

THE EUROPEAN UNION'S COMPETENCE IN INTERNATIONAL TRADE AFTER THE TREATY OF LISBON

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I. INTRODUCTION

This Article is a tribute to Professor Gabriel M. Wilner. As a true citizen of the world, and concerned about its future, Professor Wilner dedicated himself to international development and to improving international economic and social justice. For all of us who had the honor of participating in Professor Wilner's seminars on the law of international economic development in the LL.M. Program on International Legal Cooperation at the Vrije Universiteit Brussel—where he taught from 1976 to 2004—his commitment to the progressive development of international law will remain an inspiration. As a teacher, Professor Wilner worked in the tradition of his Columbia Law School mentor, Wolfgang Friedmann, with whom he had collaborated on parts of the landmark book *The Changing Structure of International Law*.¹ A proponent of the “law in context” approach, Professor Wilner's seminars constituted an eye-opener to the global economic and political sea changes of the time and their impact on the development of world law. Thanks to a wealth of experience as former member of the UN Office of Legal Affairs, former Legal Officer at the UN Conference on Trade and Development (UNCTAD), and legal consultant at the UN Commission on Transnational Corporations, Professor Wilner brought to the classroom a unique insight into the law and diplomacy of international economic relations.

Professor Wilner's influence on his students at the Vrije Universiteit Brussel went well beyond the field of international law. Year after year, he motivated and assisted students to become active members of the transatlantic community and to continue their education in the United States. In the same spirit, and in his capacity as Associate Dean of Graduate Legal Studies at the University of Georgia School of Law, he offered young colleagues at the Vrije Universiteit Brussel the unique opportunity of teaching European Union (EU) law in Athens, Georgia, while also inviting them to join the faculty of his long-running Brussels Seminar on the Law and Policy of the EU. All those who—like myself—have benefited from these opportunities, owe Professor Wilner a great debt of gratitude. As a warmhearted teacher and mentor, generous friend, and great humanist,

¹ WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964). Professor Wilner was also the principal editor of a volume of essays in honor of Professor Friedmann, *JUS ET SOCIETAS: ESSAYS IN TRIBUTE TO WOLFGANG FRIEDMANN* (Gabriel M. Wilner ed., 1979).

Professor Wilner's memory will live among the generations of students and colleagues on all continents whom he motivated, helped, and inspired.

In light of Professor Wilner's longstanding interest and teaching activities in EU law, and his concentration on international economic relations, this Article will focus on the EU's international trade competences after the Treaty of Lisbon.² The EU's external trade policy, or common commercial policy (CCP) as it is called in the EU's Treaty language, belongs to the EU's exclusive competences.³ However, its precise scope has been the subject of a decades-long legal and political debate.⁴ The main causes of this seemingly endless discussion have been: (a) the poor drafting of the original EEC Treaty Article on the CCP;⁵ (b) the decades of resistance by the Member States to accept the EU as a single actor in international trade that is empowered to conclude comprehensive and modern international trade

² 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 Lisbon Treaty]. To obtain a full picture of the currently applicable EU primary law, consult the Consolidated Version of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU], and the Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

³ See *infra* Part II. The numbering of the relevant Treaty Article on the CCP has changed over time. The Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], incorporated the CCP competences and procedures in its Article 113. With the entry into force of the Treaty of Amsterdam Amending the Treaty on European Union and the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam], the original Article 113 was renumbered as Article 133 of the Consolidated Version of the Treaty Establishing the European Community, Oct. 2, 1997, 1997 O.J. (C 340) 173 [hereinafter EC Treaty (Amsterdam)]. With the entry into force of the Lisbon Treaty, *supra* note 2, Article 133 was renumbered to Article 207 of TFEU, *supra* note 2.

⁴ See generally Jacques H.J. Bourgeois, *External Relations Powers of the European Community*, 22 *FORDHAM INT'L L.J.* S149 (1999) (discussing how poor drafting and interpretive problems have led to debate over the common commercial policy provision); see also Rafael Leal-Arcas, *Is EC Trade Policy up to Par?: A Legal Analysis over Time – Rome Marrakesh, Amsterdam, Nice, and the Constitutional Treaty*, 13 *COLUM. J. EUR. L.* 305, 305 (2007) (providing analysis of the “evolution of the EC's common commercial policy competence” over time).

⁵ See generally Jacques H.J. Bourgeois, *The Common Commercial Policy—Scope and Nature of the Powers*, in *PROTECTIONISM AND THE EUROPEAN COMMUNITY* 1, 3 (E.L.M. Völker ed., 1987); Claus-Dieter Ehlermann, *The Scope of Article 113 of the EEC Treaty*, in *ETUDES DE DROIT DES COMMUNAUTÉS EUROPÉENNES: MÉLANGES OFFERTS À PIERRE-HENRI TEITGEN* 147 (Philippe Manin et al. eds., 1984); Stephen Woolcock, *Trade Policy: A Further Shift Towards Brussels*, in *POLICY-MAKING IN THE EUROPEAN UNION* 384 (Helen Wallace et al. eds., 6th ed. 2010).

agreements without the need for separate Member State ratifications;⁶ and (c) the failure of the European Court of Justice to give a logical and coherent follow-up to its initial broad definition of the CCP.⁷ In 1994, Takis Tridimas and Piet Eeckhout accurately noted that, although the Court “has made broad statements of principle, it has been singularly reluctant to draw from them what may seem to be their logical consequences.”⁸

The question of the scope of the CCP and its delimitation of competences is of constitutional significance for two main reasons.⁹ First, the EU has conferred powers only.¹⁰ Before it can conclude an international trade agreement, the EU must tie that agreement to its own primary law (i.e., to a provision in one of the EU Treaties) that empowers it to approve the agreement.¹¹ On several occasions, a restrictive interpretation of the scope of the EU’s primary law has resulted in the conclusion that the EU Treaties do not confer sufficiently comprehensive competence on the EU to ratify an agreement in its entirety.¹² As competences not conferred upon the EU in the

⁶ See generally SOPHIE MEUNIER, *TRADING VOICES: THE EUROPEAN UNION IN INTERNATIONAL COMMERCIAL NEGOTIATIONS* (2005); Sophie Meunier & Kalypso Nicolaïdis, *The European Union As a Conflicted Trade Power*, 13 J. EUR. PUB. POL’Y 906 (2006); Sophie Meunier & Kalypso Nicolaïdis, *The European Union As a Trade Power*, in *INTERNATIONAL RELATIONS AND THE EUROPEAN UNION* 247 (Christopher Hill & Michael Smith eds., 2005) [hereinafter *The European Union As a Trade Power*] (describing the derivation of the EU’s inherent power through trade).

⁷ Some commentators have given broader negative opinions on the Court’s jurisprudence in the field of the EU’s external relations competences. See PANOS KOUTRAKOS, *EU INTERNATIONAL RELATIONS LAW* 85 (2006) (“[T]here is something deeply troubling about the lack of clarity and consistency of the line of reasoning followed [by the Court in the landmark case on implied external powers.]”); see also David L. Scannell, *Trespassing on Sacred Ground: The Implied External Competence of the European Community*, 4 CAMBRIDGE Y.B. EUR. L. STUD. 343, 345 (2001) (“[T]he language employed by the Court . . . has not been conducive to legal certainty.”).

⁸ Takis Tridimas & Piet Eeckhout, *The External Competence of the Community and the Case-Law of the Court of Justice: Principle Versus Pragmatism*, 14 Y.B. EUR. L. 143, 172 (1994).

⁹ This question is analogous to that addressed in the European Court of Justice’s Opinion 2/00 where it attributed a constitutional significance to the choice of the legal base. Opinion 2/00, 2001 E.C.R. I-9713, para. 5.

¹⁰ *Id.*; TEU, *supra* note 2, art. 5(2).

¹¹ Opinion 2/00, para. 5.

¹² See generally Marise Cremona, *Defining Competence in EU External Relations: Lessons from the Treaty Reform Process*, in *LAW AND PRACTICE OF EU EXTERNAL RELATIONS: SALIENT FEATURES OF A CHANGING LANDSCAPE* 34, 38–42 (Alan Dashwood & Marc Maresceau eds., 2008); Panos Koutrakos, *Legal Basis and Delimitation of Competence in EU External Relations*, in *EU FOREIGN RELATIONS LAW: CONSTITUTIONAL FUNDAMENTALS* 171–98 (Marise Cremona & Bruno de Witte eds., 2008).

Treaties remain with the Member States, agreements that come partly under the EU's CCP and partly within the competence of the Member States (so-called mixed trade agreements) also require the joint ratification of each of the Member States.¹³ The ratification of an agreement by all twenty-seven EU Member States, in addition to its conclusion by the EU, is a cumbersome process that creates multiple legal problems.¹⁴ At this moment, around three years typically pass between the signature and the ratification of mixed agreements by the EU and its Member States.¹⁵ Logically, the European Commission—the EU institution charged with promoting the general interest of the EU—has argued over the years for a broad interpretation of the CCP in order to avoid the complexity of mixed agreements, while the Member States, together with the EU's Council of Ministers, have often insisted on remaining directly involved in the conclusion of international trade agreements.¹⁶

Second, the competence question has consequences for the EU decisionmaking procedure.¹⁷ At the negotiation stage of international agreements, those agreements that fall under the CCP are negotiated by the European Commission as a single actor, working on behalf of the EU as a

¹³ TEU, *supra* note 2, art. 5(2). The practice that mixed trade agreements “shall be concluded jointly by the Community and the Member States” was explicitly written in the Treaty of Nice Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 (C 80) 1. The same phrase is also found in the Consolidated Version of the Treaty Establishing the European Community art. 133(6), Dec. 29, 2006, 2006 O.J. (C 321) [hereinafter EC Treaty (Nice)]. This provision is no longer present in the currently applicable TFEU, *supra* note 2.

¹⁴ See generally MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD (Christophe Hillion & Panos Koutrakos eds., 2010) [hereinafter MIXED AGREEMENTS REVISITED] (providing an up-to-date overview of legal questions related to EU mixed agreements); MIXED AGREEMENTS (David O'Keefe & Henry G. Schermers eds., 1983) (the landmark study that raised academic attention to the topic of EU mixed agreements in 1983); LA COMMUNAUTÉ EUROPÉENNE ET LES ACCORDS MIXTES: QUELLES PERSPECTIVES? (Jacques H.J. Bourgeois et al. eds., 1997) (providing interesting perspectives by practitioners and academics).

¹⁵ Frank Hoffmeister, *Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and Its Member States*, in MIXED AGREEMENTS REVISITED, *supra* note 14, at 249, 256. Judge Christiaan Timmermans of the European Court of Justice remarked that mixed agreements notably entail the risk “that a Member State might use the necessary approval of a mixed agreement as leverage to obtain concessions in other fields.” Christiaan Timmermans, *Opening Remarks—Evolution of Mixity Since the Leiden 1982 Conference*, in MIXED AGREEMENTS REVISITED, *supra* note 14, at 1, 7.

¹⁶ See MEUNIER, *supra* note 6 (providing a detailed study of EU decisionmaking in trade policy and the practical consequences of mixity).

¹⁷ Opinion 2/00, 2001 E.C.R. I-9713, para. 5.

whole.¹⁸ In the pre-Lisbon Treaty era, multilateral agreements that include trade provisions, but also other objectives that fall partly within the shared competence of the Member States (such as environmental protection), were often negotiated by the Presidency of the Council of Ministers, together with the Commission.¹⁹ The Treaty of Lisbon now explicitly stipulates that the Commission shall ensure the EU's entire external representation (except for the Common Foreign and Security Policy—CFSP).²⁰ This provision can be interpreted to include the negotiation of agreements that cover shared competences. Nevertheless, the Member States seem determined to continue the practice of having mixed agreements negotiated, at least partly, by the Council Presidency.²¹

At the conclusion stage of international agreements, the Council of Ministers can, in general, act with a qualified majority voting in favor of agreements under the CCP, after consultation of the European Parliament or after having obtained its consent.²² However, trade agreements of a “mixed” nature, involving the shared competences of the Member States, require the “common accord of the Member States,” thus preventing majority decision-taking.²³ This is an additional reason that has motivated the European Commission to favor a broad interpretation of the CCP's scope, while the Member States have been keen on maintaining their veto right.²⁴

¹⁸ TFEU, *supra* note 2, art. 207(3); Frank Hoffmeister, *The Contribution of EU Practice to International Law*, in DEVELOPMENTS IN EU EXTERNAL RELATIONS LAW 37, 49–50 (Marise Cremona ed., 2008); *The European Union As a Trade Power*, *supra* note 6, at 254–57; Woolcock, *supra* note 5, at 388–89.

¹⁹ Hoffmeister, *supra* note 15, at 253–55; *see also* Hoffmeister, *supra* note 18, at 53.

²⁰ TEU, *supra* note 2, art. 17(1).

²¹ As shown in the articles cited below, this was illustrated by the difficulties over EU representation on international environmental negotiations following the entry into force of the Treaty of Lisbon. Jennifer Rankin, *Row over Who Gets to Take Charge at Environment Talks*, EUROPEANVOICE.COM (Apr. 15, 2010), <http://www.europeanvoice.com/article/imported/row-over-who-gets-to-take-charge-at-environment-talks/67677.aspx>; Jennifer Rankin, *Row over Who Provides the EU's 'One Voice.'* EUROPEANVOICE.COM (May 20, 2010), <http://www.europeanvoice.com/article/imported/row-over-who-provides-the-eu-s-one-voice-/67997.aspx>; Jennifer Rankin, *Commission Defends Lead Role in International Talks*, EUROPEANVOICE.COM (June 24, 2010), <http://www.europeanvoice.com/article/imported/commission-defends-lead-role-in-international-talks-/68324.aspx>; Anne Eckstein, *Mercury: Running Battle Between Council and Commission*, EUROPOLITICS (May 25, 2010), <http://www.europolitics.info/sectorial-policies/mercury-running-battle-between-council-and-commission-art272673-15.html>.

²² TFEU, *supra* note 2, arts. 207(3)–(4), 218(6).

²³ The practice that mixed trade agreements require the common accord of the Member States was written into the EC Treaty (Nice), *supra* note 13, art. 133(6). This provision is no longer present in the currently applicable TFEU. Hoffmeister, *supra* note 15, at 256–57.

²⁴ *See supra* notes 4, 6 and accompanying text for a variety of cases illustrating this

Against this background, the main purpose of this Article is to clarify the current state-of-play on the complex question of EU competence in CCP matters after the entry into force of the Treaty of Lisbon. This Article will, at the same time, illustrate the gradual and sometimes complex nature of the European integration process, even in an area in which the EU and its predecessor have already made their marks. Obviously, the scope and limits of the EU's competences in the field of international trade are of crucial importance, including for non-EU countries that want to understand the EU as a partner in multilateral and bilateral trade negotiations.²⁵

II. THE COMMON COMMERCIAL POLICY AS AN EXCLUSIVE EU COMPETENCE

The limits of the EU's competences are governed by the principle of conferral,²⁶ which means that the EU shall only act within the limits of the competences conferred or attributed to it by the Member States in the Treaties on which the EU is founded.²⁷

Through the Treaty of Lisbon, external trade policy—formally called the common commercial policy—is conferred on the EU as one of its exclusive competences.²⁸ When the EU's founding Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts in that area.²⁹ In these fields, the Member States are only able to act if so empowered by the Union or for the implementation of Union acts.³⁰

That the CCP was included in the Lisbon Treaty's list of exclusive EU competences did not come as a surprise. Already in 1975, the European Court of Justice had held that the CCP was an exclusive competence of the European Economic Community (EEC)—the EU's predecessor.³¹ In Opinion 1/75, the Court underlined that the CCP was conceived “for the

struggle between Commission and Member States.

²⁵ This area is increasingly important as the European Commission has recently unveiled a particularly ambitious multilateral and bilateral trade policy agenda for the EU. *See Trade, Growth and World Affairs: Trade Policy As a Core Component of the EU's 2020 Strategy*, at 15, COM (2010) 612 (Nov. 9, 2010).

²⁶ TEU, *supra* note 2, art. 5(1).

²⁷ *Id.* art. 5(2); Opinion 2/00, 2001 E.C.R. I-9713, para. 5.

²⁸ TFEU, *supra* note 2, art. 3.

²⁹ *Id.* art. 2(2).

³⁰ *Id.*

³¹ Opinion 1/75, 1975 E.C.R. 1355, 1365.

defense of the common interests of the Community” and stated that the exercise of concurrent powers by the Member States and the Community in this field was “impossible”:

To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest.³²

The exclusive nature of the CCP is the logical corollary of the customs union that was set up by the Treaty of Rome of 1957 establishing the EEC.³³ As prescribed by Article XXIV of the General Agreement on Tariffs and Trade (GATT), customs unions have an internal and an external characteristic.³⁴ Internally, customs unions eliminate the duties and other restrictive regulations of commerce with respect to substantially all trade between the constituent territories of the union.³⁵ Externally, in relations with third countries, customs unions apply substantially the same duties and other regulations of commerce.³⁶ In the EU, these criteria have been interpreted strictly. This means that, in trade between the EU Member States, customs duties on imports and exports, and charges having equivalent effect, are prohibited.³⁷ For imports from third countries, the EU has a Common Customs Tariff (CCT).³⁸ Individual Member States have lost the competence to levy their own customs duties on products that are imported from outside the EU.³⁹ For such products from third countries, only the CCT applies. It is fixed by the EU’s Council of Ministers, on a proposal of the

³² *Id.* at 1364.

³³ EEC Treaty, *supra* note 3, art. 9; TFEU, *supra* note 2, art. 206.

³⁴ General Agreement on Tariffs and Trade art. XXIV, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT]. See generally Yuri Devuyst & Asja Serdarevic, *The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap*, 18 DUKE J. COMP. & INT’L L. 1 (2007) (underlining that the interpretation of GATT art. XXIV has been the subject of long-lasting controversy).

³⁵ GATT, *supra* note 34, art. XXIV(8)(a)(i).

³⁶ *Id.* art. XXIV(8)(a)(ii).

³⁷ TFEU, *supra* note 2, art. 30.

³⁸ *Id.* art. 31.

³⁹ *Id.* arts. 2–3, 31.

European Commission.⁴⁰ In addition to the CCT, customs unions also apply the same other regulations of commerce to third countries.⁴¹ In the EU, this application has given rise to the CCP.⁴²

III. THE SECTORAL SCOPE OF THE COMMON COMMERCIAL POLICY

The exclusive nature of the EU's competence in the CCP has been clear and accepted since Opinion 1/75.⁴³ However, its exact scope has been the subject of a decades-long legal and political debate that will be reviewed in this Part.

A. *The Treaty of Rome*

The original EEC Treaty did not contain a precise definition of the CCP. The relevant Article 113(1) mentioned that the CCP would be based on uniform principles, “*particularly* in regards to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.”⁴⁴ In other words, Article 113(1) simply listed examples—in a non-exhaustive manner—of measures belonging to the CCP. Several responsible officials within the EU institutions have regretted this rather poor drafting.⁴⁵ For instance, Claus-Dieter Ehlermann, then-Director General of the European Commission's Legal Service, lamented that “[m]ore than any other type of power, an exclusive power requires a comprehensive definition of its *ratio materiae*.”⁴⁶ Fortunately, the European Court of Justice initially seemed to adopt a broad, coherent and comprehensive view of the CCP.⁴⁷ In Opinion 1/78, it held as follows:

⁴⁰ *Id.* art. 31.

⁴¹ GATT, *supra* note 34, art. XXIV(8)(a)(ii).

⁴² TFEU, *supra* note 2, arts. 3, 207.

⁴³ See Opinion 1/78, 1979 E.C.R. 2871, para. 39 (“[The Council recalled] that the exclusive nature of Community powers in the matter of commercial policy is not in question.”).

⁴⁴ EEC Treaty, *supra* note 3, art. 113(1) (emphasis added).

⁴⁵ Bourgeois, *supra* note 5, at 3; Ehlermann, *supra* note 5, at 147.

⁴⁶ Ehlermann, *supra* note 5, at 147.

⁴⁷ PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS 16–18 (2004); Tridimas & Eeckhout, *supra* note 8, at 156.

Article 113 empowers the Community to formulate a commercial 'policy', based on 'uniform principles' thus showing that the question of external trade must be governed from a wide point of view and not only having regard to the administration of precise systems such as customs and quantitative restrictions. The same conclusion may be deduced from the fact that the enumeration in Article 113 of the subjects covered by commercial policy (changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade) is conceived as a non-exhaustive enumeration which must not, as such, close the door to the application in a Community context of any other process intended to regulate external trade. A restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.⁴⁸

B. *Opinion 1/94*

At the end of the Uruguay Round which created the World Trade Organization (WTO), the EU Member States contested the Community's competence to conclude the Round's results in the fields of trade in services and trade-related aspects of intellectual property protection.⁴⁹ The Member States were determined to protect their own prerogatives in the two latter fields and rejected the exclusive competence of the Community.⁵⁰ The dispute ended up before the Court and resulted in Opinion 1/94.⁵¹ Nothing

⁴⁸ Opinion 1/78, para. 45.

⁴⁹ Pieter J. Kuijper, *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, 6 EUR. J. INT'L L. 222 (1995); Peter L.H. Van den Bossche, *The European Community and the Uruguay Round Agreements: Confusion and Controversy over the Competence and Conduct of the European Community in International Economic Relations*, in IMPLEMENTING THE URUGUAY ROUND 23 (John H. Jackson & Alan O. Sykes eds., 1997).

⁵⁰ Kuijper, *supra* note 49; Van den Bossche, *supra* note 49.

⁵¹ Opinion 1/94 1994, E.C.R., I-5267. The most interesting critical perspectives on Opinion 1/94 are EECKHOUT, *supra* note 47, at 26-34; Jacques H.J. Bourgeois, *The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession*, 32 COMMON MKT. L. REV. 763 (1995); Nicholas Emiliou, *The Death of Exclusive Competence?*, 21 EUR. L. REV. 294, 294 (1996); Meinhard Hilf, *The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise?*, 6 EUR. J. INT'L L. 245 (1995); Pierre Pescatore, *Opinion 1/94 on "Conclusion" of the WTO Agreement: Is*

prevented the Court from adopting a modern and dynamic approach to the CCP, from giving a broad interpretation to the Article 113 concepts “the conclusion of tariff and trade agreements” and “the achievement of uniformity in measures of liberalization,” and to include—at minimum—the full range of trade in services in the CCP.⁵² Instead, the Court broke with its own comprehensive view of the CCP as formulated in Opinion 1/78 and came up with a narrow reformulation of its implied external powers doctrine to limit the scope of the CCP to the following aspects of the Uruguay Round’s Final Act: trade in goods (i.e., the entire GATT),⁵³ cross-frontier trade in services, but only where it did not involve any movement of persons, thereby excluding from the CCP the important parts of the General Agreement on Trade in Services (GATS) involving consumption abroad, commercial presence through a subsidiary or a branch, and presence of natural persons abroad;⁵⁴ and measures taken at the external frontiers of the Community regarding the prohibition of the release into free circulation of counterfeit goods, excluding practically the entire Uruguay Round’s Agreement on Trade-Related Intellectual Property measures (TRIPs) from the CCP.⁵⁵

The Court’s Opinion was disappointing from the Commission’s perspective because it prevented the simple extension of the traditional Community method to the new trade topics. One of the major drawbacks of the Court’s Opinion was that international agreements covering GATS and TRIPs required the common accord in the negotiation and ratification by all Member States as well as by the Community.⁵⁶ To nonetheless ensure the EU’s unity in international representation, the Court prescribed “close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into.”⁵⁷ Recognizing the possible problems that this

There an Escape from a Programmed Disaster?, 36 COMMON MKT. L. REV. 387 (1999).

⁵² For the state of the legal debate on the scope of the CCP and trade in services before Opinion 1/94, see PIET EECKHOUT, *THE EUROPEAN INTERNAL MARKET AND INTERNATIONAL TRADE: A LEGAL ANALYSIS* 22–34 (1994); Paolo Mengozzi, *Trade in Services and Commercial Policy*, in *THE EUROPEAN COMMUNITY’S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION* 223 (Marc Maresceau ed., 1993); Christiaan Timmermans, *Common Commercial Policy (Article 113 EEC) and International Trade in Services*, in *DU DROIT INTERNATIONAL AU DROIT DE L’INTÉGRATION* 675 (Francesco Capotorti et al. eds., 1987).

⁵³ Opinion 1/94, paras. 22–34.

⁵⁴ *Id.* paras. 36–53, 73–98.

⁵⁵ *Id.* paras. 54–71, 99–105.

⁵⁶ See *supra* note 13 and accompanying text.

⁵⁷ Opinion 1/94, para. 108.

could cause in the administration of the WTO Agreement and its annexes, and underlining that such concerns were quite legitimate, the Court nevertheless stressed that such practical considerations could not influence its findings on the allocation of competence.⁵⁸

C. The Treaties of Amsterdam and Nice

The Commission tried to rectify the situation during the negotiation of the Treaty of Amsterdam in 1997, but the result was meager.⁵⁹ Article 133(5) EC merely created a theoretical possibility for the Council, acting unanimously, to extend the application of the CCP procedures to agreements on services and intellectual property.⁶⁰ A more substantial step toward the integration of GATS and TRIPs competences in the CCP took place with the entry into force of the Treaty of Nice in 2003.⁶¹ For Finnish Prime Minister Paavo Lipponen, the issue was important:

The Community used to be a driving force in global trade negotiations for many years. Now over 60% of all trade is in the field of services, where the Community does not have exclusive competence. Consequently our status as an effective negotiator has declined dramatically. The Union must re-establish its position. We can do this only if we are able to agree on the communitarisation of trade in services, intellectual property and investments in the ongoing IGC.⁶²

Still, the final version of the Finnish compromise text that found its way into the Treaty of Nice did not lead to a formal extension of the CCP.⁶³ Rather, it simply allowed the institutional provisions of the CCP to “also apply to the negotiation and conclusion of agreements in the fields of trade in

⁵⁸ *Id.* para. 107.

⁵⁹ Marise Cremona, *EC External Commercial Policy After Amsterdam: Authority and Interpretation Within Interconnected Legal Orders*, in *THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* 5 (J.H.H. Weiler ed., 2000); Leal-Arcas, *supra* note 4, at 359.

⁶⁰ EC Treaty (Amsterdam), *supra* note 3, art. 133(5).

⁶¹ EC Treaty (Nice), *supra* note 13, art. 133.

⁶² Paavo Lipponen, Prime Minister, Fin., Address at the College of Europe, in Bruges, Belg. (Nov. 10, 2000), available at <http://www.coleurope.eu/template.asp?pagename=speeches> (click on “full text” under “Speech by Paavo Lipponen”).

⁶³ Finnish Delegation, Meeting Document: Article 133 (SN 526/00, Dec. 10, 2000).

services and the commercial aspects of intellectual property.”⁶⁴ By way of derogation, the Treaty of Nice specified that agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, fell within the “shared competence of the Community and its Member States.”⁶⁵ It prescribed that, in addition to Community decisionmaking, the negotiation of such agreements required the common accord of the Member States and that they needed to be concluded jointly by the Community and the Member States.⁶⁶ The Treaty of Nice also maintained that international agreements in the field of transport would continue to be governed by specific provisions outside the CCP.⁶⁷ The result was complex and far from satisfactory to ensure an efficient and effective EU voice in international trade diplomacy.⁶⁸ In the words of Professor Christoph Herrmann: “Sisyphus would have done a better job.”⁶⁹

D. *The Constitutional Treaty*

The breakthrough came thanks to the new negotiating method devised for the creation of the Treaty establishing a Constitution for Europe.⁷⁰ While the

⁶⁴ EC Treaty (Nice), *supra* note 13, art. 133(5). By way of derogation from the general rule that the Council decides on CCP matters by qualified majority voting, Article 133(5) specified, however, that the Council had to act unanimously when negotiating and concluding an agreement in the fields of trade in services and commercial aspects of intellectual property where that agreement included provisions for which unanimity was required for the adoption of internal rules or where it related to a field in which the Community had not yet exercised the powers conferred upon it by adopting internal rules. *Id.*

⁶⁵ *Id.* art. 133(6).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Marise Cremona, *A Policy of Bits and Pieces? The Common Commercial Policy After Nice*, 4 CAMBRIDGE Y.B. EUR. LEGAL STUD. 61 (2002); Christoph W. Herrmann, *Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job*, 39 COMMON MKT. L. REV. 7 (2002); Stefan Griller & Katharina Gamharter, *External Trade: Is There a Path Through the Maze of Competences?*, in EXTERNAL ECONOMIC RELATIONS AND FOREIGN POLICY IN THE EUROPEAN UNION 65 (Stefan Griller & Birgit Weidel eds., 2002); Horst Günter Krenzler & Christian Pitschas, *Progress or Stagnation? The Common Commercial Policy After Nice*, 6 EUR. FOREIGN AFF. REV. 291 (2001); Leal-Arcas, *supra* note 4, at 362.

⁶⁹ Herrmann, *supra* note 68, at 7.

⁷⁰ Treaty Establishing a Constitution for Europe art. III-315, Oct. 29, 2004, 2004 O.J. (C 310) 1 [hereinafter Constitutional Treaty]. For discussion of the CCP provisions in the Constitutional Treaty, see Jean-François Brakeland, *Politique Commerciale Commune, Coopération Avec les Pays Tiers et Aide Humanitaire*, in GENESIS AND DESTINY OF THE EUROPEAN CONSTITUTION 849–66 (Giuliano Amato et al. eds., 2007); Marise Cremona, *The Draft Constitutional Treaty: External Relations and External Action*, 40 COMMON MKT. L.

previous EU Treaties were negotiated largely in secret among diplomats and heads of state or government, the Constitutional Treaty was prepared in a transparent manner by a European Convention.⁷¹ It was composed of representatives of the heads of state or government, national parliaments, the European Parliament, and the European Commission.⁷² The Convention's Working Group dealing with external relations approached the issue of CCP competences from the angle of decisionmaking efficiency.⁷³ It considered the fact that not all areas of trade were subject to qualified majority voting as an "oddity" and "an impediment to the Union's efficiency in multilateral and bilateral trade negotiations."⁷⁴ It therefore supported the use of qualified majority voting in "all areas of commercial policy, including services and intellectual property."⁷⁵ The Convention's Praesidium, i.e. the leaders of the Convention who guided the drafting process, translated this request by simply incorporating trade in services, the commercial aspects of intellectual property, as well as foreign direct investment, to the list of policy fields falling under the CCP.⁷⁶ The Convention also added a number of safeguards, such as unanimous voting in a number of cases, that were further expanded by the Member States in the Intergovernmental Conference that followed the Convention.⁷⁷ However, the general principle that the CCP had to incorporate trade in goods and trade in services, the commercial aspects of intellectual property, and foreign direct investment, was sealed.⁷⁸

REV. 1347, 1361–64 (2003); Angelika Hable, *The European Constitution and the Reform of External Competences*, in *EU CONSTITUTIONALISATION: FROM THE CONVENTION TO THE CONSTITUTIONAL TREATY 2002–2005*, at 143, 143, 171–76 (Lenka Rovna & Wolfgang Wessels eds., 2006); Bernd Martenczuk, *The Constitution for Europe and the External Relations of the European Union*, in *UNDERSTANDING THE EUROPEAN CONSTITUTION* 253, 278–80 (Servaas van Thiel et al. eds., 2005); Markus Krajewski, *External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?*, 42 *COMMON MKT. L. REV.* 91 (2005).

⁷¹ Youri Devuyst, *The Constitutional Treaty and Lisbon*, in *THE OXFORD HANDBOOK OF THE EUROPEAN UNION* (Erik Jones et al. eds., forthcoming 2012).

⁷² *Id.*

⁷³ Report from Working Group VII, "External Action" to Members of the Convention, Final Report of Working Group VII on External Action CONV 459/02, para. 52 (Dec. 16, 2002).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Note from the Praesidium to the Convention, Draft Articles on External Action in the Constitutional Treaty, CONV 685/03, at 52–54 (Apr. 23, 2003).

⁷⁷ *Id.* at 53–55; Constitutional Treaty, *supra* note 70, art. III-315.

⁷⁸ Note from the Praesidium to the Convention, *supra* note 76, at 53.

E. The Treaty of Lisbon

Since the Constitutional Treaty failed to enter into force, a large part of its content was carried over by the Lisbon Treaty effective on December 1, 2009.⁷⁹ The relevant Article 207 TFEU on the CCP—which is identical to the Constitutional Treaty's Article III-315—defines its scope in the following terms:

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those taken in the event of dumping or subsidies.⁸⁰

Thus, trade in services, the commercial aspects of intellectual property, and foreign direct investment are fully integrated in the CCP.⁸¹ They remain subject, however, to the specific rule that, for the negotiation and conclusion of agreements in these three fields, the Council shall act unanimously (instead of the ordinary decisionmaking method of qualified majority voting) where such agreements include provisions for which unanimity is required for the adoption of internal rules.⁸² This requirement is less stringent than the requirement under the Treaty of Nice that imposed unanimity for agreements in trade in services and the commercial aspects of intellectual

⁷⁹ Devuyt, *supra* note 71.

⁸⁰ TFEU, *supra* note 2, art. 207(1).

⁸¹ Marc Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, 1 EUR. Y.B. INT'L ECON. L. 123, 132 (2010); Angelos Dimopoulos, *The Common Commercial Policy After Lisbon: Establishing Parallelism Between Internal and External Economic Relations?*, 4 CROATIAN Y.B. EUR. L. & POL. 101, 107–08 (2008); Peter-Christian Müller-Graff, *The Common Commercial Policy Enhanced by the Reform Treaty of Lisbon?*, in LAW AND PRACTICE OF EU EXTERNAL RELATIONS, *supra* note 12, at 188; JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* 281 (2010); Jan Wouters et al., *The European Union's External Relations After the Lisbon Treaty*, in *THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY?* 144, 170–71 (Stefan Griller & Jacques Ziller eds., 2008).

⁸² TFEU, *supra* note 2, art. 207(4).

property relating to a field in which the Community had not yet exercised its powers by adopting internal rules.⁸³

1. The CCP Extended to Trade in Services and the Commercial Aspects of Intellectual Property

With respect to the scope of trade in services, it is safe to conclude that all four GATS modes of supply are now entirely covered by the CCP.⁸⁴ In Opinion 1/08, the Court indirectly confirmed this viewpoint when dismissing a Spanish submission that the concept of trade in services would not cover all GATS modes of supply.⁸⁵ The Court added in particular that “given both its general nature and the fact that it was concluded at world level, the GATS assumes, as regards in particular the concept of ‘trade in services’ . . . particular importance in the sphere of international action relating to trade in services.”⁸⁶ By analogy, it must be assumed that the CCP coverage of commercial aspects of intellectual property encompasses the entire TRIPs Agreement.⁸⁷ That the Court looks to the GATS as of “particular” importance in interpreting the scope of the CCP concept of trade in services gives the CCP a dynamic nature (since the scope of the GATS itself may evolve as a function of the negotiations at the WTO). Again, the same reasoning should apply to the relationship between TRIPs and the CCP concept of commercial aspects of intellectual property. Furthermore, as the key aim of the inclusion of trade in services and the commercial aspects of intellectual property in the CCP was to increase the EU’s efficiency and effectiveness in the negotiation and conclusion of future agreements covering GATS and TRIPs, it is justified and appropriate to give a dynamic, and not a static, interpretation to the new Treaty provisions.⁸⁸

In contrast with the Treaty of Nice, the CCP after the Lisbon Treaty also fully includes trade in cultural and audiovisual services, educational services,

⁸³ EC Treaty (Nice), *supra* note 13, art. 133(5).

⁸⁴ Bungenberg, *supra* note 81, at 132; Dimopoulos, *supra* note 81, at 107–08; Markus Krajewski, *Of Modes and Sectors: External Relations, Internal Debates, and the Special Case of (Trade in) Services*, in DEVELOPMENTS IN EU EXTERNAL RELATIONS LAW, *supra* note 18, at 172, 193–94; PIRIS, *supra* note 81, at 281; Wouters et al., *supra* note 81, at 170–71.

⁸⁵ Opinion 1/08, 2009 E.C.R. I-11129, para. 120.

⁸⁶ *Id.* para. 121; Marise Cremona, *Balancing Union and Member State Interests: Opinion 1/2008, Choice of Legal Base and the Common Commercial Policy Under the Treaty of Lisbon*, 35 EUR. L. REV. 678, 683–84 (2010).

⁸⁷ Dimopoulos, *supra* note 81, at 108; PIRIS, *supra* note 81, at 281.

⁸⁸ Dimopoulos, *supra* note 81, at 109.

and social and human health services.⁸⁹ The Lisbon Treaty provides that the Council shall act unanimously (instead of through the ordinary qualified majority voting procedure) for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; and (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them.⁹⁰

2. *The CCP Extended to Foreign Direct Investment*

While the post-Lisbon definition of trade in services and commercial aspects of intellectual property is relatively straightforward, attempts to circumscribe the scope of the concept of foreign direct investment (FDI) in the CCP context has given rise to a greater variety of opinions.⁹¹ In contrast with the commercial aspects of intellectual property, there is no explicit requirement that FDI should be trade-related.⁹² While legal scholars disagree on which types of investment measures fall within the CCP's scope, the European Commission has published a helpful Communication that clarifies its official understanding of the new FDI competences.⁹³ For the Commission, FDI "is generally considered to include any foreign investment

⁸⁹ EC Treaty (Nice), *supra* note 13, art. 133(6); Krajewski, *supra* note 84, at 194.

⁹⁰ TFEU, *supra* note 2, art. 207(4).

⁹¹ Marc Bungenberg, *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics*, EUR. Y.B. INT'L ECON. L. 29 (2011); Bungenberg, *supra* note 81, at 144–48; Armand de Mestral, *The Lisbon Treaty and the Expansion of EU Competence over Foreign Direct Investment and the Implications for Investor-State Arbitration*, Y.B. INT'L INVEST. L. & POL. (2009–2010); Dimopoulos, *supra* note 81, at 110–19; Christoph Herrmann, *The Treaty of Lisbon Expands the EU's External Trade and Investment Powers*, 14 ASIL INSIGHT 3, 3 (2010); Wouters et al., *supra* note 81, at 171–73; Viktoriya Petrikova, *Is the EU's New Exclusive Competence in the Field of Foreign Direct Investment Blowing the Wind of Change for Third-Country Investment Agreements?* (2010–2011) (unpublished Master Thesis in International and European Law, Vrije Universiteit Brussel).

⁹² Martenczuk, *supra* note 70, at 278–79; Wouters et al., *supra* note 81, at 171–73. For a more restrictive opinion, see Krajewski, *supra* note 70, at 114.

⁹³ *Towards a Comprehensive European International Investment Policy* COM (2010) 343 final (July 7, 2010).

which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity.”⁹⁴ When FDI takes the form of shareholding, this presupposes for the Commission “that the shares enable the shareholder to participate effectively in the management of that company or in its control.”⁹⁵ The Commission agrees with most legal analysts that this contrasts with portfolio investments of a short-term and sometimes speculative nature, where there is no intention to influence the management or control of the undertaking.⁹⁶

Since portfolio investments do not come under the EU’s exclusive CCP competence, legal experts like Marc Bungenberg have drawn the conclusion that the EU would be able to conclude pure EU investment agreements based on the CCP’s explicit exclusive competence only “if these agreements solely cover pre- and post-establishment regulation but have no provisions on protection, dispute resolution and expropriation with regard to portfolio investments.”⁹⁷ However, most bilateral investment treaties (BITs) cover both FDI and portfolio investments.⁹⁸ Bungenberg therefore fears that the new CCP competence might not meet the demands of EU investors and negotiating partners for the conclusion of comprehensive BITs.⁹⁹ Other scholars have thus suggested that full EU BITs be based on a combination of explicit and implicit EU treaty-making powers.¹⁰⁰ In this construction, the EU’s implicit treaty-making competence over portfolio investment flows from the existing TFEU provisions that, as a general principle, prohibit restrictions on the free movement of capital and payments between Member States and third countries.¹⁰¹

⁹⁴ *Id.* at 2.

⁹⁵ *Id.* at 2–3.

⁹⁶ *Id.* at 3. For a similar perspective, see Bungenberg, *supra* note 91, at 41; Bungenberg, *supra* note 81, at 144; Dimopoulos, *supra* note 81, at 110; Herrmann, *supra* note 91, at 3; PIRIS, *supra* note 81, at 282.

⁹⁷ Bungenberg, *supra* note 81, at 147.

⁹⁸ Bungenberg, *supra* note 91, at 41.

⁹⁹ Bungenberg, *supra* note 81, at 147.

¹⁰⁰ Steffen Hindelang & Niklas Maydell, *The EU’s Common Investment Policy – Connecting the Dots*, EUR. Y.B. INT’L ECON. L. 1 (2011); Bungenberg, *supra* note 91, at 42.

¹⁰¹ Hindelang & Maydell, *supra* note 100, at 1; TFEU, *supra* note 2, art. 63; Martenczuk, *supra* note 70, at 278. For a substantive legal analysis of the link between the EU’s provisions on free movement of capital and investment protection, see STEFFEN HINDELANG, *THE FREE MOVEMENT OF CAPITAL AND FOREIGN DIRECT INVESTMENT: THE SCOPE OF PROTECTION IN EU LAW* 63–80, 162–200 (2009).

The European Commission's own approach is similar.¹⁰² Calling for a comprehensive EU international investment policy, the Commission points out that the Treaty's prohibition on capital and payment restrictions covers both direct and portfolio investments.¹⁰³ While recognizing that the Treaty's Chapter on capital and payments does not expressly provide for the possibility to conclude international agreements on investment, the Commission underlines that the exclusive EU competence to conclude agreements in this area is implied to the extent that international agreements on investment would affect the scope of the common rules set by the Treaty's Chapter in question.¹⁰⁴ In this context, the Commission refers to the new TFEU Article 3(2) which provides:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.¹⁰⁵

The Commission's viewpoint seemed to have been well received by EU's Trade Policy Committee, consisting of senior trade policy experts of the Member States.¹⁰⁶ It proposed that the EU's Council of Ministers would explicitly acknowledge the importance of the Commission's comprehensive approach to shaping the future EU international investment policy.¹⁰⁷ Furthermore, it recommended that the Council would expressly support "the definition of a broad scope for the new EU policy in this field as suggested by the Commission."¹⁰⁸ The door for further discussion was not, however, closed as the Trade Policy Committee also stated that the definition of the broad scope was "to be further elaborated in full respect of the respective

¹⁰² *Towards a Comprehensive European International Investment Policy*, *supra* note 93, at 8.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ TFEU, *supra* note 2, art. 3(2).

¹⁰⁶ Note from the EU Trade Policy Committee to the Permanent Representatives Committee/Council, Trade Policy Committee Draft Council Conclusions, 14373/10 (Oct. 4, 2010), available at <http://register.consilium.europa.eu/pdf/en/10/st14/st14373.en10.pdf>.

¹⁰⁷ *Id.* para. 7.

¹⁰⁸ *Id.*

competences of the Union and its Member States as defined by the Treaties.”¹⁰⁹

3. *The CCP and the Exclusion of Transport Policy*

The Lisbon Treaty did not alter the fact that the negotiation and conclusion of international agreements in the field of transport remains outside of the CCP and subject to the specific rules contained in the Treaty Title on transport.¹¹⁰ Clarifying the scope of this exception, the Court held in Opinion 1/08 that “there is no doubt that the expression ‘international agreements in the field of transport’ covers, inter alia, the field of trade concerning transport services.”¹¹¹ In Opinion 1/08, the Court also rejected the arguments of the Commission and Parliament that the exclusion of agreements in transport from the scope of the CCP should apply only in the case of agreements that are exclusively, or at the very least predominantly, concerned with transport.¹¹² The Commission and Parliament argued that CCP provisions formed the appropriate legal base where provisions on transport have a merely ancillary or secondary nature within trade agreements.¹¹³ For the Court, such an interpretation could not be accepted, notably because it would to a large extent deprive the transport exception provision of its effectiveness.¹¹⁴

4. *The Implementation of CCP Agreements and the Internal Delimitation of EU Competences and Powers*

The final paragraph of Article 207 TFEU includes the important limitation that the implementation of the CCP may not affect the delimitation of the EU’s (internal) competences and powers.¹¹⁵ It reads as follows:

The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the

¹⁰⁹ *Id.*

¹¹⁰ TFEU, *supra* note 2, art. 207(5). Being outside of the CCP, agreements in transport are covered by *id.* arts. 90–100 and 218.

¹¹¹ Opinion 1/08, 2009 E.C.R. I-11129, para. 158.

¹¹² *Id.* para. 155.

¹¹³ *Id.*

¹¹⁴ *Id.* para. 163.

¹¹⁵ TFEU, *supra* note 2, art. 207(6).

Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.¹¹⁶

At first sight, this provision could be interpreted as prohibiting the adoption of external measures under the CCP that would (a) go beyond measures that have been or could be adopted on the basis of internal EU competences; and (b) go into areas where internal harmonization is excluded.¹¹⁷ This interpretation does not, however, sufficiently take into account the new context of external competence under the Treaty of Lisbon.¹¹⁸

First, Article 207(6) cannot be interpreted as establishing a parallelism between internal and external competences in the sense of the Court's restrictive application of the *implied* external powers doctrine in Opinion 1/94.¹¹⁹ As Jan Wouters, Dominic Coppens, and Bart De Meester have correctly underlined, Article 207(6) concerns only the CCP and this is an area governed by *explicit* exclusive external competence, even in the absence of existing internal measures.¹²⁰

Second, as Markus Krajewski has convincingly demonstrated, Article 207(6) cannot be logically interpreted as prohibiting the adoption of external measures under the CCP that would go into sectors where internal harmonization is excluded.¹²¹ Such an interpretation would contradict the explicit inclusion, in the CCP, of such sectors as cultural, educational, and health services (where such internal harmonization is excluded).¹²²

Third, Article 207(6) has meaning when it is interpreted "to delimit the external from the internal sphere" and "to prevent the exclusive character of

¹¹⁶ *Id.* This provision corresponds to a certain degree, but is not identical in meaning, to the formulation in Article 133(6) of the EC Treaty (Nice), *supra* note 13, that stipulated: "An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonization of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation."

¹¹⁷ Jan Ceysens, *Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution*, 32 LEGAL ISSUES ECON. INTEGRATION 259, 279–81 (2005); PIRIS, *supra* note 81, at 282.

¹¹⁸ Hable, *supra* note 70, at 174; Krajewski, *supra* note 84, at 194; Wouters et al., *supra* note 81, at 173.

¹¹⁹ Opinion 1/94, 1994, E.C.R., I-5267, VIII.

¹²⁰ Wouters et al., *supra* note 81, at 173.

¹²¹ Krajewski, *supra* note 84, at 194.

¹²² *Id.*

the powers under the CCP encroaching upon the internal delimitation of competences.”¹²³ Without the limitation of Article 207(6), the EU might—via the need to implement CCP agreements in, for example, services—gain competence to legislate in cultural, educational, and health services.¹²⁴ Article 207(6) is therefore a limitation on the internal implementation of CCP agreements. Krajewski has fittingly reformulated the provision as follows: “The Union can only implement international agreements insofar as it enjoys internal legislative competence. In other areas, the Union has to rely on the Member States to implement international agreements.”¹²⁵

Even in those areas where the implementation of CCP agreements is the competence of the Member States, the coherent application of such agreements concluded by the EU is ensured by (a) the fact that agreements concluded by the Union are binding on its Member States;¹²⁶ (b) the obligation of the Member States to ensure fulfillment of the obligations resulting from the acts of the institutions of the Union, such as international agreements;¹²⁷ and (c) the primacy of EU law over the law of the Member States.¹²⁸

IV. CONCLUSION

After several decades of political and legal struggle, the Treaty of Lisbon has provided the EU with a primary law base that finally settled the question of the inclusion of trade in services, commercial aspects of intellectual property, and foreign direct investment in the CCP.¹²⁹ Although the Treaty of Lisbon thus constitutes a major breakthrough for the EU’s position as negotiator of international trade agreements, the preceding paragraphs have shown that it not did put an end to the legal discussions on the scope of the CCP. The precise definition of the terms “trade in services,” “commercial aspects of intellectual property,” and especially “foreign direct investment” will most likely be the subject of further debate and court cases.

¹²³ Hable, *supra* note 70, at 174.

¹²⁴ Krajewski, *supra* note 84, at 194.

¹²⁵ *Id.*

¹²⁶ TFEU, *supra* note 2, art. 216(2).

¹²⁷ *Id.* art. 4(3).

¹²⁸ Declarations Annexed to the Final Act of the Intergovernmental Conference Which Adopted the Treaty of Lisbon, Mar. 30, 2010, 2010 O.J. (C 83) 344, para. 17; TEU, *supra* note 2, art. 4(3); *see also* Hable, *supra* note 70, at 174.

¹²⁹ TFEU, *supra* note 2, art. 207(1).

Furthermore, important legal questions will continue to arise on (a) the precise delimitation of the CCP in relation to other EU policy fields such as environment and general foreign and security policy; and (b) the choice of legal bases for conclusions by the EU of multi-purpose agreements that involve trade provisions, in addition to other objectives. Space constraints, unfortunately, made it impossible to go into these issues in the framework of this Article.¹³⁰ It must be noted, however, that—much like the Court's general approach to external competences—its case law on the delimitation of the CCP in relation to other policy domains has not been a major contribution to creating legal certainty and clarity in a longer-term perspective.¹³¹

In its Opinion 1/08, the Court recalled that concerns “relating to the need for unity and rapidity of external action and to the difficulties that might arise were the Community and the Member States to participate jointly in conclusion of the agreements at issue cannot change the answer to the question of competence.”¹³² In other words, the Court cannot be relied upon to settle fundamental issues of efficiency and effectiveness of EU trade policy. This is a matter for the Member States (and the EU institutions) to work out in political agreements. Unfortunately, as Judge Christiaan Timmermans observed, “[s]ometimes, one gets the impression that in external affairs, Member States founded the Community to contest its competences rather than to exercise them.”¹³³ In this respect, the EU's competence battles on the CCP are an illustration of the constant struggle between the general interest of the Union and the welfare of its population as a whole and the narrowly defined, short-term self-interests of the Member States. At the same time, the history of the CCP also shows that, as in most other EU policy fields, Europe's long-term evolution is one that follows the rational road of integration.

¹³⁰ Guidance can be found in *supra* note 12; Cremona, *supra* note 86.

¹³¹ Marise Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law* n.50 (European Univ. Inst., Working Paper No. 2006/22); Panos Koutrakos, Annotation, *Case C-94/03, Commission v. Council; Case C-178/03, Commission v. Parliament and Council*, 44 COMMON MKT. L. REV. 171, 193–94 (2007).

¹³² Opinion 1/08, 2009 E.C.R. I-11129, para. 127.

¹³³ Christiaan Timmermans, *Organising Joint Participation of EC and Member States*, in THE GENERAL LAW OF E.C. EXTERNAL RELATIONS 239, 239–40 (Alan Dashwood & Christophe Hillion eds., 2000). My attention was drawn to this quote by Tom Delreux, *The European Union in International Environmental Negotiations: A Legal Perspective on the Internal Decision-Making Process*, 6 INT'L ENVTL. AGREEMENTS 237 (2006).