Interinstitutional Gravity and Pirates of the Parliament on Stranger Tides: the Continued Constitutional Significance of the Choice of Legal Basis in Post-Lisbon External Action

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Choice of legal basis in EU external action – Conclusion of international agreements – Application of the centre of gravity test – Delimitation of the Common Commercial Policy, the Common Foreign and Security Policy and Development Cooperation Policy – Institutional balance

Introduction

Six years after the Lisbon Treaty's entry into force, its constitutional implications for EU external action have gradually been revealed, most notably by the actions of the High Representative of the Union for Foreign Affairs and Security Policy ('High Representative'), the European External Action Service, and various Union delegations abroad,[1] and more subtly through the incremental interpretation of the post-Lisbon Treaties by the Court of Justice of the EU.[2] Among its

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[1] *See* e.g. J. Wouters et al., *The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities* (European Parliament 2013).

[2] Under Art. 19(1), first subpara. TEU, the institution of the Court of Justice of the EU encompasses the Court of Justice, the General Court and specialised courts (at present, the EU Civil Service Tribunal). This article refers to the Court of Justice as the European Court of Justice ('ECJ' or 'the Court') in the sense of the highest court of this institution.

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constitutionally prescribed duties, the Court is posed the task of deciding whether EU action at home or abroad is reconcilable with the Union's basic constitutional charter, the Treaties.[3] Characteristic of the EU's constitution is that it is based on the principle of conferral,[4] and that it provides for a balance within the institutional framework established by the Treaties.[5]

This article focuses on the Court's constitutional role[6] as adjudicator in several cases involving disputes concerning the principles of conferral and institutional balance: *Mauritius Agreement*[7] (on the common foreign and security policy – 'CFSP'), *Philippines PCA*[8] (on development cooperation), and *Daiichi Sankyo*[9] and *Conditional Access Convention*[10] (on the common commercial policy – 'CCP').

These cases illustrate that post Lisbon, the choice of the appropriate legal basis for external action remains constitutionally significant, both because the principle of conferral requires that any measure taken be based upon a Treaty provision,[11] and because the legal basis chosen will affect the respective roles of the various Union institutions.[12] They also demonstrate that, despite the alleged abolition of the pillars, the need to delineate areas of external competence still poses problems.[13]

This article examines the use of the so-called 'centre of gravity test' as a means to delineate areas of competence, resulting in the suggestion that this test may be unsuitable for establishing the legal basis for external action, especially when applied to the conclusion of international agreements involving development cooperation, the CCP, or the CFSP. The Union and the Member States may view the goals of an agreement differently from the other parties, or place varying emphasis on its different component parts. It may even prove impossible to distinguish the principal from the secondary goals of an agreement.[14] This article explores the possibility that the Lisbon Treaty may have unintentionally reinforced this effect.

[3] ECJ 18 December 2014, Opinion 2/13, *Accession to the ECHR*, para. 163, referring to ECJ 23 April 1986, 294/83, *Les Verts* v *Parliament*, para. 23.

[4] Arts. 4(1) and 5(1)-(2) TEU.

[5] Arts. 13 to 19 TEU. *See* Opinion 2/13, paras. 164-165.

[6] *Cf.* E. Sharpston and G. De Baere, 'The Court of Justice as a Constitutional Adjudicator', in A. Arnull et al. (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) p. 123-150.

[7] ECJ 24 June 2014, Case C-658/11, *Parliament* v *Council.*

[8] ECJ 11 June 2014, Case C-377/12, *Commission* v *Council.*

[9] ECJ 18 July 2013, Case C-414/11, *Daiichi Sankyo.*

[10] ECJ 22 October 2013, Case C-137/12, *Commission* v *Council.*

[11] E.g. ECJ 30 November 2009, Opinion 1/08, *GATS Schedules*, para 110.

[12] E.g. Opinion of AG Poiares Maduro of 27 September 2007, C-133/06, *Parliament* v *Council*, point 32.

[13] *Cf.* Opinion of AG Bot of 30 January 2014, C-658/11, *Parliament* v *Council*, points 2-5.

[14] M. Cremona, 'Balancing Union and Member State Interests: Opinion 1/2008, Choice of Legal Base and the Common Commercial Policy under the Treaty of Lisbon', 35 *ELR* (2010) p. 678 at p. 688-91.

The article considers the appropriateness of the 'centre of gravity' test as a means to determine the predominant subject matter of an agreement. This is followed by an analysis of the objectives-based competence delimitation method, focusing specifically on distinguishing between the breadth of development cooperation and CCP policies, as opposed to those of other policy areas, and on the confines of the CFSP. As the constitutional significance of choosing the appropriate legal basis cannot be properly understood without examining the practical implications for the institutional balance,[15] the article analyses the impact of that choice on Parliament's scrutiny of international agreements within the context of the CFSP. Finally, the article offers concluding thoughts on the broader implications of the case law examined here.

A brief summary of the cases

Philippines PCA concerned a Commission proposal resulting in a Council decision on the signing of the Framework Agreement on Partnership and Cooperation between the EU and its Member States and the Philippines ('Philippines Agreement'). The Commission found legal bases for its proposal in Articles 207 and 209 TFEU, which address, respectively, the CCP and development cooperation.[16] The Council decision authorising the signing of this agreement invoked additional legal bases to justify the provisions of the agreement concerning the readmission of third-country nationals (Article 79(3) TFEU), transport (Articles 91 and 100 TFEU), and the environment (Article 191(4) TFEU). The Court held that these provisions did not contain obligations that were so extensive that they constituted objectives distinct from development cooperation and hence needed separate legal bases. The Court annulled the decision insofar as it contained these supererogatory legal bases added by the Council.

Mauritius Agreement arose from a procedural dispute concerning anti-piracy measures to be taken off the coast of Somalia.[17] On 12 July 2011 the Council adopted a decision authorising the signing of the EU-Mauritius Agreement setting the conditions of transfer for suspected pirates arrested and detained by the EU's

[15] *Cf.* Opinion of AG Kokott of 28 October 2015, C-263/14, *Parliament* v *Council*, point 4.

[16] Proposal for a Council Decision on the signing of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part (COM(2010) 460 final).

[17] *See* in general D. Guilfoyle, 'Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts', 57 *ICLQ* (2008) p. 690-699; R. Geiss and A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011); P. Koutrakos and A. Skordas (eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart 2014).

naval mission EU NAVFOR,[18] both during and after transfer (the 'Mauritius Agreement').[19] The Agreement itself was signed on 14 July 2011 and has been provisionally applied since. The Council decision was adopted on the legal bases of Article 37 TEU (CFSP) and Article 218(5)-(6) TFEU (procedure to negotiate and conclude international agreements). While agreeing with the Council that Article 37 TEU was the appropriate legal basis, the Court held that, by failing to inform Parliament immediately and fully at all stages of the negotiations, and conclusion of, the EU-Mauritius Agreement, the Council had violated Article 218(10) TFEU. Since that provision contains an essential procedural requirement within the meaning of Article 263, second paragraph TFEU, the contested decision had to be annulled (albeit in this instance with maintenance of its effects).

In *Daiichi Sankyo,* the Court was asked to consider whether Article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) falls under the competence of the Member States, or is rather an exclusive external competence of the EU. The Court had previously held[20] that only the parts of the TRIPs Agreement specifically relating to international trade fell within the scope of the CCP. However, post Lisbon, Article 207(1) TFEU specifies that 'commercial aspects of intellectual property' are covered by the CCP. Nonetheless, the Court held that Union acts need to have more than fleeting implications for international trade in order to be covered by the CCP. A Union act therefore 'falls within the CCP if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade'. Consequently, only rules on intellectual property with a specific link to international trade are capable of falling within the concept of 'commercial aspects of intellectual property', this being the case regarding the TRIPs Agreement.

Conditional Access Convention was provoked by concerns as to the appropriate legal basis for the European Convention on the legal protection of services based on, or consisting of, conditional access.[21] Should the Council Decision to sign the

[18] Extended to 12 December 2016 by Council Decision 2014/827/CFSP of 21 November 2014 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (2014 OJ L335/19).

[19] Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer (2011 OJ L254/1).

[20] ECJ 15 November 1994, Opinion 1/94, *WTO Agreement*.

[21] Council Decision 2011/853/EU of 29 November 2011 on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access (2011 OJ L336/1).

Convention on behalf of the EU have been based on Article 207(4) TFEU (CCP) or rather on Article 114 TFEU (internal market)? The Court recalled its findings in *Daiichi Sankyo* on the scope of the CCP, and concluded that the primary objective of the Council Decision had a specific connection with international trade and was therefore covered by the CCP.

Gravity revisited

The Court's settled case law on the choice of the appropriate legal basis states that the choice of legal basis must rest on objective factors amenable to judicial review, including the aim and content of the measure.[22] If a measure pursues a twofold purpose or has a twofold component and if one of those is identifiable as the main or predominant purpose or component, the measure must be founded on a single legal basis: the legal basis required by the main or predominant purpose or component. Exceptionally, when it is established that the measure pursues several objectives that are inseparably linked, without one being secondary and indirect to the other, the measure must be founded on the various corresponding legal bases. However, such a dual legal basis is impossible when the procedures prescribed by the relevant legal bases are incompatible.[23] The cases examined here use a specific form of the 'centre of gravity' test. Notably, the disagreement between the Commission and the Council in *Philippines PCA* as to whether the Philippines Agreement implies obligations other than development cooperation should be seen in the light of *Portugal* v *Council*.[24] There, Portugal challenged the Community's competence and the choice of legal basis for Council Decision 94/578/EC concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development.[25] It objected to the inclusion in the Cooperation Agreement of human rights, energy, intellectual property, tourism, and drug abuse control provisions. The Court used a two-pronged test to determine the scope of development cooperation agreements. To qualify as such, an agreement needed to pursue the development cooperation objectives then contained in Article 130u

[22] As most recently recalled in ECJ 10 September 2015, Case C-363/14, *Parliament* v *Council*, para. 41.

[23] ECJ 11 June 2014, Case C-377/12, *Commission* v *Council*, para. 34, and ECJ 24 June 2014, Case C-658/11, *Parliament* v *Council*, para. 43 referring to ECJ 19 July 2012, Case C-130/10, *Parliament* v *Council*, paras. 42-45. Case C-658/11 only refers to Case C-130/10, paras. 42-44, and omits the phrase on procedurally incompatible legal bases.

[24] ECJ 3 December 1996, Case C-268/94, *Portugal* v *Council*.

[25] Council Decision 94/578/EC of 18 July 1994 concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development (1994 OJ L223/23).

TEC, which were, however, so broadly written that a development cooperation agreement could additionally address extraneous matters without altering its essential characterisation. Furthermore, the essential object of an agreement, rather than the contents of its individual provisions, would determine its characterisation, provided that such provisions did not impose such extensive obligations concerning specific matters that those obligations constituted objectives distinct from those of development cooperation.[26] The Court found on the merits that the provisions of the agreement aimed to promote development cooperation objectives. The manner in which cooperation in each specific area was to be achieved was not prescribed in concrete terms. Accordingly, the provisions on energy, intellectual property, tourism, culture and the control of drug abuse could be considered to be an integral part of the development cooperation agreement between the EU and India.

In *Philippines PCA*, the Court examined whether provisions relating to readmission, transport and the environment required the use of their own legal bases, or could stand on the legal basis used for development cooperation policy, continuing the line of thought introduced in *Portugal* v *Council*. Specifically, the Court recalled and confirmed its two-pronged test to determine the scope of development cooperation agreements.[27] The Court used a particular form of the centre of gravity test: the 'absorption doctrine',[28] as introduced in Opinion 1/78, i.e. that 'an agreement must be assessed having regard to its essential objective rather than in terms of individual clauses of an altogether subsidiary or ancillary nature'.[29] The essential characterisation of the International Agreement on Natural Rubber at issue in Opinion 1/78 as a CCP agreement was not altered by the fact that it also covered various secondary subjects, such as technological assistance, research programmes, industrial labour conditions, and consultation on national tax policies. The main objective 'absorbed' the other provisions. The Court had already used a similar line of reasoning in *Portugal* v *Council*: the legal basis for development cooperation 'absorbed' the other substantive provisions, with the notable exception of those involving trade. In *Philippines PCA,* the Court applied a 'centre of gravity' test in order to determine whether the use of additional legal bases alongside those for development cooperation and CCP was justifiable. However, it did so starting from the premise that development cooperation policy constituted the main purpose or component of the Philippines Agreement.[30] That may have been a reasonable inference for the Court to draw, but it would have

[26] C-268/94, para. 39.

[27] C-377/12, paras. 38-39, recalling C-268/94, paras. 37-39.

[28] M. Maresceau, 'Bilateral agreements concluded by the European Community', *Académie de Droit International – Recueil des Cours* (2004) p. 127 at p. 156-157.

[29] ECJ 4 October 1979, Opinion 1/78, *International Agreement on Natural Rubber*, para. 56.

[30] C-377/12, para. 35.

been in the interest of clarity if the Court had first examined the aim and content of the measure.[31] In *Conditional Access Services*, the Court departed from this approach when it applied the 'centre of gravity' test to determine whether Article 207 TFEU or Article 114 TFEU was the appropriate legal basis, yet returned to it in *Daiichi Sankyo*, where it considered whether the CCP could also be considered to encompass 'commercial aspects of intellectual property'. As will be explored below, that approach might be explained by the international trade context.[32]

A centre of gravity test was also applied in *Mauritius Agreement*, albeit within the context of Article 218 TFEU. That dispute involved the choice of what procedural, rather than substantive, legal basis needed to be applied for the conclusion of the agreement. That is in any event the way the Court presented the matter, maintaining that Parliament had confirmed at the hearing that it did not contest the status of Article 37 TEU as its substantive legal basis. Parliament did argue, however, that, as the Mauritius Agreement and the contested decision to conclude it pursue additional aims not falling within the purview of the CFSP, they do not fall exclusively within that policy for the purposes of Article 218(6) TFEU.[33] In other words, Parliament was suggesting a separate line of reasoning for the determination of the substantive legal basis and for the determination of the procedural legal basis.

Advocate General Bot reported the details of the disagreement somewhat differently, pointing out that 'at the request of the Court at the hearing, Parliament stated that, in its view, the contested decision should have been founded on the following substantive legal bases, namely, in addition to Article 37 TEU, Articles 82 TFEU, 87 TFEU and 209 TFEU'.[34] These contrasting representations of the dispute were reflected in the respective analyses: while Advocate General Bot argued that it was 'necessary to determine the substantive legal basis authorising the Union to adopt an international agreement before determining the procedural legal basis',[35] the Court unfortunately paid no further heed to the choice of substantive legal basis for the decision.

[31] Similarly, on ECJ 20 May 2008, Case C-91/05, *Commission* v *Council ('Small Arms Light Weapons' or 'SALW')*: B. Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil', 14 *EFAR* (2009) p. 231 at p. 235-236.

[32] *See* further Y. Tanghe, 'The EU's External Competence in IP matters: the Contribution of the *Daiichi Sankyo* Case to Cloudy Constitutional Concepts, Blurred Borders and the Corresponding Court Jurisdiction', 22 *CJEL* (2015); I. Van Damme, 'Case C-414/11 Daiichi: The Impact of the Lisbon Treaty on the Competence of the European Union over the TRIPS Agreement', 4 *CJICL* (2015) p. 73-87.

[33] C-658/11, paras. 44-46.

[34] Opinion in C-658/11, point 40.

[35] *Ibid.*, point 20.

Given that the procedural requirements of Article 218 TFEU vary depending on whether or not the agreement relates exclusively to the CFSP, it remains necessary to determine the appropriate substantive legal basis first. The Court's determination of the appropriate procedure is based entirely on the symmetry between the internal and external division of competences, with the ultimate goal of ensuring legal certainty. In other words, the substantive legal basis of the decision concluding the agreement determines the type of procedure applicable under Article 218(6) TFEU. If the decision is founded exclusively on a substantive legal basis falling within the CFSP, the first sentence of that article applies, as follows from the general rule that the substantive legal basis dictates what procedure is to be followed when adopting a measure. However, the Court initiated its reasoning on the symmetry between the internal and external competences with the statement that the issue at hand was disagreement over 'a decision concluding an agreement that pursues a main aim falling within the CFSP'.[36] Article 37 TEU was therefore identified as the substantive legal basis on the basis of the centre of gravity test. However, similarly to its judgment in *Philippines PCA*, the Court did not elaborate on what other aims might be involved, did not explain why the main aim was covered by the CFSP in the first place, and ignored the impact of the 'new' non-affectation clause in Article 40 TEU[37] on the application of the gravity test.

This raises two additional concerns. First, if the Court wishes to provide guidance on choosing the appropriate legal basis for international agreements with an eye to preventing future disputes, it is unfortunate that it merely announces the main aspect or goal of the agreement, without revealing how it came to that discovery. Second, even if the Court had outlined how it had applied the gravity test, that test in general, and the absorption doctrine in particular, are, as objectives-based theories, ill-suited to determine the scope of development cooperation, the CCP and the CFSP. These issues will be further explored below.

Measuring gravity: the objectives-based competence delimitation method

The objectives-based approach to delimiting the scope of development cooperation policy and the common commercial policy: gravitational pull

The Maastricht Treaty introduced an explicit legal basis for development cooperation, including specific objectives. Pursuant to Articles 130u-130y TEC (later Articles 177-181 TEC), EU development cooperation was 'complementary

[36] C-658/11, para. 50.
[37] *Cf. infra.*

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to the policies pursued by the Member States' and had to foster (i) sustainable economic and social development of developing countries, and more particularly the most disadvantaged among them, (ii) smooth and gradual integration of developing countries into the world economy and (iii) the campaign against poverty in developing countries. Moreover, Union development cooperation policy had to contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

The wide ambit of these objectives was confirmed in *Portugal* v *Council*. There, the Court acknowledged the significance of the fact that development cooperation had been given its own legal basis by recognising that it was entitled to its own specific scope that could encompass a range of elements from other areas to make it a viable policy. At the same time, *Portugal* v *Council* had signalled the importance and precariousness of the balancing act between on the one hand interpreting development cooperation widely enough so as to avoid making its legal basis nugatory by requiring additional legal bases for every element touching on another EU competence, and on the other hand interpreting it so widely that other legal bases were in danger of being dragged into its gravitational pull, thereby distorting both the principles of conferral and institutional balance.[38] In *Small Arms and Light Weapons*, the Court clarified that the objectives of development cooperation policy should not be limited to measures directly related to the campaign against poverty. Nevertheless, if a measure was to fall within development cooperation policy, it had to contribute to the pursuit of that policy's economic and social development objectives.[39]

Post Lisbon, Articles 208-211 TFEU contain the primary legal framework on development cooperation. Article 208(1) TFEU provides for the Union's development cooperation policy and that of the Member States to 'complement and reinforce each other', which appears to imply a more balanced complementarity relationship than pre Lisbon, and identifies the reduction, and in the long term, the eradication of poverty as the primary objective of EU development cooperation. Apart from this primary objective, the provisions on EU development cooperation remain silent about the other objectives mentioned in Articles 130u-130y TEC/Articles 177-181 TEC. Does this imply that the Lisbon Treaty has limited the scope of EU development cooperation to measures aimed at poverty reduction or eradication?[40]

[38] *See* M. Broberg and R. Holdgaard, 'Demarcating the Union's Development Cooperation Policy after Lisbon: *Commission v Council (Philippines PCFA)*', 52 *CMLRev* (2015) p. 547 at p. 560-561.

[39] C-91/05, para. 67.

[40] *Cf.* Opinion in C-658/11, point 126.

More generally, the presence of specific objectives in TFEU provisions on EU external action despite the creation of general EU external action objectives in Article 21(2) TEU prompts questions on the relation or even hierarchy between these two types of objectives. The identification of poverty reduction and eradication as the primary aim of development cooperation in Article 208 TFEU appears to imply such a hierarchy.[41] However, in *Philippines PCA* the Court referred to Article 21(2)(d) TEU, which contains the objective of fostering the sustainable economic, social and environmental development of developing countries with the primary aim of eradicating poverty, as an *example* of one of the objectives in Article 21(2) TEU that development cooperation can primarily pursue. It emphasised that EU development cooperation is not limited to measures directly aimed at the eradication of poverty, but can also pursue the objectives laid down in Article 21(2) TEU, confirming in that respect *Small Arms and Light Weapons* .[42] The Court held that this follows from the fact that Article 208(1) TFEU provides that Union development cooperation policy be conducted within the framework of the principles and objectives of Union external action, and that Article 209(2) TFEU provides that the Union may conclude with third countries and international organisations any agreement helping to achieve the objectives referred to in Articles 21 TEU and 208 TFEU.[43] The Court therefore does not seem inclined to regard the general EU external action objectives as only incidental to the objectives mentioned in the specific provisions of each policy area. Such an approach would indeed make the common EU external action objectives in Article 21(2) TEU somewhat supernumerary.

Given the potentially broad scope of development cooperation agreements, which might render superfluous the legal bases added by it, the Council was anxious to distinguish post-Lisbon *Philippines PCA* from pre-Lisbon *Portugal* v *Council*.[44] However, the Court emphasised the increase in the objectives of development cooperation and in the matters concerned by it, which reflected the EU vision for development set out in the European Consensus,[45] and that this confirmed rather than departed from *Portugal* v *Council*. In that regard, the Court agreed with Advocate General Mengozzi[46] that the main objective of development

[41] E.g. M. Cremona, 'A reticent court? Policy objectives and the Court of Justice', in M. Cremona, A. Thies (eds.), *The European Court of Justice and External Relations Law* (Hart 2014) p. 15 at p. 19.

[42] C-377/12, paras. 37 and 47.

[43] *Ibid.*, para. 36.

[44] C-377/12, para. 41.

[45] Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus' (2006 OJ C46/1).

[46] C-377/12, para. 42 and Opinion of AG Mengozzi of 23 January 2014, C-377/12, *Commission* v *Council*, points 40-41.

cooperation is the eradication of poverty in the context of sustainable development, including pursuit of the Millennium Development Goals.[47]

The European Consensus, the leading policy document on the EU's perspective on development cooperation policy, interprets poverty eradication as a multidimensional concept, which reflects a broader understanding of poverty eradication, possibly encompassing different areas of EU action.[48] In line therewith, *Philippines PCA* referred to the broad notion of development cooperation and poverty eradication as a multifaceted concept as upheld by the European Consensus and the Development Cooperation Instrument I – the main financing instrument for development in the EU budget,[49] an intriguing example of the Court relying on a non-legally binding instrument, here invoked in combination with a pre-Lisbon legislative instrument, in order to determine the objective and appropriate legal basis of a measure.[50] The fact that the Court also relied on policy documents in *Philippines Borders Management*[51] and *Small Arms and Light Weapons*[52] appears to indicate that the Court's reliance on policy documents in order to support the choice and scope of a legal basis is particularly prominent in cases concerning development cooperation.[53] However helpful these documents may be, the constitutional significance of the choice of legal basis calls, as Advocate General Mengozzi put it, for 'a certain vigilance'.[54] That vigilance is not only a responsibility of the Court, but also of the Union's political institutions: in revising development cooperation policy documents and secondary law, they must take into account that the way they do so is likely to be used by the Court as an interpretative tool when determining the scope of EU development cooperation policy.[55] In other words, measures such as the

[47] *See United Nations Millennium Declaration* (UN Doc A/RES/55/2), sections III and IV and *2005 World Summit Outcome* (UN Doc A/RES/60/1), para. 17. The Millennium Development Goals ('MDGs') expired in 2015 and have been succeeded by the Sustainable Development Goals ('SDGs'): *Transforming our world: the 2030 Agenda for Sustainable Development* (UN Doc. A/RES/70/1), the first one of which is: 'End poverty in all its forms everywhere'.

[48] European Consensus, points 11-12.

[49] Regulation 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation ('Development Cooperation Instrument I') (2006 OJ L378/41); replaced by Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 ('Development Cooperation Instrument II') (2014 OJ L77/44).

[50] Cremona, *supra* n. 41, p. 19; Broberg and Holdgaard, *supra* n. 38, p. 562-563.

[51] ECJ 23 October 2007, Case C-403/05, *Parliament* v *Commission,* para. 57.

[52] C-91/05, paras. 66, 69, 90-91.

[53] P. Eeckhout, *EU external relations law* (OUP 2011) p. 138.

[54] Opinion in C-377/12, point 43.

[55] Broberg and Holdgaard, *supra* n. 38, p. 563.

pre-Lisbon Instrument for Stability[56] and the post-Lisbon Instrument Contributing to Stability and Peace,[57] which were adopted under a joint development cooperation and economic, financial and technical cooperation legal basis,[58] while arguably also contributing to CFSP goals, could predetermine the scope of development cooperation in future cases. The Council would be well advised to take that into account when, for financial or other reasons, it agrees to the pursuance of CFSP objectives under development cooperation competences.

Be that as it may, the Court's broad interpretation of poverty eradication as the principal objective of development cooperation policy leaves room for an extensive scope of measures, even if development cooperation were to be limited to poverty eradication.[59] In fact, *Philippines PCA* appears to imply that the pre-Lisbon case law remains largely valid for determining the post-Lisbon scope of development cooperation.[60] Nevertheless, the broad scope of the objectives of EU development cooperation policy, potentially covering nearly all Union external action, implies that determining its limits on the basis of its objectives is a precarious exercise.[61] Yet the test formulated in *Portugal* v *Council* and confirmed in *Philippines PCA* to determine whether a development cooperation legal basis suffices, or additional legal bases need to be added, is two-pronged. Not only do the provisions have to contribute to the pursuit of the development cooperation objectives, they must also not contain obligations so extensive that they may be considered to constitute objectives distinct from those of development cooperation that are neither secondary nor indirect.[62] The Court assessed the second aspect of the test by requiring that the provisions were limited to identifying the aims and subjects of the cooperation but did not go so far as to determine in concrete terms how the cooperation will be implemented.[63] As the provisions in both cases met the test,

[56] Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing the Instrument for Stability (2006 OJ L 327/1) [2006] OJ L 327/1. *See* G. De Baere, *Constitutional Principles of EU External Relations* (OUP 2008) p. 293-294.

[57] Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace (2014 OJ L 77/1).

[58] Ex Arts. 179(1) and 181a TEC and Arts. 209 and 212 TFEU, respectively.

[59] *Cf.* R. Schütze, 'EU Development Policy: Constitutional and legislative foundations', *CYELS* (2013) p. 699 at p. 707. Contrast with the much more limited interpretation of the scope of economic and social cohesion policy in ECJ 3 September 2009, Case C-166/07, *Parliament* v *Council*, on which *see* T. Corthaut, 'Case C-166/07, European Parliament v Council of the European Union, Judgment of the Court of Justice ([Fourth] Chamber) of 3 September 2009, [2009] ECR I-7135', 48 *CMLRev* (2011) p. 1271 at p. 1282-1283.

[60] Broberg and Holdgaard, *supra* n. 38, p. 562.

[61] *Cf.* Opinion in C-377/12, point 29.

[62] The fact that a provision in an agreement creates binding obligations does not suffice to justify the addition of a separate legal basis: *ibid*., point 55.

[63] C-377/12, para. 56.

the development cooperation legal basis 'absorbed' the other legal bases. The second prong of the test implies a more content-focused criterion next to the objectives-based first prong to determine the scope of development cooperation. By also focusing on the content of the provisions, the Court avoided subjecting other areas of EU external action to the overpowering gravitational pull potentially engendered by applying solely an objectives-based approach to development cooperation in combination with a wide interpretation of its objectives. As will be discussed in relation to *Mauritius Agreement, Daiichi Sankyo* and *Conditional Access Services*, the Court's case law post Lisbon appears to use an increasingly content-based line of reasoning to determine the appropriate legal basis of a measure, which seems the most viable solution to determine the scope of development cooperation, the CFSP and the CCP.

As set out in the TFEU, the CCP objectives are rather opaque. Article 206 TFEU provides that, by establishing a customs union, the Union is to 'contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'.[64] The creation of a customs union,[65] linked to the aim of building the internal market,[66] constitutes the foundation of the CCP.[67] Article 207(1) TFEU on the CCP does not refer to any objective as such, but rather to areas that the CCP covers. Arguably, the objective traditionally assigned to the CCP is the liberalisation of international trade, as currently still reflected in Article 206 TFEU.[68] Nevertheless, Article 207(1) TFEU requires that 'the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'. This alignment between the CCP objectives and the general external action objectives in Article 21 TEU has been used to explain the established practice for trade agreements and measures to be used to attain other objectives of EU (external) action.[69] While the consideration of non-trade objectives

[64] On the relationship between the CCP and the WTO/GATT: G. De Baere and I. Van Damme, 'Co-Adaptation in the International Legal Order: The EU and the WTO', in J. Crawford, S. Nouwen (eds.), *Select Proceedings of the European Society of International Law (Volume 3)* (Hart Publishing 2012) p. 311-325.

[65] Art. 28(1) TFEU.

[66] Art. 3(2) TEU.

[67] S. Gstöhl, 'The European Union's trade policy', 11 *Ritsumeikan International Affairs* (2013) p. 1 at p. 2.

[68] A. Dimopoulos, 'The effects of the Lisbon Treaty on the principles and objectives of the Common Commercial Policy', 15 *EFARev* (2010) p. 153 at p. 159-161; Gstöhl, *supra* n. 67, p. 1 at p. 8; C. Vedder, 'Linkage of the Common Commercial Policy to the general objectives for the Union's external action', in M. Bungenberg, C. Herrmann (eds.), *Common Commercial Policy after Lisbon. European Yearbook of International Economic law* (2013) p. 115-144 at p. 118.

[69] Dimopoulos, *supra* n. 68, p. 161-165; Vedder, *supra* n. 68, p. 137-143.

when implementing the CCP is in line with the requirements of consistency in the Treaties, extending the argument too far would lead to the conclusion that nearly every act of external action can be pursued under the scope of the CCP. This would not only be ineffective for determining the scope of the CCP and delineating it from other competence areas, but would also contravene the principle of conferral.

The Court, from early on in the development of EU external action, needed to develop a line of case law to delineate the CCP from other competence areas. In an early phase, the CCP was formulated in broad terms, such as notably in Opinion 1/75[70] and Opinion 1/78.[71] The Court displayed a more cautious approach in Opinion 1/94[72] by deciding that only certain parts of the TRIPs agreement fell within the scope of the CCP, and hence that the agreement was mixed.[73] The judgments in *Daiichi Sankyo* and *Conditional Access Convention*, arguably showing the Court in its former more audacious incarnation, grant the CCP a wide scope, most clearly with the inclusion of commercial aspects of intellectual property rights in the CCP.[74] Relevant for present purposes is the reasoning the Court followed to reach this conclusion. Since the early 2000's the Court assesses whether a measure falls within the CCP by determining whether it is 'essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade'.[75] Both judgments start with this rule but add the criterion of the 'specific link with international trade': only acts displaying such a link are capable of falling within the CCP.[76] In *Conditional Access Convention*, the Court established that there was such a link because the Convention at issue extends the internal legal protection to the external stage.[77] In *Daiichi Sankyo*, the fact that TRIPs is 'an integral part' of the WTO system was decisive in confirming the specific link with international trade. The Court added that the 'context of those rules is the liberalisation of international trade' and not the harmonisation of the laws of the member states.[78] In both cases the content, respectively the context was therefore crucial to determine that the decisions concluding these agreements fell

[70] ECJ 11 November 1975, Opinion 1/75, *OECD Local Cost Standard*.

[71] *Supra* n. 29.

[72] *Supra* n. 20.

[73] G. De Baere and P. Koutrakos, 'The interactions between the legislature and the judiciary in EU external relations', in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) p. 243 at p. 250.

[74] *See also* J. Larik, 'No mixed feelings: The post-Lisbon Common Commercial Policy in Daiichi Sankyo and Commission v Council (Conditional Access Convention)', 52 *CMLRev* (2015) p. 779 at p. 792.

[75] e.g. ECJ 6 December 2001, Opinion 2/00, *Cartagena Protocol*, para. 40.

[76] C-414/11, para. 52; C-137/12, para. 58.

[77] C-137/12, paras. 58-65.

[78] C-414/11, paras. 52-60.

within the scope of the CCP.[79] Combined with the initial test formulated in Opinion 2/00, which arguably aims to assess a measure's aim, the Court seems to intend to strike a balance between the aim and content aspects of the centre of gravity test in the area of the CCP as well.

Defying gravity: delimiting development, transport, environment, immigration and trade

The consequence of applying the absorption theory in *Philippines PCA* is that provisions on environment, transport and readmission of third country nationals can, within certain limits, fall under development cooperation. Some issues remain unresolved. Do the provisions on environment, readmission or other non-development provisions in a development cooperation agreement take on the parallel nature[80] of the development cooperation competence,[81] even if they are implemented separately? Furthermore, the Philippines Agreement is also based on Article 207 TFEU. Why were the additional legal bases regarding environment, transport and readmission challenged, but not regarding the CCP?

Development and environment have been intertwined in the international agenda at least since the 1987 report *Our Common Future*, also known as the 'Brundtland Report',[82] which in turn significantly influenced the 1992 Rio Declaration.[83] The link between environment and development was further highlighted in the Millennium Development Goals, the seventh of which aims to ensure environmental sustainability. The European Consensus builds explicitly on the Millennium Development Goals.[84] Post Lisbon, the link between EU external environmental policy and EU development cooperation policy is made explicitly in Article 21(2) TEU. Moreover, Article 208 TFEU reaffirms that Union development cooperation policy must be conducted 'within the framework of the principles and objectives of the Union's external action'[85] and must 'comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international

[79] *See also* L. Ankersmit, 'The scope of the Common Commercial policy after Lisbon: the Daiichi Saknyo and Conditional Access Services Grand Chamber Judgments', 41 *LIEI* (2014) p. 193 at p. 206-207.

[80] I.e. a shared competence without pre-emption: *see* G. De Baere, 'EU external action', in C. Barnard and S. Peers (eds.), *European Union Law* (Oxford University Press 2014) p. 704 at p. 722.

[81] Art. 4(4) TFEU.

[82] *Report of the World Commission on Environment and Development* (UN Doc. A/RES/42/187).

[83] *Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), Annex I, Rio Declaration on Environment and Development* (UN Doc A/CONF.151/26 (Vol. I)), principles 4 and 7.

[84] European Consensus, para. 5.

[85] Art. 208(1) TFEU.

organisations'.[86] These principles, objectives, and commitments all contain important environmental obligations. Furthermore, Article 11 TFEU implies an obligation for the Union not only to mainstream environmental protection and sustainable development into its policies, but also to ensure consistency between environmental policy and its other policies.[87] *Philippines PCA* appears consistent with that approach.

The European Consensus also explicitly provides for the Union to promote a 'sustainable transport sectoral approach'.[88] As Advocate General Mengozzi pointed out, the Philippines Agreement's provisions on transport aim at ensuring that the contracting third country respects minimum international standards of transport safety and security, which should contribute both to the stabilisation and the sustainability of its travel networks and to that country's smooth and gradual integration into the global economy in that sector.[89] They do not prescribe in any concrete form how this cooperation should be implemented, and are therefore distinguishable from the provisions on transport at issue in Opinion 1/08.[90]

The dividing line between development cooperation and immigration policy is more politically sensitive. The preamble to the draft Philippines Agreement noted that the provisions of the Agreement that fall within the scope of the Area of Freedom, Security and Justice bound the 'United Kingdom and Ireland as separate Contracting Parties, or alternatively, as part of the European Union', in accordance with Protocol 21,[91] and Denmark in accordance with Protocol 22.[92] In other words, adding Article 79(3) TFEU entailed the application of the opt-in and opt-out schemes laid down in these protocols. The European Consensus refers to the nexus between migration and development cooperation in the context of poverty eradication as a multi-dimensional notion.[93] After several initiatives at UN level[94] the EU reinforced the development-migration nexus in policy documents, underlining the need to incorporate migration in development

[86] Art. 208(2) TFEU.

[87] M. Cremona, 'Coherence and EU external environmental policy', in E. Morgera (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press 2012) p. 36.

[88] European Consensus, para. 77.

[89] Opinion in C-377/12, points 48-49.

[90] *Cf. ibid.*, point 49.

[91] Protocol (No 21) on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice (2012 OJ C326/295).

[92] Protocol (No 22) on the Position of Denmark (2012 OJ C326/299).

[93] European Consensus, paras. 12, 40 and 110.

[94] *Declaration of the High-level Dialogue on International Migration and Development* (UN Doc. A/68/L.5); *Report of the Secretary-General: International migration and development* (UN Doc A/69/207).

cooperation.[95] Nevertheless, the incorporation of readmission provisions dates back to the Joint Declaration attached to the agreements with Laos[96] and Cambodia,[97] which provide the basis for the conclusion of readmission agreements between those countries and the EU member states. In sanctioning the possibility for agreements in the area of development cooperation to contain provisions on environment and readmission, *Philippines PCA* is in line with the Union's evolving approach. Nevertheless, while Advocate General Mengozzi acknowledged that the readmission agreement contemplated in Article 26(4) Philippines Agreement would have to be based on the specifically dedicated legal basis of Article 79 TFEU,[98] the Court's acknowledgment that the readmission provisions were more than merely programmatic but still within the scope of development cooperation suggests a subtle yet significant broadening of the scope of development cooperation. In contrast with *Portugal* v *Council*, in which the Court examined whether the provisions on other policy areas were declaratory or concrete, the criterion in *Philippines PCA* shifted to the question whether they require specific further implementation. The flexibility of that test may arguably allow the Commission and the European External Action Service more leeway in developing a comprehensive approach to development cooperation.[99] Nevertheless, the question remains what the impact is of the Council's acknowledgment that 'in providing for the conclusion as soon as possible of an agreement governing admission and readmission, the Framework Agreement contains a best-endeavours obligation which constitutes important leverage for obtaining from the Republic of the Philippines a result that is hard to obtain separately'.[100] That appears to reveal that the reason why the readmission provision was entered into the Philippines Agreement was not because of the inherent link between development cooperation and migration policy, but in

[95] *Council Conclusions on Migration in EU Development Cooperation* (Council Doc. 16901/14); *Conclusions of the Council and of the Representatives of Governments of the Member States meeting within the Council on the 2013 UN High-Level Dialogue on Migration and Development and on broadening the development-migration nexus* (Council Doc. 12415/13).

[96] Cooperation Agreement between the European Community and the Lao People's Democratic Republic, Joint Declaration on the readmission of citizens (1997 OJ L334/15).

[97] Cooperation Agreement between the European Community and the Kingdom of Cambodia, Joint Declaration on the readmission of citizens (1999 OJ L 269/18); Maresceau, *supra* n. 28, p. 178.

[98] Opinion in C-377/12, point 77. *See* e.g. Council Decision 2014/252/EU of 14 April 2014 on the conclusion of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation (2014 OJ L134/1).

[99] Broberg and Holdgaard, *supra* n. 38, p. 564. On the comprehensive approach and on the EEAS-Commission relationship in development cooperation, *see* Wouters et al., *supra* n. 1, p. 28-29 and 49-50.

[100] C-377/12, para. 29

order to incentivise the Philippines to enter into a readmission agreement. In other words, the reasoning would not so much be that the conclusion of a readmission agreement is an integral part of a proper development cooperation policy, but that the latter is used to obtain the former. That suggests the existence – to the Council – of a separate aim with respect to readmission that is distinct from development cooperation. Yet the development-migration nexus is part of the Union's development agenda, as is evident not just in the European Consensus but also in Council policy documents.[101] Furthermore, instrumental considerations based on the need for leverage in negotiations on a readmission agreement seem insufficiently objective as a ground for the choice of legal basis.

Matters are different with respect to trade provisions. While the development cooperation legal basis can absorb provisions on other substantive areas of cooperation, trade provisions appear invariably – including in the Philippines Agreement – to require the CCP legal basis.[102] However, the provisions in Title III 'Trade and Investment' of the Philippines Agreement do not appear to go beyond the test formulated to assess whether additional legal bases on environment, transport and readmission are necessary: they do not go beyond declarations on the aims and subjects of the cooperation, and therefore do not contain obligations so extensive that they form distinct objectives. Nevertheless, the relationship between the CCP and development cooperation can be explained by the specific nature of the CCP competence on the one hand, and due to history on the other.

Like development cooperation, the CCP has a wide scope.[103] As opposed to development cooperation, the CCP is an *a priori* exclusive competence.[104] The Court expounded upon both aspects in Opinion 1/75,[105] and further elaborated upon the application of the wide scope in Opinion 1/78,[106] holding that UN Conference on Trade and Development commodity agreements that also have a clear development cooperation aim are covered by the CCP competence. Trade measures are often used for aims incidental to the policies flowing from their legal basis, notably to pursue development cooperation objectives (e.g. the Generalised System of Preferences),[107] but also to attain environmental aims and 'high politics' foreign policy objectives.[108] Historically, the CCP predates development

[101] *Supra* n. 95.
[102] Maresceau, *supra* n. 28, p. 176-177.
[103] *Cf. supra*.
[104] *See* Art. 3(1) TFEU.
[105] Opinion 1/75, 1362-1364. *See* De Baere, *supra* n. 56, p. 41-42.
[106] Opinion 1/78, paras. 43-45.
[107] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (2012 OJ L303/1).
[108] Cremona, *supra* n. 41, p. 20.

cooperation as an explicit EU competence and the relationship between the EU and the developing countries has always been based on 'trade and aid'. EU agreements with developing countries can be categorised into 'generations of agreements': 'first-generation' agreements only contained trade provisions, 'second-generation' agreements also covered limited areas of economic cooperation, while 'third-generation' agreements cover a variety of areas, aimed at a comprehensive framework of cooperation.[109] Before Maastricht these 'third-generation' agreements were based on the CCP and the flexibility clause,[110] as a specific development cooperation legal basis was lacking.[111] After Maastricht, they were based on the CCP and development cooperation legal bases. The CCP legal basis was therefore consistently present in the agreements the EU concluded with developing countries, which may indicate a certain path-dependency as to why trade provisions cannot be covered by the development cooperation legal basis. Nevertheless, the notion that 'trade and aid' in EU comprehensive cooperation agreements, as a rule, go together like a horse and carriage should not be taken to imply that agreements based solely on a development cooperation legal basis are impossible.[112]

Finally, it has been suggested that the test in *Portugal* v *Council* (and in *Philippines PCA*) can provide a solution for the post-Lisbon delimitation between the CFSP and development cooperation. The possibility of involving several areas of cooperation under the umbrella of one legal basis as long as they fulfil the condition that specific provisions are 'limited to identifying the aims and subjects of the cooperation' and do not 'go so far as to determine in concrete terms the manner in which the cooperation will be implemented' would meet the requirements flowing from consistency, the need for a legal delimitation between the different areas, as well as the non-affectation clause in Article 40 TEU.[113] These issues will be further explored in the next section.

Escaping the black hole: an objectives-based centre of gravity test for the CFSP?

Pre Lisbon, the delimitation between the first and second pillars was governed by the former Article 47 TEU, which prohibited the CFSP from affecting

[109] Maresceau, *supra* n. 28, p. 177.

[110] Art. 235 EEC (later Art. 308 TEC; now Art. 352 TFEU). *See* e.g. Council Decision 90/674/EEC of 19 November 1990 on the conclusion of the Agreement establishing the European Bank for Reconstruction and Development (1990 OJ L372/1).

[111] *Cf* De Baere, *supra* n. 56, p. 30.

[112] *See* e.g. Council Decision 2014/211/EU of 14 April 2014 on the conclusion on behalf of the European Union of the Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, of the other part, with the exception of Article 49(3) thereof (2014 OJ L111/4). The agreement nevertheless contains an Art. 13 on 'Trade cooperation'.

[113] *Cf* regarding *SALW:* Van Vooren, *supra* n. 31, p. 244-247.

Community law. In *Small Arms and Light Weapons*, the Court used the objectives-based centre of gravity test to delineate the CFSP from development cooperation, holding that a combination of legal bases was impossible with regard to a measure that pursues a number of objectives or that has several components falling, respectively, within development cooperation policy and within the CFSP, and where neither component is incidental to the other.[114]

The Court held that if the provisions of a CFSP measure, on account of *both aim and content*, had as their *main purpose* the implementation of a Community policy, and if they *could properly have been adopted* on the basis of the TEC, they infringed ex Article 47 TEU.[115] In other words, in order to determine under which pillar a provision should have been adopted, it was necessary to identify its main purpose, which could be gleaned both from its aim and its content. If that main purpose amounted to development cooperation, and if the provision *could* have been adopted within that policy, it *should* have been so adopted. The Court then pointed out that no sustainable socio-economic development was possible without peace and security, and that the pursuit of development policy objectives necessarily proceeded via the promotion of democracy and respect for human rights.[116] It referred to the European Consensus and a resolution on small arms and light weapons adopted by the development Council[117] to underline the importance of fighting the proliferation of small arms and light weapons.[118]

That argument only goes so far. It would be impossible to define the scope of development cooperation by including all measures that could potentially contribute to developmental goals:[119] any measure contributing to peace and stability in a certain region will, if only indirectly, contribute to developmental goals. Such measures provide necessary background circumstances for even the most minimal socio-economic goals to have a chance at succeeding. Sending troops to stop warring parties from harming civilians would clearly benefit developmental goals; it would equally clearly fall within the CFSP.[120] Nevertheless, the Court emphasised that a measure combating the proliferation of small arms and light weapons could be adopted under EU development cooperation only if by virtue both of *its aim and its content*, it fell within the scope of development competences.[121]

[114] C-91/05, para. 76. Critically: Van Vooren, *supra* n. 31, p. 231 and 248.
[115] C-91/05, para. 60.
[116] Para. 66, referring to C-403/05, para. 57.
[117] Council of the EU, *EU Strategy to combat illicit accumulation and trafficking of SALW and their ammunition* (Council Doc. 5319/06 CFSP 31).
[118] C-91/05, paras. 66-70.
[119] Cf. Opinion in C-658/11, point 126.
[120] De Baere, *supra* n. 56, p. 286.
[121] C-91/05, paras. 71-72.

Given that the CFSP has lost its specific objectives, applying that objectives-based approach post Lisbon is not at all straightforward.[122] Article 23 TEU requires that the CFSP be conducted in line with the principles and objectives laid down in the first chapter of Title V TEU. Article 21(1) TEU outlines the principles that should guide Union external action, while Article 21(2) TEU lays down the general external action objectives.[123] These include objectives from specific areas of EU external action in the pre-Lisbon era, as well as some new aims. In particular, the distinction suggested by AG Mengozzi between 'preserving peace and/or strengthening international security' (the CFSP) and 'social and economic development' (development cooperation)[124] would not in se resolve any conflict between ordinary EU external action and the CFSP. Both would fall under the general EU external action objectives in Article 21(2)(c) and 21(2)(d) TEU, respectively. Moreover, the former Article 47 TEU was replaced by Article 40 TEU, which prohibits any *mutual* affectation between the 'Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union' (i.e. the former first pillar competences) and the CFSP.

Legal Basis for Restrictive Measures[125] offered the Court the first opportunity to clarify the post-Lisbon delimitation rules on the CFSP. Parliament had asked the Court to annul a regulation imposing restrictive measures directed against persons and entities associated with Usama bin Laden, Al-Qaida and the Taliban,[126] arguing that it was wrongly based on Article 215 TFEU (in Part Five 'The Union's External Action', Title IV 'Restrictive Measures'), and that Article 75 TFEU (in Part Three 'Union Policies and Internal Actions', Title V 'Area of Freedom, Security and Justice') was the correct legal basis. In choosing between those two provisions, the Court attached significant importance to the connection between Article 215 TFEU and the CFSP.[127]

Advocate General Bot had proposed a remarkable solution to the post-Lisbon lack of specific CFSP objectives. Despite the objectives listed in Article 21(2) TEU being common to EU external action, and none of them being reserved for the CFSP, he considered that those set out in sub-paragraphs (a)-(c) 'are among those

[122] *See also* G. De Baere, 'From "Don't mention the Titanium Dioxide Judgment" to "I mentioned it once, but I think I got away with it all right". Reflections on the choice of legal basis in EU external relations after the *Legal Basis for Restrictive Measures* Judgment', 15 *CYELS* (2013) p. 554.

[123] Art. 21(3) TEU.

[124] Opinion of AG Mengozzi of 19 September 2007, C-91/05, *Commission* v *Council*, point 189.

[125] C-130/10.

[126] Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (2009 OJ L346/42).

[127] C-130/10, paras. 55-58.

traditionally assigned to that policy'.[128] The Advocate General argued that the objectives in Article 21(2)(a)-(c) TEU are essentially the same as the CFSP objectives in ex Article 11(1) TEU. That is only partially true: the objective in Article 21(2)(b) TEU to 'consolidate and support democracy, the rule of law, human rights and the principles of international law' also corresponds to that assigned to development cooperation by the former Article 177(2) TEC, except for the addition of the 'principles of international law'. The latter did not feature in ex Article 11(1) TEU, nor in the former Article 177(2) TEC, but was added by Lisbon. The Advocate General further noted that the objectives defined in Article 21(2)(a)-(c) TEU are consistent with the provisions of Article 24(1), first sub-paragraph TEU, the basic provision on the CFSP. He concluded therefrom that EU external action pursuing one or more of the objectives in Article 21(2)(a)-(c) TEU, in particular the objective of preserving peace and strengthening international security, must be regarded as falling within the CFSP.[129] That interpretation is another notable example of path dependency and would appear to be at least to some extent *contra legem*, in that Article 21(2) TEU unequivocally regards the objectives as common to EU external action as a whole.[130]

The Court did not attach the specific objectives of Article 21(2)(a)-(c) TEU to the CFSP. It referred to the preamble of the contested regulation in order to determine its purpose,[131] an approach that has long since prompted concerns that institutions may draft preambles or enacting provisions of acts so as to set the Court 'on the right track'.[132] In that sense, determining the legal basis of a measure by looking at its predominant aim may give rise to a form of 'legislative hazard'.[133] Nevertheless, the objectives mentioned in the act may still be informative in the sense that they provide an insight into what the institutions *thought* they were doing.

In *Mauritius Agreement*, Advocate General Bot reiterated his view that the objectives in Article 21(2)(a)-(c) TEU are 'among those that are traditionally assigned to the CFSP',[134] this time adding Article 21(2)(h) TEU. However, the latter provides for EU external action to 'promote an international system based on stronger multilateral cooperation and good global governance', which was added by the Lisbon Treaty as a general objective of EU external action, and cannot therefore plausibly be regarded to be 'traditionally assigned to the CFSP'.

[128] Opinion of AG Bot of 31 January 2012, C-130/10, *Parliament* v *Council*, points 62-63.
[129] *Ibid.*, point 64.
[130] Van Vooren, *supra* n. 31, p. 245.
[131] C-130/10, paras. 68 and 70.
[132] *See*, eg, N. Emiliou, 'Opening Pandora's Box: The Legal Basis of Community Measures before the Court of Justice', 19 *ELR* (1994) p. 488 at p. 499.
[133] M. Klamert, 'Conflicts of legal basis: no legality and no basis but a bright future under the Lisbon Treaty?', 35 *ELR* (2010) p. 497 at p. 502 and 505; Cremona, *supra* n. 41, p. 21-23.
[134] Opinion in C-658/11, points 86-87.

The Advocate General also argued that Article 21(2) TEU should be read together with more specific provisions applicable to each policy in order to determine the policy to which an objective is specifically related.[135] That is a plausible approach. Nevertheless, Article 21(3) TEU's exhortation for the Union to 'respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action' implies that such 'reading together' ought not to be applied so as effectively to limit objectives exclusively to one policy. In other words, Advocate General Bot may well be correct in arguing that certain objectives can more readily be pursued within certain policies. However, the pursuance of those objectives should not *automatically* lead to the conclusion that a certain policy field is applicable.

The Court's judgment in *Mauritius Agreement* left the question of how to choose between the CFSP and ordinary EU external action mostly undecided. Unless one is willing to adopt Advocate General Bot's approach, which sits uneasily with the Lisbon Treaty's aim to infuse more unity into EU external action through common objectives, the absence of specific CFSP objectives post Lisbon makes it considerably more difficult for the Court to apply Article 40 TEU.[136]

In *Legal Basis for Restrictive Measures*, the Court did not follow an absolute objectives-based approach to determine the legal basis, but equally paid attention to the context and the wording of the provisions. That is, in essence, a more content-based approach, which, as also argued in the context of *Philippines PCA*, seems the most feasible option.[137] However, it should be kept in mind that the choice between the 'context' or the 'content' criterion would be decisive for the outcome of the choice of legal basis in *Mauritius Agreement*: while the decision takes place in a CFSP context, the provisions of the agreement relate more to the Area of Freedom, Security and Justice.[138] Unfortunately, as already pointed out, the Court did not address the choice of the substantive legal basis. Further guidance on how the rules on the choice of legal basis have to be applied when a CFSP legal basis is involved would, however, be welcome, especially as a combination of a CFSP and non-CFSP legal basis regarding international agreements seems viable post Lisbon.[139] The Court is unlikely to be able to avoid

[135] *Ibid.*, point 88.

[136] Compare Eeckhout, *supra* n. 53, p. 169, who advocates a nuanced approach.

[137] *Cf* De Baere, *supra* n. 122, p. 557.

[138] C. Matera, R. Wessel, 'Context or content? A CFSP or AFSJ legal basis for EU international agreements', 49 *Revista de Derecho Comunitario Europeo* (2014) p. 1047 at p. 1057; P. Van Elsuwege, 'Securing the institutional balance in the procedure for concluding international agreements: European Parliament v Council (Pirate Transfer Agreements with Mauritius)', 52 *CMLRev* (2015) p. 1379 at p. 1396.

[139] E.g. Council Decision (EU) 2016/123 of 26 October 2015 on the signing, on behalf of the European Union, and provisional application of the Enhanced Partnership and Cooperation

determining the substantive legal basis and giving indications on the delimitation between the CFSP and the Area of Freedom, Security and Justice in the currently pending *Tanzania Agreement* case.[140]

Arguably, the Court ought, from now on, to strike a balance between the aim and content aspects by referring predominantly to the content of a measure instead of to its objectives in order to determine its legal basis.[141] That is not to say that objectives are irrelevant in determining the legal basis. When the content of an agreement predominantly provides for the financing of certain activities, the nature of those activities and hence the objectives of the financing agreement will be crucial to determine the legal basis. A balance between aim and content is therefore imperative, all the while taking into account the context of the measure, when this is of particular relevance. At any rate, the common objectives of Article 21(2) TEU ought to inspire the Court to a wider application of its reasoning in *Portugal* v *Council*, which includes both the aim and content aspect.[142]

Choice of legal basis and parliamentary scrutiny of international agreements: sailing into uncharted waters

As Advocate General Kokott pointed out in her Opinion in *Tanzania Agreement*, while a legal basis dispute may at first appear to concern 'a question of technical detail' it often has 'considerable political and even constitutional implications', in particular by determining the respective powers of the institutions.[143] This is well illustrated by *Mauritius Agreement*, where Parliament's powers of oversight over international agreements in the CFSP were at stake.

Since *Roquette Frères*,[144] the Court has underlined that the participation of the European Parliament in decision-making reflects the fundamental democratic principle whereby the people should participate in the exercise of power at Union level through the intermediary of a representative assembly. However, in the CFSP, the drafters of the Treaties have chosen to limit Parliament's role.

Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (2016 OJ L29/1), based on Arts. 31(1) and 37 TEU and Arts. 91, 100(2), 207, 209, 218(5) and 218(8), second subpara. TFEU.

[140] Case C-263/14, an action for annulment brought by the Parliament of Council Decision 2014/198/CFSP of 10 March 2014 on the signing and conclusion of the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania (2014 OJ L108/1). *See* Opinion in C-263/14, points 50-73.

[141] Klamert, *supra* n. 133, p. 505-06.

[142] C-268/94, para. 39; *see* Van Vooren, *supra* n. 31, p. 246.

[143] Opinion in C-263/14, point 4.

[144] ECJ 29 October 1980, Case No 138/79, *Roquette Frères* v *Council.*

The merits of that choice are clearly debatable. Nevertheless, it is in line with the situation in many States, where foreign policy is reserved for the executive, and the role of the judiciary and the legislature is limited.[145] That is especially the case regarding so-called 'high politics' issues such as security and defence.[146]

While Article 36 TEU sets out a number of possibilities for Parliament's involvement in the CFSP,[147] and while Parliament attempts to influence the CFSP through its budgetary competences and inter-institutional agreements,[148] all in all, it is held at bay from any particular CFSP measure, and can only exercise influence on general policy choices.[149] Nevertheless, parliamentary involvement in international agreements is now the rule, except for agreements relating *exclusively* to the CFSP. Article 218(10) TFEU further provides for Parliament to be immediately and fully informed 'at all stages of the procedure'.

In his Opinion in *Mauritius Agreement*, Advocate General Bot argued that where the agreement concerned relates exclusively to the CFSP, 'the Council cannot be required to inform the Parliament in such full detail as where consent from or consultation of the Parliament were required'. The Advocate General opined that, in so far as Parliament was not required to give its opinion on the content of the Agreement, it was not compulsory to inform it about the progress of the negotiations.[150] Yet, if one were to conclude that there is no way of influencing the content of the Agreement from the fact that Parliament is not required to be consulted nor to consent to the agreement, that would be a grave underestimation of the potential influence of both public discussion of a proposed agreement and of Parliament's budgetary powers on the content of the agreement. Furthermore, there appears to be no link in the text of Article 218 TFEU or any link of logical necessity between the right of Parliament to be informed and its right to consent to or be consulted about a proposed international agreement. It could be argued that Parliament's lack of involvement through consultation or consent ought to be compensated by adopting a more forthcoming approach in keeping Parliament involved. Moreover, full and timely compliance with Article 218(10) TFEU gives

[145] P.J. Kuijper, 'The case law of the Court of Justice of the EU and the allocation of external relations powers. Whither the traditional role of the executive in EU foreign relations?', in M. Cremona, A. Thies (eds.), *The European Court of Justice and external relations law* (Hart 2014) p. 95 at p. 95. Further: De Baere, *supra* n. 56, p. 159-200.

[146] *Cf.* C. Hill, *The Changing Politics of Foreign Policy* (Palgrave 2003) p. 4, questioning the continuing validity of the traditional distinction between 'high' and 'low' politics.

[147] *Cf.* Rule 112 of the Rules of Procedure of the EP (2015).

[148] E.g. Interinstitutional Agreement of 2 December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management (2013 OJ C373/1).

[149] De Baere, *supra* n. 56, p. 161-166.

[150] Opinion in C-658/11, points 153-157.

Parliament the possibility to indicate, at an earlier stage of the procedure, that it considers the agreement not to relate exclusively to the CFSP within the meaning of Article 218(6) TFEU. That in turn may provide an opportunity to rectify the potentially incorrect legal basis and submit the agreement for consultation or consent before adoption. That timing is crucial, as after conclusion of the agreement, Parliament's only available remedy is an action for annulment which, even if successful, is unlikely to lead to renegotiation of the agreement along the lines favoured by Parliament. At any rate, the Court adopted a different view than did the Advocate General.

Of course, by qualifying the Mauritius Agreement as 'an agreement relating exclusively to the CFSP', the Court had no other choice than, on the basis of Article 218 TFEU, to accept the strict limitation of Parliament's role. Nevertheless, in a significant move, the Court held that the exclusion of its own jurisdiction over the CFSP was an exception to the general rule in Article 19 TEU and thus had to be interpreted restrictively. In particular, that exception did not go so far as to preclude the Court from having jurisdiction to interpret and apply a provision such as Article 218 TFEU that does not fall within the CFSP, even though in the case at issue that article laid down the procedure on the basis of which a CFSP act had been adopted.[151]

Having jumped that hurdle, the Court straightforwardly established that the requirements of Article 218(10) TFEU had not been met. After having announced the opening of negotiations, the Council did not inform Parliament of the adoption of the contested decision, nor of the signing of the agreement until three months later, and 17 days after their publication in the *Official Journal*. The Council's argument that the period within which Parliament was informed was only 'slightly longer than usual', but in any event 'still reasonable, taking into account also the fact that this period included the summer break'[152] sounds remarkably cavalier. At any rate, Parliament has in the past often complained of a lack of involvement compounded by the fact that information reached it too late.[153] As the Court considers this to constitute an essential procedural requirement, its violation leads to nullity.[154]

Despite having already established the violation of Article 218(10) TFEU and its consequences, the Court in *Mauritius Agreement* elaborated on Parliament's role in exercising democratic scrutiny in the CFSP. Recalling *Roquette Frères*,[155] the Court added that Article 218(10) TFEU is an expression of the democratic principles on

[151] *Ibid.*, paras. 69-73.
[152] *Ibid.*, para. 67.
[153] Further: De Baere, *supra* n. 56, p. 161-169.
[154] C-658/11, paras. 80-86.
[155] 138/79, para. 33.

which the Union is founded. By inserting Article 218(10) TFEU in a separate provision applicable to all types of procedures envisaged in Article 218 TFEU, including those involving CFSP agreements, the Lisbon Treaty had even enhanced the importance of that rule.[156] In other words, the duty to keep Parliament informed is applicable to all negotiations for international agreements. That reasoning would seem to be transposable to other aspects of Article 218 TFEU that do not contain explicit rules for the CFSP, such as the possibility for Member States, Parliament, Council or Commission to obtain the Court's opinion as to whether an agreement envisaged is compatible with the Treaties (Article 218(11) TFEU).

In particular, the Court emphasised that Parliament's limited role in the CFSP does not imply that it has no right of scrutiny. On the contrary, this is precisely the purpose of the information requirement in Article 218(10) TFEU:[157] if Parliament is not immediately and fully informed at all stages of the procedure, it is unable to exercise its right of scrutiny regarding the CFSP or to formulate its views, in particular, in relation to the legal basis.[158] Moreover, if democratic control is allowed at an early stage, this may even help to prevent subsequent legal disputes between the institutions.[159]

Conclusion

All cases examined above illustrate that the constitutional importance of the choice of legal basis for EU external action has not been lost post Lisbon. In particular, choosing what legal basis or bases apply, and how to go about making that choice, determines both whether a viable EU external policy in the fields examined above is possible, and how far the right of Parliament to provide democratic scrutiny of international agreements reaches.

First, *Philippines PCA* provides an illustration of the impact of the choice of legal basis on the viability of EU external policies, by carving out a space for taking more comprehensive development cooperation measures. Nevertheless, the Court must be wary of how its logic might play out in different factual circumstances. For example, given the Court's broad interpretation of the CCP, what would happen if the logic of *Philippines PCA* on the broad scope of development cooperation were transposed to the equally broad CCP pursuant to *Daiichi Sankyo* and *Conditional Access Convention*? If policies as concrete as the Philippines Agreement's readmission provisions can fit within the scope of development

[156] C-658/11, paras. 80-82.

[157] *Cf.* A. Ott, 'The legal bases for international agreements post-Lisbon; Of pirates and The Philippines', 21 *MJ* (2014) p. 739 at p. 751.

[158] C-658/11, paras. 83-86.

[159] Opinion in C-263/14, point 99.

cooperation, could the same not be said of equally deep forms of development cooperation within the scope of the CCP?[160] Or does the Court's 'new approach' to development cooperation as per Advocate General Mengozzi[161] imply that, as a CCP legal basis has been almost invariably necessary if a development cooperation measure contains elements of trade, vice versa a development cooperation legal basis is necessary in addition to a CCP legal basis whenever an act within the latter area contains elements of the former? It is probably safe to assume that whatever the Court decides in future cases on the scope of development cooperation, it will build on its pre-Lisbon case law. In that sense, there is a parallel with the case law on implied external competences, which as per *Rights of Broadcasting Organisations* remains valid for the interpretation of Article 3(2) TFEU.[162] The Court appears to opt for an approach favouring continuity and hence intertemporal legal certainty over taking into account shifts in wording or emphasis in the Treaties in comparison to the pre-Lisbon situation. Second, as Advocate General Poiares Maduro put it, 'it is because it affects the institutional balance that the Court attaches so much importance to the choice of legal basis': it determines the applicable decision-making procedure, which in turn has ramifications for the determination of the content of an act.[163] Cases like *Mauritius Agreement* both illustrate the constitutional importance of the choice of legal basis in that regard and put it into perspective. The fact that the agreement at issue there pertained exclusively to the CFSP entailed limited parliamentary scrutiny, but that did not imply that no scrutiny at all was possible. This shows the Court's willingness to ensure parliamentary oversight, even over the CFSP, and illustrates the wider tendency to 'parliamentarise' foreign policy.[164] Arguably, that evolution will, for the foreseeable future, more likely take place through subtle shifts (e.g. the presence of CFSP elements in non-CFSP measures such as development cooperation instruments) than through major innovations in the CFSP itself. At the same time, the Court's jurisdiction over Article 218 TFEU, even if the agreement falls exclusively within the scope of the CFSP, may in turn illustrate a tendency of 'judicialisation' of that field. Indeed, in holding that the accession agreement of the EU to the European Convention on Human Rights is incompatible with the Treaties inter alia because the European Court of Human Rights would have jurisdiction over the CFSP,[165] the ECJ may well be trying to

[160] Broberg and Holdgaard, *supra* n. 38, p. 566.

[161] Opinion in C-377/12, point 37.

[162] ECJ 4 September 2014, C-114/12, *Commission* v *Council*, paras. 65-67. *See* De Baere, *supra* n. 80, p. 714-718. *See further* T. Verellen, 'The ERTA Doctrine in the Post-Lisbon Era: Note under Judgment in *Commission v Council* (C-114/12) and Opinion 1/13', 21 *CJEL* (2015), p. 383-410.

[163] Opinion in C-133/06, point 32.

[164] E.g. Kuijper, *supra* n. 145, p. 95-114.

[165] Opinion 2/13, paras. 249-257.

coax the Member States, as Masters of the Treaties, towards the full-scale abolition of the exception to its jurisdiction laid down in Article 24(1) TEU and Article 275 TFEU, and hence the extension of its jurisdiction over the CFSP.[166] That would at least potentially have the effect of taking the sting out of choice of legal basis disputes on the border between the CFSP and other EU policies.

For the time being, the institutions will have to live with the obvious impact that the Court's choices in reviewing the compliance with the principle of conferral and the choice of legal basis has on the pursuit of viable external policies and on the institutional balance, even if that entails them sailing on stranger tides indeed.

[166] The Court also noted in Opinion 2/13, para. 251 that it had 'not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of' Art. 24(1) TEU and Art. 275 TFEU. It may now have that opportunity in Case C-72/15, *Rosneft*, pending, in which the High Court of Justice (England and Wales), Queen's Bench Division (Divisional Court) (United Kingdom) has referred questions for a preliminary ruling inter alia on whether the Court of Justice has 'jurisdiction to give a preliminary ruling under Article 267 TFEU on the validity' of a CFSP measure.