS commitments following the accession of new Member States to the EU.

33. Case C-414/11, *Daiichi Sankyo v. DEMO*, [2013] E.C.R. I-____ (delivered July 18, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=139744&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=821637>.

TRIPS Article 27 “falls within the field of the common commercial policy.”

This conclusion must be seen in the context of the arguments put before the Court by a number of Member States. They argued that the question should be approached in the context of the case law of the Court relating to mixed agreements, implying that there was an EU competence only to the extent that the European Union had exercised its powers and adopted provisions to implement the agreement. This was because the majority of the rules of TRIPS, such as those concerning patentability, should be considered as concerning international trade only indirectly, and hence as falling outside the field of common commercial policy. The Court disagreed, observing, *inter alia*, that TFEU Article 207 differed noticeably from Article 133 of the EC Treaty, that Opinions 1/94 and 1/08 were no longer relevant, that TRIPS, being as it is an integral part of the WTO system,³⁴ has a specific link with international trade, and also that the terms used in TFEU Article 207(1) “correspond almost literally” to the very title of TRIPS.³⁵

Whilst this judgment should by now have settled the question of the status of TRIPS, there may be other issues to clarify in the future concerning the precise scope of TFEU Article 270(1), such as the question of other international agreements relating to the protection of intellectual property rights or the definition of “foreign direct investment.”³⁶ Moreover, Article 207(5) repeats the exclusion of transport services, which shall continue to be subject to the transport part of the TFEU (Title VI of Part Three).

As to trade in services in general, a case brought by the European Commission against the EU Council in 2012 and decided by the ECJ in the following year concerned the delimitation of acts having a specific link to international trade from acts relating to the EU internal market.³⁷ It is notable that in this case the parties did not contest that the international trade in services falls under TFEU Article 207. The Council, contrary to the proposal of the Commission, had decided that the legal basis of the decision to sign a Council of

34. In this context, the Court also observed that under the WTO system, there may be “cross-suspension” of concessions between TRIPS and the other WTO multilateral agreements. *Id.* ¶ 54.

35. *Id.* ¶ 55.

36. See, e.g., EECKHOUT, *supra* note 13, at 63-64; Eeckhout, *supra* note 20, at 624-25; Rosas, *supra* note 7, at 21-22.

37. See generally Case C-137/12, *Comm’n. v. Council*, 2013 EU:C:2013:675.

Europe Convention relating to the legal protection of radio, television and information society services based on conditional access (access subject to prior individual authorization) should be TFEU Article 114 relating to the internal market and that the Convention should accordingly be signed both by the European Union and its Member States.³⁸ Before the Court, the Council, together with some Member States, argued that the Convention was primarily intended to approximate the legislation of the contracting parties and that it thus concerned the EU internal market and that the fact that the Convention, unlike EU internal legislation in this field,³⁹ also affected trade in services between the European Union and third countries, was of an indirect and secondary nature only. Some Member States added that the provisions of the Convention relating to seizure and confiscation were of a criminal-law nature and already for this reason fell outside the common commercial policy.

The Court rejected this line of argument and annulled the Council decision. After a detailed analysis of the different provisions of the Convention, the Court concluded that it was supposed to help extend the application of EU internal legislation beyond the borders of the European Union in order to promote the supply of services to third countries, and that the aspects of the Convention which did not clearly relate to the international trade in services were of an incidental or ancillary nature. Hence the contested decision (to sign the Convention) “primarily” pursued an objective having a “specific connection to the common commercial policy.” That meant that the decision should have been based on TFEU Article 207(4) instead of Article 114 and that the signing of the Convention fell within the exclusive competence of the European Union.⁴⁰ The judgment confirms earlier case law relating to “ancillary” provisions, implying that it is sufficient for an act to fall under the common commercial policy and thus EU exclusive competence if its primary objective and content is to regulate trade with third countries.

38. Unlike the common commercial policy, the internal market is in TFEU Article 4(2) listed among the areas of shared competence. *See* Opinion 2/92, Third Revised Decision of the OECD on National Treatment, 1995, EU:C:1995:83 (holding that the OECD rules in question were partly covered by the Unions internal market rules and not by the rules of its common commercial policy (¶ IV:25)).

39. Council Directive 98/84, 1998 O.J. (L 320) 54 (EC) (discussing the legal protection of services based on, or consisting of, conditional access).

40. *Comm'n v. Council*, *supra* note 37, ¶ 76.

III. *THE AETR/ERTA PRINCIPLE*

As noted above, the ECJ in its AETR/ERTA judgment of 1971 held that each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, “the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.”⁴¹ This fairly broad formula was applied and clarified notably in Opinion 2/91, which, *inter alia*, made it clear that the AETR/ERTA principle would also apply to Community rules which did not “implement a common policy” in the meaning of the AETR/ERTA judgment itself.⁴² Moreover, according to the Opinion, it is not necessary that the area covered by EU legislation and the international agreement coincide fully as long as the relevant area is covered “to a large extent” by EU rules. Opinion 2/91, on the other hand, provided for a more restrictive approach to Community rules which lay down minimum requirements only, stating that such rules may not be sufficiently “affected” by an international agreement which itself allows contracting parties to adopt more stringent measures than the minimum requirements of the agreement.⁴³

In Opinion 1/94, in which the Court ruled that as Community law stood in 1994, GATS and TRIPS should be concluded jointly by the Community and its Member States, the Court also seems to have applied the AETR/ERTA principle in a somewhat more restrictive manner.⁴⁴ True, the Court may even have slightly expanded this principle in stating that the Community acquires an exclusive competence not only when it has included in its internal legislation provisions relating to the treatment of nationals of third states, but also by the mere fact that internal legislation provides for a power to negotiate with third states. But when the Court added a third criteria, referring to a situation where there are no express provisions relating to third states in Community legislation—the situation which seems to be at the heart of the AETR/ERTA principle, it spoke of a situation of “complete harmonization” of the internal rules—as the common rules thus adopted could be affected within the meaning of the

41. *Comm'n v. Council*, *supra* note 17, ¶ 17.

42. Opinion 2/91, ILO Convention No. 170, 1993 EU:C:1993:106.

43. *Id.*, ¶¶ 17-21.

44. Opinion 1/94, *supra* note 24; *Cf. EECKHOUT*, *supra* note 13, at 82-95 (arguing that “the Court left AETR and Opinion 1/76 fully intact”).

AETR/ERTA judgment.⁴⁵ Whilst this dictum was made in a GATS context, with the Court referring to the complete harmonization of rules “governing access to a self-employed activity,” it has often been understood as a ruling of more general relevance.

That was at least the interpretation of Opinion 1/94 on this point put forward in the so-called “Open Skies” judgments of 2002, which concerned the conformity with EU law of bilateral air transport agreements concluded by some Member States with the United States.⁴⁶ These judgments did establish an exclusive AETR/ERTA competence but this competence only covered certain concrete issues (such as air fares) and did not establish an exclusive competence for air transport agreements in general.

In Opinion 1/03, the Court was called upon to rule on the relevance of the AETR/ERTA principle for the conclusion of a multilateral agreement relating to private international law.⁴⁷ The Court this time concluded that the new agreement fell “entirely within the sphere of exclusive competence of the European Community.”⁴⁸ The following elements should be highlighted: (1) the Court took a certain distance to the above-mentioned three situations leading to an exclusive competence set out in Opinion 1/94—and repeated in the Open Skies judgments of 2002⁴⁹—and now stated that these were only examples, formulated in the particular contexts with which the Court was concerned; (2) the Court confirmed a dictum in Opinion 2/91 according to which it is not necessary for the areas covered by the international agreement and the EU legislation to coincide fully and that an area which is “already covered to a large extent” by EU rules may suffice;⁵⁰ (3) in the latter context, the Court also confirmed and specified a reference in Opinion 2/91 by observing that it is necessary to take into account “not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that

45. *Id.* ¶ 96.

46. *See, e.g.*, Case C-467/98, *Comm’n v. Den.*, 2002 EU:C:2002:625, ¶ 84. *Compare id.*, with ¶ 82, where another formula is used and the other so-called *Open Skies* judgments delivered on the same day.

47. The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, provides for an extension of most of the rules of an internal EU regulation to some non-member states. *See* Council Regulation (EC) No. 44/2001 of 22 December 2000, 2001 O.J. (L 304) 34.

48. Opinion 1/03, Lugano Convention, 2006 EU:C:2006:81.

49. *See Comm’n v. Den.*, *supra* note 46, ¶ 45.

50. *Opinion 1/03*, [2006] E.C.R. I-1198, ¶ 126.

analysis;”⁵¹ (4) the Court further confirmed that initiatives seeking to avoid contradictions on substance between EU law and the agreement does not remove the obligation to determine, prior to the conclusion of the agreement, whether it is capable of affecting the EU rules within the meaning of the AETR/ERTA principle;⁵² and (5) on the other hand, the Court emphasized that an exclusive competence may not follow from mere suppositions but requires a “specific analysis,” which must be both “comprehensive and detailed,”⁵³ of the relationship between the agreement and the EU rules concerned.

What mattered, at the end of the day, was to ensure that the agreement was “not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish.” Opinion 1/03 can be said to have implied a certain return to the general approach of the initial AETR/ERTA judgment viewed in combination with certain dicta, notably the “to a large extent” criterion, of Opinion 2/91. The new provision in TFEU Article 3(2) is also based on a fairly broad understanding of this principle. Reference is made here to not only situations where the conclusion of an agreement “is provided for in a legislative act of the Union”—one of the three situations mentioned in Opinion 1/94—or the so-called 1/76 criterion—which will not be further explored in this context⁵⁴—but also situations where the conclusion of the agreement “may affect common rules or alter their scope.” The need for “complete harmonization” of the area by EU legislation is not mentioned.

In an infringement case brought in 2007, that is, before the entry into force of the TFEU, the Commission argued that a Member State, by submitting to the International Maritime Organization a proposal for the monitoring of ships and port facilities, acted in contravention of the European Union’s exclusive competence, following from a regulation on enhancing ship and port facility security.⁵⁵ The Court agreed, and the Member State was condemned for having failed to fulfil its obligations under EU law.⁵⁶ By reference to the AETR/ERTA judgment, the Court observed that the Member State

51. *Id.* ¶ 126.

52. *Id.* ¶ 129.

53. *Id.* ¶¶ 124, 133.

54. *See supra*, notes 19-20 and accompanying text.

55. Regulation (EC) No. 725/2004 of the European Parliament and of the Council of 31 March 2004, 2004 O.J. L 129/6.

56. Case C-45/07, *Comm’n v. Greece*, [2009] E.C.R. I-701.

had set in motion a procedure which could have led—although it had not actually led—to the adoption of new international rules in a field covered by the Regulation in question and had thus taken an initiative “likely to affect the provisions of the Regulation.”⁵⁷

That the dicta of Opinions 2/91 and 1/03 continue to be relevant in a post-Lisbon context also has been confirmed in recent case law. In a case brought by the European Commission against the Council, the Commission asked for the annulment of a decision taken by the Council and the representatives of the governments of the Member States, by which the Commission was denied authorization to negotiate the entire future Council of Europe Convention on the protection of neighbouring rights of broadcasting organisations, the decision being based on the assumption that the agreement envisaged belonged to the sphere of shared competence.⁵⁸ The Court agreed with the Commission and concluded, in annulling the contested decision, that the negotiations to be held “[e]ll within the exclusive competence of the Union.”

This conclusion was grounded in a reaffirmation of the “covered to a large extent” formula following from Opinions 2/91 and 1/03 and was reached after a “specific analysis” of the relationship between the agreement envisaged and the EU legislation in question, as required by Opinion 1/03. The judgment thus confirms the relevance of the earlier case law for an application and interpretation of the AETR/ERTA criterion of Article TFEU 3(2). In referring to a possible “risk that common EU rules might be adversely affected by international commitments, or that the scope of those rules might be altered,”⁵⁹ the judgment seems to be based on a fairly broad interpretation of the AETR/ERTA principle. The Court in any case firmly rejected the view put forward by some Member States arguing that since the entry into force of the Lisbon Treaty, the exclusive external competence of the European Union should be viewed in a more restrictive way.⁶⁰

In this case, the Court also clarified an issue which in most other decisions of the Court relating to the AETR/ERTA principle have been tackled only implicitly: What is the “area” of legal regulation to be considered when it has to be decided whether EU legislation

57. *Id.* ¶ 23.

58. *Comm’n v. Council*, Case C-114/12, EU:C:2014:2151.

59. *Id.* ¶ 68.

60. *Id.* ¶¶ 82-73.

covers something “to a large extent” and according to which criteria should this “area” be determined? This question became of particular significance in the case in question as the Advocate General of the Court had split the international agreement relating to the rights of broadcasting organisations into different “parts,” holding that in order to establish an exclusive competence for the entire international agreement to be negotiated, it is necessary that “each and every part” of that agreement be covered by EU rules.⁶¹ On this basis, and on the basis of quite a detailed analysis of some specific questions—such as the right of retransmission, as distinct from the notions of fixation, reproduction, distribution and making available to the public, and the right of protection of pre-broadcast programme-carrying signals—she concluded that the Commission had not been able to establish that “each and every part” of the agreement belonged to the sphere of exclusive competence—partly because some EU rules seemed to establish minimum requirements only. The European Union thus did not have an exclusive competence to negotiate the entire agreement, despite the fact that, according to the Advocate General, it was “undoubtedly true that EU law covers a considerable part of what falls to be negotiated.”⁶²

The Court did not subscribe to such a piecemeal approach. By reference to applicable EU legislation, it observed that the neighbouring rights of broadcasting organisations are the subject of a “harmonized legal framework” which has established a regime with high, homogenous protection for broadcasting organisations. As the negotiations to be conducted aimed at an international treaty relating to the same subject-matter—the protection of neighbouring rights of broadcasting organisations—*that* was the relevant area for the purposes of the AETR-ERTA-based analysis, and as that area was covered “to a large extent” by EU rules, the competence became exclusive for the entire agreement. It was in this regard immaterial whether the harmonized legal framework in question had been established by various legal instruments—as was the case here⁶³—or not.

The Court also referred to a previous judgment relating to the environment, where “the protection of waters against pollution,”

61. Opinion of Advocate General Sharpston of Apr. 3, 2014, *Comm’n v. Council*, *supra* note 58, ¶¶ 111, 143-45, 166.

62. *Id.* ¶ 145.

63. *Comm’n v. Council*, *supra* note 58, ¶¶ 78-84.

which was the subject-matter of the international agreement in question, was considered as the “area” which had to be taken into account.⁶⁴ In other contexts as well the Court has considered a legal regime or framework as a whole rather than determining the nature of the European Union’s competence separately for each and every concrete question;⁶⁵ on the other hand, the Court has not always limited its analysis to an entire agreement to be negotiated or concluded, but has in some cases provided different answers to different parts of an agreement in so far as these parts have been clearly distinguishable from each other.⁶⁶

The Court’s approach seems nevertheless to be based on the consideration that an international agreement normally forms a whole, where everything may have an impact on everything, and that splitting this whole up into small parts would be foreign to the reality of international treaty negotiations. This could also have as an effect that there were practically no treaty negotiations which would any longer be entirely covered by an exclusive competence—as there would almost always be some question which has not yet been fully covered by existing EU legislation; such an approach would also render the “to a large extent” criterion close to meaningless.

Finally, the judgment clarifies the scope of the exception for “minimum requirements” which had been formulated in Opinion 2/91—and reiterated in some later decisions. With regard to the right of “retransmission,” some Member States had argued that as the internal EU rules referred only to retransmission by wireless means, these rules constituted a minimum harmonization only, and thus the international agreement could freely extend the concept of retransmission to retransmission by wire, including the internet. The

64. *Id.* ¶ 83. The reference was to *Commission v. France*, Case C-239/03, EU:C:2004:598 (although in this case, the Court was only called upon to decide whether a given question fell under a Union competence and not whether that competence was exclusive or shared).

65. *See, e.g.*, Opinion 1/03, *supra* note 48, where the Court first distinguished between the jurisdiction of (national) courts and the recognition and enforcement of their judgments under Regulation 44/2001 but then observed that these two issues “are closely linked” (at ¶ 163) and that the relevant Community rules on the recognition and enforcement of judgments “are indissociable from those on the jurisdiction of courts, with which they form a unified and coherent system” (at ¶ 172).

66. For instance, in Opinion 1/94, *supra* note 24, ¶¶ 43-53, the Court with regard to GATS made a distinction between the cross-frontier supply of services not involving any movement of persons and other services as well as between transport services and other services. *See* Opinion 2/91, *supra* note 42.

Court disagreed, pointing out that the scope of the right of retransmission under the EU rules did not concern a situation comparable to that stated in Opinion 2/91, in which *both* the EU rules *and* the international agreement had laid down minimum requirements.⁶⁷ The material scope of the right of retransmission as circumscribed in the EU Directive in question would have been altered if the international agreement came to extend that right to retransmission by wire.⁶⁸ The definition of a basic concept is in other words not a minimum requirement but a *limitation of the scope* of the concept which will inevitably be altered if the international agreement foresees another definition—it should be recalled in this context that the international agreement, too, would become an integral part of EU law and it would even prevail over internal secondary law.⁶⁹

Soon—roughly one month—after this judgment the ECJ gave an opinion on the extent of the respective powers of the European Union and its Member States to declare the acceptance of the accession of third states to the 1980 Hague Convention on the civil aspects of international child abduction.⁷⁰ This Convention provides for an exceptional procedure whereby an accession to it will have effect only as regards the bilateral relations between the acceding state and a contracting party which has declared its acceptance thereof. Whilst the European Union cannot become a contracting party—as the Convention is open to “states” only—the Commission had proposed Council decisions authorizing Member States to give declarations of acceptance, “in the interest of the EU,” of the accession of eight third states to the Convention. The Commission argued that such a Council authorization⁷¹ was necessary in view of the fact that the international abduction of children had become part of an exclusive competence of the European Union, given Regulation No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.⁷²

67. See Opinion 2/91, *supra* note 42, ¶ 18.

68. *Comm'n v. Council*, *supra* note 58, ¶¶ 90-92.

69. See, e.g., *ROSAS & ARMATI*, *supra* note 1, 59-61.

70. Opinion 1/13, Convention on the Civil Aspects of International Child Abduction, EU:C:2014:2303.

71. On the mechanism of Council authorization, “in the interest of the EU,” of Member State action in the field of EU exclusive competence, see *ROSAS*, *supra* note 6, at 1331-35; *Rosas*, *supra* note 7, at 32-33.

72. Council Regulation (EC) No. 2201/2003 of Nov. 27, 2003, 2003 O.J. L 338/1.

Opinion 1/13 first of all confirmed earlier case law, including in particular the “cover to a large extent” criterion, which in conjunction with the judgment relating to the Council of Europe convention on rights of broadcasting organizations was said to persist also with TFEU Article 3(2).⁷³ Then, after having established that the provisions of the Regulation “cover to a large extent” the two procedures governed by the 1980 Hague Convention, namely the procedure concerning the return of wrongfully abducted children and the procedure for securing the exercise of access rights, the Court went on to consider whether there was a “risk” that common EU rules may be affected. In this regard, Regulation 2201/2003 contained less elements of an obvious relevance for relations with third countries than Regulation 44/2001 relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which was dealt with in Opinion 1/03.⁷⁴ The Court nevertheless observed that there was an overlap and close connection between the provisions of Regulation 2201/2003 and those of the Convention and that the provisions of the latter “may have an effect on the meaning, scope and effectiveness” of the rules laid down in the former. The Court moreover referred to the specific situation which could arise when one Member State acting individually would accept the accession to the Convention of a third state whilst another Member State would not. In a concrete situation involving at the same time a third state and these two Member States, there would be a “risk of undermining the uniform and consistent application of Regulation No 2201/2003 and, in particular, the rules concerning cooperation between the authorities of the Member States.”⁷⁵

One is left with the impression that particularly with this decision, the threshold for concluding an AETR/ERTA effect is not very high. It is noteworthy that the Court in several instances refers to a “risk” of affectation. That, in itself, is fully in line with the wording of TFEU Article 3(2), which provides for an exclusive competence in so far as the conclusion of an international agreement “may affect” common rules or alter their scope. It is arguable, on the other hand, that some of the older decisions, and perhaps Opinion 1/94 in particular, were based on a somewhat more restrictive view of the scope of the AETR/ERTA principle.

73. Opinion 1/13, *supra* note 70, ¶ 73.

74. *See supra* notes 47-53 and accompanying text.

75. Opinion 1/13, *supra* note 70, ¶ 89.

The story does not end here, however. About one month after having given its Opinion 1/13, the Court gave a preliminary ruling⁷⁶ on some questions put to it by an Italian court.⁷⁷ The national judge wanted to know whether, having regard to an EU directive on the promotion of electricity produced from renewable energy sources in the internal electricity market,⁷⁸ the European Union had exclusive external competence that precluded a provision of Italian law, which provided for an exemption to acquire green certificates in case of electricity imports from a third state on the basis of a bilateral agreement between Italy and the third state (Switzerland), under which the electricity imported was guaranteed to be green. As under the national legislation that exemption was conditional on the conclusion, between Italy and the third state, of an international agreement on mutual recognition of electricity as being produced from renewable sources, it became important to know whether such a system was compatible with EU external competences in this field.

The Court, by observing that the question concerned the applicability of the AETR/ERTA principle, confirmed that this principle is relevant also in the context of the protection of the environment, despite the fact that TFEU Article 4 (2) lists the “environment” among the shared competences and that the Directive in question has been adopted on the basis of the then Article 175 of the EC Treaty (now TFEU Article 192).⁷⁹ This is in line with a Declaration adopted already in the context of the Treaty of Maastricht of 1992, according to which the references in the EC Treaty to a shared competence, *inter alia*, in the field of the environment (then Article 130) “do not affect the principles resulting from the judgment handed down by the Court of Justice in the AETR case.”⁸⁰

The Court held that the European Union had acquired an exclusive competence to conclude agreements of the nature envisaged under the Italian legislation to be concluded by Italy. This conclusion was basically grounded in three different considerations. First of all,

76. See, e.g., Allan Rosas, *The National Judge as EU Judge: Some Constitutional Observations*, 67 *SMU L. REV.* 717 (2014) (on the preliminary ruling procedure based on TFEU Article 267).

77. Green Network, Case C-66/13, EU:C:2014.

78. Directive 2001/77/EC of the European Parliament and of the Council of Sept. 27, 2001, (2001) O.J. L 283, 33.

79. Green Network, *supra* note 77, ¶¶ 35-36.

80. Declaration on Article 109, 130r and 130y of the Treaty establishing the European Community, July 29, 1992, 1992 O.J. C 191/1.

the purpose of a certain provision of the EU Directive was to harmonize the conditions on, and mechanisms under, which electricity could and must be certified in the EU as being green electricity. As the effect of the envisaged bilateral agreement could have been to extend the scope of this harmonized mechanism, by allowing guarantees of origin issued in third states to enjoy a status equivalent to that enjoyed by guarantees of origin issued in the Member States, such an agreement was liable to “alter the scope” of the common rules laid down in the Directive.⁸¹ Second, a bilateral agreement, by making it possible, in the operation of a national support scheme, to take into account also the green nature of electricity produced in a third state, could interfere with the objectives of the Directive and the obligation of the EU Member States to increase their national production of green electricity. The conclusion of such agreements was therefore “liable to affect the proper functioning of the system established by [the D]irective.”⁸² Thirdly, the judgment recalls that according to the case law,⁸³ in assessing whether an area is already “largely covered” by EU rules, account should be taken not only of EU law as it stands but also “its future development, in so far as that is foreseeable at the time of [the] analysis.”⁸⁴ In this regard, the Court observed that whilst the Directive in question did not lay down a Community-wide support scheme for electricity produced from renewable sources, the Commission was requested to present a report accompanied, if necessary, by a proposal for a Community framework for the national support schemes, and that the Italian legislation was adopted during the period in which the Commission was required to examine this question. The Court also mentioned that a new Directive of 2009,⁸⁵ which had replaced the previous Directive of 2001, referred to the need to specify the conditions under which green electricity produced in a third state could be taken into account by a Member States in order to achieve the binding target on green energy imposed on it by the new

81. *Green Network*, [2014] E.C.R. I ___ (delivered Nov. 26, 2014), ¶¶ 41-49.

82. *Id.* ¶¶ 50-60.

83. *Id.* ¶¶ 33, 61; See Opinion 2/91, *supra* note 42, ¶ 25; Opinion 1/03, *supra* note 48, ¶ 126; *Comm'n v. Council*, [2014] E.C.R. I ___ (delivered Sept. 4, 2014), ¶ 74; Opinion 1/13, *supra* note 70, ¶ 74.

84. *Green Network*, [2014] E.C.R. I ___ (delivered Nov. 26, 2014), ¶ 61.

85. Directive 2009/28/EC of the European Parliament and of the Council of Apr. 23, 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, 2009 O.J. L 140/16.

Directive.⁸⁶ This seems to be the first time that the Court makes concrete use of the criterion of “future development” as one element pointing at the existence of exclusive competence in a given area.⁸⁷

CONCLUSION

By its AETR/ERTA judgment of 1971 and Opinion 1/75, the ECJ provided an important platform for the existence not only of a competence to conclude international agreements in the name of the European Union, but also of an exclusive competence in this regard. Subsequent case law relating to the common commercial policy introduced some important limits to this concept. According to Opinion 1/94 the trade in services and the trade-related aspects of intellectual property rights fell largely outside an exclusive competence,⁸⁸ and according to some later Court decisions, even measures affecting the trade in goods could fall outside the common commercial policy if the measures were deemed to pursue predominantly objectives other than the promotion of trade as such, such as the protection of the environment.⁸⁹

The AETR/ERTA principle, too, became circumscribed by dicta making a reserve for EU legislation providing for minimum requirements only (Opinion 2/91) and referring to the need for “complete harmonization” as one ground for an exclusive AETR/ERTA competence (Opinion 1/94). Opinion 2/91, it is true, also introduced the “to a large extent” criterion and made reference to the future development of EU law as a possible element to be taken into account, but with the exception of the Open Skies judgments,⁹⁰ in which a limited external competence was confirmed, there were no cases in which the ECJ determined the existence of an AETR/ERTA exclusive competence.⁹¹

The scope of the common commercial policy was considerably enlarged by the Treaty of Lisbon and the new definition given in TFEU Article 207. The judgment in *Daiichi Sankyo* of 2013 confirms

86. *Green Network*, [2014] E.C.R. I ___ (delivered Nov. 26, 2014), ¶¶ 63-64.

87. *Id.*

88. Opinion 1/94, *supra* note 24.

89. See Opinion 2/00, *supra* note 27; see also *Comm’n v. Council*, [2006] E.C.R. I-1; *Comm’n v. Parliament and Council*, [2006] E.C.R. I-7585.

90. See *Comm’n v. Denmark*, [2002] E.C.R. I-9519, ¶ 84.

91. In Opinion 2/92, *supra* note 38, ¶¶ 25, 31-34, an AETR/ERTA competence was denied.

that the whole area of TRIPS falls under Article 207,⁹² and there is every reason to believe that the same conclusion would apply to the trade in services and GATS.⁹³ There are, on the other hand, some issues which remain to be clarified in later case law, such as the exact scope of the notions of “commercial aspects” of intellectual property outside the TRIPS framework and of “foreign direct investment,” both appearing in TFEU Article 207.

With Opinion 1/03,⁹⁴ as well as the new rule in TFEU Article 3(2), the AETR/ERTA principle has experienced somewhat of a *renaissance*. Not only in Opinion 1/03, but also in an infringement case of 2009 and in three judgments given in 2014, the ECJ has confirmed the existence of an AETR/ERTA-based exclusive competence.⁹⁵ It is too early to predict all the consequences Article 3(2) and this new case law may have for the application of the AETR/ERTA principle in general. What seems undeniable, however, is that in the light of this case law, the principle will play an important role in judging the nature of EU external competences. What is noticeable, in particular, is the Court’s focus, in determining whether there is coverage “to a large extent,” on a given legal *regime* rather than each and every detail of this regime, the *limitation* of the reserve for “minimum requirements” to situations where it is clear that both the EU internal rules and the international agreements provide for such requirements only, and the inclusion of *future* foreseeable legal developments in the elements to be taken into account when deciding whether EU rules may be affected or not. The general but at the same time ultimate criterion formulated in Opinion 1/03 and in subsequent case law, namely the need to ensure that the agreement is “not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish,” calls for an overall assessment, adjusted to the particularities of each case, rather than a strict fixation on this or that more detailed criterion.

With the by now extensive, and it seems, ever expanding, EU legislation in areas such as the environment, transport, judicial

92. See *Daiichi Sankyo*, [2013] E.C.R. I ____ (delivered July 18, 2013), ¶¶ 52, 54-55.

93. See also *Comm’n v. Council*, [2013] E.C.R. I ____ (delivered Oct. 22, 2013).

94. *Supra* note 48, and accompanying text.

95. *Comm’n v. Greece*, [2009] E.C.R. I-701; *Comm’n v. Council*, [2014] E.C.R. I ____ (delivered Sept. 4, 2014); *Opinion 1/13*, *supra* note 70; *Green Network*, [2014] E.C.R. I ____ (delivered Nov. 26, 2014).

cooperation in civil matters, and the status of third-country nationals and asylum-seekers, there is a potential for a broad rather than narrow application of the AETR/ERTA principle, including with respect to bilateral agreements between the European Union and third countries.⁹⁶ The last chapter on the scope of exclusive external competence is far from having been written.

96. Important bilateral agreements such as association agreements have also recently been concluded as mixed agreements. *See* Rosas, *supra* note 7, at 24-25.