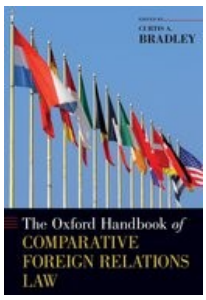

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CHAPTER

19 Foreign Affairs Federalism in the European Union

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Abstract

The European Union was born as an international organization. The 1957 Treaty of Rome formed part of international law, although the European Court of Justice was eager to emphasize that the Union constitutes "a new legal order" of international law. With time, this new legal order has indeed evolved into a true "federation of States." Yet how would the foreign affairs powers of this new supranational entity be divided? Would the European Union gradually replace the member states, or would it preserve their distinct and diverse foreign affairs voices? In the past sixty years, the Union has indeed significantly sharpened its foreign affairs powers. While still based on the idea that it has no plenary power, the Union's external competences have expanded dramatically, and today it is hard to identify a nucleus of exclusive foreign affairs powers reserved for the member states. And in contrast to a classic international law perspective, the Union's member states only enjoy limited treaty-making powers under European law. Their foreign affairs powers are limited by the exclusive powers of the Union, and they may be preempted through European legislation. There are, however, moments when both the Union and its states enjoy overlapping foreign affairs powers. For these situations, the Union legal order has devised a number of cooperative mechanisms to safeguard a degree of "unity" in the external actions of the Union. Mixed agreements constitute an international mechanism that brings the Union and the member states to the same negotiating table. The second constitutional device is internal to the Union legal order: the duty of cooperation.

Keywords: European Union, external competences, Common Foreign and Security Policy, ERTA doctrine, Common Commercial Policy, mixed agreements, duty of loyal cooperation, trustees doctrine

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I. Introduction

THE federal principle stands for a duplex regime—the existence of two levels of government within a compound polity. Within federal states, powers are divided between a general government and particular governments, and there are therefore potentially two governments that could engage in foreign relations with third parties. Yet classic international law has principally responded to the emergence of federal states "by ignoring their constitutional characteristics and assimilating them to other sovereign States."[1] In light of its unitary vision, international law has indeed long remained ambivalent toward the foreign affairs powers of member states within a federation. Modern doctrine today holds that they can enjoy international personality "[i]f the federal constitution grants them the right to deal separately with foreign States and such States agree to deal with them."[2] Chapters in this *Handbook* describe some specific approaches taken by a number of federal states.

But what about classic international organizations or unions of states, like the European Union? Here, the problem has traditionally been the reverse: with the member states presumed to be sovereign, the capacity of international organizations to conduct foreign affairs of their own has long been in doubt. And even if the capacity of international organizations to engage in treaty making was expressly recognized in 1949,[3]
p. 334 international ↳ law has nonetheless remained ambivalent about the nature and scope of the foreign affairs powers of international organizations.Their external relations raise fundamental challenges to the traditional conception of international law as a law based on the sovereign equality of its subjects because "[i]nternational organizations are neither sovereign nor equal."[4] The foreign affairs powers of international organizations have thus been attacked from two sides: "from the outside world, where historically only States have held 'full powers,' and also from within, where member states are constantly on guard against both loss of sovereignty and against any consequences the activities of the organization might bring for them."[5]

What was the outcome of this dual challenge for the foreign affairs powers of the European Union? The European Union was born with the genetic code of an international organization. The 1957 Treaty of Rome formed part of international law, although the European Court of Justice was eager to emphasize that the Union "constitutes a new legal order of international law."[6] With time, this new legal order has indeed evolved into a true "federation of States."[7] How would the foreign affairs powers of this new supranational entity be divided? Would the European Union gradually replace the member states, or would it preserve their distinct and diverse foreign affairs voices? As discussed below, in light of its international origins, the European legal order has remained an "open federation": both the Union and its member states are entitled to conduct their own foreign affairs autonomously. Yet bound together in a compound polity, the Union's foreign affairs federalism nevertheless had to be organized in a way that would enable coordination and cooperation between the Union and its states. Both of these *federal* strategies will be discussed below. But first we need to quickly explore the limits of the Union's foreign affairs powers.

II. The Union's Enumerated Foreign Affairs Powers

The Treaty of Rome acknowledged the legal personality of the European "Union";[8] and the international
p. 335 *capacity* of the Union would thereby stretch "over the whole field of ↳ [its] objectives."[9] But what about the Union's treaty-making *powers*? In accordance with the federal principle of enumeration or conferral, the Union must act "within the limits of the competences conferred upon it by the Member States in the Treaties."[10] The European Court of Justice has clarified that this principle applies to "both the internal action and the international action of the [Union]."[11]

Under the 1957 Rome Treaty, the Union's foreign affairs powers were originally confined to the Common Commercial Policy (CCP) and Association Agreements with third countries or international organizations.[12]

This restrictive attribution of external powers protected a status quo in which the member states were to remain the principal players on the international relations scene. Yet this picture has changed dramatically in the past forty years: the Union has expanded its foreign affairs powers significantly, both through the doctrine of implied external powers and by the significant widening of its express external powers.

The Doctrine of Implied External Powers

The doctrine of implied external powers is the single most important foreign affairs doctrine of EU law. While not completely unknown to the early Treaties,[13] it is best understood as a constitutional invention offered by the European Court of Justice in its famous *ERTA* decision.[14]

The European Road Transport Agreement (ERTA, or under its French acronym, AETR) had been intended to harmonize certain aspects of international road transport and involved a number of member states as potential signatories. The negotiations had restarted in 1967 and were conducted without involvement of the Union. The member states involved in the ERTA negotiations agreed to coordinate their positions within the Council, with the presiding member state acting as a spokesman. The Commission felt excluded from its role as the Union's external broker and insisted on being involved in the negotiations and finally brought the matter before the European Court.

The Commission argued that the Union's internal power over transport policy—set out today in Article 91 TFEU—included the external power of treaty-making. This broad teleological interpretation was justified by reference to the argument that "the full effect of this provision would be jeopardized if the powers which it confers, particularly that of laying down 'any appropriate provisions,' within the meaning of subparagraph (1)(c) of the article cited, did not extend to the conclusion of agreements with third countries."[15] The Council opposed this interpretation, contending that "Article [91] relates only to measures *internal* to the [Union], and
p. 336 cannot be interpreted as authorizing the conclusion of international agreements." The power to enter ↳ into agreements with third countries, argued the Council, "cannot be assumed in the absence of an express provision in the [Treaties]."[16]

In its judgment, the European Court sided with the Commission's expansive approach, explaining:

> To determine in a particular case the [Union's] authority to enter into international agreements, regard must be had to the whole scheme of the [Treaties] no less than to its substantive provisions. Such authority arises not only from an express conferment by the [Treaties]—as is the case with Article [207] for tariff and trade agreements and with Article [217] for association agreements—but may equally flow from other provisions of the [Treaties] and from measures adopted, within the framework of those provisions, by the [Union] institutions…

> Article [91(1)] directs the Council to lay down common rules and, in addition, "any other appropriate provisions"…This provision is equally concerned with transport from or to third countries, as regards that part of the journey which takes place on [Union] territory. It thus assumes that the powers of the [Union] extend to relationships arising from international law, and hence involve the need in the sphere in question for agreements with the third countries concerned.[17]

This passage spoke the language of teleological interpretation: in light of the general scheme of the Treaties, the Union's power to adopt "any other appropriate provision" to give effect to the Union's transport policy objectives must be interpreted as including the legal power to enter international agreements.[18] This was subsequently confirmed by the Court in *Opinion 1/76*.[19] There, the Court declared that "whenever [European] law has created for the institutions of the [Union] powers within its internal system for the purpose of attaining a specific objective, the [Union] has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion."[20] The

reasoning of the Court created the idea of a parallel treaty-making power running alongside the internal legislative powers of the Union. In its most extensive format, this doctrine of parallel external powers means that the Union's foreign affairs powers are "coextensive with its internal domestic powers."[21]

The doctrine of parallel external powers has had a complex and contradictory history.[22] The Lisbon Treaty tried to codify it in Article 216 TFEU.[23] The provision today states:

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> The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.[24]

While recognizing the express treaty-making competences of the Union conferred elsewhere by the Treaties, this provision grants the Union a residual competence to conclude international agreements in three situations.

The first alternative mentioned in Article 216(1) TFEU confers a treaty-making power to the Union "where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties." Textually, this competence seems much wider than the judicial doctrine of parallel external powers as espoused in *ERTA*. For, as we saw above, the Court had insisted that an external Union competence only derived from an internal *competence*, and that meant that no external competence could be derived from an internal *objective*. By contrast, the first alternative in Article 216 suggests exactly that. The Court has recently clarified, however, that this implication reflects sloppy drafting and that Article 216 TFEU in fact codifies the doctrine of parallel powers from *ERTA*.[25]

Article 216 mentions two additional situations. The Union will also be entitled to conclude international agreements where this "is provided for in a legally binding act or is likely to affect common rules or alter their scope." Both alternatives make the existence of an external competence dependent on the existence of internal Union law. Two objections may be launched against this view. Theoretically, it is difficult to accept that the Union can expand its competences without Treaty amendment through the simple adoption of internal Union acts, and practically, it is hard to see how either alternative will ever go beyond the first alternative.

The Union's Express Foreign Affairs Competences

The express foreign affairs competences of the Union are grouped into two constitutional sites: Title V of the Treaty on European Union deals with the "Common Foreign and Security Policy" (CFSP),[26] and Part V of the Treaty on the Functioning of the European Union enumerates various specific policies within which the Union is entitled to act. Perhaps the best way to make sense of the constitutional division is to identify the Union's CFSP competence as a *lex generalis* to the specific external competences found in the TFEU.

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The general competence over the CFSP can be found in Article 24 TEU, which states:

> The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.

This competence includes the power to adopt unilateral decisions and, as Article 37 TEU clarifies, the power to "conclude agreements with one or more States or international organisations." The Common Security and Defence Policy (CSDP) is thereby generally seen to form "an integral part" of the CFSP.[27] The latter "shall provide the Union with an operational capacity," which the Union may use "on missions outside the Union for

peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter."[28] The CSDP will—in the future—also include the "progressive framing of a common Union defence policy,"[29] yet Article 42 TEU here contains a constitutional guarantee not to prejudice the neutrality of certain member states, and to respect other member states' obligations within the North Atlantic Treaty Organization (NATO).[30]

The Union's general CFSP competence is complemented by a number of special foreign affairs competences listed in Part V of the TFEU. The latter contains seven titles. Title II deals with the Union's Common Commercial Policy (CCP). This is the external expression of the Union's internal market. Here, the Union is tasked with representing the common commercial interests of the member states on the international scene and with contributing to "the harmonious development of world trade."[31] Under Article 207 TFEU, the Union is entitled to adopt unilateral legislative acts,[32] and to conclude bilateral or multilateral international agreements.[33] The scope of the CCP covers all matters relating to trade in goods and services, commercial aspects of intellectual property, and foreign direct investment.[34]

Title III deals with three related but distinct external policies in three chapters. All three policies allow the Union to adopt unilateral measures,[35] and to conclude international agreements with third states.[36] Chapter 1 concerns "Development Cooperation," whose primary objective is "the reduction and, in the long term, the eradication of poverty" in developing countries.[37] Chapter 2 extends various forms of assistance to "third countries other than developing counties."[38] The Union's competence in respect of humanitarian aid can be found in Chapter 3 of this Title. It permits the Union to provide "ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations."[39]

p. 339 Finally, Title IV confers on the Union a competence to adopt economic sanctions against third states and nonstate actors. These are unilateral acts with a "punitive" character. This competence has had an eventful constitutional history,[40] and still constitutes a strange animal. For, according to Article 215 TFEU, the Union is not entitled to act on the basis of this competence alone. It can only exercise this competence *after* the Union has exercised its CFSP competence. The provision constitutes the central platform for the implementation of resolutions of the Security Council of the United Nations.

In addition to these three main competence titles, we also find some special foreign affairs competences in the institutional provisions of this Part of the TFEU. Title V grants the Union a residual competence to conclude international agreements in Article 216 as well as a special competence to conclude "association agreements."[41] Title VI grants the Union a competence to establish and maintain cooperative relations "as are appropriate" with international organizations, in particular the United Nations and the Council of Europe.[42] Even outside Part V of the TFEU, external competences can be found.[43]

Voting in the Council: The Political Safeguards of Federalism

The central organ responsible for the Union's external relations is the Council. While increasingly required to obtain the consent of the European Parliament, the Council has remained the "primus" in the foreign relations apparatus of the Union. Representing the member states, it constitutes the intergovernmental organ of the Union, and, as such, it constitutes the most important political safeguard of foreign affairs federalism of the Union.

Within the Council, the most powerful way to protect particular member state interests is unanimity voting. This voting arrangement still predominates the CFSP, where Article 31 TEU states that the Council generally acts by unanimity.[44] In stark contrast to the remarkably strong political safeguards of federalism under the
p. 340 CFSP, in ↳ many other areas of EU foreign affairs the Council increasingly operates on the basis of a qualified majority.[45] This voting arrangement is set out in Article 16(4) TEU:

> As from 1 November 2014, a qualified majority shall be defined as at least 55 per cent of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 per cent of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. The other arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the European Union.[46]

In a Union of twenty-eight states, 55 percent of the Council members corresponds to sixteen states. This near simple majority rule is, however, "qualified" by an additional criterion as the bigger member states have insisted on a population majority in addition to the state majority. (The population threshold of 65 percent theoretically means that any three of the four biggest states of the Union could block a Council decision.) By contrast, the smaller member states have insisted that a qualified majority will be "deemed attained" where fewer than four states try to block a Council decision. Thus, as under the past system of weighted votes in the Council,[47] the EU constitutional order does not adopt the sovereign equality solution that can be found in classic international law or the U.S. Senate. Instead, it distinguishes between bigger and smaller states, and this distinction makes the voting in the Council not just a direct political safeguard of federalism but also an indirect safeguard of democracy.

III. Dual Federalism: Originally and Subsequently Exclusive Powers

From a classic international law perspective, the member states of the European Union enjoy full treaty-making powers as equal and sovereign subjects. Yet this perspective is not shared by the European legal order. Here, the member states enjoy only limited foreign affairs powers, and these Union limits are set in two ways. First, the EU Treaties may themselves grant the Union a constitutionally exclusive competence over external relations. Even where this is not the case, the Union can preempt the member states in areas of shared foreign affairs competences.

Originally Exclusive External Powers: The Common Commercial Policy

Exclusive powers are constitutionally guaranteed monopolies: only one governmental level is entitled to act autonomously. For the Union legal order, exclusive competences are defined as areas in which "only the Union may legislate and adopt legally binding acts." The member states will only be able to act "if so empowered by the Union or for the implementation of Union acts."[48]

With regard to foreign affairs, the core exclusive competence of the Union is its competence over the Common Commercial Policy (CCP). The first signs of such a constitutionally exclusive power began to take shape in the form of the "succession" doctrine established by the Court in *International Fruit*.[49] But the constitutional exclusivity thesis only fully emerged in *Opinion 1/75*.[50] The European Court had here been asked to clarify the scope and nature of the Union's power under Article 207 TFEU in the context of an Organisation for Economic Co-operation and Development (OECD) agreement on export credits. In denying that the member states had a shared competence over the issue, the Court explained:

> Such a policy is conceived in that Article in the context of the operation of the common market, for the defence of the common interest of the [Union], within which the particular interests of the Member States must endeavour to adapt to each other. Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the [Union]...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 [Union] intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the [Union] and prevent the latter from fulfilling its tasks in the defence of the common interest.[51]

The harmonious operation of the institutional framework of the Union and the solidarity among its members would, according to the Court, be called into question if the member states retained a shared competence to engage autonomously in commercial activities with third countries. The judgment was affirmed a year later in
p. 342 *Donckerwolcke*,[52] where the Court again held that "full responsibility in the matter ↳ of commercial policy was transferred to the [Union] by means of Articles [207 (1)]," with the consequence that "measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the [Union]."[53] Under the CCP, the member states therefore no longer enjoyed any autonomous foreign affairs powers, and the exclusive nature of the CCP is today firmly established in European constitutionalism.[54]

Subsequently Exclusive Powers: Dual Federalism on the Move

Early on, the Union legal order insisted that the member states will be deprived of their treaty-making powers to the extent that their exercise would affect internal European law. This first limit was spelled out in *ERTA* and became known as the "ERTA doctrine." It states that each time the Union "adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules."[55]

The original *ERTA* ruling had thereby left in suspense the question of *when* the exercise of external powers by the member states would be incompatible with European law, and it was up to subsequent jurisprudence to clarify the extent to which the member states would lose their treaty-making power. In *Opinion 1/94*,[56] the Court voted against the automatic field preemption of the member states. And, according to *Opinion 1/2003*,[57] a finding in favor of exclusive Union powers indeed requires "a comprehensive and detailed analysis" of the relationship between internal legislation and the international treaty that must prove that "it is clear that the conclusion of such an agreement is capable of affecting the [European] rules."[58]

The second constitutional principle is the *Opinion 1/76* doctrine.[59] The Court here wished to extend the exclusionary effect to situations where the "external powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted."[60] An external Union power could thus become exclusive by exercising that very power through the conclusion of an international agreement. The exclusivity
p. 343 here is neither purely legislative, since the member states are prevented from autonomous action ↳ at a time when no European secondary law exists, nor purely constitutional, for it is through the subsequent exercise that the competence becomes exclusive.

The scope of this hybrid exclusivity has, however, always been very restricted. It was confined to "the situation where the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules."[61] The Union would therefore only enjoy an exclusive external power where the achievement of an internal objective was "inextricably linked" with the external sphere.[62]

Lastly, in *Opinion 1/94* the Court added a third constitutional principle limiting the treaty-making powers of the member states, known as the "WTO Principle." It states that "[w]henever the [Union] has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on the institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts."[63]

These three judicial doctrines have, with the 2007 Lisbon Treaty, been imperfectly codified in Article 3(2) TFEU. The provision states:

> 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.

According to the first situation mentioned here, the Union enjoys an exclusive treaty-making power when the conclusion of an international agreement "is provided for in a legislative act." This formulation corresponds to the "WTO Doctrine," yet the codification is more restrictive, as it excludes the first alternative ("provisions relating to the treatment of nationals of non-member countries") from its scope.

The second situation mentioned in Article 3(2) TFEU grants the Union an exclusive treaty power, where this "is necessary to enable the Union to exercise its internal competence." This formulation aims to codify the "Opinion 1/76 Doctrine,"[64] yet unlike the original version, Article 3(2) TFEU seems much wider. The almost identical wording of Article 3(2) and Article 216 TFEU indeed suggested that "implied shared competence would disappear," yet as Marise Cremona notes, this would be "a wholly undesirable departure from the case law."[65]

Finally, the third situation in Article 3(2) appears to refer to the Court's *ERTA* doctrine. But it strangely breaks
p. 344 the link between a *member state agreement* and ↳ internal European law, and replaces it with an analysis of the effect of a *Union agreement* on European rules. This is an "editorial mistake," and the Court has clarified that the "old" *ERTA* case law fully applies here.[66]

As a practical matter, the most important situation within Article 3(2) is the third situation. To what extent does the *ERTA* doctrine "preempt" the member states from concluding international agreements on their own? The following criteria have guided the Court in its analysis. First, Article 3(2) TFEU is only triggered once the Union has adopted secondary law. The reference to "common rules" being affected does not include primary law.[67] Second, in order to see if Article 3(2) applies, the Court will investigate the extent to which internal Union law covers the scope of the envisaged international agreement. If that is the case "to a large extent," the Court will then, as a third step, look to what extent there exists a risk that the Union common rules will be affected.[68]

What happens to international agreements, originally concluded by the member states, that subsequently cover an area in which the Union has assumed an exclusive competence? The Union has answered this question by means of a doctrine of functional succession.[69] Treaty succession is here not based on a transfer of territory, but rather on a transfer of functions. The European Court originally announced this European doctrine in relation to the General Agreement on Tariffs and Trade in *International Fruit*.[70] Formally, the Union was not a party to the GATT, but the Court nonetheless found as follows:

> [I]n so far as under the [European] Treat[ies] the [Union] has assumed the powers previously exercised by Member States in the area covered by the General Agreement, the provisions of that agreement have the effect of binding the [Union].[71]

Functional succession here emanated from the exclusive nature of the Union's powers under the Common Commercial Policy (CCP). Since the Union had assumed the "functions" previously exercised by the member states in this area, it was entitled and obliged to also assume their international obligations.

For a long time after *International Fruit*, the succession doctrine remained quiet. In the last decade, however, it has experienced a constitutional revival. This allowed the Court to better define the doctrine's contours. Three principles have traditionally governed functional succession in the European legal order. First, for the
p. 345 succession ↳ doctrine to come into operation, all the member states must be parties to an international

treaty.[72] Second, when the international treaty is concluded is irrelevant. It will thus not matter whether the international treaty was concluded before or after the creation of the European Community in 1958.[73]

Third, the Union will only succeed to international treaties where there is a "full transfer of the powers previously exercised by the Member States."[74] The Union will thus not succeed to all international agreements concluded by all the member states, but only to those where it has assumed an exclusive competence. Would the European succession doctrine thereby be confined to the sphere of the Union's *constitutionally* exclusive powers, or would *legislative* exclusivity generated by Article 3(2) TFEU be sufficient? The Court has shown a preference for a succession doctrine that includes legislative exclusivity. In *Bogiatzi*,[75] the Court indeed found that a "full transfer" could take place where the member states were completely preempted within the substantive scope of the international treaty.

A fourth and potentially radical principle has recently been suggested in *Opinion 2/15*.[76] The Court here controversially found that where the Union has succeeded the member states according to principles one through three, it also "has competence to approve, by itself, a provision of an agreement concluded by it with a third State which stipulates that the commitments…in bilateral agreements previously concluded between Member States of the European Union and that third State must, upon entry into force of that agreement concluded by the European Union, be regarded as replaced by the latter."[77] If that means what it seems to mean, then the doctrine of functional succession would no longer only have purely "internal" effects within the Union legal order. It would, on the contrary, seem to entitle the *Union* to *externally* terminate the international agreements of the member states previously concluded with a third state.

IV. Cooperative Federalism: Sharing Power between the Union and the States

How has the EU legal order coordinated the potentially dual presence of the Union and its member states? The Union has followed two mechanisms. The first mechanism is a political safeguard of federalism that brings the Union and its member states to the same negotiating table for an international agreement. This technique of
p. 346 cooperation is called a mixed agreement. A second mechanism is "internal" to the Union and ↳ imposes a "duty of cooperation" so as to guarantee "unity in the international representation of the [Union]."[78]

Mixed Agreements: An International and Political Safeguard

Who can conclude international agreements that do not entirely fall into the competence sphere of the Union or the member states? The traditional answer to that question has been that the Union *and* the member states combine their foreign affairs competences in the form of a *mixed* agreement—that is, an agreement to which both the Union and some or all of its member states appear as contracting parties. Mixity was originally designed for a specific sector of European law,[79] yet it soon spread to become the hallmark of the European Union's foreign affairs federalism.[80]

The growth and success of mixed agreements in Europe's foreign affairs federalism may be accounted for by a number of reasons internal and external to the Union legal order. First, mixed agreements would allow the Union and its member states to combine their competences into a unitary whole that matched the external sovereignty of a third state. The division of treaty-making powers between them could then be reduced to an "internal" Union affair.[81] Second, the uncertainty surrounding the nature and extent of the treaty-making powers of the young Union under international law originally provided an additional reason.[82] As long as it remained uncertain whether or how the Union could fulfill its international obligations, mixed agreements would provide legal security for third states by involving the member states as international "guarantors" of the Union obligation.[83]

The constitutional developments within the European legal order in the last four decades have weakened both rationales. Not only have the external powers of the Union been significantly expanded through the development of the doctrine of implied powers—now codified in Article 216 TFEU—its internal powers have
p. 347 been sharpened to guarantee the autonomous enforcement of Union agreements within the European ↳ legal order.[84] Today, the dominant reason behind mixed agreements appears to be of a purely political nature: member states insist on participating in their own name so as to remain "visible" on the international scene. Even for matters that fall squarely into the Union's competence, the member states dislike being enclosed behind a supranational veil.

How has the European Union reacted to the member states' demand for mixed agreements? Shared competences should not, constitutionally, require mixed action. For within shared competences, the Union or the member states can both act autonomously and conclude independent agreements; or, if they so wish, they may act jointly.[85] Indeed, it originally seemed that the European Court would demand specific constitutional justification for mixed external action in place of a pure Union agreement.[86] However, in the last three decades, the Court of Justice has given its judicial blessing to the uncontrolled use of mixed agreements in areas of shared competences. And in *Opinion 2/15*, the Court even alluded to the idea that shared competences required joint action by the Union and its member states under a mixed agreement.[87]

The widespread use of mixed external action evinces a remarkable Union tolerance toward the member states' international powers, as the practice of mixed agreements entails a significant anti-Union consequence. For, according to a European "constitutional convention," the Council generally concludes mixed agreements on behalf of the Union only once all the member states have themselves concluded the agreement in accordance with their constitutional traditions.[88] The convention thus boils down to requiring unanimous consent before the Union can exercise its competence. The conventional arrangement thus prolongs the infamous Luxembourg Compromise in the external sphere. The constitutionally uncontrolled use of mixed agreements under the Union's shared powers has, unsurprisingly, been criticized as "a way of whittling down systematically the personality and capacity of the [Union] as a representative of the collective interest."[89]

On the other hand, mixed agreements can also be seen more positively as a way of safeguarding the role of national parliaments in EU treaty-making. For once the Union uses a mixed agreement, the conclusion of this
p. 348 agreement will not only require ↳ ratification by the European Parliament, but also—subject to the constitutional traditions of the member states—the ratification by every single national parliament and sometimes even regional parliaments. How complex and uncertain this makes the EU ratification process can be seen in the drama surrounding the conclusion of the EU-Canada Trade Agreement that had originally been blocked by the Belgian region of Wallonia.[90] Yet the constitutional principles governing an "incomplete" ratification of a mixed agreement have hardly been explored.[91]

The Duty of Cooperation: An Internal and Judicial Safeguard

The member states' duty to cooperate loyally informs all areas of European law.[92] The duty is particularly important in the external sphere.[93] Unlike the internal sphere, the duty has here been predominantly used to facilitate the autonomous exercise of the Union's external competences. This facilitating role has been expressed in a positive and a negative manner. The positive aspect of the duty here demands that the member states act as "trustees of the Union interest." By contrast, the negative aspect of the duty can place a limit on the member states exercising their shared external competences.

Classic international law is still built on the idea of the sovereign state. The European Union is a union of states, and, as such, still encounters legal hurdles when acting on the international scene. These hurdles have become fewer, but there remain situations in which the Union cannot externally act due to the partial blindness of international law toward compound subjects. And where the Union is—internationally—"disabled" from

exercising its competences, it will have to authorize its member states to act on its behalf. This positive manifestation of the duty of cooperation is called the "trustees doctrine."[94]

A good illustration of the trustees doctrine may be found in the context of the Union's inability to participate in international organizations. Many of these organizations still only allow states to become active members, and hence the European Union finds itself unable to exercise its competences in these international decision-
p. 349 making ↳ forums. An example of this state-centered membership is the International Labour Organization (ILO). Here, the Union cannot itself conclude international conventions and must thus rely on its member states. The obligation to act as trustee of the Union thereby derives from the duty of cooperation:

> In this case, cooperation between the [Union] and the Member States is all the more necessary in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO convention and must do so through the medium of the Member States.[95]

The Union must thus exercise its external competences indirectly, that is, through the member states "acting jointly in the [Union's] interest."[96] This idea was recently confirmed in the context of the International Organisation of Vine and Wine.[97] The Court here expressly clarified that the Union is entitled to adopt a common position for all the European Union that would subsequently need "to be adopted on its behalf in the body set up by that agreement, in particular through the Member States which are party to that agreement acting jointly in its interest."[98]

In an area of shared competence, both the Union and the member states are entitled to act externally by, for example, concluding an international agreement with the United States. But due to the various procedural obstacles in the Union treaty-making power, the member states might be much quicker in exercising their shared competence, and third parties might also be more interested in twenty-eight bilateral agreements than one Union agreement on a matter.[99] Thus, in order to safeguard the "unity in the international representation of the [Union],"[100] the Court has therefore developed a "negative" aspect to the duty of cooperation. Where the international actions of a member state might jeopardize the conclusion of a Union agreement, the Court has imposed specific obligations on the member states.

We find a good illustration of the negative duties imposed on the member states when exercising their shared external competences in *Commission v. Luxembourg*.[101] Luxembourg had exercised its international treaty power to conclude a number of bilateral agreements with Eastern European states. The Commission was incensed, as it had already started its own negotiations for the Union as a whole. It thus complained that even if Luxembourg enjoyed a shared competence to conclude the agreements, "[t]he negotiation by the Commission of an agreement on behalf of the [Union] and its subsequent conclusion by the Council is inevitably made more
p. 350 difficult by interference from a Member State's own initiatives."[102] The Union's position was claimed to have ↳ been weakened "because the [Union] and its Member States appear fragmented."[103] The Court adopted this view, but only partly:

> The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the [Union] marks the start of a concerted [Union] action at international level and requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the [Union] institutions in order to facilitate the achievement of the [Union] tasks and to ensure the coherence and consistency of the action and its international representation.[104]

Importantly, the Court did not condemn the exercise of Luxembourg's foreign affairs power as such. Endowed with shared external power, Luxembourg could very well conclude bilateral agreements with third states. However, since the Commission had started a "concerted [Union] action" for the conclusion of a Union agreement in this area, the member state was under an obligation to cooperate and consult with the

Commission. And in not consulting the Union, Luxembourg had violated the duty of cooperation.[105] The duty of cooperation was thus primarily seen as a duty of information. It appeared to be a *procedural* duty of conduct, and not a substantive duty of result.

The purely procedural character of the duty was subsequently put into question in *Commission v. Sweden*.[106] The Union institution brought proceedings against Sweden for "splitting the international representation of the [Union] and compromising the unity achieved…during the first Conference of the Parties to [the Stockholm Convention on Persistent Organic Pollutants]."[107] What had happened? Sweden had not abstained from making a proposal within the international conference, and the Commission claimed that this unilateral action violated the duty of cooperation. Sweden responded that it had given sufficient information to and consulted with the Union and the other member states.[108]

But this time, information and consultation were not enough. After duly citing its case law, the Court moved to examine whether there existed a Union "strategy" not to make a proposal.[109] In finding that such a Union strategy existed, and that Sweden had "dissociated itself from a concerted common strategy within the Council,"[110] the Court concluded that Sweden had violated the duty of cooperation. In a remarkable feat of judicial creativity, the Court now found that its past case law stood for the proposition that:

> p. 351 Member States are subject to special duties of action *and abstention* in a situation in which the Commission has submitted to the Council proposals which, although ↳ they have not been adopted by the Council, represent a point of departure for concerted [Union] action.[111]

This case represents the beginning of a *substantive* duty of cooperation. Because the Court was not satisfied with the procedural obligation to inform and consult, it prohibited the very exercise of a shared external competence by a member state.

V. Conclusion

The European Union is not a federal state. It was born as an international organization at a time when international law betrayed an impressive ambivalence toward the treaty powers of international organizations. In the past sixty years, the Union has nevertheless significantly sharpened its foreign affairs powers. While still based on the idea that it has no plenary power, the Union's external competences have expanded dramatically, and today it is hard to identify a nucleus of exclusive foreign affairs powers reserved for the member states.

How do the Union and the member states coordinate their foreign affairs powers? In contrast to a classic international law perspective, the Union's member states only enjoy limited treaty-making powers under European law. Their foreign affairs powers are limited by the exclusive powers of the Union, and they may be preempted through European legislation. The Union thereby prefers to gradually preempt the member states through the adoption of internal legislation. And where this has happened exhaustively (or to a large extent), the Union may even functionally succeed the member states in their international commitments.

There are, however, moments when both the Union and its states enjoy overlapping foreign affairs powers. For these situations, the Union legal order has devised a number of cooperative mechanisms to safeguard a degree of "unity" in the external actions of the Union. Mixed agreements constitute an international mechanism that brings the Union and the member states to the negotiating table. The second constitutional device is internal to the Union legal order. It is the duty of cooperation. The duty of cooperation has thereby been given a positive and a negative aspect. Positively, the member states might be obliged to act as "trustees of the Union interest" in international forums. Negatively, the duty has imposed obligations on the member states when exercising their shared competences.

Notes

1 IVAN BERNIER, INTERNATIONAL LEGAL ASPECTS OF FEDERALISM 1 (1973).

2 *Id.* at 81.

3 *Cf.* Reparation for Injuries Suffered in the Service of the UN, Advisory Opinion [1949] ICJ 174, at 179: "Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is 'a super-State,' whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims."

4 Paul Reuter, *Question of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations*, 27 Y.B. ILC (vol. 2) 119, 120 (1975).

5 Neri Sybesma-Knol, *The New Law of Treaties: The Codification of the Law of Treaties Concluded between States and International Organizations or between Two or More International Organizations*, GA. J. INT'L & COMP. L. 425, 428 (1985).

6 Case 26/62 NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration [1963] ECR 1, 12.

7 On this point, *see* ROBERT SCHU¨TZE, EUROPEAN CONSTITUTIONAL LAW ch. 2 (2015).

8 Ex-Art. 210 EEC: "The Community shall have legal personality."

9 Case 22/70 Commission v. Council (ERTA) [1971] ECR 263, para.14.

10 Art. 5(2) TEU.

11 Opinion 2/94 (Accession to the ECHR) [1996] ECR I-1759, para. 24.

12 *Cf.* Ex-Arts. 113 and 238 of the original EEC Treaty.

13 *Cf.* Ex-Art. 101 Euratom Treaty.

14 Case 22/70 Commission v. Council (ERTA) [1971] ECR 263.

15 *Id.*, para. 7.

16 *Id*., paras. 9–10 (emphasis added).

17 *Id*., paras. 15–16 and 23–27.

18 In the words of the *ERTA* Court: "With regard to the implementation of the [Treaties] the system of internal [Union] measures may not therefore be separated from that of external relations." *Id.*, para. 19.

19 Opinion 1/76 (Draft Agreement for the Laying-up Fund for Inland Waterway Vessels) [1977] ECR 741.

20 *Id.*, para. 3.

21 Eric Stein, *External Relations of the European Community: Structure and Process*, *in* COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW (vol. I-1) 115, 146 (1990).

22 *See* ROBERT SCHU¨TZE, FOREIGN AFFAIRS AND THE EU CONSTITUTION ch. 7 (2014).

23 *See* European Convention, *Final Report Working Group VII—External Action* (CONV 459/02), para. 18: "The Group saw merit in making explicit the jurisprudence of the Court[.]"

24 Art. 216(1) TFEU.

25 Opinion 1/13 (Hague Convention), EU:C:2014:2303, para.67.

26 The TEU's common provisions also contain two external competences for the Union. Article 6(2) TEU empowers the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Union's "Neighbourhood Policy" (ENP) finds its constitutional basis in Article 8 TEU.

27 Art. 42(1) TEU.

28 *Id.*

29 Art. 42(2) TEU, first indent.

30 *Id*., second indent.

31 Art. 206 TFEU.

32 Art. 207(2) TFEU.

33 Art. 207(3) TFEU.

34 Art. 207(1) TFEU.

35 *See* Arts. 209(1), 212(2), 214(3) TFEU.

36 *See* Arts. 209(2), 212(3), 214(4) TFEU.

37 Art. 208(1) TFEU.

38 Art. 212(1) TFEU.

39 Art. 214(1) TFEU.

40 For a good account of that constitutional history, *see* PANOS KOUTRAKOS, TRADE, FOREIGN POLICY AND DEFENCE IN EU CONSTITUTIONAL LAW: THE LEGAL REGULATION OF SANCTIONS, EXPORTS OF DUAL-USE GOODS AND ARMAMENTS (2001), ch. 3.

41 *See* Art. 217 TFEU. These agreements are special agreements in that they create "special, privileged links with a non-member country which must, at least to a certain extent, take part in the [Union] system." *See* Case 12/86, Demirel v. Stadt Schwäbisch Gmünd [1987] ECR 3719, para. 9.

42 Art. 220 TFEU. The European Union is a full or partial member of a number of international organizations. For a comparative perspective here, *see* Joris Larik, *Regional Organizations' Relations with International Institutions: The EU and ASEAN Compared*, ch. 25 in this volume.

43 A number of legal bases outside Part V of the TFEU also grant the Union external competences. For example, Article 168(3) TFEU confers the power to adopt measures that foster cooperation with third countries and competent international organizations in the context of the Union's Public Health policy.

44 Exceptionally, and in derogation from the unanimity rule, Article 31(2) enumerates a number of situations in which qualified majority voting applies. The CFSP also recognizes the option of a "constructive abstention."

45 For an analysis of the treaty-making procedure within the Union legal order, *see* Marise Cremona, *Making Treaties and Other International Agreements: The European Union*, ch. 14 in this volume.

46 The Treaty recognizes an express exception to this in Art. 238(2) TFEU.

47 On the old arrangement of weighted votes, *see* SCHU¨TZE, EUROPEAN CONSTITUTIONAL LAW, *supra* note 7, at 179.

48 Art. 2(1) TFEU.

49 Joined Cases 21–24/72, International Fruit Company NV v. Produktschap voor Groenten en Fruit [1972] E.C.R. 1219.

50 Opinion 1/75 (Draft understanding on a local cost standard) [1975] E.C.R. 1355.

51 *Id.* at 1363–1364.

52 Case 41/76, Suzanne Criel, née Donckerwolcke and Henri Schou v. Procureur de la République au tribunal de grande instance de Lille and Director General of Customs [1976] E.C.R. 1921.

53 *Id.*, para. 32.

54 Art. 3(1) (e) TFEU. On the rise and fall of partial exclusivity of the CCP from Opinion 1/94 to the Lisbon Treaty, *see* SCHU¨TZE, FOREIGN AFFAIRS, *supra* note 22, at 411.

55 *ERTA*, *supra* note 14, para. 18.

56 Opinion 1/94 *(WTO)* [1994] ECR I-5267, para. 96.

57 Opinion 1/2003 (Lugano) [2006] ECR I-1145.

58 *Id*., para. 124.

59 On the transformation of the *Opinion 1/76* ratio decidendi, *see* SCHÜTZE, FOREIGN AFFAIRS, *supra* note 22, at 258.

60 Opinion 1/94, *supra* note 56, para. 85.

61 Opinion 2/92 *(OECD)* [1996] ECR I-1759, § V, para. 4.

62 Case 476/98 Commission v. Germany (Open Skies) [2002] ECR I-9855, para. 87.

63 Opinion 1/94, *supra* note 56, para. 95.

64 Opinion 1/76 (Laying-up Fund) [1977] ECR 741. On the evolution of the Opinion 1/76 doctrine, *see* SCHU¨TZE, *supra* note 22, at 258.

65 Marise Cremona, *A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty*, EUI Working Paper 2006/30, 10.

66 Case C-114/12 Commission v. Council, EU:C:2014:2151, para.66.

67 This was recently confirmed, beyond doubt, in Opinion 2/15 (Singapore), EU:C:2017:376, paras. 234 and 235.

68 *See* Opinion 1/13 (Hague Convention), EU:C:2014:2303, paras. 83–84.

69 *See* PIERRE PESCATORE, L'ORDRE JURIDIQUE DES COMMUNAUTÉS EUROPÉENNES 147–148 (Presse Universitaire de Liège, 1975) (my translation): "[B]y taking over, by virtue of the Treaties, certain competences and certain powers previously exercised by the Member States, the [Union] equally had to assume the international obligations that controlled the exercise of these competences and powers[.]"

70 Joined Cases 21–24/72, International Fruit Company NV v. Produktschap voor Groenten en Fruit [1972] ECR 1219.

71 *Id*., paras. 14–18.

72 Case C-188/07, Commune de Mesquer v. Total [2008] ECR I-4501.

73 Case 308/06, Intertanko and others v. Secretary of State for Transport [2008] ECR I-4057.

74 *Id*., para. 4.

75 Case C-301/08, Bogiatzi v. Deutscher Luftpool and others [2009] ECR I-10185.

76 Opinion 2/15, *supra* note 67.

77 *Id.*, para. 249.

78 Opinion 1/94, *supra* note 56, para. 108.

79 Art. 102 Euratom Treaty.

80 For a now slightly outdated registry, *see* JONI HELISKOSKI, MIXED AGREEMENTS AS A TECHNIQUE FOR ORGANIZING THE INTERNATIONAL RELATIONS OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES 252–277 (2001) (listing 154 mixed agreements concluded between 1961 and 2000).

81 *See* Ruling 1/78 (IAEA Convention) [1978] ECR 2151, para. 35 ("It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene.").

82 Pierre Pescatore, *Les Relations extérieures des communautés européennes: contribution à la doctrine de la personnalité des organisations internationales*, 103 RECUEIL DES COURS 1, 105 (1961).

83 MAURITS J. DOLMANS, PROBLEMS OF MIXED AGREEMENTS: DIVISION OF POWERS WITHIN THE EEC AND THE RIGHTS OF THIRD STATES 95 (1985).

84 On the direct and indirect effects of international agreement in the Union legal order, *see* Mario Mendez, *The Application of International Law by the Court of Justice of the European Union*, ch. 34 in this volume.

85 *See* Case 316/91, Parliament v. Council [1994] ECR I-625, para. 26 ("The [Union's] competence in that field is not exclusive. The Member States are accordingly entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the [Union].").

86 Opinion 1/76 (Laying-up Fund) [1977] ECR 741, paras. 6–8.

87 In Opinion 2/15, *supra* note 67, para.244 the Court found that because the Union "only" had a shared competence, "the envisaged agreement cannot be approved by the European Union alone."

88 The inspiration for this constitutional convention appears to lie in Article 102 of the Euratom Treaty.

89 Pierre Pescatore, *Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster?*, 36 CML REV. 387 fn.6 (1999).

90 *See Belgium's Walloon Parliament blocks EU-Canada free-trade deal*, FINANCIAL TIMES, Oct. 14, 2016.

91 *But see* Guillaume van der Loo & Ramses Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, 54 CML REV. 735 (2017).

92 For the general duty, *see* Art. 4(3) TEU.

93 For a special expression of the general duty of Article 4(3) TEU in the CFSP area, *see* Art. 24(3) TEU; and for even more specific duties of cooperation, *see* Art. 32 TEU (consultation and coordination of national policies within the European Council and the Council), and Art. 34 TEU (coordination of member states in international organizations).

94 For a first analysis of this doctrinal construction in the external sphere, *see* Marise Cremona, *Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union*, *in* A CONSTITUTIONAL ORDER OF STATES: ESSAYS IN HONOUR OF ALAN DASHWOOD 435 (Anthony Arnull et al. eds., 2011).

95 Opinion 2/91 (ILO Convention 170) [1993] ECR I-1061, para. 37.

96 *Id*., para. 5.

97 Case C-399/12, Germany v. Council (OIV), EU:C:2014, 2258.

98 *Id.*, para.52.

99 This approach might be inspired by the classic Roman strategy of *divide et impera*, that is, divide and rule.

100 Opinion 1/94 (WTO Agreement) [1994] ECR I-5267, para. 108.

101 Case 266/03, Commission v. Luxembourg [2005] ECR 4805.

102 *Id*., para. 53.

103 *Id*.

104 *Id*., para. 60.

105 *Id*., para. 61.

106 Case C-246/07, Commission v. Sweden [2010] ECR I-3317. For an extensive analysis, *see* Geert de Baere, *"O, Where Is Faith? O, Where Is Loyalty?" Some Thoughts on the Duty of Loyal Co-operation and the Union's External Environmental Competences in the Light of the PFOS Case*, 36 ELR. 405 (2011).

107 Commission v. Sweden, *supra* note 106, para. 44.

108 *Id*., para. 63.

109 *Id*., para. 76.

110 *Id*., para. 91.

111 *Id*., para. 103 (emphasis added).