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KALLIOPI KOUFA FOUNDATION
FOR THE PROMOTION OF INTERNATIONAL
AND HUMAN RIGHTS LAW

Jean Monnet Project | EURIS

EU Responsibility in the International System

Training Manual No. 7

Opinions of the Court of Justice of the European Union in relation to conclusion/accession to International Agreements

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Kalliopi Koufa Foundation for the Promotion of International and Human Rights Law

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	Opinion 1/75 (11/11/1975) ECLI:EU:C:1975:145
	Understanding on a Local Cost Standard
1	1. The existence of a Community power to conclude the OECD Understanding on a Local Cost Standard Articles 112 and 113 of the Treaty must be borne in mind in formulating a reply to this question. The first of these provisions provides that: '… Member States shall, before the end of the transitional period, progressively harmonize the systems whereby they grant aid for exports to third countries, to the extent necessary to ensure that competition between undertakings of the Community is not distorted.' Since there is no doubt that the grant of export credits falls within the system of aids granted by Member States for exports, it is already clear from Article 112 that the subject-matter of the standard laid down in the Understanding in question relates to a field in which the provisions of the Treaty recognize a Community power. Furthermore, Article 113 of the Treaty lays down, in paragraphs (1) and (2), that: '… the common commercial policy shall be based on uniform principles, particularly in regard to … export policy…'. The field of the common commercial policy, and more particularly that of export policy, necessarily covers systems of aid for exports and more particularly measures concerning credits for the financing of local costs linked to export operations. In fact, such measures constitute an important element of commercial policy, that concept having the same content whether it is applied in the context of the international action of a State or to that of the Community. Directives concerning credit insurance, adopted by the Council towards the end of 1970 and the beginning of 1971 expressly recognize the important role played by export credits in international trade, as a factor of commercial policy. For these reasons the subject-matter covered by the standard contained in the Understanding in question, since it forms part not only of the sphere of the system of aids for exports laid down at Article 112 of the Treaty but also, in a more general way, of export policy and, by reason of that fact, of the sphere of the common commercial policy defined in Article 113 of the Treaty, falls within the ambit of the Community's powers. A commercial policy is in fact made up by the combination and interaction of internal and external measures, without priority being taken by one over the others. Sometimes agreements are concluded in execution of a policy fixed in advance, sometimes that policy is defined by the agreements themselves. Such agreements may be outline agreements, the purpose of which is to lay down uniform principles. Such is the case with the Understanding on local costs: it does not have a specific content adapted to particular export credit transactions; it merely lays down a standard, sets out certain exceptions, provides, in exceptional circumstances, for derogations and, finally, lays down general provisions. Furthermore, the implementation of the export policy to be pursued within the framework of a common commercial policy does not necessarily find expression in the adoption of general and abstract rules of internal or Community law. The common commercial policy is above all the outcome of a progressive development based upon specific measures which may refer without distinction to 'autonomous' and external aspects of that policy and which do not necessarily presuppose, by the fact that they are linked to the field of the common commercial policy, the existence of a large body of rules, but combine gradually to form that body. 2. The exclusive nature of the Community's powers The reply to this question depends, on the one hand, on the objective of the Understanding in question and, on the other hand, on the manner in which the common commercial policy is conceived in the Treaty. At Nos I and II the Understanding itself defines the transactions to which the common standard applies, and those which, on the other hand, are excluded from its field of application because they are directed to specifically military ends or because they have been entered into with developing

	countries. It is to be understood from this definition that the subject-matter of the standard, and therefore of the Understanding, is one of those measures belonging to the common commercial policy prescribed by Article 113 of the Treaty. Such a policy is conceived in that article in the context of the operation of the Common Market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other. Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community. In fact any unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets. Such distortion can be eliminated only by means of a strict uniformity of credit conditions granted to undertakings in the Community, whatever their nationality. To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest. It is of little importance that the obligations and financial burdens inherent in the execution of the agreement envisaged are borne directly by the Member States. The 'internal' and 'external' measures adopted by the Community within the framework of the common commercial policy do not necessarily involve, in order to ensure their compatibility with the Treaty, a transfer to the institutions of the Community of the obligations and financial burdens which they may involve: such measure are solely concerned to substitute for the unilateral action of the Member States, in the field under consideration, a common action based upon uniform principles on behalf of the whole of the Community. Similarly, in relation to products subject to the ECSC Treaty, it is of little importance to note that the power of the Member States to conclude the Understanding envisaged is safeguarded by Article 71 of that Treaty, according to which: The powers of the Governments of Member States in matters of commercial policy shall not be affected by this Treaty…' The matter under discussion has been referred to the Court pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty. The opinion which it has been called upon to give therefore bears upon the problem of the compatibility of the agreement envisaged with the provisions of the EEC Treaty and will define the power of the Community to conclude that agreement solely in relation to those provisions. Independently of the question whether, in view of the necessity of ensuring that international transactions to which the Communities are party should have as uniform a character as possible, Article 71 of the ECSC Treaty retains its former force following the entry into force of the EEC Treaty, that provision cannot in any event render inoperative Articles 113 and 114 of the EEC Treaty and affect the vesting of power in the Community for the negotiation and conclusion of international agreements in the realm of common commercial policy. [The Court] gives the following opinion: **The Community has exclusive power to participate in the Understanding on a Local Cost Standard referred to in the request for an opinion.**
2	Opinion 1/76 (26/04/1977) ECLI:EU:C:1977:63
	Draft Agreement on the Establishment of a European

3. The power of the Community to conclude such an agreement is not expressly laid down in the Treaty. However, the Court has already had occasion to state, most recently in its judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76, Cornelis Kramer and Others, [1976] ECR 1279, that authority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions. The Court has concluded inter alia that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion.

4. This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality. Although the internal Community measures are only adopted when the international agreement is concluded and made enforceable, as is envisaged in the present case by the proposal for a regulation to be submitted to the Council by the Commission, the power to bind the Community vis-à-vis third countries nevertheless flows, by implication from the provisions of the Treaty creating the internal power and insofar as the participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the Community.

5. In order to attain the common transport policy, the contents of which are defined in Articles 74 and 75 of the Treaty, the Council is empowered to lay down 'any other appropriate provisions', as expressly provided in Article 75 (1) (c). The Community is therefore not only entitled to enter into contractual relations with a third country in this connexion but also has the power, while observing the provisions of the Treaty, to cooperate with that country in setting up an appropriate organism such as the public international institution which it is proposed to establish under the name of the 'European Laying-up Fund for Inland Waterway Vessels'. The Community may also, in this connexion, cooperate with a third country for the purpose of giving the organs of such an institution appropriate powers of decision and for the purpose of defining, in a manner appropriate to the objectives pursued, the nature, elaboration, implementation and effects of the provisions to be adopted within such a framework.

17. The legal system contained in the draft Agreement provides for the grant of certain powers to an organ, the Fund Tribunal, which, in particular by its composition, differs from the Court of Justice established by the Treaty. The Tribunal is to be invested with power to give judgments relating to the activities of the Fund on applications lodged against the organs of the Fund or the States in conditions laid down in Article 43 of the Statute and on applications for a declaration that there has been a failure to fulfil an obligation brought against one of the States on the territory of which the Statute has binding force (but not the Community as such), in the conditions laid down in Article 45. Moreover, the Tribunal is to have power to give preliminary rulings on applications referred to it by the national courts in the conditions laid down in Article 44. With regard to the latter applications it is necessary to note that they may concern not only the validity and interpretation of decisions adopted by the organs of the Fund but also the interpretation of the Agreement and the Statute.

18. However, as the Court has had occasion to state, in particular in its judgment of 30 April 1974 in Case 181/73, Haegemann v Belgian State, [1974] ECR 449, an agreement concluded by the Community with a third State is, as far as concerns the Community, an act of one of the institutions within the meaning of subparagraph (b) of the first paragraph of Article 177 of the Treaty. It follows that the Court, within the context of the Community legal order, has jurisdiction to give a preliminary ruling on the interpretation of such an agreement. Thus the question arises whether the provisions

	relating to the jurisdiction of the Fund Tribunal are compatible with those of the Treaty relating to the jurisdiction of the Court of Justice. **20.** It is not for the Court within the context of a request for an opinion pursuant to the second paragraph of Article 228 (1) to give a final judgment on the interpretation of texts which are the subject of a request for an opinion. In the present case, it is sufficient to state that it will be for the legal organs in question to make such an interpretation. It is to be hoped that there is only the smallest possibility of interpretations giving rise to conflicts of jurisdiction; nevertheless no one can rule out a priori the possibility that the legal organs in question might arrive at divergent interpretations with consequential effect on legal certainty. **21.** It is not feasible to establish a legal system such as that provided for in the Statute, which on the whole gives individuals effective legal protection, and at the same time to escape the consequences which inevitably follow from the participation of a third State. The need to establish judicial remedies and legal procedures which will guarantee the observance of the law in the activities of the Fund to an equal extent for all individuals may justify the principle underlying the system adopted. While approving the concern reflected by the provisions of the Statute to organize within the context of the Fund legal protection adapted to meet the difficulties of the situation, the Court is however obliged to express certain reservations as regards the compatibility of the structure of the 'Fund Tribunal' with the Treaty. **22.** In the case of the second interpretation set out in paragraph 19 above, the Court considers that a difficulty would arise from the implementation of Article 6 of the draft regulation because the six members of the Court required to sit on the Fund Tribunal might be prejudicing their position as regards questions which might come before the Court of Justice of the Community after being brought before the Fund Tribunal and vice versa. The arrangement suggested might conflict with the obligation on the judges to give a completely impartial ruling on contentious questions when they come before the Court. In extreme cases the Court might find it impossible to assemble a quorum of judges able to give a ruling on contentious questions which had already been before the Fund Tribunal. For these reasons, the Court considers that the Fund Tribunal could only be established within the terms of Article 42 of the Statute on condition that judges belonging to the Court of Justice were not called upon to serve on it. [The Court] gives the following opinion: **The draft Agreement on the establishment of a European Laying-up Fund for Inland Waterway Vessels is incompatible with the EEC Treaty.**
3	Opinion 1/78 (04/10/1979) ECLI:EU:C:1979:224 **International Agreement on Natural Rubber (in the course of negotiation within the United Nations Conference on Trade and Development)** **36.** As the Council has indicated, the problem of competence which has been submitted to the Court must be examined from two aspects. The first question is whether the agreement envisaged, by reason of its subject-matter and objectives, comes within the concept of common commercial policy referred to in Article 113 of the Treaty. The second question — but only if the first question is answered in the affirmative — is whether, by reason of certain specific arrangements or special provisions of the agreement concerning matters coming within the powers of the Member States, the participation of the latter in the agreement is necessary. **39.** The Council, after recalling that the exclusive nature of Community powers in the matter of commercial policy is not in question and that it does not reject the idea of a gradual evolution in this

sphere, emphasizes that the common commercial policy nevertheless fulfils a function of its own in the context of the structure of the Treaty inasmuch as it applies to "any measure the aim of which is to influence the volume or flow of trade". Thus Article 113 should be interpreted so as not to render meaningless other provisions of the Treaty, in particular those dealing with general economic policy, including the supply policy for raw materials which remains within the powers of Member States and for which the Council has only, under Article 145, a power of "co-ordination". According to the Council there is here a close interrelation between the powers of the Community and those of the Member States, since it is difficult to distinguish between international economic relations and international political relations. In this connexion the Council once again draws attention to the fact that rubber is a "strategic product" so that the agreement in question impinges also on the defence policy of Member States. In these circumstances the Council takes the view that the negotiation of the agreement envisaged comes not only under Article 113 of the Treaty but also under Article 116 relating to common action by Member States within the framework of international organizations of an economic character to which they belong.

41. By its special machinery as much as by certain aspects of its legal structure, the International Agreement on Natural Rubber which it is proposed to conclude stands apart from ordinary commercial and tariff agreements which are based primarily on the operation of customs duties and quantitative restrictions. The agreement in question is a more structured instrument in the form of an organization of the market on a world scale and in this way it is distinguished from classical commercial agreements. An answer to the question which is the subject of the request for an opinion requires a reference to the scope and consequences of these specific characteristics in relation to the concept of common commercial policy as referred to in Article 113 of the Treaty. At the same time consideration must be given to the question whether the link which exists between the agreement envisaged and the development problems to which the Council refers may perhaps exclude the agreement from the sphere of the common commercial policy as defined by the Treaty.

42. The Nairobi Resolution, which is the basis of the negotiations in progress on natural rubber, shows that commodity agreements have complex objectives. Whilst stressing the needs of the developing countries the resolution includes many references to mechanisms of a commercial nature and does not overlook the needs of the industrialized countries. As regards, more particularly, the interests of the developing countries, it is true that commodity agreements may involve the granting of advantages which are characteristic of development aid; it must however be acknowledged also that for those countries such agreements respond more fundamentally to the preoccupation of bringing about an improvement in the "terms of trade" and thus of increasing their export earnings. This characteristic is particularly brought out in the agreement in question, which seeks to establish a fair balance between the interests of the producer countries and those of the consumer countries. It is natural that, in negotiating an agreement of this type, the industrialized countries, whilst seeking to defend their own interests, should be obliged to recognize the situation of the producer countries which are negotiating from an economic standpoint which is very different from their own and that a reasonable compromise must be found between these points of view so as to make an agreement possible.

43. The link between the various agreements on commodities which were emphasized by the Nairobi Resolution must also be taken into account. As an increasing number of products which are particularly important from the economic point of view are concerned, it is clear that a coherent commercial policy would no longer be practicable if the Community were not in a position to exercise its powers also in connexion with a category of agreements which are becoming, alongside traditional commercial agreements, one of the major factors in the regulation of international trade.

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

46. Moreover, when the whole canvas of existing and planned agreements is considered it appears that as far as the Community is concerned a wide range of interests is involved in the negotiation of those agreements and that there are connexions with the most varied spheres in which the Community has undertaken responsibilities. Thus, alongside agreements dealing, like the rubber agreement, with products with regard to which (always excepting of course the problem of substitution products) the Community appears only in the position of a consumer, there are other agreements, for example those concerning products such as wheat, oils and fats and sugar, in which the Community is interested also as a producer and by which its export policy, expressly mentioned in Article 113 as being amongst the objectives of the common commercial policy, is affected at the same time import policy. Several of the agreements belonging to this category are furthermore directly related to the execution of the common agricultural policy.

47. In its arguments the Council has raised the problem of the interrelation within the structure of the Treaty of the concepts of "economic policy" and "commercial policy". In certain provisions economic policy is indeed considered primarily as a question of national interest; such is the meaning of that concept in Articles 6 and 145 which, for that reason, prescribe for the Member States nothing more than a duty to ensure co-ordination. In other provisions economic policy is envisaged as being a matter of common interest as is the case with Articles 103 to 116, which are grouped together in a title devoted to the "economic policy" of the Community. The chapter devoted to the common commercial policy forms part of that title.

48. The considerations set out above already form to some extent an answer to the arguments relating to the distinction to be drawn between the spheres of general economic policy and those of the common commercial policy since international co-operation, inasmuch as it does not belong to commercial policy, would be confused with the domain of general economic policy. If it appears that it comes, at least in part, under the common commercial policy, as has been indicated above, it follows clearly that it could not, under the name of general economic policy, be withdrawn from the competence of the Community.

49. Having regard to the specific nature of the provisions relating to commercial policy in so far as they concern relations with non-member countries and are founded, according to Article 113, on the concept of a common policy, their scope cannot be restricted in the light of more general provisions relating to economic policy and based on the idea of mere co-ordination. Consequently, where the organization of the Community's economic links with nonmember countries may have repercussions on certain sectors of economic policy such as the supply of raw materials to the Community or price policy, as is precisely the case with the regulation of international trade in commodities, that consideration does not constitute a reason for excluding such objectives from the field of application of the rules relating to the common commercial policy. Similarly, the fact that a product may have a

	political importance by reason of the building up of security stocks is not a reason for excluding that product from the domain of the common commercial policy. **50.** It is in the light of the same considerations that the the connexion between Article 113 and Article 116 must be determined in the context of the chapter of the Treaty devoted to the common commercial policy. Whilst those two provisions contribute to the same end inasmuch as their objective is the realization of a common policy in international economic relationships, as a basis for action the two articles are founded on different premises and consequently apply different ideas. According to Article 113 the common commercial policy is determined by the Community, independently, that is to say, acting as such, by the intervention of its own institutions; in particular, agreements entered into under that provision are, in the terms of Article 114, "concluded ... on behalf of the Community" and accordingly negotiated according to the procedures set out in those provisions and in Article 228. Article 116 on the other hand was conceived with a view to evolving common action by the Member States in international organizations of which the Community is not part; in such a situation the only appropriate means is concerted, joint action by the Member States as members of the said organizations. [The Court] gives the following opinion: **1. The Community's powers relating to commercial policy within the meaning of Article 113 of the Treaty establishing the European Economic Community extend to the International Agreement on Natural Rubber which is in the course of negotiation within the United Nations Conference on Trade and Development.** **2. The question of the exclusive nature of the Community's powers depends in this case on the arrangements for financing the operations of the buffer stock which it is proposed to set up under that agreement. If the burden of financing the stock falls upon the Community budget the Community will have exclusive powers. If on the other hand the charges are to be borne directly by the Member States that will imply the participation of those States in the agreement together with the Community.** **3. As long as that question has not been settled by the competent Community authorities the Member States must be allowed to participate in the negotiation of the agreement.**
4	Opinion 1/91 (14/12/1991) ECLI:EU:C:1991:490 **Agreement creating a European Economic Area (Member States of the Community and EFTA countries)** **29.** It follows from the foregoing considerations that the divergences which exist between the aims and context of the agreement, on the one hand, and the aims and context of Community law, on the other, stand in the way of the achievement of the objective of homogeneity in the interpretation and application of the law in the EEA. **30.** It is in the light of the contradiction which has just been identified that it must be considered whether the proposed system of courts may undermine the autonomy of the Community legal order in pursuing its own particular objectives. **34.** This means that, when a dispute relating to the interpretation or application of one or more provisions of the agreement is brought before it, the EEA Court may be called upon to interpret the expression 'Contracting Party', within the meaning of Article 2(c) of the agreement, in order to determine whether, for the purposes of the provision at issue, the expression 'Contracting Party' means the Community, the Community and the Member States, or simply the Member States. Consequently,

the EEA Court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement.

35. It follows that the jurisdiction conferred on the EEA Court under Article 2(c), Article 96(1)(a) and Article 117(1) of the agreement is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that treaty to any method of settlement other than those provided for in the Treaty. Article 87 of the ECSC Treaty embodies a provision to the same effect.

36. Consequently, to confer that jurisdiction on the EEA Court is incompatible with Community law.
37. As for the second point, it must be observed in limine that international agreements concluded by means of the procedure set out in Article 228 of the Treaty are binding on the institutions of the Community and its Member States and that, as the Court of Justice has consistently held, the provisions of such agreements and the measures adopted by institutions set up by such agreements become an integral part of the Community legal order when they enter into force.

38. In this connection, it must be pointed out that the agreement is an act of one of the institutions of the Community within the meaning of indent (b) of the first paragraph of Article 177 of the EEC Treaty and that therefore the Court has jurisdiction to give preliminary rulings on its interpretation. It also has jurisdiction to rule on the agreement in the event that Member States of the Community fail to fulfil their obligations under the agreement.

44. Although, under Article 6 of the agreement, the EEA Court is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement, the EEA Court will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date.

45. Consequently, the agreement's objective of ensuring homogeneity of the law throughout the EEA will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law.

46. It follows that in so far as it conditions the future interpretation of the Community rules on free movement and competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community.

58. Accordingly, this procedure is characterized by the fact that it leaves the EFTA States free to authorize or not to authorize their courts or tribunals to refer questions to the Court of Justice and does not make such a reference obligatory in the case of courts of last instance in those States. Furthermore, there is no guarantee that the answers given by the Court of Justice in such proceedings will be binding on the courts making the reference. This procedure is fundamentally different from that provided for in Article 177 of the EEC Treaty.
59. Admittedly, there is no provision of the EEC Treaty which prevents an international agreement from conferring on the Court of Justice jurisdiction to interpret the provisions of such an agreement for the purposes of its application in non-member countries.

60. Neither can any objection on a point of principle be made to the freedom which the EFTA States are given to authorize or not to authorize their courts and tribunals to ask the Court of Justice questions

	or to the fact that there is no obligation on the part of certain of those courts and tribunals to make a reference to the Court of Justice. **61.** In contrast, it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the EFTA States are to be purely advisory and without any binding effects. Such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding. Even in the very specific case of Article 228, the Opinion given by the Court of Justice has the binding effect stipulated in that article. **62.** It must further be observed that the interpretation of the agreement provided by the Court of Justice in response to questions put by courts and tribunals in EFTA States also has to be taken into account by courts in Member States of the Community when they have to rule on the application of the agreement. However, the fact that the answers are not binding on the EFTA courts may give rise to uncertainty about their legal value for courts in Member States of the Community. **63.** Furthermore, the possibility cannot be ruled out that courts in the Member States will be led to consider that the non-binding effect of interpretations given by the Court of Justice under Protocol 34 also extends to judgments given by the Court of Justice under Article 177 of the EEC Treaty. **64.** To that extent, the machinery in question will have an adverse impact on legal certainty, which is essential for the proper operation of the preliminary rulings procedure. **65.** It follows from the above considerations that Article 104(2) of the agreement and Protocol 34 thereto are incompatible with Community law in so far as they do not guarantee that the answers which the Court of Justice may be called upon to give pursuant to that protocol will have a binding effect. **69.** In its last question, the Commission asks whether Article 238 of the EEC Treaty, which deals with the conclusion by the Community of association agreements with a third State, a union of States or an international organization, authorizes the establishment of a system of courts as provided for in this agreement. The Commission stated in this connection that, in the event that the Court were to answer this question in the negative, Article 238 could be amended so as to permit such a system to be set up. **70.** As already pointed out in paragraph 40, an international agreement providing for a system of courts, including a court with jurisdiction to interpret its provisions, is not in principle incompatible with Community law and may therefore have Article 238 of the EEC Treaty as its legal basis. **71.** However, Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community. [The Court] gives the following opinion: **The system of judicial supervision which the agreement proposes to set up is incompatible with the Treaty establishing the European Economic Community.**
	Opinion 2/91 (19/03/1993) ECLI:EU:C:1993:106
	ILO Convention No 170 (Chemicals Convention)
5	**8.** The exclusive nature of the Community's competence has been recognized by the Court with respect to Article 113 of the Treaty (Opinion 1/75, cited above; judgment in Case 41/76 Donckerwolke and Schou v Procureur de la République [1976] ECR 1921, paragraph 32) and to Article 102 of the Act of

Accession (judgment in Case 804/79 Commission v United Kingdom [1981] ECR 1045, paragraphs 17 and 18). It follows from that line of authority that the existence of such competence arising from a Treaty provision excludes any competence on the part of Member States which is concurrent with that of the Community, in the Community sphere and in the international sphere (see Opinion 1/75 above).

9. The exclusive or non-exclusive nature of the Community's competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis. As the Court stated at paragraph 22 in its judgment in Case 22/70 Commission v Council [1971] ECR 263 (the AETR judgment), where Community rules have been promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.

10. Contrary to the contentions of the German, Spanish and Irish Governments, the authority of the decision in that case cannot be restricted to instances where the Community has adopted Community rules within the framework of a common policy. In all the areas corresponding to the objectives of the Treaty, Article 5 requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.

12. Finally, an agreement may be concluded in an area where competence is shared between the Community and the Member States. In such a case, negotiation and implementation of the agreement require joint action by the Community and the Member States (judgment in Kramer, cited above, paragraphs 39 to 45, and Opinion 1/78, cited above, paragraph 60).

18. For the purpose of determining whether this competence is exclusive in nature, it should be pointed out that the provisions of Convention N o 170 are not of such a kind as to affect rules adopted pursuant to Article 118a. If, on the one hand, the Community decides to adopt rules which are less stringent than those set out in an ILO convention, Member States may, in accordance with Article 118a(3), adopt more stringent measures for the protection of working conditions or apply for that purpose the provisions of the relevant ILO convention. If, on the other hand, the Community decides to adopt more stringent measures than those provided for under an ILO convention, there is nothing to prevent the full application of Community law by the Member States under Article 19(8) of the ILO Constitution, which allows Members to adopt more stringent measures than those provided for in conventions or recommendations adopted by that organization.

20. That argument cannot be accepted. Difficulties, such as those referred to by the Commission, which might arise for the legislative function of the Community cannot constitute the basis for exclusive Community competence.

21. Nor, for the same reasons, can exclusive competence be founded on the Community provisions adopted on the basis of Article 100 of the Treaty, such as, in particular, Council Directive 80/1107/EEC of 27 November 1980 on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work (OJ 1980 L 327, p. 8) and individual directives adopted pursuant to Article 8 of Directive 80/1107, all of which lay down minimum requirements.

30. Admittedly, as Community law stands at present, social policy and in particular cooperation between both sides of industry are matters which fall predominantly within the competence of the Member States.

	31. This matter, has not, however, been withdrawn entirely from the competence of the Community. It should be noted, in particular, that, according to Article 118b of the Treaty, the Commission is required to endeavour to develop the dialogue between management and labour at European level. **32.** Consequently, the question whether international commitments, whose purpose is consultation with representative organizations of employers and workers, fall within the competence of the Member States or of the Community cannot be separated from the objective pursued by such consultation. **34.** As to that, even if the competent authority referred to in that article is an authority of one of the Member States, the Community may nevertheless assume the aforementioned obligation for external purposes. Just as, for internal purposes, the Community may provide, in an area covered by Community rules, that national authorities are to be given certain supervisory powers (see in particular Article 4 of Council Directive 80/1107/EEC of 27 November 1980 on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work, OJ 1980 L 327, p. 8, cited by the Council), it may also, for external purposes, undertake commitments designed to ensure compliance with substantive provisions which fall within its competence and imply the attribution of certain supervisory powers to national authorities. **36.** At points 34 to 36 in Ruling 1/78 [1978] ECR 2151, the Court pointed out that when it appears that the subject-matter of an agreement or contract falls in part within the competence of the Community and in part within that of the Member States, it is important to ensure that there is a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into. This duty of cooperation, to which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the EEC Treaty since it results from the requirement of unity in the international representation of the Community. **38.** It is therefore for the Community institutions and the Member States to take all the measures necessary so as best to ensure such cooperation both in the procedure of submission to the competent authority and ratification of Convention No 170 and in the implementation of commitments resulting from that Convention. [The Court] gives the following opinion: **The conclusion of ILO Convention No 170 is a matter which falls within the joint competence of the Member States and the Community.**
6	Opinion 1/92 (10/04/1992) ECLI:EU:C:1992:189
	Agreement creating a European Economic Area (Member States of the Community and EFTA countries)
	21. In order to achieve the most uniform interpretation possible of the provisions of the agreement and those of Community law whose substance is incorporated in the agreement, Article 105 of the agreement empowers the Joint Committee to keep under constant review the development of the case-law of the Court of Justice of the European Communities and of the EFTA Court and to act so as to preserve the homogeneous interpretation of the agreement. **22.** If that article were to be interpreted as empowering the Joint Committee to disregard the binding nature of decisions of the Court of Justice within the Community legal order, the vesting of such a power in the Joint Committee would adversely affect the autonomy of the Community legal order,

respect for which must be assured by the Court pursuant to Article 164 of the EEC Treaty, and would therefore be incompatible with the Treaty.

23. However, according to the 'procès-verbal agréé ad article 105', decisions taken by the Joint Committee under that article are not to affect the case-law of the Court of Justice.

24. That principle constitutes an essential safeguard which is indispensable for the autonomy of the Community legal order.

25. Consequently, the power which Article 105 confers on the Joint Committee for the purposes of preserving the homogeneous interpretation of the agreement is compatible with the EEC Treaty only if that principle is laid down in a form binding on the Contracting Parties.

30. The interpretation according to which the Joint Committee is bound to comply with the aforementioned principle in the context of Article 111 is the only interpretation that is consistent with the jurisdiction to interpret the relevant rules conferred on the Court of Justice by Article 111(3).

31. The question then arises as to whether it is compatible with the Treaty to confer that jurisdiction on the Court of Justice.

32. The powers conferred on the Court by the Treaty may be modified pursuant only to the procedure provided for in Article 236 of the Treaty. However, an international agreement concluded by the Community may confer new powers on the Court, provided that in so doing it does not change the nature of the function of the Court as conceived in the EEC Treaty.

38. Finally, it is necessaiy to assess the compatibility with the EEC Treaty of the rules contained in Article 56 of the agreement with regard to the sharing of responsibilities in the competition field between the EFTA Surveillance Authority and the Commission of the European Communities.

39. It follows from the Court's case-law (judgment in Case 22/70 Commission v Council [1971] ECR 263 ('the ERTA case'), judgment in Joined Cases 3, 4 and 6/76 Kramer [1976] ECR 1279 and Opinion 1/76 [1977] ECR 741, paragraph 3) that the Community's authority to enter into international agreements arises not only from an express attribution by the Treaty, but also from other provisions of the Treaty and measures taken pursuant to those provisions by the Community institutions.

40. Consequently, the Community is empowered, under the competition rules in the EEC Treaty and measures implementing those rules, to conclude international agreements in this field.

41. That power necessarily implies that the Community may accept rules made by virtue of an agreement as to the sharing of the respective competences of the Contracting Parties in the field of competition, provided that those rules do not change the nature of the powers of the Community and of its institutions as conceived in the Treaty.

42. It follows that Article 56 of the agreement is compatible with the EEC Treaty.

[The Court] gives the following opinion:

The following are compatible with the Treaty establishing the European Economic Community:

	(1) The provisions of the agreement which deal with the settlement of disputes, as long as the principle that decisions taken by the Joint Committee are not to affect the case-law of the Court of Justice is laid down in a form binding on the Contracting Parties; **(2) Article 56 of the agreement, dealing with the sharing of competences in the field of competition.**
7	Opinion 2/92 (24/03/1995) ECLI:EU:C:1995:83 **Third Revised Decision on national treatment of the Council of the Organization for Economic Cooperation and Development** **27.** Furthermore, as the Court stated in paragraphs 48 to 52 of Opinion 1/94, international agreements in the field of transport fall within the scope of the common transport policy and not within that of the common commercial policy. To the extent that it concerns the conditions under which foreign-controlled undertakings are involved in international transport to or from non-member countries, the national treatment rule also falls outside the scope of Article 113. **28.** It follows from the foregoing that Article 113 does not confer exclusive competence on the Commission to participate in the Third Decision. **31.** In that regard, the Court has consistently held, most recently in Opinion 1/94 (paragraph 77), that the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level. As the Court pointed out in the AETR judgment (paragraphs 17 and 18), the Member States, whether acting individually or collectively, only lose their right to enter into obligations with non-member countries as and when there are common rules which could be affected by such obligations. **32.** It is true that, as the Court stated in Opinion 1/76, the external competence based on the Community's internal powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted. However, this relates to a situation where the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules (see Opinion 1/94, paragraph 85). It is undisputed that that is not the case here. **33.** Accordingly, it is necessary to ascertain whether the matters covered by the Third Decision are already the subject of internal legislation containing provisions on the treatment to be accorded to foreign-controlled undertakings, or empowering the institutions to negotiate with non-member countries, or effecting complete harmonization of the rules governing the right to take up an activity as a self-employed person. It follows from the case-law of the Court (see, in particular, Opinion 2/91 [1993] ECR 1-1061 and Opinion 1/94) that in those circumstances the Community has exclusive competence to enter into international obligations. **34.** It should be noted, first of all, that although the Community has adopted measures capable of serving as a basis for an exclusive external competence in accordance with the aforesaid case-law and falling in particular within the scope of Articles 57(2), 75, 84 and 100a of the EC Treaty, it is undisputed that those measures do not cover all the fields of activity to which the Third Decision relates. **35.** It follows that the Community is competent to participate in the Third Decision, but that such competence does not cover all the matters to which that decision relates.

	36. Article 235, which enables the Community to cope with any insufficiency in the powers conferred on it, expressly or by implication, for the achievement of its objectives, cannot in itself vest exclusive competence in the Community at international level. Save where internal powers can only be effectively exercised at the same time as external powers, internal competence can give rise to exclusive external competence only if it is exercised. This applies a fortiori to Article 235 (see Opinion 1/94, paragraph 89). Furthermore, as the Court has consistently held (see most recently the judgment in Joined Cases C-51/89, C-90/89 and C-94/89 United Kingdom v Council [1991] ECR 1-2757, paragraph 6), recourse to Article 235 is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question. [The Court] gives the following opinion: **(1) The Community is competent to participate in the Third Revised Decision of the OECD.** **(2) The Community and the Member States share joint competence to participate in that decision.**
8	Opinion 1/94 (15/11/1994) ECLI:EU:C:1994:384
	General Agreement on Tariffs and Trade (GATT); General Agreement on Trade in Services (GATS); Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
	27. However, since the ECSC Treaty was drawn up at a time when the European Economic Community was not yet in existence, Article 71 of that Treaty can only have been intended to refer to coal and steel products. In any event, it can only have reserved competence to the Member States as regards agreements relating specifically to ECSC products. On the other hand, the Community has sole competence pursuant to Article 113 of the EC Treaty to conclude an external agreement of a general nature, that is to say, encompassing all types of goods, even where those goods include ECSC products. As the Court held in Opinion 1/75, cited above (at p. 1365, third paragraph), Article 71 of the ECSC Treaty cannot 'render inoperative Articles 113 and 114 of the EEC Treaty and affect the vesting of power in the Community for the negotiation and conclusion of international agreements in the realm of common commercial policy'. In the present case, it appears from an examination of the Multilateral Agreements on Trade in Goods that none of them relates specifically to ECSC products. It follows that the exclusive competence of the Community to conclude those agreements cannot be impugned on the ground that they also apply to ECSC products. **28.** The Council contends that Article 43 of the EC Treaty must be adopted as the basis for its decision to conclude the WTO Agreement and its annexes in respect of the Agreement on Agriculture and the Agreement on the Application of Sanitary and Phytosanitary Measures, since they concern not just the commercial measures applicable to international trade in agricultural products but also, and above all, the internal rules on the organization of agricultural markets. The United Kingdom in particular contends that the commitments to reduce domestic support and export refunds stipulated in the Agreement on agricultural products will affect the common organizations of the markets and that, since they concern Community products and not imported products, they fall outside the framework of Article 113 of the EC Treaty. **29.** As regards the Agreement on Agriculture, it is true that Article 43 has been held to be the appropriate legal basis for a directive laying down uniform rules on the conditions under which products may be marketed, not only in intra-Community trade but also when they originate from non-member countries (see Case C-131/87 Commission v Council [1989] ECR1-3764, paragraph 27). However, that directive was intended to achieve one or more of the common agricultural policy objectives laid down in Article 39 of the Treaty. That is not the case as regards the Agreement on Agriculture annexed to the WTO Agreement. The objective of the Agreement on Agriculture is to

establish, on a worldwide basis, 'a fair and marketoriented agricultural trading system' (see the preamble to that Agreement). The fact that the commitments entered into under that Agreement require internal measures to be adopted on the basis of Article 43 of the Treaty does not prevent the international commitments themselves from being entered into pursuant to Article 113 alone.

34. It follows that the Community has exclusive competence, pursuant to Article 113 of the EC Treaty, to conclude the Multilateral Agreements on Trade in Goods.

76. It was on the basis of Article 75(l)(a) which, as regards that part of a journey which takes place on Community territory, also concerns transport from or to non-member countries, that the Court held in the AETR judgment (at paragraph 27) that 'the powers of the Community extend to relationships arising from international law, and hence involve the need in the sphere in question for agreements with the third countries concerned'.

77. However, even in the field of transport, the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level. As the Court pointed out in the AETR judgment (paragraphs 17 and 18), the Member States, whether acting individually or collectively, only lose their right to assume obligations with non-member countries as and when common rules which could be affected by those obligations come into being. Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive. However, not all transport matters are already covered by common rules.

84. That application of Opinion 1/76 to GATS cannot be accepted.

85. Opinion 1/76 related to an issue different from that arising from GATS. It concerned rationalization of the economic situation in the inland waterways sector in the Rhine and Moselle basins, and throughout all the Netherlands inland waterways and the German inland waterways linked to the Rhine basin, by elimination of short-term overcapacity. It was not possible to achieve that objective by the establishment of autonomous common rules, because of the traditional participation of vessels from Switzerland in navigation on the waterways in question. It was necessary, therefore, to bring Switzerland into the scheme envisaged by means of an international agreement (see Opinion 1/76, paragraph 2). Similarly, in the context of conservation of the resources of the seas, the restriction, by means of internal legislative measures, of fishing on the high seas by vessels flying the flag of a Member State would hardly be effective if the same restrictions were not to apply to vessels flying the flag of a non-member country bordering on the same seas. It is understandable, therefore, that external powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted.

86. That is not the situation in the sphere of services: attainment of freedom of establishment and freedom to provide services for nationals of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community.

88. As regards Article 100a, it is undeniable that, where harmonizing powers have been exercised, the harmonization measures thus adopted may limit, or even remove, the freedom of the Member States to negotiate with non-member countries. However, an internal power to harmonize which has not been exercised in a specific field cannot confer exclusive external competence in that field on the Community.

89. Article 235, which enables the Community to cope with any insufficiency in the powers conferred on it, expressly or by implication, for the achievement of its objectives, cannot in itself vest exclusive competence in the Community at international level. Save where internal powers can only be effectively exercised at the same time as external powers (see Opinion 1/76 and paragraph 85 above), internal competence can give rise to exclusive external competence only if it is exercised. This applies a fortiori to Article 235.

90. Although the only objective expressly mentioned in the chapters on the right of establishment and on freedom to provide services is the attainment of those freedoms for nationals of the Member States of the Community, it does not follow that the Community institutions are prohibited from using the powers conferred on them in that field in order to specify the treatment which is to be accorded to nationals of non-member countries. Numerous acts adopted by the Council on the basis of Articles 54 and 57(2) of the Treaty — but not mentioned by it — contain provisions in that regard. The Commission has Usted them in response to a question from the Court.

95. Whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts.

96. The same applies in any event, even in the absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved complete harmonization of the rules governing access to a self-employed activity, because the common rules thus adopted could be affected within the meaning of the AETR judgment if the Member States retained freedom to negotiate with non-member countries.

97. That is not the case in all service sectors, however, as the Commission has itself acknowledged.
98. It follows that competence to conclude GATS is shared between the Community and the Member States.

101. Moreover, Articles 100a and 235 of the Treaty cannot in themselves confer exclusive competence on the Community, as stated above.

102. It only remains, therefore, to consider whether the subordinate legislative acts adopted in the Community context could be affected within the meaning of the AETR judgment if the Member States were to participate in the conclusion of TRIPs, as the Commission maintains.

103. Suffice it to say on that point that the harmonization achieved within the Community in certain areas covered by TRIPs is only partial and that, in other areas, no harmonization has been envisaged. There has been only partial harmonization as regards trade marks, for example: it is apparent from the third recital in the preamble to the First Council Directive (89/104/EEC) of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1) that it is confined to the approximation of national laws 'which most directly affect the functioning of the internal market'. In other areas covered by TRIPs, no Community harmonization measures have been adopted. That is the position as regards the protection of undisclosed technical information, as regards industrial designs, in respect of which proposals have merely been submitted, and as regards patents. With regard to patents, the only acts referred to by the Commission are conventions which are intergovernmental in origin, and not Community acts: the Munich Convention of 5 October 1973 on the Grant of European Patents (JORF, Decree No 77-1151, of 27 September 1977, p. 5002) and the

	Luxembourg Agreement of 15 December 1989 relating to Community Patents (OJ 1989 L 401, p. 1), which has not yet, however, entered into force. **105.** It follows that the Community and its Member States are jointly competent to conclude TRIPs. [The Court] gives the following opinion: **1. The Community has sole competence, pursuant to Article 113 of the EC Treaty, to conclude the Multilateral Agreements on Trade in Goods.** **2. The Community and its Member States are jointly competent to conclude GATS.** **3. The Community and its Member States are jointly competent to conclude TRIPs.**
9	Opinion 2/94 (28/03/1996) ECLI:EU:C:1996:140 **European Community accession to the European Convention on Human Rights** **23.** It follows from Article 3 b of the Treaty, which states that the Community is to act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein, that it has only those powers which have been conferred upon it. **24.** That principle of conferred powers must be respected in both the internal action and the international action of the Community. **25.** The Community acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them. **26.** Thus, in the field of international relations, at issue in this request for an Opinion, it is settled case-law that the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions. The Court has held, in particular, that, whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect (see Opinion 2/91 of 19 March 1993 [1993] ECR I-1061, paragraph 7). **27.** No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field. **28.** In the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 of the Treaty may constitute a legal basis for accession. **29.** Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. **30.** That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define

	the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose. **31.** It is in the light of those considerations that the question whether accession by the Community to the Convention may be based on Article 235 must be examined. **32.** It should first be noted that the importance of respect for human rights has been emphasized in various declarations of the Member States and of the Community institutions (cited in point III.5 of the first part of this Opinion). Reference is also made to respect for human rights in the preamble to the Single European Act and in the preamble to, and in Article F(2), the fifth indent of Article J. 1(2) and Article K.2(1) of, the Treaty on European Union. Article F provides that the Union is to respect fundamental rights, as guaranteed, in particular, by the Convention. Article 130u(2) of the EU Treaty provides that Community policy in the area of development cooperation is to contribute to the objective of respecting human rights and fundamental freedoms. **33.** Furthermore, it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they arc signatories. In that regard, the Court has stated that the Convention has special significance (see, in particular, the judgment in Case C-260/89 ERT [1991] ECR I-2925, paragraph 41). **34.** Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. **35.** Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment. **36.** It must therefore be held that, as Community law now stands, the Community has no competence to accede to the Convention. [The Court] gives the following opinion: **As Community law now stands, the Community has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.**
10	Opinion 1/00 (18/04/2002) ECLI:EU:C:2002:231
	Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area
	6. Conversely, where an agreement more clearly separates the Community from the other Contracting Parties from an institutional point of view and no longer affects either the exercise by the Community and its institutions of their powers by changing the nature of those powers, or the interpretation of Community law, the autonomy of the Community legal order can be considered to be secure. In particular, the risk that the foundations of the Community might be affected as a result of

implementation of an agreement is even lower where the States Parties to that agreement are members of a single organisation, which has its own judicial body and surveillance authority, distinct from the Community institutions. That was the position in the case of the second version of the agreement relating to the creation of the EEA submitted to the Court for an opinion, which the Court found to be compatible with the Treaty in view of the different framework: the proposal for an EEA Court had been abandoned, the EFTA Court had been created and decisions taken by the committee responsible for resolving differences between the Community and the EFTA States and for ensuring uniform interpretation as regards the EEA rules could in no circumstances affect the case-law of the Court (Opinion 1/92, paragraphs 18 to 35).

7. The proposed ECAA Agreement has objectives comparable to those of the EEA Agreement but a different institutional structure. Whilst the EEA Agreement is based on the 'twin pillar' of the Communities on the one hand and the EFTA on the other, the proposed agreement provides for the ECAA to be founded on a 'single pillar', a solution which is made possible and necessary by the absence of pre-existing institutional links between the States Parties in the area of air transport. Where Community legislation provides that the Community institutions, in particular the Commission, are competent, the same institutions are in many cases competent as regards the competition rules for the purpose of applying the corresponding provisions referred to in the proposed agreement throughout the ECAA. In areas in which neither the competition rules nor the secondary legislation mentioned in Annex I to the proposed agreement confer power on the Community institutions, the States Parties are responsible for applying the provisions of the ECAA Agreement. Dispute resolution and the task of ensuring uniform implementation of the provisions concerned are entrusted to the Joint Committee set up by Article 25 of the proposed agreement. Furthermore, the proposed agreement gives States Parties the option of permitting their courts or tribunals to refer questions to the Court for a preliminary ruling, an option which, in this case, is of particular significance given that those States do not have a common judicial body capable of securing, outside Community territory, a degree of uniformity in the interpretation of the rules of the ECAA Agreement.

12. Preservation of the autonomy of the Community legal order requires therefore, first, that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered (Opinion 1/91, paragraphs 61 to 65, and 1/92, paragraphs 32 and 41).

13. Second, it requires that the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement (Opinions 1/91 and 1/92).

14. The proposed ECAA Agreement does not affect the essential character of the powers of the Community and its institutions to such an extent that it must be declared to be incompatible with the Treaty.

27. Having analysed the effect of the proposed agreement on the powers of the Community and its institutions, it is appropriate to consider the operation of the mechanisms in the proposed agreement for ensuring uniform interpretation of the rules of the ECAA Agreement and the resolution of disputes. As stated in paragraph 13 of this Opinion, the autonomy of the Community legal order will not be safeguarded if those mechanisms have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in the ECAA Agreement.

37. In Opinion 1/92 concerning a proposed agreement relating to the creation of the EEA, the Court found that the procedures for its case-law to be taken into account were sufficient. The mechanisms

	put in place by that agreement were the following. First, the EEA Joint Committee was to be sent the judgments and decisions of the Court and of the EFTA Court and was to keep the development of their case-law under constant review in order to preserve the uniform interpretation of the agreement concerned. Second, decisions of the Committee, whether they related to the implications to be drawn from the development of the Court's case-law or to the resolution of disputes on the interpretation of the agreement, were taken by a 'commonly acceptable solution' and 'were not to affect the case-law of the Court'. Furthermore, in paragraph 24 of Opinion 1/92, the Court described that last precept as 'an essential safeguard which is indispensable for the autonomy of the Community legal order'. [The Court] gives the following Opinion: **The system of legal supervision proposed by the Agreement on the establishment of a European Common Aviation Area in Articles 17, 23 and 27 and Protocol IV is compatible with the EC Treaty.**
11	Opinion 2/00 (06/12/2001) ECLI:EU:C:2001:664 **Cartagena Protocol on Biosafety** **20.** According to the Commission, the Protocol essentially falls within the scope of Article 133(3) EC, but it does not rule out that certain matters more specifically related to environmental protection fall outside that provision. It therefore maintains that Articles 133 and 174(4) EC constitute the appropriate legal basis for concluding the Protocol. **21.** That interpretation is contested by the Council and by the Member States which have submitted observations. They argue that, principally on account of its purpose and content, the Protocol can be concluded only on the basis of Article 175(1) EC. The Parliament also contends that this provision constitutes the appropriate legal basis for the measure concluding the Protocol, but it does not rule out referring in addition to Article 133 EC in so far as it is established that the Protocol's effects on trade in LMOs are a significant additional factor over and above environmental protection, which is its primary objective. **22.** It is settled case-law that the choice of the legal basis for a measure, including one adopted in order to conclude an international agreement, does not follow from its author's conviction alone, but must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure (see Portugal v Council, cited above, paragraph 22, Case C-269/97 Commission v Council [2000] ECR I-2257, paragraph 43, and Spain v Council, cited above, paragraph 58). **23.** If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component (see the Waste Directive judgment, paragraphs 19 and 21, Case C-42/97 Parliament v Council [1999] ECR I-869, paragraphs 39 and 40, and Spain v Council, cited above, paragraph 59). By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases (see, to that effect, the Titanium Dioxide judgment, paragraphs 13 and 17, and Case C-42/97 Parliament v Council, paragraph 38). **24.** Since interpretation of an international agreement is at issue, it should also be recalled that, under Article 31 of the Vienna Convention on the Law of Treaties, 'a treaty shall be interpreted in good faith

in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

25. In the present case, application of those criteria amounts to asking whether the Protocol, in the light of its context, its aim and its content, constitutes an agreement principally concerning environmental protection which is liable to have incidental effects on trade in LMOs, whether, conversely, it is principally an agreement concerning international trade policy which incidentally takes account of certain environmental requirements, or whether it is inextricably concerned both with environmental protection and with international trade.

26. It is established, first of all, that the Protocol was drawn up pursuant to decision II/5 of the Conference of the Parties to the Convention, held in accordance with Article 19(3) of the Convention which calls on the parties to consider the desirability of adopting measures, in particular of a procedural nature, 'in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity'.

27. It is not in dispute that the Convention, concluded by the Community on the basis of Article 130s of the Treaty, is an instrument falling within the field of environmental protection. It results from the United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro in June 1992. Article 1 of the Convention states, in particular, that its objectives are 'the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources'.

28. In accordance with Article 31 of the Vienna Convention on the Law of Treaties, it is by reference to that context relating to the Convention on Biological Diversity that it is necessary to identify the purpose and define the subject-matter of the Protocol, in whose preamble the second and third recitals refer to certain provisions of the Convention, in particular Article 19(3), and to decision II/5 of the Conference of the Parties to the Convention. Numerous provisions of the Protocol, in particular Articles 3, 7, 16, 18, 20, 22, 27 to 35 and 37, also refer to the Convention or to the Conference of the Parties to the Convention.

29. Next, as regards the Protocol's purpose, it is clear beyond doubt from Article 1 of the Protocol, which refers to Principle 15 of the Rio Declaration on Environment and Development, that the Protocol pursues an environmental objective, highlighted by mention of the precautionary principle, a fundamental principle of environmental protection referred to in Article 174(2) EC.

Second, the fact that numerous international trade agreements pursue multiple objectives and the broad interpretation of the concept of common commercial policy under the Court's case-law are not such as to call into question the finding that the Protocol is an instrument falling principally within environmental policy, even if the preventive measures are liable to affect trade relating to LMOs. The Commission's interpretation, if accepted, would effectively render the specific provisions of the Treaty concerning environmental protection policy largely nugatory, since, as soon as it was established that Community action was liable to have repercussions on trade, the envisaged agreement would have to be placed in the category of agreements which fall within commercial policy. It should be noted that environmental policy is expressly referred to in Article 3(1)(1) EC, in the same way as the common commercial policy, to which reference is made in Article 3(l)(b).

41. Third, whatever their scale, the practical difficulties associated with the implementation of mixed agreements, which are relied on by the Commission to justify recourse to Article 133 EC — conferring exclusive competence on the Community so far as concerns common commercial policy — cannot be

	accepted as relevant when selecting the legal basis for a Community measure (see Opinion 1/94, cited above, paragraph 107). **45.** It is thus also necessary to consider whether the Community holds exclusive competence under Article 175 EC to conclude the Protocol because secondary legislation adopted within the framework of the Community covers the subject of biosafety and is liable to be affected if the Member States participate in the procedure for concluding the Protocol (see the ERTA judgment, paragraph 22). [The Court] gives the following Opinion: **Competence to conclude the Cartagena Protocol on Biosafety is shared between the European Community and its Member States.**
12	Opinion 1/03 (07/02/2006) ECLI:EU:C:2006:81 **(New) Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters** **114.** The competence of the Community to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions (see ERTA, paragraph 16). The Court has also held that whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/76, paragraph 3, and Opinion 2/91, paragraph 7). **115.** That competence of the Community may be exclusive or shared with the Member States. As regards exclusive competence, the Court has held that the situation envisaged in Opinion 1/76 is that in which internal competence may be effectively exercised only at the same time as external competence (see Opinion 1/76, paragraphs 4 and 7, and Opinion 1/94, paragraph 85), the conclusion of the international agreement being thus necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules (see, in particular, Commission v Denmark, paragraph 57). **116.** In paragraph 17 of the ERTA judgment, the Court established the principle that, where common rules have been adopted, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with non-member countries which affect those rules. In such a case, the Community also has exclusive competence to conclude international agreements. **117.** In the situation addressed by the present opinion, that principle is relevant in assessing whether or not the Community's external competence is exclusive. **118.** In paragraph 11 of Opinion 2/91, the Court stated that that principle also applies where rules have been adopted in areas falling outside common policies and, in particular, in areas where there are harmonising measures. **119.** The Court noted in that regard that, in all the areas corresponding to the objectives of the Treaty, Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty (Opinion 2/91, paragraph 10). **120.** Giving its opinion on Part III of Convention No 170 of the International Labour Organisation concerning safety in the use of chemicals at work, which is an area already largely covered by

Community rules, the Court took account of the fact that those rules had been progressively adopted for more than 25 years with a view to achieving an ever greater degree of harmonisation designed, on the one hand, to remove barriers to trade resulting from differences in legislation from one Member State to another and, on the other hand, to provide, at the same time, protection for human health and the environment. It concluded that that part of that Convention was such as to affect those Community rules and that consequently Member States could not undertake such commitments outside the framework of the Community (Opinion 2/91, paragraphs 25 and 26).

121. In Opinion 1/94, and in the Open Skies judgments, the Court set out three situations in which it recognised exclusive Community competence. Those three situations, which have been the subject of much debate in the course of the present request for an opinion and which are set out in paragraph 45 hereof are, however, only examples, formulated in the light of the particular contexts with which the Court was concerned.

122. Ruling in much more general terms, the Court has found there to be exclusive Community competence in particular where the conclusion of an agreement by the Member States is incompatible with the unity of the common market and the uniform application of Community law (ERTA, paragraph 31), or where, given the nature of the existing Community provisions, such as legislative measures containing clauses relating to the treatment of nationals of non-member countries or to the complete harmonisation of a particular issue, any agreement in that area would necessarily affect the Community rules within the meaning of the ERTA judgment (see, to that effect, Opinion 1/94, paragraphs 95 and 96, and Commission v Denmark, paragraphs 83 and 84).

123. On the other hand, the Court did not find that the Community had exclusive competence where, because both the Community provisions and those of an international convention laid down minimum standards, there was nothing to prevent the full application of Community law by the Member States (Opinion 2/91, paragraph 18). Similarly, the Court did not recognise the need for exclusive Community competence where there was a chance that bilateral agreements would lead to distortions in the flow of services in the internal market, noting that there was nothing in the Treaty to prevent the institutions from arranging, in the common rules laid down by them, concerted action in relation to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings (Opinion 1/94, paragraphs 78 and 79, and Commission v Denmark, paragraphs 85 and 86).

124. It should be noted in that context that the Community enjoys only conferred powers and that, accordingly, any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions drawn from a 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.

125. In certain cases, analysis and comparison of the areas covered both by the Community rules and by the agreement envisaged suffice to rule out any effect on the former (see Opinion 1/94, paragraph 103; Opinion 2/92, paragraph 34, and Opinion 2/00, paragraph 46).

126. However, it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully. Where the test of 'an area which is already covered to a large extent by Community rules' (Opinion 2/91, paragraphs 25 and 26) is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question

but also its future development, insofar as that is foreseeable at the time of that analysis (see, to that effect, Opinion 2/91, paragraph 25).

127. That that assessment must include not only the extent of the area covered but also the nature and content of the Community rules is also clear from the Court's case-law referred to in paragraph 123 of the present opinion, stating that the fact that both the Community rules and the international agreement lay down minimum standards may justify the conclusion that the Community rules are not affected, even if the Community rules and the provisions of the agreement cover the same area.

128. In short, it is essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law.

129. Furthermore, any initiative seeking to avoid contradictions between Community law and the agreement envisaged does not remove the obligation to determine, prior to the conclusion of the agreement, whether it is capable of affecting the Community rules (see in particular, to that effect, Opinion 2/91, paragraph 25, and Commission v Denmark, paragraphs 101 and 105).

130. In that regard, the existence in an agreement of a so-called 'disconnection clause' providing that the agreement does not affect the application by the Member States of the relevant provisions of Community law does not constitute a guarantee that the Community rules are not affected by the provisions of the agreement because their respective scopes are properly defined but, on the contrary, may provide an indication that those rules are affected. Such a mechanism seeking to prevent any conflict in the enforcement of the agreement is not in itself a decisive factor in resolving the question whether the Community has exclusive competence to conclude that agreement or whether competence belongs to the Member States; the answer to that question must be established before the agreement is concluded (see, to that effect, Commission v Denmark, paragraph 101).

131. Lastly, the legal basis for the Community rules and more particularly the condition relating to the proper functioning of the internal market laid down in Article 65 EC are, in themselves, irrelevant in determining whether an international agreement affects Community rules: the legal basis of internal legislation is determined by its principal component, whereas the rule which maypossibly be affected may be merely an ancillary component of that legislation. The purpose of the exclusive competence of the Community is primarily to preserve the effectiveness of Community law and the proper functioning of the systems established by its rules, independently of any limits laid down by the provision of the Treaty on which the institutions base the adoption of such rules.

132. If an international agreement contains provisions which presume a harmonisation of legislative or regulatory measures of the Member States in an area for which the Treaty excludes such harmonisation, the Community does not have the necessary competence to conclude that agreement. Those limits of the external competence of the Community concern the very existence of that competence and not whether or not it is exclusive.

133. It follows from all the foregoing that a comprehensive and detailed analysis must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area covered by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish.

	As regards the existence of a disconnection clause in the agreement envisaged, such as that in Article 54B(1) of the Lugano Convention, it follows from paragraphs 130 and 154 of the present opinion that its presence would not appear to alter that finding as regards the existence of exclusive competence on the part of the Community to conclude that agreement. **172.** All those factors demonstrate that the Community rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts, with which they form a unified and coherent system, and that the new Lugano Convention would affect the uniform and consistent application of the Community rules as regards both the jurisdiction of courts and the recognition and enforcement of judgments and the proper functioning of the unified system established by those rules. **173.** It follows from all those considerations that the Community has exclusive competence to conclude the new Lugano Convention. In conclusion, the Court (Full Court) gives the following opinion: **The conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as described in paragraphs 8 to 12 of the request for an opinion, reproduced in paragraph 26 of this Opinion, falls entirely within the sphere of exclusive competence of the European Community.**
13	Opinion 1/08 (30/11/2009) ECLI:EU:C:2009:739
	General Agreement on Trade in Services (GATS) - Conclusion of agreements on the grant of compensation for modification and withdrawal of certain commitments following the accession of new Member States to the European Union
	114. As a preliminary point, it must be recalled that, in the present case, the agreements at issue amend the GATS and more specifically the Annex thereto which includes the Schedules of specific commitments of WTO members. The GATS is a mixed agreement concluded both by the Community and by its Member States. The single Schedule of commitments of the Community and its Member States – the modification of which is inter alia the purpose of the agreements at issue – sets out, like the Schedules of the other WTO members, a collection of specific commitments which contribute to the establishment of a multilateral balance between the commitments of the various WTO members. **115.** In those circumstances, it is important to make clear from the outset that the Schedule of commitments of the Community and its Member States cannot be modified as the result of unilateral action by the Member States, whether they act individually or together. For such modifications, the Community's participation is essential. **116.** However, it does not necessarily follow from those circumstances that the same is true as far as the participation of the Member States in the agreements at issue is concerned. Indeed, whether the participation of the Member States is necessary depends, in this instance, on, inter alia, whether, by virtue of the amendments made to Article 133 EC by the Treaty of Nice, external Community competence has evolved in such a way as to justify the Community alone concluding the agreements at issue – a question which will be examined in this Opinion. **117.** The competence of the Community to participate in conclusion of the agreements at issue under Article 133(1) and (5) EC is beyond doubt. **118.** First, it is not in dispute that those agreements contain provisions which concern inter alia services supplied under mode 1. As the Court held in paragraph 44 of Opinion 1/94, such a mode which covers cross-frontier supplies of services falls within the concept of the common commercial

policy referred to in Article 133(1) EC. That provision, which, as the Court has consistently held, confers exclusive competence on the Community, has not been amended.

119. Second, it follows from the first subparagraph of Article 133(5) EC, which was introduced by the Treaty of Nice, that the Community is now also competent to conclude, under the common commercial policy, international agreements relating to trade in services supplied under modes 2 to 4. Such modes of supply of services, which the GATS refers to as 'consumption abroad', 'commercial presence' and 'presence of natural persons' respectively and which were formerly outside the sphere of the common commercial policy (see Opinion 1/94, paragraph 47), now fall within it on the conditions laid down in Article 133(5) and (6) EC.

120. Contrary to the submission of the Kingdom of Spain, nothing permits the inference that only trade in services through supplies made under mode 2, within the meaning of the GATS, is covered by the external Community competence thus established in the first subparagraph of Article 133(5) EC.

121. First, it may be noted that, given both its general nature and the fact that it was concluded at world level, the GATS assumes, as regards in particular the concept of 'trade in services' (an expression used both by the GATS and by the first subparagraph of Article 133(5) EC), particular importance in the sphere of international action relating to trade in services.

122. Second, the stipulation in the first subparagraph of Article 133(5) EC to the effect that the conclusion of agreements in the field of trade in services is now to fall within the common commercial policy 'in so far as those agreements are not covered by [Article 133(1) to (4) EC]' must particularly be read in the light of the context following Opinion 1/94, in which the Court – as has been recalled in paragraphs 118 and 119 of this Opinion – held that trade in the services supplied under mode 1 within the meaning of the GATS fell within the scope of Article 133(1) EC, to the exclusion of trade in the services supplied under modes 2 to 4 within the meaning of that agreement.

123. In this case and as is clear from paragraphs 34 to 39 of this Opinion, it is moreover established that the agreements at issue, particularly the modifications, withdrawals and compensatory adjustments which they include in relation to both horizontal and sectoral commitments, concern to a very great extent trade in services provided under modes 2 to 4.

124. Having regard to the foregoing, it may be concluded, in the context of the answer to be given to the second question raised in the request for an Opinion, that the Community has competence to conclude the agreements at issue in part under Article 133(1) EC and in part under Article 133(5) EC, so that the Community act concluding those agreements must be based inter alia on those two provisions.

125. In contrast to the Commission and the Parliament, which submit that conclusion of the agreements at issue falls within the exclusive competence of the Community, the Member States which have submitted observations and the Council take the view that the conclusion of those agreements requires the joint participation of the Community and its Member States. To explain why joint participation is necessary, they base their argument in particular (as is clear from paragraph 62 of this Opinion) on the second subparagraph of Article 133(6) EC.

126. Two preliminary observations must be made.

127. First, it must be recalled that concerns such as those expressed by the Commission relating to the need for unity and rapidity of external action and to the difficulties which might arise were the Community and the Member States to participate jointly in conclusion of the agreements at issue

cannot change the answer to the question of competence. Replying to similar arguments advanced by the Commission in the procedure concerning the request for Opinion 1/94 relating to conclusion of the agreements annexed to the WTO agreement, the Court held that the resolution of the issue of the allocation of competence could not depend on problems which might possibly arise in administration of the agreements concerned (Opinion 1/94, paragraph 107; see also, to that effect, Opinion 2/00, paragraph 41). The same clearly holds for possible problems relating to the conclusion of agreements.

128. Second, the fact, emphasised by the Commission, that the provisions in Annex I to the agreements at issue withdraw or modify commitments and accordingly result in service markets in the Member States being less open to suppliers of services from non-member countries and thus in a reduction in the external commitments with which the Member States have to comply, likewise cannot have any bearing on the determination of the rules establishing competence to make such withdrawals or modifications.

129. Indeed, external competence whereby commitments may be made to determine the conditions on which suppliers of services from non-member countries may have access to a service market within the Community necessarily includes competence to abandon or reduce such commitments.

130. Having made those preliminary points, it is now appropriate to consider the scope of the second subparagraph of Article 133(6) EC in order to ascertain whether that provision requires, as the Council and all the Member States which have expressed a view on this point have maintained, that the agreements at issue be concluded jointly by the Community and its Member States.

131. In the interpretation of that provision, it should be borne in mind, as has already been pointed out in paragraph 110 of this Opinion, that the Community has, as is clear from Article 5 EC, conferred powers only.

132. Furthermore, the first subparagraph of Article 133(5) EC, which establishes external Community competence in respect of international trade in services under modes 2 to 4, expressly provides that that competence is 'without prejudice' to Article 133(6) EC.

133. For its part, the second subparagraph of Article 133(6) EC provides that 'by way of derogation' from the first subparagraph of Article 133(5) EC, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services are to fall within the shared competence of the Community and its Member States and are to be concluded jointly by the Member States and the Community.

134. It is thus apparent from the very wording of those provisions that, in contrast to the agreements relating to trade in services which do not concern the services identified in the second subparagraph of Article 133(6) EC, agreements which relate to those services cannot be concluded by the Community acting alone, such conclusion requiring the joint participation of the Community and the Member States.

135. The second subparagraph of Article 133(6) EC reflects a concern to prevent trade in such services being regulated by means of international agreements concluded by the Community alone under its external competence in commercial matters. Without in any way excluding a Community competence in that regard, the second subparagraph of Article 133(6) EC requires, however, that that competence which the Community in this instance shares with its Member States be exercised jointly by those States and the Community.

136. It may be observed that, by providing in that way for common action by the Community and its Member States by virtue of their shared competence, the second subparagraph of Article 133(6) EC allows the interest of the Community in establishing a comprehensive, coherent and efficient external commercial policy to be pursued whilst at the same time allowing the special interests which the Member States might wish to defend in the sensitive areas identified by that provision to be taken into account. The requirement of unity in the international representation of the Community calls in addition for close cooperation between the Member States and the Community institutions in the process of negotiation and conclusion of such agreements (see, to that effect, inter alia, Opinion 2/00, paragraph 18 and case-law cited).

137. In view of the foregoing, the various arguments put forward by the Commission and the Parliament to restrict the scope of the second subparagraph of Article 133(6) EC cannot succeed.

138. As regards the contention of those institutions that that provision covers only agreements which concern exclusively or predominantly trade in services in the sectors referred to by it, the following points should be noted.

139. Besides the fact that it finds no support in the wording of the second subparagraph of Article 133(6) EC, such an interpretation cannot be reconciled with the aim pursued by that provision which, as has been pointed out in paragraph 135 of this Opinion, seeks to preserve for the Member States an effective external competence in the sensitive areas covered by the provision.

140. Indeed, one of the consequences of such an interpretation would be to remove from the sphere of application of the second subparagraph of Article 133(6) EC all the 'horizontal' agreements which concern trade in services as a whole. In addition, it would follow from that interpretation that international provisions with strictly the same object contained in an agreement and concerning the areas of sensitive services specified in the second subparagraph of Article 133(6) EC would fall within or outwith the shared competence of the Community and its Member States to which that provision refers depending solely on whether the contracting parties to the agreement decided to deal only with trade in such sensitive services or whether they agreed to deal at the same time with that trade and with trade in some other type of services or in services as a whole.

141. For the same reasons, the fact, also highlighted by the Commission, that the third subparagraph of Article 133(5) EC provides that a Community act concluding a horizontal agreement requires unanimity within the Council insofar as such an agreement also concerns the second subparagraph of Article 133(6) EC likewise cannot support the conclusion that Community competence to conclude such an agreement must, contrary to the case of sectoral agreements which specifically concern the sensitive areas referred to in that second subparagraph, be exclusive in character.

142. The third subparagraph of Article 133(5) EC articulates moreover a rule whose purpose is to state the manner in which Community competence must be exercised and not to specify the nature of that competence. Furthermore, the requirement for unanimity within the Council in relation to the adoption of a Community act concluding an agreement is not in any way incompatible with the fact that such conclusion falls within a competence which is shared with the Member States.

143. As regards the argument which the Commission also espouses that it follows from the first subparagraph of Article 133(6) EC that the second subparagraph thereof is applicable only where provisions of an agreement would lead to harmonisation in the sensitive service sectors covered by that second subparagraph, the following points should be noted.

144. As the Council and most of the Member States which have submitted observations have maintained, the premiss on which that argument is based, namely that the first subparagraph of Article 133(6) EC has the sole object of excluding external Community competence where the provisions of a proposed agreement lead to harmonisation of national laws or regulations in an area in which the Treaty rules out such harmonisation, cannot be inferred from that provision. Indeed, the case of harmonisation is mentioned in that provision only by way of example as use of the phrase 'in particular' shows.

145. That conclusion alone serves to rule out the Commission's interpretation which seeks, on that basis, to restrict the sphere of application of the second subparagraph of Article 133(6) EC to only those cases in which the provisions of a proposed agreement would lead to harmonisation in one of the service sectors identified in that second subparagraph.

146. In those circumstances, and having regard, in particular, to the points made in paragraphs 131 to 136 of this Opinion and specifically to the actual wording of the second subparagraph of Article 133(6) EC and to the aim which it pursues, the interpretation advocated by the Commission in respect of the second subparagraph cannot follow from the content of the first subparagraph of Article 133(6) EC.

147. In this instance, it is clear from the agreements at issue that the matters they cover include, as is stated in paragraph 36 of this Opinion, the extension to a number of new Member States of a sectoral limitation relating to educational services mentioned in the existing Schedule of commitments of the Community and its Member States and seeking to ensure that those services be covered by that Schedule only in so far as privately funded education services are concerned.

148. As has been seen in paragraph 34 of this Opinion, the agreements also extend to all or some of the new Member States various horizontal limitations concerning market access and national treatment. Such horizontal limitations are, as a general rule, applicable in all the service sectors covered by the Schedule of commitments of the Community and its Member States, which include services that are mentioned in the second subparagraph of Article 133(6) EC, such as privately funded education services or certain social or health services.

149. Thus, for example, the extension to the new Member States of the horizontal limitation relating to access under mode 3 to services regarded as public utilities at a national or local level which may be subject to public monopolies or to exclusive rights granted to private operators may, in particular, apply in relation to health services, as is expressly stated in the explanatory note relating to that limitation in the existing Schedule of commitments of the Community and its Member States.

150. In those circumstances, it follows from the second subparagraph of Article 133(6) EC that the Community and the Member States have in this instance a shared competence to conclude the agreements at issue jointly. That finding suffices to answer the first question raised in the request submitted to the Court for an Opinion.

151. It remains to point out, in view of the answer to be given to the second question raised in that request, that, since it is established that the second subparagraph of Article 133(6) EC governs the conclusion of the agreements at issue, that provision, which makes clear the shared nature of the Community competence in that regard and, in doing so, supplements the rule in the first subparagraph of Article 133(5) EC, must, like the latter provision, serve as a legal basis for the Community act concluding those agreements.

152. The Commission and the Parliament submit that Article 133(1) and (5) EC constitute the sole legal basis to which recourse must be had for the purposes of adoption of the Community act concluding the agreements at issue.

153. Conversely, the Council and all the Member States which have intervened in these proceedings and which have expressed a view on this point contend that, since the agreements cover inter alia transport services – in particular maritime and air transport services – the Community act concluding the agreements must, in addition to Article 133(1), (5) and (6) EC, also be based on Articles 71 EC and 80(2) EC.

154. In order to give an opinion on these divergent views, it is necessary, as all the governments and institutions which have submitted observations agree, to consider the third subparagraph of Article 133(6) EC, which specifically provides that the negotiation and conclusion of international agreements in the field of transport is to continue to be governed by the provisions of Title V of the Treaty and Article 300 EC.

155. According to the Commission and the Parliament, the third subparagraph of Article 133(6) EC must be interpreted as being applicable only in the case of agreements which are exclusively, or at the very least predominantly, concerned with transport. In the view of those institutions, that is not the case of the agreements at issue, whose object is trade in services in general, transport services for their part being only ancillary or secondary within the agreements.

156. In order to clarify the scope of the third subparagraph of Article 133(6) EC, it should, in the first place, be recalled that the first subparagraph of Article 133(5) EC, which, as has been stated above, confers external competence on the Community in respect of the common commercial policy in the field of trade in services supplied under modes 2 to 4, expressly states that that competence is 'without prejudice to paragraph 6'.

157. Second, it is highly unusual that a Treaty provision conferring external Community competence in a given field should resolve, as the third subparagraph of Article 133(6) EC does, a potential conflict of Community legal bases by specifically stating that another provision of the Treaty is to be preferred to it so far as concerns the conclusion of certain types of international agreements which are prima facie liable to be covered by one or other legal basis.

158. Third, there is no doubt that the expression 'international agreements in the field of transport' covers, inter alia, the field of trade concerning transport services. It would make no sense to specify in the middle of a provision relating to the common commercial policy that agreements in the field of transport which are not related to trade in transport services fall within the transport policy and not the common commercial policy.

159. Fourth, the provision stating that the negotiation and conclusion of agreements in the field of transport 'shall continue' to be governed by the provisions of the Treaty relating to transport policy reflects the intention that a form of status quo ante should be preserved in that field.

160. It should be recalled in that regard that in Opinion 1/94, given precisely in relation to the conclusion of the GATS which the agreements at issue are to modify, the Court held that international agreements in transport matters were not covered by Article 113 of the EC Treaty (now, after amendment, Article 133 EC) making clear that that was the case irrespective of the fact that such agreements concern safety rules such as those at issue in Case 22/70 Commission v Council ('ERTA')

[1971] ECR 263 or that they constitute, like the GATS, agreements of a commercial nature (see Opinion 1/94, paragraphs 48 to 53; see also, to that effect, Opinion 2/92, paragraph 27).

161. In order to arrive at that conclusion, the Court pointed out, in particular, (in paragraph 48 of Opinion 1/94) that transport was the subject of a specific title of the Treaty, distinct from the title on the common commercial policy, and recalled in that regard that it followed from settled case-law that the Community has an implied external competence under the common transport policy.

162. It follows from the foregoing that, before the entry into force of the Treaty of Nice, trade in services in transport matters remained wholly outside the common commercial policy. Even if supplied under mode 1, trade in such services thus continued, unlike other types of services, to be covered by the title of the Treaty relating to the common transport policy (Opinion 1/94, paragraph 53).

163. Fifth, the interpretation proposed by the Commission, by virtue of which only agreements exclusively or predominantly relating to trade in transport services are covered by the third subparagraph of Article 133(6) EC, would to a large extent deprive that provision of its effectiveness. Indeed, the consequence of that interpretation would be that international provisions with strictly the same object and contained in an agreement would fall in some cases within transport policy and in some cases within commercial policy depending solely on whether the parties to the agreement decided to deal only with trade in transport services or whether they agreed to deal at the same time with that trade and with trade in some other type of services or in services as a whole.

164. It is apparent, however, from all the foregoing that the third subparagraph of Article 133(6) EC seeks to maintain, with regard to international trade in transport services, a fundamental parallelism between internal competence whereby Community rules are unilaterally adopted and external competence which operates through the conclusion of international agreements, each competence remaining – as previously – anchored in the title of the Treaty specifically relating to the common transport policy.

165. It may, moreover, be observed that the particularity of Community action in respect of transport policy is underlined in Article 71(1) EC, which specifies that the Council is required to establish the common transport policy taking into account 'the distinctive features of transport'. Similarly, it may be noted that, with regard more specifically to the field of trade in services, Article 71(1)(b) EC expressly confers competence on the Community to lay down, for the purpose of implementing that policy, 'the conditions under which non-resident carriers may operate transport services within a Member State'.

166. As regards the case-law concerning the choice of legal basis by reference to the criterion of the principal and the incidental purpose of a Community act, to which the Commission has also referred in order to justify recourse to Article 133(1) and (5) EC alone when concluding the agreements at issue, it is sufficient, in this instance, to state that the provisions of the agreements at issue relating to trade in transport services cannot be held to constitute a necessary adjunct to ensure the effectiveness of the provisions of those agreements concerning other service sectors (see, in that regard, Opinion 1/94, paragraph 51) or to be extremely limited in scope (see, in that regard, Opinion 1/94, paragraph 67, and Case C-268/94 Portugal v Council [1996] ECR I-6177, paragraph 75).

167. First, trade in transport services, like trade in the other types of services covered by the GATS or by the agreements at issue, falls within the very purpose of the GATS and of those agreements,

which, moreover, have a direct and immediate effect on trade in each of the types of services thus affected, no distinction being possible in that regard between those types of services.

168. Second, it is established that the agreements at issue include, in this instance, a relatively high number of provisions whose effect is to modify both horizontal and sectoral commitments made by the Community and its Member States under the GATS, as regards the terms, conditions and limitations on which the Member States grant (i) access to transport services markets, in particular air or maritime, to suppliers of services from other WTO members and (ii) national treatment.

169. It is clear for example from paragraph 34 of this Opinion that Annex I(A) to the agreements at issue extends to various new Member States the horizontal limitation relating to access under mode 3 to services regarded as public utilities at a national or local level which may be subject to public monopolies or to exclusive rights granted to private operators. As is specifically made clear by the explanatory note relating to that horizontal limitation in the existing Schedule of commitments of the Community and its Member States, that limitation may affect, inter alia, transport services and services related and auxiliary to all modes of transport. Likewise, the horizontal restrictions relating in some cases to national treatment and in others to market access, with which paragraph 34 of this Opinion is also concerned, are as a rule applicable in the service sectors covered by that Schedule of the Community and its Member States, which include, for example, certain air transport services such as services for the repair and maintenance of aircraft, sales and marketing of transport services or computer reservations systems as well as road transport services for passengers or freight.

170. Furthermore, as is clear from paragraphs 36 and 37 of this Opinion, Annex I(A) to the agreements at issue also includes a number of provisions relating to sectoral commitments concerning transport services, which in some cases involve extension of sectoral limitations to certain new Member States and in some cases introduce such limitations in their regard.

171. Annex I(B) to the agreements at issue effects, as can be seen from paragraph 38 of this Opinion, various withdrawals of horizontal commitments previously given by the Republic of Malta and the Republic of Cyprus in relation to national treatment under mode 4, as well as the withdrawal of a sectoral commitment given by the Republic of Malta concerning maritime transport services for passengers and freight.

172. With regard, finally to the legislative practice invoked by the Commission, it is sufficient to recall that a mere practice on the part of the Council cannot derogate from rules laid down in the Treaty and cannot therefore create a precedent binding on the Community institutions with regard to the correct legal basis (Opinion 1/94, paragraph 52). According to settled case-law, the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review and not on the legal basis used for the adoption of other Community measures which might, in certain cases, display similar characteristics (see, inter alia, Case C-155/07 Parliament v Council [2008] ECR I-0000, paragraph 34 and case-law cited).

173. On the basis of all the foregoing it must be concluded, in the context of the answer to be given to the second question raised in the request for an Opinion, that the 'transport' aspect of the agreements at issue falls, in accordance with the third subparagraph of Article 133(6) EC, within the sphere of transport policy and not that of the common commercial policy.

In conclusion, the Court (Grand Chamber) gives the following opinion:

1. The conclusion of the agreements with the affected members of the World Trade Organisation, pursuant to Article XXI of the General Agreement on Trade in Services (GATS),

	as described in the request for an Opinion, falls within the sphere of shared competence of the European Community and the Member States. **2. The Community act concluding the abovementioned agreements must be based both on Article 133(1), (5) and (6), second subparagraph, EC and on Articles 71 EC and 80(2) EC, in conjunction with Article 300(2) and (3), first subparagraph, EC.**
14	Opinion 1/09 (08/03/2011) ECLI:EU:C:2011:123 **Draft agreement – Creation of a unified patent litigation system – European and Community Patents Court**
	66. As is evident from Article 19(1) TEU, the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States. **67.** Moreover, it is for the Court to ensure respect for the autonomy of the European Union legal order thus created by the Treaties (see Opinion 1/91, paragraph 35). **68.** It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law (see, to that effect, Case C-298/96 Oelmühle and Schmidt Söhne [1998] ECR I-4767, paragraph 23). Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to 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 European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law (see, to that effect, Case C-432/05 Unibet [2007] ECR I-2271, paragraph 38 and case-law cited). **69.** The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed (see Case 244/80 Foglia [1981] ECR 3045, paragraph 16, and Joined Cases C-422/93 to C-424/93 Zabala Erasun and Others [1995] ECR I-1567, paragraph 15). **70.** The judicial system of the European Union is moreover a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions (see, inter alia, Case C-50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I-6677, paragraph 40). **71.** As regards the characteristics of the PC, it must first be observed that that court is outside the institutional and judicial framework of the European Union. It is not part of the judicial system provided for in Article 19(1) TEU. The PC is an organisation with a distinct legal personality under international law. **72.** In accordance with Article 15 of the draft agreement, the PC is to be vested with exclusive jurisdiction in respect of a significant number of actions brought by individuals in the field of patents. That jurisdiction extends, in particular, to actions for actual or threatened infringements of patents, counterclaims concerning licences, actions for declarations of non-infringement, actions for provisional and protective measures, actions or counterclaims for revocation of patents, actions for damages or compensation derived from the provisional protection conferred by a published patent application, actions relating to the use of the invention before the granting of the patent or to the right based on prior use of the patent, actions for the grant or revocation of compulsory licences in respect of Community patents, and actions for compensation for licences. To that extent, the courts of the

contracting States, including the courts of the Member States, are divested of that jurisdiction and accordingly retain only those powers which are not subject to the exclusive jurisdiction of the PC.

73. It must be added that, in accordance with Article 14a of the draft agreement, the PC, in carrying out its tasks, has the duty to interpret and apply European Union law. The draft agreement confers on that court the main part of the jurisdiction ratione materiae held, normally, by the national courts, to hear disputes in the Community patent field and to ensure, in that field, the full application of European Union law and the judicial protection of individual rights under that law.

74. As regards an international agreement providing for the creation of a court responsible for the interpretation of its provisions, the Court has, it is true, held that such an agreement is not, in principle, incompatible with European Union law. The competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit itself to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions (see Opinion 1/91, paragraphs 40 and 70).

75. Moreover, the Court has stated that an international agreement concluded with third countries may confer new judicial powers on the Court provided that in so doing it does not change the essential character of the function of the Court as conceived in the EU and FEU Treaties (see, by analogy, Opinion 1/92 [1992] ECR I-2821, paragraph 32).

76. The Court has also declared that an international agreement may affect its own powers provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the European Union legal order (see Opinion 1/00 [2002] ECR I-3493, paragraphs 21, 23 and 26).

77. However, the judicial systems under consideration in the abovementioned Opinions were designed, in essence, to resolve disputes on the interpretation or application of the actual provisions of the international agreements concerned. Further, while providing particular powers to the courts of third countries to refer cases to the Court for a preliminary ruling, those systems did not affect the powers of the courts and tribunals of Member States in relation to the interpretation and application of European Union law, nor the power, or indeed the obligation, of those courts and tribunals to request a preliminary ruling from the Court of Justice and the power of the Court to reply.

78. By contrast, the international court envisaged in this draft agreement is to be called upon to interpret and apply not only the provisions of that agreement but also the future regulation on the Community patent and other instruments of European Union law, in particular regulations and directives in conjunction with which that regulation would, when necessary, have to be read, namely provisions relating to other bodies of rules on intellectual property, and rules of the FEU Treaty concerning the internal market and competition law. Likewise, the PC may be called upon to determine a dispute pending before it in the light of the fundamental rights and general principles of European Union law, or even to examine the validity of an act of the European Union.

79. As regards the draft agreement submitted for the Court's consideration, it must be observed that the PC:

– takes the place of national courts and tribunals, in the field of its exclusive jurisdiction described in Article 15 of that draft agreement,

– deprives, therefore, those courts and tribunals of the power to request preliminary rulings from the Court in that field,

– becomes, in the field of its exclusive jurisdiction, the sole court able to communicate with the Court by means of a reference for a preliminary ruling concerning the interpretation and application of European Union law and

– has the duty, within that jurisdiction, in accordance with Article 14a of that draft agreement, to interpret and apply European Union law.

80. While it is true that the Court has no jurisdiction to rule on direct actions between individuals in the field of patents, since that jurisdiction is held by the courts of the Member States, nonetheless the Member States cannot confer the jurisdiction to resolve such disputes on a court created by an international agreement which would deprive those courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU, or, as the case may be, the obligation, to refer questions for a preliminary ruling in the field concerned.

81. The draft agreement provides for a preliminary ruling mechanism which reserves, within the scope of that agreement, the power to refer questions for a preliminary ruling to the PC while removing that power from the national courts.

82. It must be emphasised that the situation of the PC envisaged by the draft agreement would differ from that of the Benelux Court of Justice which was the subject of Case C-337/95 Parfums Christian Dior [1997] ECR I-6013, paragraphs 21 to 23. Since the Benelux Court is a court common to a number of Member States, situated, consequently, within the judicial system of the European Union, its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union.

83. It should also be recalled that Article 267 TFEU, which is essential for the preservation of the Community character of the law established by the Treaties, aims to ensure that, in all circumstances, that law has the same effect in all Member States. The preliminary ruling mechanism thus established aims to avoid divergences in the interpretation of European Union law which the national courts have to apply and tends to ensure this application by making available to national judges a means of eliminating difficulties which may be occasioned by the requirement of giving European Union law its full effect within the framework of the judicial systems of the Member States. Further, the national courts have the most extensive power, or even the obligation, to make a reference to the Court if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of the provisions of European Union law and requiring a decision by them (see, to that effect, Case 166/73 Rheinmühlen-Düsseldorf [1974] ECR 33, paragraphs 2 and 3, and Case C-458/06 Gourmet Classic [2008] ECR I-4207, paragraph 20).

84. The system set up by Article 267 TFEU therefore establishes between the Court of Justice and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order.

85. It follows from all of the foregoing that the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties.

86. In that regard, the Court has stated that the principle that a Member State is obliged to make good damage caused to individuals as a result of breaches of European Union law for which it is

	responsible applies to any case in which a Member State infringes European Union law, whichever is the authority of the Member State whose act or omission was responsible for the breach, and that principle also applies, under specific conditions, to judicial bodies (see, to that effect, Case C-224/01 Köbler [2003] ECR I-10239, paragraphs 31 and 33 to 36; Case C-173/03 Traghetti del Mediterraneo [2006] ECR I-5177, paragraphs 30 and 31, and judgment of 12 November 2009 in Case C-154/08 Commission v Spain, paragraph 125). **87.** It must be added that, where European Union law is infringed by a national court, the provisions of Articles 258 TFEU to 260 TFEU provide for the opportunity of bringing a case before the Court to obtain a declaration that the Member State concerned has failed to fulfil its obligations (see Case C-129/00 Commission v Italy [2003] ECR I-14637, paragraphs 29, 30 and 32). **88.** It is clear that if a decision of the PC were to be in breach of European Union law, that decision could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more Member States. **89.** Consequently, the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law. Consequently, the Court (Full Court) gives the following Opinion: **The envisaged agreement creating a unified patent litigation system (currently called 'European and Community Patents Court') is not compatible with the provisions of the EU Treaty and the FEU Treaty.**
15	Opinion 1/13 (14/10/2014) ECLI:EU:C:2014:2303 **Convention on the civil aspects of international child abduction — Accession of third States** **67.** The competence of the EU to conclude international agreements may arise not only from an express conferment by the Treaties but may equally flow implicitly from other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the EU institutions. In particular, whenever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/03, EU:C:2006:81, paragraph 114 and the case-law cited). The last-mentioned possibility is also referred to in Article 216(1) TFEU. **68.** In the matter in issue, the 1980 Hague Convention concerns civil cooperation where children are moved across borders. The Convention thus falls within the area of family law with cross-border implications in which the EU has internal competence under Article 81(3) TFEU. Moreover, the EU has exercised that competence by adopting Regulation No 2201/2003. In those circumstances, the EU has external competence in the area which forms the subject-matter of the Convention. **69.** The FEU Treaty specifies, in particular in Article 3(2), the circumstances in which the EU has exclusive external competence.

	70. In that regard, it is common ground that acceptance of the accession of a third State to the 1980 Hague Convention is not provided for in any legislative act of the EU and that such acceptance is not necessary to enable the EU to exercise its internal competence. Consequently, the request for an opinion must be considered in the light of the third condition referred to in Article 3(2) TFEU, namely that the EU has exclusive competence for the conclusion of an international agreement in so far as its conclusion 'may affect common rules or alter their scope'. **71.** The question as to whether that condition is met must be examined in the light of the Court's case-law according to which there is a risk that common EU rules may be adversely affected by international commitments undertaken by the Member States, or that the scope of those rules may be altered, which is such as to justify an exclusive external competence of the EU, where those commitments fall within the scope of those rules (see, to that effect, judgments in Commission v Council ('ERTA'), 22/70, EU:C:1971:32, paragraph 30; Commission v Denmark, C-467/98, EU:C:2002:625, paragraph 82; and Commission v Council, C-114/12, EU:C:2014:2151, paragraphs 66 to 68). **72.** A finding that there is such a risk does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully (see Opinion 1/03, EU:C:2006:81, paragraph 126, and judgment in Commission v Council, EU:C:2014:2151, paragraph 69). **73.** In particular, the scope of EU rules may be affected or altered by international commitments where such commitments are concerned with an area which is already covered to a large extent by such rules (see, to that effect, Opinion 2/91, EU:C:1993:106, paragraphs 25 and 26). As the Court has already held and contrary to what has been maintained by the Council and certain governments that have submitted observations, that circumstance remains relevant, in the context of Article 3(2) TFEU, for the purpose of ascertaining whether the condition pertaining to the risk of EU common rules being affected, or of their scope being altered, is met (judgment in Commission v Council, EU:C:2014:2151, paragraphs 70, 72 and 73). **74.** That said, since the EU has only conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the envisaged international agreement and the EU law in force. That analysis must take into account the areas covered by the EU rules and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish (see Opinion 1/03, EU:C:2006:81, paragraphs 126, 128 and 133, and judgment in Commission v Council, EU:C:2014:2151, paragraph 74).
16	Opinion 2/13 (18/12/2014) ECLI:EU:C:2014:2454 **EU accession to the European Convention on Human Rights** **182.** The Court of Justice has admittedly already stated in that regard that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions (see Opinions 1/91, EU:C:1991:490, paragraphs 40 and 70, and 1/09, EU:C:2011:123, paragraph 74).

183. Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order (see Opinions 1/00, EU:C:2002:231, paragraphs 21, 23 and 26, and 1/09, EU:C:2011:123, paragraph 76; see also, to that effect, judgment in Kadi and Al Barakaat International Foundation v Council and Commission, EU:C:2008:461, paragraph 282).

184. In particular, any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law (see Opinions 1/91, EU:C:1991:490, paragraphs 30 to 35, and 1/00, EU:C:2002:231, paragraph 13).

185. It is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on the EU and its institutions, including the Court of Justice, and that, on the other, the interpretation by the Court of Justice of a right recognised by the ECHR would not be binding on the control mechanisms provided for by the ECHR, particularly the ECtHR, as Article 3(6) of the draft agreement provides and as is stated in paragraph 68 of the draft explanatory report.

However, there is no provision in the agreement envisaged to ensure such coordination.

191. In the second place, it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, judgments in N. S. and Others, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80, and Melloni, EU:C:2013:107, paragraphs 37 and 63).

192. Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.

193. The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.

194. In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

195. However, the agreement envisaged contains no provision to prevent such a development.

201. The Court has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein (see, to that effect, Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and 12; judgments in Commission v Ireland, C-459/03, EU:C:2006:345, paragraphs 123 and 136, and Kadi and Al Barakaat International Foundation v Council and Commission, EU:C:2008:461, paragraph 282).

202. Furthermore, the obligation of Member States to have recourse to the procedures for settling disputes established by EU law — and, in particular, to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system — must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU (see, to that effect, judgment in Commission v Ireland, EU:C:2006:345, paragraph 169), it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the EU.

203. It is precisely in view of these considerations that Article 3 of Protocol No 8 EU expressly provides that the accession agreement must not affect Article 344 TFEU.

204. However, as explained in paragraph 180 of this Opinion, as a result of accession, the ECHR would form an integral part of EU law. Consequently, where EU law is at issue, the Court of Justice has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR.

205. Unlike the international convention at issue in the case giving rise to the judgment in Commission v Ireland (EU:C:2006:345, paragraphs 124 and 125), which expressly provided that the system for the resolution of disputes set out in EU law must in principle take precedence over that established by that convention, the procedure for the resolution of disputes provided for in Article 33 of the ECHR could apply to any Contracting Party and, therefore, also to disputes between the Member States, or between those Member States and the EU, even though it is EU law that is in issue.

206. In that regard, contrary to what is maintained in some of the observations submitted to the Court of Justice in the present procedure, the fact that Article 5 of the draft agreement provides that proceedings before the Court of Justice are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR is not sufficient to preserve the exclusive jurisdiction of the Court of Justice.

207. Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law.

208. The very existence of such a possibility undermines the requirement set out in Article 344 TFEU.

209. This is particularly so since, if the EU or Member States did in fact have to bring a dispute between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seised of such a dispute.

210. Contrary to the provisions of the Treaties governing the EU's various internal judicial procedures, which have objectives peculiar to them, Article 344 TFEU is specifically intended to preserve the exclusive nature of the procedure for settling those disputes within the EU, and in particular of the jurisdiction of the Court of Justice in that respect, and thus precludes any prior or subsequent external control.

211. Moreover, Article 1(b) of Protocol No 8 EU itself refers only to the mechanisms necessary to ensure that proceedings brought before the ECtHR by non-Member States are correctly addressed to Member States and/or to the EU as appropriate.

212. Consequently, the fact that Member States or the EU are able to submit an application to the ECtHR is liable in itself to undermine the objective of Article 344 TFEU and, moreover, goes against the very nature of EU law, which, as noted in paragraph 193 of this Opinion, requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law.

213. In those circumstances, only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope ratione materiae of EU law would be compatible with Article 344 TFEU.

214. In the light of the foregoing, it must be held that the agreement envisaged is liable to affect Article 344 TFEU.

215. The co-respondent mechanism has been introduced, as is apparent from paragraph 39 of the draft explanatory report, in order to 'avoid gaps in participation, accountability and enforceability in the [ECHR] system', gaps which, owing to the specific characteristics of the EU, might result from its accession to the ECHR.

216. In addition, that mechanism also has the aim of ensuring that, in accordance with the requirements of Article 1(b) of Protocol No 8 EU, proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.

217. However, those objectives must be pursued in such a way as to be compatible with the requirement of ensuring that the specific characteristics of EU law are preserved, as required by Article 1 of that protocol.

218. Yet, first, Article 3(5) of the draft agreement provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party.

219. When the ECtHR invites a Contracting Party to become co-respondent, that invitation is not binding, as is expressly stated in paragraph 53 of the draft explanatory report.

220. This lack of compulsion reflects not only, as paragraph 53 of the draft explanatory report indicates, the fact that the initial application has not been brought against the potential co-respondent and that no Contracting Party can be forced to become a party to a case where it was not named in the application initiating proceedings, but also, above all, the fact that the EU and Member States must remain free to assess whether the material conditions for applying the co-respondent mechanism are met.

221. Given that those conditions result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR, the decision as to whether those conditions are met in a particular case necessarily presupposes an assessment of EU law.

222. While the draft agreement duly takes those considerations into account as regards the procedure in accordance with which the ECHR may invite a Contracting Party to become co-respondent, the same cannot be said in the case of a request to that effect from a Contracting Party.

223. As Article 3(5) of the draft agreement provides, if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must give reasons from which it can be established that the conditions for their participation in the procedure are met, and the ECtHR is to decide on that request in the light of the plausibility of those reasons.

224. Admittedly, in carrying out such a review, the ECtHR is to ascertain whether, in the light of those reasons, it is plausible that the conditions set out in paragraphs 2 and 3 of Article 3 are met, and that review does not relate to the merits of those reasons. However, the fact remains that, in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU.

225. Such a review would be liable to interfere with the division of powers between the EU and its Member States.

226. Secondly, Article 3(7) of the draft agreement provides that if the violation in respect of which a Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent are to be jointly responsible for that violation.

227. That provision does not preclude a Member State from being held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State may have made a reservation in accordance with Article 57 of the ECHR.

228. Such a consequence of Article 3(7) of the draft agreement is at odds with Article 2 of Protocol No 8 EU, according to which the accession agreement is to ensure that nothing therein affects the situation of Member States in relation to the ECHR, in particular in relation to reservations thereto.

229. Thirdly, there is provision at the end of Article 3(7) of the draft agreement for an exception to the general rule that the respondent and co-respondent are to be jointly responsible for a violation established. The ECtHR may decide, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, that only one of them is to be held responsible for that violation.

230. A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission.

231. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States.

232. That conclusion is not affected by the fact that the ECtHR would have to give its decision solely on the basis of the reasons given by the respondent and the co-respondent.

233. Contrary to the submissions of some of the Member States that participated in the present procedure and of the Commission, it is not clear from reading Article 3(7) of the draft agreement and paragraph 62 of the draft explanatory report that the reasons to be given by the respondent and co-respondent must be given by them jointly.

234. In any event, even it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law. The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction.

235. Having regard to the foregoing, it must be held that the arrangements for the operation of the co-respondent mechanism laid down by the agreement envisaged do not ensure that the specific characteristics of the EU and EU law are preserved.

236. It is true that the necessity for the procedure for the prior involvement of the Court of Justice is, as paragraph 65 of the draft explanatory report shows, linked to respect for the subsidiary nature of the control mechanism established by the ECHR, as referred to in paragraph 19 of this Opinion. Nevertheless, it should equally be noted that that procedure is also necessary for the purpose of ensuring the proper functioning of the judicial system of the EU.

237. In that context, the necessity for the prior involvement of the Court of Justice in a case brought before the ECtHR in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved, as required by Article 2 of Protocol No 8 EU.

238. Accordingly, to that end it is necessary, in the first place, for the question whether the Court of Justice has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR to be resolved only by the competent EU institution, whose decision should bind the ECtHR.

239. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice.

240. Yet neither Article 3(6) of the draft agreement nor paragraphs 65 and 66 of the draft explanatory report contain anything to suggest that that possibility is excluded.

241. Consequently, the prior involvement procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent EU institution is able to assess whether the Court of Justice has already given a ruling on

the question at issue in that case and, if it has not, to arrange for the prior involvement procedure to be initiated.

242. In the second place, it should be noted that the procedure described in Article 3(6) of the draft agreement is intended to enable the Court of Justice to examine the compatibility of the provision of EU law concerned with the relevant rights guaranteed by the ECHR or by the protocols to which the EU may have acceded. Paragraph 66 of the draft explanatory report explains that the words '[a]ssessing the compatibility of the provision' mean, in essence, to rule on the validity of a legal provision contained in secondary law or on the interpretation of a provision of primary law.

243. It follows from this that the agreement envisaged excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law by means of the prior involvement procedure.

244. However, it must be noted that, just as the prior interpretation of primary law is necessary in order for the Court of Justice to be able to rule on whether that law is consistent with the EU's commitments resulting from its accession to the ECHR, it should be possible for secondary law to be subject to such interpretation for the same purpose.

245. The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation.

246. If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.

247. Accordingly, limiting the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of the Court of Justice in that it does not allow the Court to provide a definitive interpretation of secondary law in the light of the rights guaranteed by the ECHR.

248. Having regard to the foregoing, it must be held that the arrangements for the operation of the procedure for the prior involvement of the Court of Justice provided for by the agreement envisaged do not enable the specific characteristics of the EU and EU law to be preserved.

258. In the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:

– it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;

– it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope ratione materiae of EU law being brought before the ECtHR;

	– it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and – it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body. Consequently, the Court (Full Court) gives the following Opinion: **The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.**
17	Opinion 3/15 (14/02/2017) ECLI:EU:C:2017:114 **Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled** **60.** In view of its purpose and content, it is clear that the Marrakesh Treaty does not concern the first four areas referred to in Article 3(1) TFEU. However, consideration must be given to whether that treaty relates, in whole or in part, to the common commercial policy, defined in Article 207 TFEU, which, under Article 3(1)(e) TFEU, falls within the European Union's exclusive competence. **61.** According to the Court's settled case-law, the mere fact that an EU act is liable to have implications for international trade is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy 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 (judgments of 18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland, C-414/11, EU:C:2013:520, paragraph 51, and of 22 October 2013, Commission v Council, C-137/12, EU:C:2013:675, paragraph 57). **62.** In order to determine whether the Marrakesh Treaty falls within the common commercial policy, it is necessary to examine both the purpose of that treaty and its content. **102.** Pursuant to Article 3(2) TFEU, the European Union has exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope. **103.** The conclusion of the Marrakesh Treaty is not provided for in any legislative act of the European Union and its conclusion is not necessary to enable the Union to exercise its internal competence. **104.** Consequently, only the case mentioned in the last limb of Article 3(2) TFEU is relevant here: that case concerns a situation in which the conclusion of an international agreement 'may affect common rules or alter their scope'. **105.** In that regard, the Court has held that there is a risk that common EU rules may be adversely affected by international commitments undertaken by the Member States, or that the scope of those rules may be altered, which is such as to justify an exclusive external competence of the European Union, where those commitments fall within the scope of those rules (Opinion 1/13 (Accession of

	third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 71, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 29). **106.** A finding that there is such a risk does not presuppose that the area covered by the international commitments and that of the EU rules coincide fully (Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 72, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 30). **107.** In particular, such international commitments may affect EU rules or alter their scope when the commitments fall within an area which is already covered to a large extent by such rules (see, to that effect, Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 73, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 31). **108.** That said, since the EU is vested only with conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the EU law in force. That analysis must take into account the areas covered, respectively, by the rules of EU law and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish (Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 74, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 33). **128.** Consequently, the conclusion of the Marrakesh Treaty would mean that the various constraints and requirements imposed by EU law which are mentioned in paragraphs 123 to 125 of this Opinion will apply to all the Member States, which would henceforth be required to provide for such an exception or limitation under Article 4 of that treaty. **129.** Accordingly, the body of obligations laid down by the Marrakesh Treaty falls within an area that is already covered to a large extent by common EU rules and the conclusion of that treaty may thus affect those rules or alter their scope. **130.** It follows from the foregoing considerations that the conclusion of the Marrakesh Treaty falls within the exclusive competence of the European Union. Consequently, the Court (Grand Chamber) gives the following Opinion: **The conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled falls within the exclusive competence of the European Union.**
18	Opinion 2/15 (16/05/2017) ECLI:EU:C:2017:376
	EU-Singapore Free Trade Agreement (EUSFTA)
	276. The Court has already had occasion to point out that the competence of the European Union to enter into international commitments includes competence to couple those commitments with institutional provisions. Their presence in the agreement has no effect on the nature of the competence to conclude it. Those provisions are of an ancillary nature and therefore fall within the same competence as the substantive provisions which they accompany (see to that effect, inter alia, 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, paragraph 5; Opinion 1/78 (International Agreement on Natural Rubber) of 4 October 1979, EU:C:1979:224, paragraph 56; and judgment of 22 October 2013, Commission v Council, C-137/12, EU:C:2013:675, paragraphs 70 and 71). **290.** Without prejudice to what is stated in paragraph 30 of this opinion, the Court has the task of ruling on the nature of the competence to establish such a dispute settlement regime. In that regard, whilst it is true that, as is clear from Article 9.17 thereof, the envisaged agreement does not rule out the possibility of a dispute between a Singapore investor and a Member State being brought before the courts of that Member State, the fact remains that that is merely a possibility in the discretion of the claimant investor. **291.** The claimant investor may indeed decide, pursuant to Article 9.16 of the envisaged agreement, to submit the dispute to arbitration, without that Member State being able to oppose this, as its consent in this regard is deemed to be obtained under Article 9.16.2 of the agreement. **292.** Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature within the meaning of the case-law recalled in paragraph 276 of this opinion and cannot, therefore, be established without the Member States' consent. **293.** It follows that approval of Section B of Chapter 9 of the envisaged agreement falls not within the exclusive competence of the European Union, but within a competence shared between the European Union and the Member States.
19	Opinion 1/17 (30/04/2019) ECLI:EU:C:2019:341 **EU-Canada Comprehensive Economic and Trade Agreement (CETA)**
	74. In addition, by virtue of the mechanism referred to in Article 8.21 of the CETA, that Tribunal cannot take notice of the division of powers between the European Union and its Member States. The difficulty identified by the Court in paragraphs 33 to 36 of Opinion 1/91 (EEA Agreement — I) of 14 December 1991 (EU:C:1991:490), and in paragraphs 224 and 225 of Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454), therefore does not arise in this case. **132.** The fact that there is no jurisdiction to interpret the rules of EU law other than the provisions of the CETA is also reflected in Article 8.21 of that agreement, which confers not on the CETA Tribunal, but on the Union, the power to determine, when a Canadian investor seeks to challenge measures adopted by a Member State and/or by the Union, whether the dispute is, in the light of the rules on the division of powers between the Union and its Member States, to be brought against that Member State or against the Union. The exclusive jurisdiction of the Court to give rulings on the division of powers between the Union and its Member States is thereby preserved, and Section F of Chapter Eight of the CETA must be distinguished in that regard from the draft agreement that was the subject of Opinion 2/13 (Accession of the Union to the ECHR) of 18 December 2014, (EU:C:2014:2454, paragraphs 224 to 231). **140.** It must be noted, second, that, notwithstanding Article 8.21 of the CETA, which confers on the Union the power to determine whether, if a claim is lodged before the CETA Tribunal by a Canadian investor, the Union will itself be the respondent or whether it will leave that position to the investment host Member State, the Union will not be able to object, when the contested measure was adopted by it, to that measure being examined by that Tribunal. It follows from the rules of procedure laid down in the CETA, and in particular Article 8.25.1 of that agreement, that the respondent, whether that is the investment host Member State or the Union itself, is required to consent to the settlement of that dispute by that Tribunal.

	Opinion 1/19 (6/10/2021) **Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)**
20	**236**. Article 218(1) TFEU thus requires that agreements between the European Union and third countries or international organisations which, in accordance with Article 216(2) TFEU, are binding upon the institutions of the European Union and on Member States once they have been concluded, are to be negotiated and concluded in accordance with the procedure laid down in the relevant paragraphs of Article 218 TFEU. **237.** In that regard, in accordance with Article 218(2) and (6) TFEU, the decision concluding such agreements is to be adopted by the Council, where appropriate after obtaining the consent or consulting the Parliament. No competence is granted to the Member States for the adoption of such a decision. **238.** In addition, it follows from Article 218(8) TFEU that, as regards a decision such as that mentioned in the previous paragraph, the Council is to act by a qualified majority in the event that such a decision does not correspond to any of the situations in which the second subparagraph of Article 218(8) TFEU requires a unanimous vote (see, to that effect, judgment of 2 September 2021, Commission v Council (Agreement with Armenia), C-180/20, EU:C:2021:658, paragraph 30 and the case-law cited). **239.** In the present case, it is common ground between the parties to the present proceedings, first of all, that the Istanbul Convention is, assuming it is concluded, to be a mixed agreement, concluded as such by the European Union and the Member States, next, that the Council's decision concluding that convention on behalf of the European Union may be adopted only after obtaining the consent of the Parliament and, lastly, that, in accordance with the provisions of the first subparagraph of Article 218(8) TFEU, it is by qualified majority that the Council is, in that scenario, to act in adopting that decision, since it does not correspond to any of the situations for which the second subparagraph of Article 218(8) requires a unanimous vote. **240.** The contracting parties to a mixed agreement concluded with third countries are, first, the European Union and, secondly, the Member States. When such an agreement is negotiated and concluded, each of those parties must act within the framework of the competences which it has while respecting the competences of any other contracting party (judgment of 28 April 2015, Commission v Council, C-28/12, EU:C:2015:282, paragraph 47). **241.** It is true that the Court has acknowledged that, where it is apparent that the subject matter of an agreement falls partly within the competence of the European Union and partly within that of the Member States, it is essential to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into (judgment of 28 April 2015, Commission v Council, C-28/12, EU:C:2015:282, paragraph 54 and the case-law cited). **242.** However, that principle cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU (judgment of 28 April 2015, Commission v Council, C-28/12, EU:C:2015:282, paragraph 55). **243.** The Court has thus specified that it is not permissible to bring together in a single decision, or adopt under a single procedure, two different acts, one of which entails a consensus of the representatives of the Member States, and therefore their unanimous agreement, whereas the other

must be adopted in accordance with Article 218(8) TFEU, which provides that the Council must act, on behalf of the European Union, by a qualified majority (see, to that effect, judgment of 28 April 2015, Commission v Council, C-28/12, EU:C:2015:282, paragraph 52).

244. In the present case, it is admittedly common ground that the practice of 'common accord' does not lead to two different acts – one being the result of a consensus of the Member States while the other is adopted by the European Union – being brought together in a single hybrid decision, such as the one annulled in the judgment cited in the previous paragraph.

245. However, in so far as that practice entails that the establishment of the 'common accord' of the Member States to be bound by a mixed agreement in the fields falling within their competences is a prerequisite, in the Council's view, for initiating the conclusion procedure laid down in Article 218(2), (6) and (8) TFEU, it results in the addition to that procedure of a step which is not provided for in the Treaties and which is therefore inconsistent with the case-law referred to in paragraph 232 above and with the considerations in paragraphs 237 to 243 above.

246. More specifically, as rightly pointed out by the Republic of Austria, the Republic of Finland, the Parliament and the Commission, in so far as that practice makes the initiation of that procedure contingent upon a consensus of the representatives of the Member States, and therefore on their unanimous agreement – whereas Article 218(2), (6) and (8) TFEU envisages the conclusion by the European Union of an international agreement as an autonomous act of the European Union which is adopted by the Council acting by a qualified majority, where appropriate after obtaining the consent of or consulting the Parliament – it establishes a hybrid decision-making process which is incompatible with the requirements set out in those provisions and contrary to the case-law resulting from the judgment of 28 April 2015, Commission v Council (C-28/12, EU:C:2015:282).

247. If the practice of 'common accord' were to have a scope such as that set out in paragraph 245 above, the European Union's ability to conclude a mixed agreement would depend entirely on each Member State's willingness to be bound by that agreement in the fields falling within their competences and, therefore, on the Member States' sovereign choices in those fields.

248. In accordance with Article 218(2), (6) and (8) TFEU, where the conclusion of an international agreement is proposed to the Council, it is for the Council alone to decide on the conclusion of that agreement, acting, in principle, by a qualified majority and, where appropriate, after obtaining the consent of or consulting the Parliament. It has also been held in that respect that the Council may, in that situation, decide that the European Union should exercise alone the external competence that it shares with the Member States in the field of activity concerned, provided that the required majority to do so is obtained within the Council (see, to that effect, judgment of 5 December 2017, Germany v Council, C-600/14, EU:C:2017:935, paragraph 68).

249. It follows that the Treaties not only do not require the Council to wait, before concluding the Istanbul Convention on behalf of the European Union, for the 'common accord' of the Member States to be bound by that convention in the fields falling within their competences, but that they prohibit it from making the initiation of the procedure for concluding that convention, set out in Article 218(2), (6) and (8) TFEU, contingent on the prior establishment of such a 'common accord'.

250. That being said, the conclusion of an international agreement by the European Union depends on whether the Council is able to obtain the required majority.

251. Furthermore, as the Advocate General observed in point 200 of his Opinion, the Treaties do not lay down any period of time within which the Council is required to adopt a decision concluding such an agreement.

252. It follows that, within the limits of the procedure laid down in Article 218(2), (6) and (8) TFEU and subject to the consent of the Parliament, where it is required, both the decision whether or not to act on the proposal to conclude an international agreement, and, if so, to what extent, and the choice of the appropriate time to adopt such a decision fall within the Council's political discretion.

253. It follows that, in so far as it acts in accordance with its Rules of Procedure and the effectiveness of Article 218(2), (6) and (8) TFEU is guaranteed, nothing precludes the Council from extending its discussions in order to achieve, inter alia, the greatest possible majority with a view to concluding an international agreement, the majority required for a broader exercise of the external competences of the European Union or, in the case of mixed agreements, closer cooperation between the Member States and the EU institutions in the process of concluding that agreement, which may involve waiting for the 'common accord' of the Member States.

254. Such close cooperation between the Member States and the EU institutions during the process of concluding a mixed agreement, such as the Istanbul Convention, required by the principle mentioned in paragraphs 241 and 242 above, in particular where the provisions of that agreement falling within the competences of the European Union and those falling within the competences of the Member States are inextricably linked, allows account to be taken, as the Council has pointed out, where necessary by means of an extended discussion, of institutional and political considerations liable to affect the perceived legitimacy and effectiveness of the European Union's external action.

255. In that regard, it is important, however, to note that, in accordance with Article 218(8) TFEU, that political discretion is to be exercised, in principle, by a qualified majority, so that such a majority within the Council may, at any time and in accordance with the rules laid down in the Council's Rules of Procedure, including those conferring on any Member State and the Commission the right to request the opening of a voting procedure and governing the transparency of that procedure, pursuant to Article 15(3) TFEU, require the closure of discussions and the adoption of the decision concluding the international agreement. The Council must therefore exercise that discretion on a case-by-case basis and having regard to the current state of discussions within the Council, in full compliance with the requirements laid down in Article 218(2), (6) and (8) TFEU.

256. Those findings, and in particular the finding that the Council cannot, in disregard of the procedure for concluding an international agreement laid down in Article 218(2), (6) and (8) TFEU, make the conclusion by the European Union of the Istanbul Convention contingent on the 'common accord' of the Member States to be bound by that convention in the fields falling within their competences, are not invalidated by the arguments of the Republic of Bulgaria, the Czech Republic, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, Hungary, the Slovak Republic and the Council alleging that the conclusion of that convention by the European Union in the absence of such a 'common accord' would be incompatible with the principles of conferral, sincere cooperation, legal certainty, unity in the external representation of the European Union, autonomy of the European Union and respect by the European Union for the national identity of Member States nor by the arguments of those Member States and the Council concerning the risk that the European Union might incur international liability if that convention were concluded without the accession of all the Member State to that convention in the fields falling within their competences.

257. In the first place, those Member States and the Council cannot reasonably argue that, if one or more Member States do not accede to the Istanbul Convention in the fields falling within their competences, the accession of the European Union to that convention would impinge upon the competences of those Member States and, consequently, infringe the principles of conferral, sincere cooperation, legal certainty and unity in the external representation of the European Union.

258. Indeed, it was noted in paragraph 240 above that, inter alia, when negotiating and concluding a mixed agreement, the European Union and the Member States must act within the framework of their competences, while respecting the competences of any other contracting party.

259. It follows that the conclusion of a mixed agreement by the European Union and the Member States in no way implies that the Member States exercise, in that event, competences of the European Union or that the European Union exercises competences of those States; rather, each of those parties acts exclusively within its sphere of competence, without prejudice to the power of the Council, referred to in paragraph 248 above, to decide that the European Union should exercise alone a competence that it shares with the Member States in the field of activity concerned, provided that the required majority to do so is obtained within the Council.

260. That is also the case where some Member States decide not to conclude a mixed agreement which the European Union decides to conclude, solely on the basis of the competences conferred on it.

278. Consequently, within the limits of the questions raised in the present request for an Opinion, it is, in the first place, for the Council and the Parliament to specify to the Court the scope of the 'agreement envisaged', within the meaning of Article 218(11) TFEU, which is the subject matter of the present proceedings and in respect of which it is necessary to identify the legal basis on which any Council act concluding that agreement on behalf of the Union must be based.

279. In that regard, it is common ground, first of all, that neither the Council nor the Parliament envisages an accession of the European Union to the parts of the Istanbul Convention which do not fall within the competences of the European Union.

280. Next, although the Council has stated that it wished to limit the accession of the European Union to that convention solely to the aspects thereof for which the European Union has exclusive external competence and that signature decisions 2017/865 and 2017/866 reflected the legal bases it had identified in that context, it must be noted that part (a) of the first question in the request for an Opinion does not present such a limitation, since, in that question, the Parliament envisages a conclusion of that convention founded on the legal bases referred to in that question, irrespective of whether or not the European Union has exclusive competence in that regard, under Article 3(2) TFEU.

281. Lastly, in so far as the Parliament and the Commission refer to the possibility of an accession to the Istanbul Convention covering all the parts of that convention falling within the European Union's competences, the Council has maintained that the majority required within the Council for such an accession could not be achieved. It follows that such an accession is at this stage hypothetical and cannot therefore serve as a reference for the purpose of defining the 'agreement envisaged' in the light of which part (a) of the first question in the request for an Opinion must be answered.

282. In those circumstances, it is for the Court to examine part (a) of the first question in the request for an Opinion by starting from the premiss that the scope of the 'agreement envisaged', within the

	meaning of Article 218(11) TFEU, is defined by the terms of that question and by the content of signature decisions 2017/865 and 2017/866. **283.** As regards the arguments of the Commission and several Member States that such an envisaged agreement, which entails a partial accession of the European Union to the Istanbul Convention, limited to only some EU competences, would run counter to the objectives and the very wording of that convention, and in particular Article 78 thereof, it has been noted in paragraph 272 above that the opinion procedure concerns the compatibility of an envisaged agreement with the Treaties and not the compatibility of such an agreement with public international law, in particular as regards the conditions laid down in that agreement concerning accession thereto. **284.** In accordance with settled case-law of the Court, the choice of the legal basis for an EU act, including one adopted in order to conclude an international agreement, must rest on objective factors amenable to judicial review, which include the aim and the content of that measure (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 76; judgments of 4 September 2018, Commission v Council (Agreement with Kazakhstan), C-244/17, EU:C:2018:662, paragraph 36, and of 20 November 2018, Commission v Council (Antarctic MPAs), C-626/15 and C-659/16, EU:C:2018:925, paragraph 76).
	Opinion 1/20 (16/06/2022) ECLI:EU:C:2022:485
	Revised Energy Charter Treaty
21	**34.** Under Article 218(11) TFEU, a Member State, the European Parliament, the Council or the Commission may obtain the Opinion of the Court as to whether an envisaged agreement is compatible with the Treaties. **35.** It is settled case-law of the Court that that provision has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements that are binding upon the European Union. A possible decision of the Court, after the conclusion of an international agreement that is binding upon the European Union, to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaties would inevitably provoke serious difficulties, not only in the internal EU context, but also in that of international relations, and might give rise to adverse consequences for all interested parties, including third countries (Opinion 1/19 (Istanbul Convention) of 6 October 2021, EU:C:2021:832, paragraph 193 and the case-law cited). **36.** It is true that the possibility of submitting a request for an Opinion under Article 218(11) TFEU does not require, as a precondition, a final agreement between the institutions concerned (Opinion 1/19 (Istanbul Convention) of 6 October 2021, EU:C:2021:832, paragraph 204 and the case-law cited). **37.** It follows that a request for an Opinion may be submitted to the Court where the subject matter of the envisaged agreement is known, even though there are a number of alternatives still open and differences of opinion on the drafting of the texts concerned (Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011, EU:C:2011:123, paragraph 53). **38.** That is particularly the case where the request for an Opinion relates only to the question whether the European Union has competence to conclude an envisaged agreement (see, to that effect, Opinion 2/94 (Accession of the Community to the ECHR) of 28 March 1996, EU:C:1996:140, paragraphs 13 to 18). **39.** However, since the request for an Opinion concerns the question of the compatibility of that agreement with the Treaties, it is necessary for the Court to have sufficient information on the actual content of that agreement (Opinion 2/94 (Accession of the Community to the ECHR) of 28 March

1996, EU:C:1996:140, paragraph 19, and Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 147).

40. First, the present request for an Opinion does not concern the competence of the European Union to conclude the modernised ECT, but the compatibility of the ECT, and in particular Article 26 thereof, with the Treaties.

41. Second, the Kingdom of Belgium itself acknowledges that, when the present request for an Opinion was submitted, there was no document setting out the text of the ECT, in its modernised version, or that of Article 26 thereof.

42. According to the Kingdom of Belgium, that fact should not affect the admissibility of that request for an Opinion since it was well known, at that stage of the negotiations, that no amendment of Article 26 was envisaged in the modernised version of the ECT. Negotiations on the modernisation of the ECT were opened only in the light of the list of areas open to negotiation, a list which does not include the dispute resolution mechanism provided for in that article.

43. The evidence submitted to the Court does not permit the inference that Article 26 of the ECT will not be subject to amendments at the end of those negotiations.

44. In the first place, although it is true that the Charter Conference identified a list of areas open to negotiation and that that list does not include the dispute resolution mechanism referred to in Article 26 of the ECT, the fact remains that, on the date on which the present request for an Opinion was submitted, the negotiations were at a very early stage and that the judgment of 2 September 2021, Republic of Moldova (C-741/19, EU:C:2021:655) had not yet been delivered. It follows that a consensus could have, and might still, emerge, among the Contracting Parties, in favour of the inclusion in that list of the area to which that article applies. Consequently, the outcome of any negotiations concerning that area is not sufficiently foreseeable and it cannot be ruled out that Article 26 of the ECT may be amended.

45. In the second place, as the Kingdom of Belgium itself pointed out, negotiations were opened in the light of the definition of the concepts of ‘investment’ and ‘investor’, within the meaning of Article 1 of the ECT, such concepts affecting the scope of the dispute resolution mechanism provided for in Article 26 of the ECT. Not only has no amending text of Article 1 been adopted at this stage, but, in addition, the impact that any amendments to those concepts might have on that dispute resolution mechanism cannot be assessed in the absence of any element making it possible to ascertain, with a certain degree of precision, the rules governing that mechanism.

46. In the light of those uncertainties, the Court does not have sufficient information on the content and, more particularly, on the scope of Article 26 which will appear in the modernised ECT, even though that scope is the subject of the present request for an Opinion. The latter therefore appears to be premature.

47. Finally, it should be added that, as regards the considerations of expediency, referred to in paragraph 25 of this Opinion, which justify the Court taking a position on the question of the compatibility of Article 26 of the ECT with the Treaties, suffice it to state, first, that such considerations are unrelated to the purpose of the Opinion procedure referred to in paragraph 35 of this Opinion, since that provision is already in force. Second, and in any event, the Court has already ruled on that question. It is clear from the judgment of 2 September 2021, Republic of Moldova (C-741/19, EU:C:2021:655), and in particular from paragraphs 40 to 66 thereof, that compliance with the principle of autonomy of EU law, enshrined in Article 344 TFEU, requires Article 26(2)(c) of the

	ECT to be interpreted as meaning that it is not applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State. **48.** It follows from all the foregoing considerations that the Court does not have sufficient information on the actual content of the envisaged agreement and that, therefore, the present request for an Opinion, on account of its premature nature, must be regarded as inadmissible. Consequently, the Court (Fourth Chamber) gives the following Opinion: **The request for an Opinion introduced by the Kingdom of Belgium, on 2 December 2020, is inadmissible.**