

EU competences, codification and case law - old and new problems

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Consolidation and contestation

Why do competences matter?

Starting point: the frictions between the *conferral of powers* and *attaining the objectives of the EU* (Art.5 TEU and 216 (1) TFEU)

Unravelling competences:

Understanding explicit and implicit/implied external competences

Understanding the ERTA doctrine and its follow-up case law

Treaty text

Article 5(ex Article 5 TEC)

1. The limits of Union competences are governed by the **principle of conferral**. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only **within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein**. Competences not conferred upon the Union in the Treaties remain with the Member States.

Article 216

1. 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.

Article 4 TEU

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.
3. Pursuant to the **principle of sincere cooperation**, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
The Member States shall take **any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.**
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The long road to competence codification

Delimitation of competences a top-priority

Growing amount of case law on existence, scope and nature of competences

Laeken Declaration: To clarify, simplify and adjust the division of competences (see next slide)

- By defining competences and forestalling creeping competences
- No Kompetenz-Kompetenz (attribution of competences, Art.5.1 TFEU)

Implemented by Art.216 TFEU and Art.2 to 6 TFEU

THE FUTURE OF THE EUROPEAN UNION

– LAEKEN DECLARATION –

Laeken, 15 December 2001

SN 273/01

I. EUROPE AT A CROSSROADS

A better division and definition of competence in the European Union

Citizens often hold expectations of the European Union that are not always fulfilled. And vice versa - they sometimes have the impression that the Union takes on too much in areas where its involvement is not always essential. Thus the important thing is to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union. This can lead both to restoring tasks to the Member States and to assigning new missions to the Union, or to the extension of existing powers, while constantly bearing in mind the equality of the Member States and their mutual solidarity.

A first series of questions that needs to be put concerns how the division of competence can be made more transparent. Can we thus make a clearer distinction between three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States? At what level is competence exercised in the most efficient way? How is the principle of subsidiarity to be applied here? And should we not make it clear that any powers not assigned by the Treaties to the Union fall within the exclusive sphere of competence of the Member States? And what would be the consequences of this?

The codification of competences: Art.216 TFEU and Art.3 (2) TFEU

Article 216 (1) TFEU: 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.**

Art.3 (2) TFEU: 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 **insofar as its conclusion may affect common rules or alter their scope.**

Categories of competences

Competences

Exclusive

Shared

Complementary

*CFSP
competence
sui
generis*

Categories of competences

Competences, Art.2 TFEU

Exclusive, Art.3 TFEU

- A priori exclusive (monetary policy countries with Euro currency, common commercial policy)
- By certain conditions (Art.3.2 TFEU)
- *By preemption (Art.2.2 TFEU)*

Shared, Art.4 TFEU

- Shared competences (internal market, environment i.a.)
- Parallel competences (development)
- Not exhaustive Art.4.1

Complementary, Art.6 TFEU

- Harmonisation excluded
- Tourism, protection and improvement of public health, education

CFSP
competence *sui generis*, Art.2.4 TFEU

Fundamental principles

Principles of conferral (attribution of powers, Art.5 TEU)

Principle of unity of international representation and sincere cooperation (Art.4.3 TEU), confirmed by case law, ruling 1/78, Opinion 2/91 para.36, Opinion 1/94, Case C-25/94, Case C-620/ (COTIF II), para.93

The ERTA principle (Art.216 (1) TFEU): attaining the EU's objectives (existence of (external) competences) and principle of effet utile (?)

Unravelling competences

Existence of EU external competence

- Explicit competence
- Implied competence
 - Parallelism between external/internal competence
 - ERTA doctrine and confirmed by COTIF case

Nature and scope of competence

- General scope: defined by Art.3 (2) TFEU
- A priori competence and its scope: such as CCP (Art.207 TFEU): Daiichi Sankyo case



External Competences in the 1960ties – restricted to explicit treaty-making power?

What is an explicit external competence?

Examples:

- Art.209 (2) TFEU Development policy “the Union **may conclude** with third countries and competent international organisations **any agreement....**”
- Art.217 TFEU Association policy: “The Union **may conclude** with one or more third countries or international organisations **agreements....**”

What are other competences/legal bases for EU action?
What is an implicit external competence (“to achieve one of the objectives referred to the Treaties”)?

External Competences: The widening of competences

Principle of the attribution of competences (Art.5 TEU): Competences conferred on the Union by MS

- Where did you find **explicit external competences** to conclude international agreements in the pre-Lisbon Treaties?
 - Limited at the beginning: trade and association policy (EEC Treaty)
 - Later added competences such as environment and development/third country cooperation (internal and external policies)
- Implicit external competences: common transport (Art.91 TFEU) or internal market (Art.114 TFEU) see ERTA case (1971)

Example: When does the EU have treaty-making power (and when are Member States excluded from acting)?

- Member States wanted to conclude a road transport agreement with third countries, they discussed it inside the Council with each other and agreed on a common negotiations position outside the EU framework.



Transport policy: EU Treaty

Article 90 (ex Article 70 TEC)

The **objectives of the Treaties** shall, in matters governed by this Title, be pursued **within the framework of a common transport policy**.

Article 91 (ex Article 71 TEC)

1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, **the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:**

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

.....

Happy birthday ERTA! 50 Years of the Implied External Powers Doctrine in EU Law

31 MARCH 2021 / BY [GRAHAM BUTLER](#) AND [RAMSES A. WESSEL](#)

1. Introduction

Wednesday 31 March 2021 marks – to the day – the 50th anniversary of the delivery of the [ERTA judgment \(Case C-22/70, Commission v Council\)](#) by the Court of Justice of the European Union – a seminal case in the history of EU law.

On 31 March 1971, in the run-up to Easter, the Court delivered its *ERTA* ruling that has come to shape a fully-fledged field known as EU external relations law, and the establishment of the implied external powers doctrine, better known as the *ERTA* doctrine. Within EU law, the existence of *ERTA* is known to some extent, but half a century after its delivery, the ramifications of the *ERTA* doctrine are not as well understood as they ought to be beyond the

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ERTA doctrine: 1. question – treaty-making power

ERTA (or
AETR)
doctrine ECJ
judgment

- Effet utile principle applied
- Parallelism of internal-external competences

Two legal
questions
addressed

- (1) Treaty-making power
- (2) Exclusive power

ERTA doctrine (2. question addressing exclusivity)

Common rules adopted - ERTA judgment para.17

- Example: Common transport policy

And adoption of secondary law/harmonisation - ERTA judgment para.28

Codification of case law?

- How far is ERTA and follow-up case law still relevant with the codification (Art.216 and 3(2) TFEU)?
- Clarified by
 - Opinion 1/13 (Hague Convention)
 - C-66/13 (Green Network)
 - Opinion 2/15 (Singapore)
 - **Opinion 3/15 (Marrakesh Treaty Opinion):**
what falls under CCP and use of Art.3(2) TFEU
outside scope of Art.3 (1) TEU
 - **C-600/14 (COTIF I) confirms ERTA and Lugano**

Divide between (implied) external power and exclusive power

General power to make international agreements

Nature and Scope of external competences

- ERTA case law, Lugano Convention Opinion
- Post-Lisbon case law

Codification by Article 216 (1) TFEU and Art.3 (1) and (2) TEU

Codification: Lack of clarity and unfinished job?

Missing competences

- Association policy, Art.217 TFEU
- Combatting discrimination, Art.19 TFEU,

Hybrid policies (social policy, employment and economic policy)

- Social policy split up into three categories of competences, depending on the concrete norm (Art.151 -161 TFEU)

CFSP as a unique policy (Art.24 TEU)

Mismatch between typology and concrete legal basis (shared competence but no harmonisation or different forms of competences)

Role of pre-emption, Art.2.2 TFEU in relations to Art.3(2) TFEU

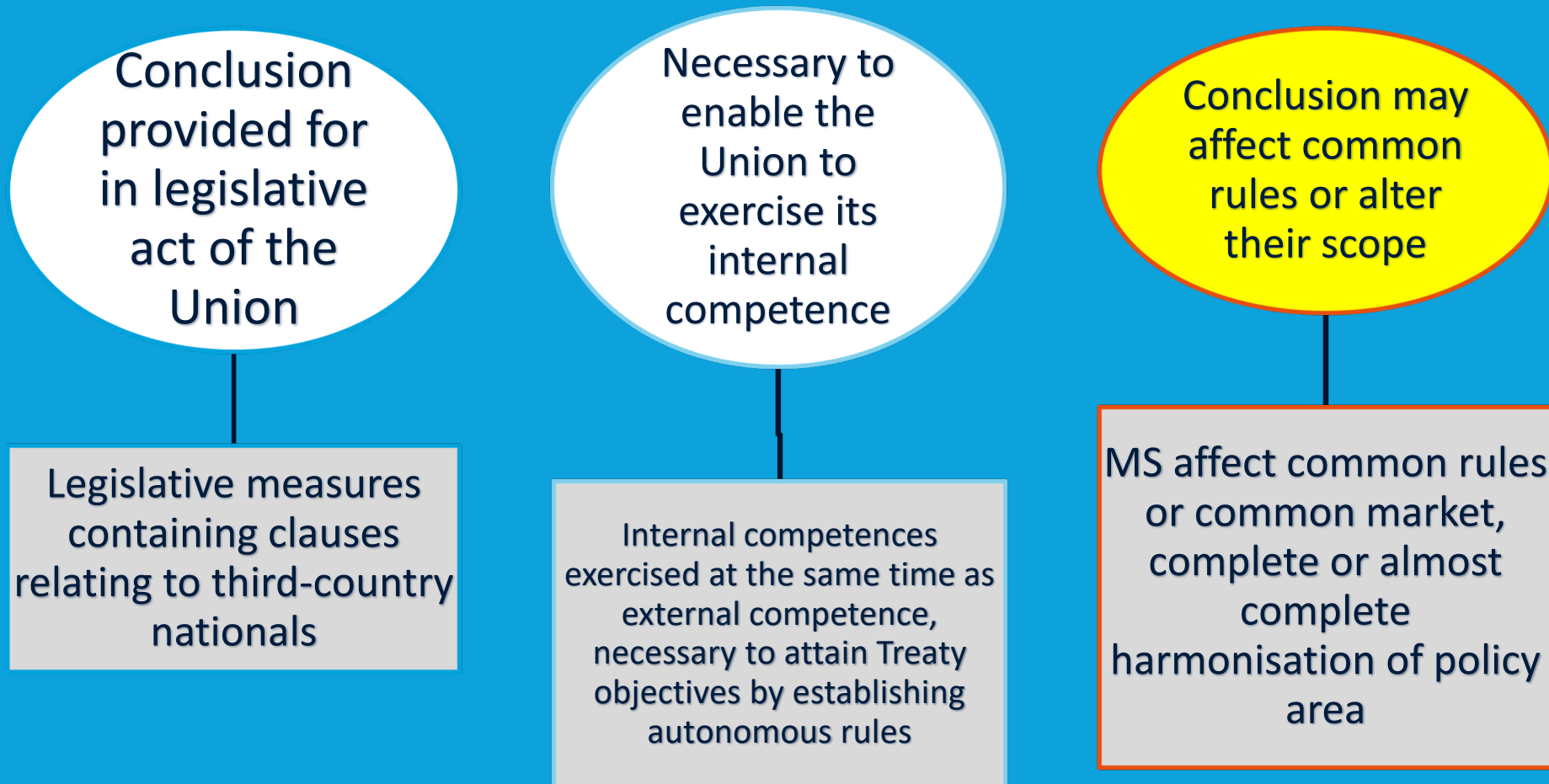
When competence?: Art.216 (1) TFEU

- **1. Treaty provides for it**
 - Examples: Art.207 TFEU CCP, Art.191 (4) TFEU (environment), Art.78 (2) g TFEU (AFSJ)
- **2. Where conclusion of an agreement is necessary in order to to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties** (see COTIF case)
- **3. Provided for in a legally binding act** (“empowering institutions to negotiate with third countries”), WTO opinion (1/94)
 - Example: legislation containing clauses in relation to third-country nationals or power transferred to institutions to negotiate with non-member countries
- **4. Likely to affect common rules or alter their scope** (see Art. 3(2) 3.alternative)

Is this competence exclusive?

- **A priori exclusive: Art.3.1 TFEU**
 - Customs union
 - Competition policy internal market
 - Monetary policy
 - Conservation of marine biological resources under the common fisheries policy
 - Common commercial polcy
- **General conditions. Art.3.2 TFEU**
 - 1. **Its conclusion is provided for in legislative act of the Union**
 - 2. **Necessary to enable the Union to exercise its internal competence**
 - 3. **Its conclusion may affect common rules or alter their scope**

Art.3(2) codification and pre-Lisbon case law



Interpretation of Art.3(2) TFEU: “may affect common rules or alter their scope”

Less than complete harmonisation but more than minimum harmonisation

- Minimum harmonisation defined in case law as provisions of EU law and international convention in question laid down only minimum requirements

ERTA and follow-up case law still applicable or more ‘restrictive’ or broader codification?

Lugano Convention Opinion pre-Lisbon:

Specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the **conclusion of such an agreement is capable of affecting the Community rules.**



Analysis and comparison of the areas covered, 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

(Broadcasters, Case C-114/12), Hague Convention on child abduction Opinion 3/15) confirmed by Singapore Opinion

A risk assessment that common EU rules are affected by MS internat.commitments or whether the risk exists that EU rules are altered by those MSs commitments (broad assessment, future development, meaning, scope, non conflict necessary)



Comparison between the EU's envisaged inter.agreement and existing or foreseeable EU secondary rules



Sufficient if area of international agreement is largely covered by EU rules

Remaining conflicts and resistance by Member States

Scope of (exclusive)competences

Implied (external) competence

Example 1: Opinion 3/15 (Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled)



Opinion 3/15 (Marrakesh Treaty)

Marrakesh Treaty

- CCP competence covers Marrakesh Treaty or does Art.3 (2) TFEU apply?



Article 207 TFEU

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

Opinion 3/15 (Marrakesh Treaty)

CCP

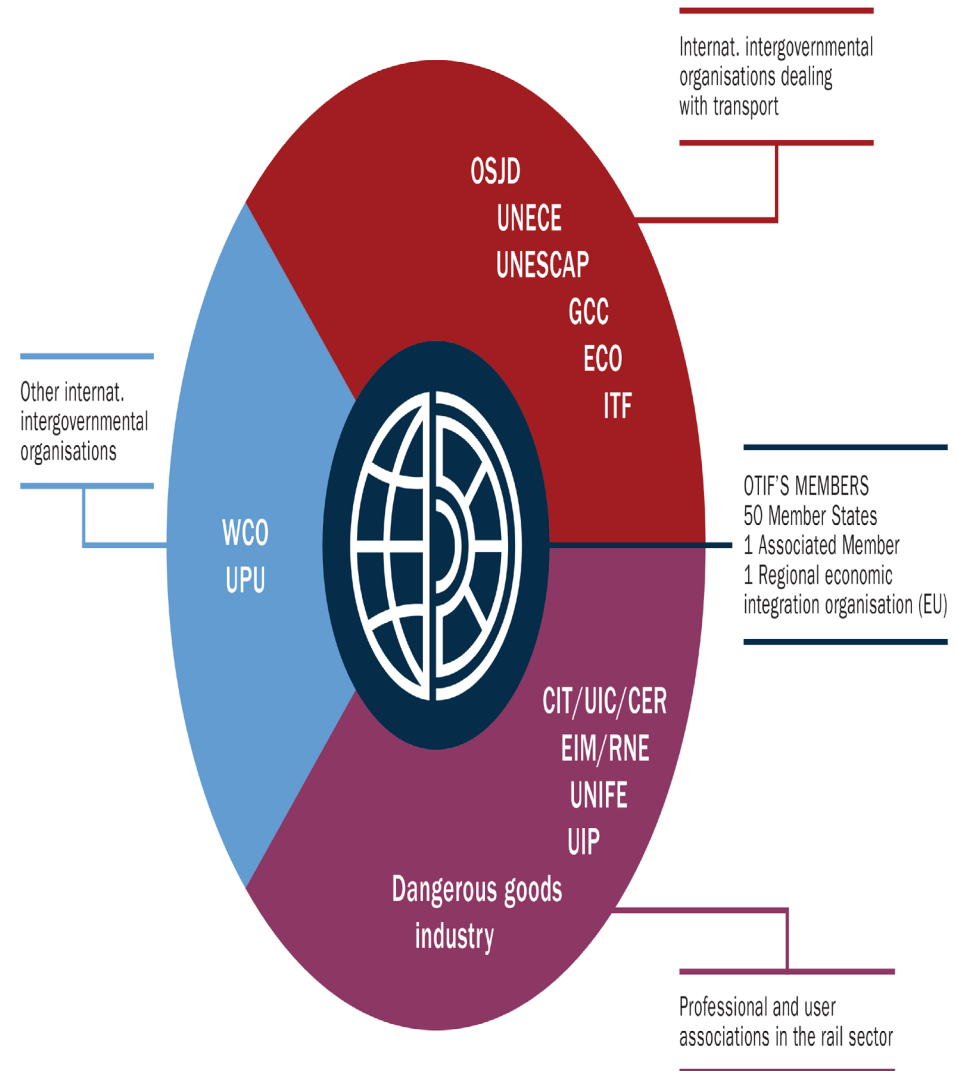
- Scope defined by Daiichi Sankyo case: specific link to international trade
- No: non-commercial aims of Marrakesh Treaty pursued

Art.3(2) TFEU:
may affect
common
rules

- Comprehensive and detailed analysis of the relationship between the international agreement envisaged and EU law in force
- Conclusion: falls into exclusive competence

Example 2: COTIF I (C-600/14) Implied powers and exclusivity

- Convention concerning International Carriage by Rail (COTIF) and Intergovernmental Organisation (OTIF)
- Accession agreement of the EU in this Organisation
- Art.6 accession agreement addresses exercise of voting right EU exclusive/shared comp.
- Decision under Art.218 (9)



COTIF case

- 38 The Federal Republic of Germany, supported by the French Republic, also argues that, in the area of transport, which is an area where the European Union and its Member States share competence, only in the situations provided for in Article 3(2) TFEU, namely those where the Union has an exclusive external competence, is the Union permitted to conclude an international agreement. In this case, however, no exclusive external competence arises from any of the situations provided for in Article 3(2) TFEU. The Federal Republic of Germany adds that, outside those situations, the Union has no external competence.

COTIF case findings

- 46 Moreover, it follows from the Court's settled case-law that a distinction must be made between whether the Union has an external competence and whether any such competence is exclusive or shared (Opinion 1/76 (*Agreement on the establishment of a European Laying-up Fund for Inland Waterway Vessels*) of 26 April 1977, EU:C:1977:63, paragraphs 3 and 4; Opinion 2/91 (*ILO Convention No 170*) of 19 March 1993, EU:C:1993:106, paragraphs 13 to 18; Opinion 1/03 (*New Lugano* ...))
- 48 Article 216(1) TFEU provides that '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'.
- 49 It follows from the very wording of that provision, in which no distinction is made according to whether the European Union's external competence is exclusive or shared, that the Union possesses such a competence in four situations. Contrary to the arguments put forward by the Federal Republic of Germany, the scenario in which the conclusion of an agreement is liable to affect common rules or to alter their scope, a scenario where the Union competence is, under Article 3(2) TFEU, exclusive, constitutes only one of those situations.
- 50 Moreover, it is clear from a comparison of the respective wording of Article 216(1) TFEU and Article 3(2) TFEU that the situations in which the Union has an external competence, in accordance with the former provision, are not limited to the various scenarios set out in the latter provision, where the Union has exclusive external competence.

COTIF case findings

- 66 However, it must be observed that it is now stated in the first sentence of Article 2(2) TFEU, on shared competences, that, ‘when the Treaties confer on the Union a shared competence with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area’. That provision does not state that a prerequisite of the Union having an external competence that is shared with its Member States is the existence, in the Treaties, of a provision explicitly conferring such an external competence on the Union.
- 67 The fact that the existence of an external European Union competence is not, in any event, dependent on the prior exercise, by the Union, of its internal legislative competence in the area concerned is also apparent from paragraph 243 of Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017 (EU:C:2017:376), from which it is clear that the relevant provisions of the agreement concerned, relating to non-direct foreign investment, fall within the shared competence of the Union and its Member States, even though it was common ground between the parties, as is clear from paragraphs 229 and 230 of that Opinion, that the Union had taken no internal action, by adopting rules of secondary law, in that field.

Conclusions

The politics of competences

- Competences and legal basis disputes are power struggles between institutions and EU v. MS (mixed agreements)

Failed competence clarification

- Failure by legal drafters and EU judges

Judicial attempts of consolidation

- Broad external powers v. sectoral internal powers
- Preference for one legal base and wide scope of express external competence and normalised CFSP competence