THE DEVELOPMENT OF EUROPEAN UNION IMPLIED EXTERNAL COMPETENCE: THE COURT OF JUSTICE AND OPINION 1/03

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I. INTRODUCTION

The European Union ("EU")[1] is an ever important actor in the world. The EU acts to influence external affairs through a complex but significant network

1. The European Communities came into existence on 1 July 1967, in the merger of the European Coal and Steel Community (Treaty of Paris 1951), the European Economic Community (Treaty of Rome 1957) (renamed the European Community on 1 November 1993), and the European Atomic Energy Community (Euratom) (Treaty of Rome 1957). Previously, each of these three organisations had its own Commission and its own Council. The merger created a single Commission of the European Communities as well as a single Council of Ministers of the European Communities. Other executive, legislative, and judicial bodies were also collected under the umbrella of the European Communities. The plural dropped from the organisation's name in the 1980s as the economic integration of the then Member States progressed. It later became known as the European Community ("EC"). Under the Treaky on European Union 1992 ("TEU"), the EC became the basis for the European Union ("EU"). Uner now, the EU was founded on three pillars. They comprised the EC (ie, the European Coal and Steel Community, the European Economic Community, and Euratom), a Common Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters. Upon the entry into force of the Treaty of Lisbon 2007 in December 2009, the EC and the EC will merged together. In particular, the Treaty of Lisbon 2007 has collapsed the three pillars and unified the EU into a single entity with legal personality. In fact, to symbolise the merger, the Treaty of Lisbon has renamed the EC Treaty as the Treaty on the Functioning of the European Union ("TFEU"). See HOWE, M., *Europe and the Constitution after Maastricht* (1993). Note that Asthide 216(1) of the TFEU attempts to codify the doctrine of implied external competence that it is the subject of this artide. It states: "The Union may conclude an agreement with one or more third countries or international organizations... where the conclusion of an agreement is necessary in order to archive, within the framework of the Union's policies,

of external relations. The significance of that network corresponds to the status of the EU as the largest trade power in the world and as the first world donor of development and humanitarian aid. However significant it may be, the network of EU external relations is nonetheless complex. Its complexity lies in the doctrinal uncertainty of the external competence of the EU. External competence refers to the power of the EU to act in external relations.

In this respect, Article 5 (now Article 5.2 of the Treaty on European Union ["TEU"]) of the Treaty establishing the European Community (the "EC Treaty" but now be renamed, the Treaty on the Functioning of the European Union ["TFEU"]) states that the EU must abide by the principle of "conferred powers":

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

It follows from this provision that the EU has external competence only when it acts on the basis of an appropriate power. Power, therefore, may be expressly conferred under the provisions of the EC Treaty. For example, the EU has the power to conclude association agreements with other countries under Article 310 (now Article 217 ["TEU"]).

However, in the absence of an express conferment of power, the European Court of Justice ("ECJ") (now the Court of Justice of the European Union TFEU) held in Case 22/70 that:

> To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.
>
> Such authority arises not only from an express conferment by the Treaty – as is the case with Articles 113 and 114 (now, respectively, Article 284 and 134 TEU) for tariff and trade agreements and with Article 238 (now Article 272 TFEU) for association agreements – but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions[2].

In Opinion 1/76, the ECJ further held "that authority to enter into international commitments may not only arise from an express attribution by the

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! Obviously, the interpretation of this provision wil still require reference to the earlier (and complex) jurisprudence.

2. *Commission v Council* (*AETR/ERTA*) (Case 22/70) [1971] ECR 263, [15] – [16].

Treaty, but equally may flow implicitly from its provisions"[3]. Thus, besides express external competence, the ECJ accepts that the EU also has implied powers and, thereby, implied external competence.

However, despite the importance of the doctrine of implied external competence as an instrument of European integration[4], its doctrinal uncertainty causes problems between the EU and its Member States[5]. Two are the reasons for the lack of certainty that afflict the doctrine of implied external competence.

First, the distribution of powers between the EU and its Member States continues to be a sensitive exercise, as legal doctrine cannot simply ignore political considerations[6]. Judgments of the ECJ have a significant impact upon the external relations of the Member States and the EU. On the one hand, the Member States maintain that the EU is an international organisation whose powers come from its Member States and that any attempt to redraw the precise delineation of powers entertains a violation of their national sovereignty in the field of foreign affairs. On the other hand, the EU maintains that extensive implied external powers are necessary in order to enable its institutions to achieve the aims and objectives of the EC Treaty across frontiers.

Secondly, the ECJ ranks international agreements above secondary legislation of national origin[7]. International agreements may thus invalidate or, at the very least, affect secondary legislation while free from internal procedural constraints.

Reasons aside, the tension between the EU and its Member States that flows from the uncertainty of the doctrine causes two major problems. One, the tension continuously threatens the negotiation, conclusion, and implementation of international agreements[8]. Two, the tension does not only diminish the effectiveness and credibility of the external conduct of the EU but it also hinders the ability of third countries to negotiate efficiently, and sometimes even to successfully conclude, any international agreement with the EU.

3. *Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels* (Opinion 1/76) [1977] ECR 741, [3].

4. HOLTERMAN, M., *The Importance of Implied Powers in Community Law* (LLM Thesis, RijksUniversiteit Groningen, 2005).

5. DUKE, S., "Areas of Grey: Tensions in EU External Relations Competences" (2006) 1 *EIPAScope* 21.

6. HOLDGAARD, R., "The European Community's Implied External Competence after the Open Skies Cases", *European Foreign Affairs Review*, 8 (2003), 365, 366.

7. *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* (Joined Cases 21 to 24/72) [1972] ECR 1219.

8. See further LEAL-ARCAS, R., "Unitary Character of EC External Trade Relations" (2001) 7 *Columbia Journal of European Law* 355; LEAL-ARCAS, R., "The European Community and Mixed Agreements", *European Foreign Affairs Review*, 6 (2001), 483.

In response to such uncertainty and the problems that it causes, this article critiques the development of the doctrine of implied external competence by the ECJ. The article does not comment on the progressive development of the doctrine[9]; rather, the article assesses Opinion 1/03, as the most recent statement of the ECJ on implied external competence, in order to measure the level of doctrinal uncertainty.

The ECJ draws a distinction between situations in which there is secondary EU legislation (within the scope of Case 22/70) and situations in which there is no secondary EU legislation (within the scope of Opinion 1/76). The first part of the article examines the former situation while the second part examines the latter.

Both parts comprise two sections. The first section in each part outlines the state of the doctrine of implied external competence before Opinion 1/03. Correspondingly, the second section outlines the state of the doctrine after Opinion 1/03 in order to explain its implications.

The article argues that, in Opinion 1/03, the ECJ changed its approach to the development of the doctrine of implied external competence. First, the article argues that Opinion 1/03 redefined the concept of exclusivity. The new definition not only takes into account the respective subject matter of international agreements and EU rules but it also examines the content, nature, and future foreseeable development of EU law in order to determine whether the relevant international agreements will affect it. Secondly, the article argues that, after Opinion 1/03, the condition of necessity no longer refers to the *existence* of EU external competence; rather, it now refers to its *nature* (that is, whether external competence is exclusive to the EU or whether it is shared with the Member States).

II. IMPLIED EXTERNAL COMPETENCE WITH SECONDARY LEGISLATION

2.1. *Implied External Competence before Opinion 1/03*

The decision of the ECJ in Case 22/70 confirmed that the EU has implied external competence over any area in which the EU has already exercised its authority to enact secondary legislation in pursuit of some EU objective. Years later, the ECJ conveniently summarised the case law on implied external com-

9. For an exhaustive analysis of EU external implied powers, see KOUTRAKOS, P., *EU International Relations Law* (2006), 77-135.

petence in the *Open Skies* cases of November 2002[10]. The facts of these cases were as follows.

The Commission charged seven Member States with violation of the exclusive external competence of the EU after they concluded, without any EU endorsement, a set of air transport agreements with the United States of America (USA). These bilateral agreements intended to liberalize the air transport services market. The Commission, however, had long intended to establish a common market for air transport services and so it had already petitioned a mandate from the Council under Article 84(2) of the EC Treaty (now Article 100[2] TFEU) to conclude a single EU-USA agreement. The provision states that:

> The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.

After several unsuccessful petitions by the Commission, the Council finally issued a mandate but only over certain matters, including competition rules, ownership and control of air carriers, Computer Reservation Systems (CRSs), code-sharing, dispute resolution, leasing, environmental clauses, and transitional measures. The Council later expanded the scope of its mandate to the Commission, at the request of the USA, to include State aid and other measures to avert bankruptcy of air carriers, slot allocation at airports, economic and technical fitness of air carriers, security and safety clauses, safeguard clauses and any other matter relating to the regulation of the air transport services sector[11]. Pursuant to that mandate, the Commission introduced three packages of measures: Council Regulation (EEC) No 2407/92 of 23 July 1992 on the licensing of air carriers, Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for EU air carriers to internal air routes, and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services[12]. The Commis-

10. The *Open Skies* cases comprise *Commission v Denmark* (Case C-467/98) [2002] ECR I-9519; *Commission v Sweden* (Case C-468/98) [2002] ECR I-9575; *Commission v Finland* (Case C-469/98) [2002] ECR I-9627; *Commission v Belgium* (Case C-471/98) [2002] ECR I-9681; *Commission v Luxembourg* (Case C-472/98) [2002] ECR I– 9741; *Commission v Austria* (Case C-475/98) [2002] ECR I– 9797; *Commission v Germany* (Case C 476/98) [2002] ECR I– 9855. The European Court of Justice ("ECS") (now the Court of Justice of the European Union) decided the *Open Skies* cases with a single judgment. For ease of reference, this article will only refer to the transcript of the judgment in *Commission v Belgium*.

11. *Commission v Belgium* (Case C-471/98) [2002] ECR I– 9681, [19].

12. For further information on the facts of the *Open Skies* cases, see SLOT, P.J. and DUTHEIL DE LA ROCHÈRE, J., "Case C-466/98, *Commission v. United Kingdom*; C-467/98, *Commission v.*

sion, therefore, claimed to be exclusively competent to conclude an agreement with the USA by virtue of these measures.

The *Open Skies* cases provided the ECJ with a good opportunity to clarify its doctrine of implied external competence. It worth quoting in full the relevant extract from the judgement in Case C-471-98:

> ... the Community's competence to conclude international agreements arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions; that, in particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, 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 towards non-member countries which affect those rules or distort their scope; and that, as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member countries affecting the whole sphere of application of the Community legal system.
>
> ... It must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence.
>
> According to the Court's case-law, that is the case where the international commitments fall within the scope of the common rules (AETR judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26).
>
> Thus it is that, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts (Opinion 1/94, paragraph 95; Opinion 2/92, paragraph 33)[13].

The *Open Skies* cases may appear straightforward. However, a closer examination of the cases raises issues which are still open to debate. In other

Denmark; C-468/98, *Commission v. Sweden*; C-469/98, *Commission v. Finland*; C-471, *Commission v. Belgium*; C-472/98, *Commission v. Luxemburg*; C-475/98, *Commission v. Austria*; C-476/98, *Commission v. Germany*. (Open Skies judgments) Judgments of the Full Court of 5 November 2002", *Common Market Law Review*, 40 (2003), 697.

13. *Commission v Belgium* (Case C-471/98) [2002] ECR I– 9681, [90], [94] [96].

words, far from clarifying the doctrine of implied external competence, it seems that the *Open Skies* cases leave unanswered as many questions as it answers.

The distinction between the *existence* and the *nature* of EU external competence has been the subject of much commentary[14]. In brief, the distinction requires a determination first as to whether the EU is competent and, secondly, as to whether its competence is exclusive or shared with Member States.

On the one hand, in areas where the EU has exclusive external competence, the Member States lose their right to undertake obligations with third countries. In particular, they no longer have the right, acting individually or even collectively, to conclude international agreements which affect EU rules or change the scope of those rules. In other words, the EU alone can negotiate and conclude agreements with third countries.

On the other hand, in areas where the EU shares its external competence with the Member States, the negotiation and conclusion of international agreements requires joint action by EU and its Member States.

This distinction is thus of extreme importance both to the EU and its Member States. Most commentators, however, accept that the ECJ failed to clarify the distinction in the *Open Skies* judgment on, at least, two grounds.

First, the ECJ evaluated its earlier decision in Case 22/70 under the section: "The alleged existence of an external Community competence in the sense contemplated in the line of authority beginning with the AETR judgment"[15]. Additional extracts expressly refer to the existence of external competence. For example, paragraph 94 reads: "It must next be determined ... under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence"[16]. These two extracts imply that there must first be a determination as to whether the EU is competent, before examining whether its competence is exclusive or shared with the Member States.

However, other extracts from the *Open Skies* judgement may suggest a different interpretation. For example, paragraph 91 states that: "those findings imply recognition of an exclusive external competence for the Community in consequence of the adoption of internal measures"[17]. In this extract, the ECJ

14. ANTONIADIS, A., "The EU's Implied Competence to Conclude International Agreements after the Reform Treaty: Reformed Enough?" in LAURSEN, F. (ed), *The EU in the Global Political Economy* (2009).

15. *Commission v Belgium* (Case C-471/98) [2002] ECR I– 9681, [75] – [76].

16. *Commission v Belgium* (Case C-471/98) [2002] ECR I– 9681, [94].

17. *Commission v Belgium* (Case C-471/98) [2002] ECR I– 9681, [91]. In the same way, paragraph 98 states that "any distortions in the flow of services in the internal market which

seems to reason that secondary legislation directly gives rise to the exclusive external competence of the EU. It, thereby, abolishes the distinction between the existence and the nature of the EU external competence.

There is, however, a strong argument against this last interpretation. In the *Open Skies* cases, the Commission was only concerned with the exclusivity of its external competence. Thus, the ECJ did not have to determine the existence of the Commission's external competence; rather, it only had to determine whether or not the Commission's external competence was exclusive or shared with the Member States, which would explain the obvious gap in its reasoning.

Secondly, as to the issue of exclusivity, the ECJ held in the *Open Skies* cases that the EU is exclusively competent insofar as the relevant international agreement affects the EU legal system. It identified three situations in which there is an automatic presumption of that effect on EU law: one, the relevant international agreement falls within the scope of common rules; two, the internal agreement falls within an area that is already under the cover of EU rules; and, three, the relevant international agreement falls within an area where the EU has achieved complete harmonization.

It is notable that the ECJ held that: "Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26)"[18]. The ECJ there contented itself with verifying whether or not the relevant international agreements fall within the three situations above[19]. In other words, as soon as the relevant international agreement and EU rules concern the same "subject matter", that international agreement is, by default, considered to affect EU rules and, therefore, to fall within the exclusive external competence of the EU.

The implication from the *Open Skies* cases is that the ECJ does not seek to determine whether international agreements affect, *in concreto*, EU rules; it simply compares, *in abstracto*, the respective subject matter of international agreements and EU rules. According to Michel Petite, the ECJ appears to adopt a "quantitative

might arise from bilateral 'open skies' agreements concluded by Member States with non-member countries do not in themselves affect the common rules adopted in that area and are thus not capable of establishing an external competence of the Community".

18. *Commission v Belgium* (Case C-471/98) [2002] ECR I– 9681, [95].

19. See further HOFFMEISTER, F., "*Commission v. United Kingdom* et al: European Court of Justice Ruling on External Competence of the Community and Member States Regarding Bilateral Air Transport Agreements" (2004) 98 *American Journal of International Law* 567; R Abeyratne, "The Decision of the European Court of Justice on Open Skies and Competition Cases", *World Competition Law and Economics Review*, 26 (2003), 335.

test"[20]. Thus, the exclusive external competence of the EU depends on the scope of secondary legislation adopted at the internal level, which deprives Member States from external powers that they could otherwise previously exercise on a transitional basis. Correspondingly, it appears that, so long as the EU achieves a partial harmonization or even only imposes the most minimum of requirements, Member States would, necessarily, have to share their external competence with the EU. Moreover, the test is not only quantitative but also *formalistic* as it does not really take into account the effect of international law on EU rules.

2.2. *Implied External Competence after Opinion 1/03*

In Opinion 1/03[21], the ECJ had to determine whether the new Lugano Convention (the Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) fell within the exclusive external competence of the EU and, in doing so, the ECJ took the opportunity to clarify its case law.

To some commentators, Opinion 1/03 did not delineate with sufficient precision the contours of the doctrine of implied external competence. However, this article argues that the ECJ did not only clarify numerous issues, but it also committed itself in the right direction. It worth quoting the relevant paragraphs of the reasoning:

> In Opinion 1/94, and in the *Open Skies* judgments, the Court set out three situations in which it recognised exclusive Community competence. Those three situations, which have been the subject of much debate in the course of the present request for an opinion and which are set out in paragraph 45 hereof are, however, only examples, formulated in the light of the particular contexts with which the Court was concerned
>
> Ruling in much more general terms, the Court has found there to be exclusive Community competence in particular where the conclusion of an agreement by the Member States is incompatible with the unity of the common market and the uniform application of Community law (*ERTA*, paragraph 31) ... .
>
> ... In certain cases, analysis and comparison of the areas covered both by the Community rules and by the agreement envisaged suffice to rule out any effect on the former ...

20. PETITE, M., "Current Legal Issues in the External Relations of the European Union" (Working Paper Law No 2006/38, European University Institute, 2006) 7, 9.

21. *Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Opinion 1/03) [2006] ECR I-1145.

> However, it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully. Where the test of "an area which is already covered to a large extent by Community rules" (Opinion 2/91, paragraphs 25 and 26) is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis ...[22].

Two positive developments are apparent from these paragraphs. First, and most importantly, the ECJ begins its legal considerations with a statement in paragraph 115 "[t]hat competence of the Community may be exclusive or shared with the Member States"[23]. The ECJ here expressly draws a distinction between the existence and the nature of EU external competence. Such reasoning implies two steps.

First, the ECJ must examine whether the EU is competent to conclude international agreements. In doing so, the ECJ simply considers the relevant provisions of the EC Treaty. The principle is that whenever EU law confers internal powers on the EU for specific objectives, the external competence of the EU impliedly follows. The ECJ must then consider the nature of the external competence; that is, whether it is exclusive to the EU or shared with the Member States.

Secondly, the ECJ moves away from its quantitative and formalistic approach in order to scrutinize, *in concreto*, the effect on EU law. Traditionally, however, the ECJ would take a rigid attitude to any determination of the effect of the international agreements of Member States on EU rules. With such an attitude, the ECJ would, by default, presume the requisite effect on EU rules if the international agreement under review fell within one of three situations above. Furthermore, the ECJ would then proceed to examine the subject matter of the relevant international agreement without any care for possible contradictions.

Opinion 1/03 may be interpreted as a move away from the traditional quantitative and formalistic approach of the ECJ. The ECJ now analyses various criteria in order to determine, *in concreto*, whether the international agreements of Member States are likely to affect the unity of the single market and the uniform application of EU law. The ECJ does not only compare the scope of

22. *Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Opinion 1/03) [2006] ECR I-1145, [121] – [122], [125] – [126].

23. *Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Opinion 1/03) [2006] ECR I-1145, [115].

the international agreement under review and the relevant EU rules but it also takes into consideration their actual content, their nature, and even their future foreseeable development.

It is true that the ECJ already prohibited the Member States from entry into international agreements that would be incompatible with the uniform application of EU law. For example, in Case 22/70, at a very early point in the development of the doctrine of external competence, the ECJ stated:

> ... it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or affect their scope[24].

However, as this article has explained, subsequent developments in the case law reduced this paragraph to dead letter. Thankfully, Opinion 1/03 appears to indicate the new if only apparent willingness of the ECJ to resurrect it and to give it practical application.

Nikolaos Lavranos takes the view that this new approach broadens the scope of exclusive external competence. He writes:

> ... the application of the effect on Community law test gives the Court a wider margin to determine whether or not an envisaged agreement affects the uniform and coherent application of Community law. This is especially so because the Court does not only take into account the extent of existing Community legislation and the level of harmonization achieved, but also includes the nature and content of the envisaged agreement as well as future developments of Community law[25].

Marise Cremona, however, takes the opposite view and considers that Opinion 1/03 "should not be regarded as opening the door to a new wider reading of the scope of exclusivity, but rather as a signal that the approach to be adopted should focus on the overall effect and nature of an agreement on the Community legal order"[26]. In other words, Opinion 1/03 should be better regarded as a confirmation that a comprehensive and detailed analysis is desirable, as already stated by the ECJ in its previous case law.

24. *Commission v Council (AETR/ERTA)* (Case 22/70) [1971] ECR 263, [22].

25. LAVRANOS, N., "Opinion 1/03, *Lugano Convention*", *Common Market Law Review*, 43 (2006), 1087, 1095.

26. CREMONA, M., "External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law" (Working Paper Law No 2006/22, European University Institute, 2006) 5.

Contrary to Cremona, this article argues that a tacit message did indeed clearly emerge from Opinion 1/03: it puts an end to the ECJ's quantitative and formalistic approach to the kind of circumstances that once determined the exclusive external competence of the EU. The use of criteria, such as the scope of the international agreement under review and the relevant EU rules in conjunction with their actual content, their nature as well as their future foreseeable development, gives the ECJ considerable discretion to conclude in favour of exclusive external competence. This is a positive development for, at least, two reasons.

First, the ECJ scrutinizes how an international agreement will, in practice, impact on EU rules. It does not do so *in abstracto* by comparing only their respective subject matter; it, above all, takes into consideration criteria, such as the scope, the content, and the nature of the respective rules as well as the future foreseeable development of EU law, so as to determine, *in concreto*, if the international agreement under review does affect EU rules. This "effect-orientated" approach consequently gives sense to the previous case law which repeatedly insisted on the respect and uniformity of EU rules.

Secondly, this new approach of the ECJ does not only ensure a better preservation of the *acquis communautaire* but it also, by the inclusion of criteria such as the future foreseeable development of EU law, enables the EU institutions to develop, effectively and coherently, their external policy with a prospective view.

Like Cremona's, the opinion of Lavranos is not beyond critique either: a more flexible and dynamic approach does not necessarily broaden the otherwise narrow set of exclusive implied external powers at the disposition of the EU. Suffice it to provide a single example: contrary to the earlier situation, the new approach may well prevent Member States from entry into international agreements which do not cover the same subject matter. In other words, it will be necessary, in all cases, to demonstrate an actual effect on EU rules.

In conclusion, Opinion 1/03 might represent a new definition of exclusivity: Member States are not precluded from external action, *in abstracto*, in an area largely covered by secondary EU legislation. Rather, they cannot establish contractual relations with third countries which affect EU rules *in concreto*.

This new approach, the advantages of which this article has already presented, is, however, not short of drawbacks. Multiple if somewhat vague criteria do allow the benefit of flexibility and adaptability to diversified circumstances. They thus give the ECJ the discretion to face all potential contingencies. Nevertheless, they also imply a lack of predictability and clarity, both indispensable qualities to reasonably predict circumstances in which an international agreement falls within the exclusive external competence of the EU. Lengthy discussions may weaken the position of the EU in the international sphere.

However, the ECJ is right to observe in Opinion 1/94 that "resolution of the issue of the allocation of competence cannot depend on problems which may possibly arise in administration of the agreements"[27]. Rather, it is more important to insist on the duty of cooperation in order to reconcile the uniform and coherent application of EU law with the preservation of national (Member State) sovereignty. In the words of the ECJ in Opinion 2/91:

> ... when it appears that the subject-matter of an agreement or contract falls in part within the competence of the Community and in part within that of the Member States, it is important to ensure that there is a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into. This duty of cooperation, to which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the EEC Treaty since it results from the requirement of unity in the international representation of the Community[28].

III. IMPLIED EXTERNAL COMPETENCE WITHOUT SECONDARY LEGISLATION

3.1. *Implied External Competence before Opinion 1/03*

In Opinion 1/76, the ECJ confirmed that the EU can have implied external competence even in situations in which the EU has not exercised its authority to enact secondary legislation in pursuit of some EU objective. The competence of the EU to conclude agreements with third countries can also come from the provisions of the EC Treaty itself, which confers on the EU internal legislative powers, as long as EU involvement is *necessary* in order to achieve the objectives of the EC Treaty. In this respect, the *Open Skies* judgement reads:

> It is true that the Court has held that the Community's competence to enter into international commitments may arise not only from express conferment by the Treaty but also by implication from provisions of the Treaty. Such implied external competence exists not only whenever the internal competence has already been used in order to adopt measures for implementing common policies, but also if the internal Community measures are adopted only on the occasion of the conclusion and implementation of the international agreement. Thus, the competence to bind

27. *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property* (Opinion 1/94) [1994] ECR I-5267, [107].

28. *Convention No 170 International Labour Organization Concerning Safety in the Use of Chemicals at Work* (Opinion 2/91) [1993] ECR I-1061, [36].

> the Community in relation to non-member countries may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in the international agreement is necessary for attaining one of the Community's objectives (see Opinion 1/76, paragraphs 3 and 4).
>
> ... the hypothesis envisaged in Opinion 1/76 is that where the internal competence may be effectively exercised only at the same time as the external competence (Opinion 1/94, paragraph 89), the conclusion of the international agreement thus being necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules[29].

In response to this extract, two observations can be made. First, the ECJ implies the power of the EU to act externally from its power to act internally in order to achieve the objectives of the EC Treaty. Opinion 1/76 states that:

> Whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community 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[30].

Opinion 2/91 also confirms that the external competence of the EU comes directly from its internal power to achieve any of the objectives in Part One of the EC Treaty (now Part One TFEU). As a matter of principle, the doctrine of implied external competence or, at least, the doctrine within the scope of Opinion 1/76, would thus be applicable in any area in order to achieve an EU objective.

However, in the *Open Skies* cases, the ECJ expressly stated that Article 84(2) of the EC Treaty (now Article 100[2] TFEU) could not alone support the external competence of the EU in the area of air transport services. The explanation was rather ambiguous: "Article 84(2) of the Treaty merely provides for a power for the Community to take action, a power which, however, it makes dependent on there being a prior decision of the Council"[31]. Yet, Article 3(1)(f) of the EC Treaty (now Article 4[g] TFEU) instigates, as one of the objectives of the EU, the pursuit of "a common policy in the sphere of transport". The importance of transport policy is furthermore illustrated by Title IV of the EC Treaty (now Title VI TFEU), which is entirely devoted to its regulation.

29. *Commission v Belgium* (Case C-471/98) [2002] ECR I- 9681, [67] – [68].

30. *Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels* (Opinion 1/76) [1977] ECR 741, [1].

31. *Commission v Belgium* (Case C-471/98) [2002] ECR I- 9681, [65].

It is, therefore, legitimate to call into question the general assertion which holds that any internal power gives rise to a corresponding external power. In other words, it is not unreasonable to suggest that the ECJ is engaging in a "sectoral" approach[32], based on an examination of the relevant provision which confers competence to act at the internal level.

Secondly, the ECJ implies the power to act externally from the power to act internally where the conclusion of the relevant international agreement is *necessary* in order to achieve the objectives of the EC Treaty. The principle of necessity requires the EU institutions to check whether there are alternatives at their disposal. Thus, they must determine whether the same outcome could be achievable by common rules or even by prescribing the approach to be taken by Member States in their external relations. In other words, the EU institutions have to assess whether internal rules alone can achieve the objectives of the EC Treaty or whether the achievement of those objectives requires the conclusion of the relevant international agreement.

However, a key question is still unanswered: does the necessity condition imply the recognition of the *existence* of the EU's external competence? This question is very important. Unfortunately, the ambiguity of the case law divides the answer of practitioners and commentators.

Advocate-General Tizzano, in the course of the *Open Skies* judgment, opined that the ECJ should draw a distinction between the existence and the nature of the EU's external competence. He repeatedly stressed that the principle of necessity conditions the acknowledgment of the competence of the EU. It is the exercise of that competence which deprives Member States of the powers they could previously exercise on a transitional basis:

> ... the "necessity" for an agreement in a given field may enable the Community to affirm its own external competence. But it will always and only be the specific recognition of such necessity, that is to say, the actual exercise of that competence, which will render it exclusive[33].

Advocate-General Tizzano based his opinion on two arguments. First, he argued that the case law supported his opinion and so he quoted extracts from earlier opinions such as: "... 'the external competence based on the Community's internal powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted' (quoting Opinion 2/92; the same words are

32. HOLDGAARD, R., "The European Community's Implied External Competence after the Open Skies Cases", *European Foreign Affairs Review*, 8 (2003), 365, 382.

33. Joined Opinion of Mr Advocate-General Tizzano [2002] ECR I-9427, [49].

used subsequently in Opinion 1/94)"[34]. Secondly, he argued that the direct recognition of exclusive external competence would protect the separation of powers:

> ... the above conclusions are confirmed above all, to my mind, by the problems which the Commission's argument raises when one goes on to consider how and by whom the assessment should be carried out as to the "necessity" of an agreement in a situation where the competence in question has not previously been exercised by the Community[35].

He then affirmed:

> ... it is my view that the necessity for an agreement must be determined in accordance with the procedure laid down for the exercise of the parallel internal competence, where such competence is already provided for, or, if that is not the case, in accordance with the procedure laid down in Article 235 of the Treaty[36].

In summary, Advocate-General Tizzano recommended the "proceduralisation"[37] of the doctrine of implied external competence by reference to Article 308 (now Article 352 TFEU) which states that, if the EC Treaty does not provide the necessary powers to operate internally, "the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".

However, the Commission argued that, according first to Opinion 1/76 and then to Opinion 1/94 as well as to Opinion 2/92, the EU is exclusively competent to conclude any international agreements which are necessary to achieve the objectives of the EC Treaty. The Commission referred to the work of prominent commentators such as Alan Dashwood who had earlier described this position as consistent with the *modus operandi* of implied powers[38].

In the *Open Skies* cases, the ECJ did not satisfactorily respond to these issues but instead left in the judgement elements which might signal a more transparent position in the future. One such signal is the section under the title: "The alleged existence of an external competence of the Community within the meaning of Opinion 1/76"[39]. The ordinary meaning of the words (their literal interpretation) as well as their location in the title of a "section" of the judgment (their systemic

34. Joined Opinion of Mr Advocate-General Tizzano [2002] ECR I-9427, [50].
35. Joined Opinion of Mr Advocate-General Tizzano [2002] ECR I-9427, [51].
36. Joined Opinion of Mr Advocate-General Tizzano [2002] ECR I-9427, [52].
37. KOUTRAKOS, P., *EU International Relations Law* (2006), 124.
38. DASHWOOD, A., "The Relationship Between the Member States and the European Union/European Community", *Common Market Law Review*, 41 (2004), 355.
39. *Commission v Belgium* (Case C-471/98) [2002] ECR I– 9681, [55] – [56].

interpretation) suggests that the condition of necessity gives rise simply to the external competence of the EU and not to the exclusivity of that competence[40].

In conclusion, the judgement in the *Open Skies* cases simply applied the line of authority that Opinion 1/76 had earlier established: in the absence of secondary legislation, it is only when the objectives of the EC Treaty cannot be achieved by autonomous rules, because of the link between internal and international spheres, that the EU is competent to conclude agreements with third countries. Whether that competence is shared or exclusive was too controversial a question to answer and so the ECJ forced practitioners and commentators to wait for a future opportunity for further clarification. The Lugano Convention gave the ECJ the perfect opportunity.

3.2. *Implied External Competence after Opinion 1/03*

Opinion 1/03 brought much welcome clarification. In that respect, it read:

> The competence of the Community to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions (see *ERTA*, paragraph 16). The Court has also held that whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/76, paragraph 3, and Opinion 2/91, paragraph 7).
>
> That competence of the Community may be exclusive or shared with the Member States. As regards exclusive competence, the Court has held that the situation envisaged in Opinion 1/76 is that in which internal competence may be effectively exercised only at the same time as external competence (see Opinion 1/76, paragraphs 4 and 7, and Opinion 1/94, paragraph 85), the conclusion of the international agreement being thus necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules (see, in particular, *Commission v Denmark*, paragraph 57)[41].

40. Nevertheless and not without contradiction, paragraph 74 appears to suggest another interpretation: "... the Community could not validly claim that there was an exclusive external competence...". See *Commission v Belgium* (Case C-471/98) [2002] ECR I- 9681, [74].

41. *Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Opinion 1/03) [2006] ECR I-1145, [114] – [115].

Thus, the ECJ does seem to depart from its ruling in the *Open Skies* cases. Back then, the ECJ considered the condition of necessity to be a requirement for its recognition of the existence of EU external competence. In Opinion 1/03, the ECJ commits itself in a different direction. External implied powers of the EU within the scope of Opinion 1/76 may, therefore, be summarised as follows.

When the EC Treaty confers internal powers onto the EU for the achievement of its objectives, the EU has, in parallel, the powers to conclude international agreements to achieve those objectives. The maxim is: "*in foro interno, in foro externo*". In other words, internal competence will, by default, give rise to concurrent external competence[42]. Since internal competence gives rise, in parallel, to external competence, the condition of necessity, therefore, refers to the nature (and not the existence) of that competence. In that respect, the EU is exclusively competent to conclude international agreements which are *inextricably linked* to the achievements of objectives of the EC Treaty.

However, once again, the notion of exclusivity does not mean that Member States cannot, *in abstracto*, conclude agreements with third countries. The notion of exclusivity, within the scope of Opinion 1/76, must be consistent with the line of judicial authority that Case 22/70 established. This interpretation simply implies, therefore, that Member States cannot conclude international agreements that could affect, *in concreto*, EU rules. Such an interpretation would accord with the new emphasis on the *de facto* effect on EU rules. It would, furthermore, allay the concerns of Member States who, traditionally, are jealous guardians of their national sovereignty.

IV. CONCLUSION

The long and winding development of the doctrine of implied external EU competence does not hide an obvious reality: the utility of the doctrine that the ECJ developed in Opinion 1/76 is questionable. EU law has, in recent years, progressively expanded to cover very diverse areas of regulation. Its expansion has simultaneously reduced the utility of the doctrine of implied external competence that the ECJ developed in Opinion 1/76 and it is difficult to identify areas in which the ECJ may still rely upon it. However, EU law has not yet revealed all its intricacies and it is not impossible that unforeseeable future developments may validate its utility.

42. BAUMÉ, T., "Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters: Opinion 1/03 of 7 February 2006" (2006) 7 *German Law Journal* 681, 687-690.

Abstract

External competence refers to the power of the European Union ("EU") to act in external relations. In this respect, Article 5 (now Article 5.2 of the Treaty on European Union) of the Treaty establishing the European Community ("EC Treaty") (now the Treaty on the Functioning of the European Union ["TFEU"]) states that the EU must abide by the principle of "conferred powers". It follows from this provision that the EU has external competence only when it acts on the basis of an appropriate power. Power, therefore, may be expressly conferred under the provisions of the EC Treaty. However, in the absence of an express conferment of power, the European Court of Justice ("ECJ") (now the Court of Justice of the European Union) held in Case 22/70 and Opinion 1/76 that the EU also has implied powers and, thereby, implied external competence.

However, despite the importance of the doctrine of implied external competence as an instrument of European integration, its uncertainty causes problems between the EU and its Member States. In response to such uncertainty and the problems that it causes, this article critiques the development of the doctrine by the ECJ. In particular, the article assesses Opinion 1/03, as the most recent statement of the ECJ on the doctrine of implied external competence, in order to measure the level of doctrinal uncertainty.

The article argues that, in Opinion 1/03, the ECJ changed its approach to the development of the doctrine of implied external competence. First, the article argues that Opinion 1/03 redefined the concept of exclusivity. The new definition not only takes into account the respective subject matter of international agreements and EU rules but it also examines the content, nature, and future foreseeable development of EU law in order to determine whether the relevant international agreements will affect it. Secondly, the article argues that, after Opinion 1/03, the condition of necessity no longer refers to the *existence* of EU external competence; rather, it now refers to its *nature* (that is, whether external competence is exclusive to the EU or whether it is shared with the Member States).