1 New Horizons or Old Shores?

The Treaty of Lisbon\(^1\) not only codified to a large extent the evolutionary and pre-existing case law of the European Court of Justice\(^2\) regarding the Union’s external competences in its art. 3 and 216 Treaty on the Functioning of the European Union (TFEU). It also added new layers to its external action by referring to the Union’s common values in art. 21 Treaty on European Union (TEU), art. 206 TFEU which the EU shall upheld in its dealing with third countries and international organizations. Thus, external and internal issues are determining the Union’s external action, and the question arises whether these additions are enabling the Union to set sail for expanding to new horizons in its external actions or whether it is bound by the old, already known shores for its international activities.

This volume tries to explore some of the remaining legal and practical challenges for the EU of these two additions to the text of the EU founding treaties. First, the Union’s external treaty-making power will be analysed. According to the principle of conferral as embodied in art. 4 (1), 5 (1) TEU, the EU is only entitled to act if the Member States have entrusted it with a competence to do so. If not, the Member States remain competent to act internationally. Over the years and with the aim to

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\(^1\)Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, O.J. C 306, 17.12.2007, pp. 1–271.

\(^2\)Throughout the volume the abbreviation “ECJ” is used for the Court of Justice of the European Union.
avoid conflicts of competence between the Union and its Member States, this led to the conclusion of mixed agreements which became the foremost legal tool for the EU’s exercise of its external trade power. In its already famous Opinion 2/15, the Court of Justice of the EU (CJEU) examined the external competences of the Union post-Lisbon but was unable to solve all open matters. A side look will be given to the very special relations of the EU with Switzerland which deserve further scrutiny. Secondly, a closer look will be given to the EU’s actions in regard to its Eastern Neighbourhood, because the relations to the countries of the Eastern Partnership are largely drawn after the entry into force of the Treaty of Lisbon and are driven by the EU’s new legal portfolio and serve as a perfect example for the exercise of its newly acquired powers in the domain of external relations. The post-Soviet states of the Eastern Neighbourhood are culturally deeply linked to the EU but face peculiar difficulties in transforming their societies. The third chapter of the book is devoted to the Union’s far lesser relations with the countries of the Eurasian Economic Union, the second block of post-Soviet countries.

2 Evolution and Current Challenges of the Union’s External Action

Therefore, the first part of this volume is devoted to the evolution and current challenges of the EU external actions by scrutinizing the issues associated with shared competences and shared values. The chapter is opened by Peter-Christian Müller-Graff’s contribution on “New Challenges for the Union’s Treaty Making Powers and Common Values in Implementing its Agreements”. He deals with the political and legal issues stemming from the role of the EU in the world as laid down in the 2017 Rome Declaration of the Union. There, the leaders of 27 Member States pledged to work towards “a stronger Europe on the global scene: a Union further developing existing partnerships, building new ones and promoting stability and prosperity in its immediate neighbourhood to the east and south but also in the Middle East and across Africa and globally”. The underlining politically relevant question is whether the Union has the clout for fulfilling this pledge, whereas the legally relevant question is how far the Union’s competences match this intention. One of the analysed overarching questions is directed to exploring how far the Union’s treaty-making powers carry in the new challenges of international relations.

The following works by Lorenzmeier, Vedder, Kumin and van Elsuwege are shedding light on the Union’s external powers and mixed agreements, one of the main legal tools for solving the allocation of competence between the EU and its Member States. Christoph Vedder explores the Union’s implied competences in his contribution “From ERTA to Singapore – Two Landmark Decisions on the Road to

\[3^3\] ECJ, Opinion 2/15, Singapore, ECLI:EU:C:2017:376.

\[4^4\] Müller-Graff, Chap. 2.
the Union’s Powerful Foreign Policy”. By providing an overview about the historical evolution of the Union’s external powers, he is putting the 2017 Singapore Opinion 2/15 of the CJEU in context. In particular, Christoph Vedder delineates the evolution of the treaty-making powers with special emphasis on the exclusivity of the common commercial policy and, in a broad range of situations, the implied powers after their codification through the Treaty of Lisbon. The strive of the European Commission for the conclusion of “EU-only” instead of mixed agreement with the participation of the Member States led, in 2017, to the Singapore opinion of the CJEU, another landmark in the row CJEU judgments which elucidated the scope of the external powers of the Union.

This opinion and some of its implications are also analysed by Stefan Lorenzmeier. In “Exclusive and Shared Competences After the Singapore Opinion of the CJEU: 2/15 revisited”, he scrutinizes the landmark decision of the CJEU in respect of the already established case law of the CJEU and the EU treaties. Therein, especially in light on new-generation EU trade agreements, it shows the impact of the decision on these agreements and how they have to be shaped after the decision, especially for avoiding the rather burdensome process of concluding mixed agreements. Additionally, by turning to the German national legal order, a further layer, the impact of the decision for the principle of democracy will be shown as well.

Andreas J. Kumin is taking a closer look at mixed agreements after Opinion 2/15 in his contribution “Mixed Agreements After ECJ Opinion 2/15 on the EU-Singapore Free Trade Agreement”. The questions addressed by the CJEU in this Opinion have implications on the appropriate handling of concrete present and future comprehensive free trade agreements of the EU including provisions on trade in services, transport services, establishment, investment protection and investment dispute resolution, such as CETA with Canada, the EU-Japan Economic Partnership Agreement or TTIP with the United States, which are looked at by the author.

A final layer of mixed agreements is their ratification in the Member States. By using the problematic ratification of the association agreement between the EU and Ukraine in the Netherlands, Peter Van Elsuwege is elaborating on the lack of or delayed ratification in an EU Member State and the provisional entry into force of an agreement in his work entitled “The Ratification Saga of the EU-Ukraine Association Agreement: Some Lessons for the Practice of Mixed Agreements”. In particular, the author emphasizes how domestic political agenda in one of the EU Member States may jeopardize the complicated process of the ratification of the EU framework agreement with a third country.

The first part of the volume concludes with Christa Tobler’s elaboration of the very peculiar EU-Swiss relationship. Her contribution “The EU-Swiss Sectoral

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5 Vedder, Chap. 4.
6 Opinion 2/15, Singapore, ECLI:EU:C:2017:376.
7 Lorenzmeier, Chap. 3.
8 Kumin, Chap. 5.
9 Van Elsuwege, Chap. 6.
Approach Under Pressure – Not Least Because of Brexit”\textsuperscript{10} states that Switzerland’s unique legal relationship with the European Union experiences constant political pressure, both from the inside and the outside. This concerns notably the debate in Switzerland around the issue of migration from the EU to Switzerland and the demand of the EU for a renewed institutional framework for certain market agreements with the EU that has led to negotiations on this matter. Whilst Switzerland is seeking special solutions in both respects, the EU’s rhetoric is increasingly emphasizing the need for homogeneity in the internal market. Brexit has not made matters simpler and is itself influenced by the situation in relation to Switzerland.

3 The EU and Its Eastern Neighbourhood

The second part aims at having a closer look on the EU’s cooperation with its Eastern Neighbourhood as a case study that illuminates the impact of the EU’s regional policies on its external bilateral relations with third countries that pursue different geopolitical objectives. An emphasis of the second part is different assessments of debate between shared values on the one hand and the type of integration of the states of the Eastern Neighbourhood into the EU system. First, the association agreements with Ukraine, Georgia and Moldova will be looked at. This group of association agreements is distinguished by deep level of political and economic cooperation and profound desire of close integration with the EU of Ukraine, Georgia and Moldova. The second group of the enhanced partnership agreements with Armenia and Kazakhstan will be scrutinized. These agreements mirror the association agreements with Ukraine, Georgia and Moldova but lack deep trade cooperation and comprehensive legislative approximation due to participation of Armenia and Kazakhstan in the Eurasian Economic Union.

Roman Petrov analyzes the challenges of the effective implementation of the EU-Ukrainian Association Agreement in his work.\textsuperscript{11} He looks at the progress of the implementation and application of the EU-Ukraine Association Agreement (AA) which triggered unprecedented political, economic and legal reforms in Ukraine. In particular, the paper focuses on the constitutional challenges that have aroused before Ukraine in the course of implementation of the AA into its legal system. There are two issues which found consideration in the chapter. The first issue is effective implementation and application of the AA within the Ukrainian legal order. The second issue is compatibility between the AA and the Constitution of Ukraine. Latest political and legal developments in Ukraine are being looked at through the prism of effective implementation of the EU-Ukraine Association Agreement and promotion of EU common values. In conclusion, it is argued that the EU-Ukraine AA enhanced the adaptability of the national constitutional order to the European integration project and EU common values.

\textsuperscript{10}Tobler, Chap. 7.
\textsuperscript{11}Petrov, Chap. 8.
This is followed by Gaga Gabrichidze’s work on “National and Bilateral Normative Framework for Legislative Impact of the EU Law on the Georgian Legal System”. He explores the Association Agreement concluded between Georgia and the European Union in 2014 which raised the relevance of the EU law for Georgian legislation to a new level. However, long before the conclusion of the AA, the Georgian legislator has expressed its fascination for the EU law in the form of many self-imposed commitments. Gabrichidze’s chapter deals with those obligations that Georgia has put on itself, whether on the basis of unilateral actions or under an international arrangement, which form a normative framework for legislative impact of the EU law on the Georgian legal system.

A third strain concerning the EU’s association agreements with its Eastern Neighbourhood is looked at by Kseniia Smyrnova. Her contribution “Principles and Values of Fair Competition in the EU and Its Association Agreements with Ukraine, Moldova and Georgia” is dealing with the EU’s sharing principles and values of fair competition included in the AAs with these countries. The preferential trade relations established by the AAs include rules on fair competition. However, the competition chapters are very diverse, and the provisions on competition rules include some important differences as the Moldovan and Georgian DCFTAs are less ambitious than the Ukrainian DCFTA. The chapter delves into these differences by analysing the legislative enforcement and judicial practice within the implementation of the AAs’ competition rules in Moldova, Georgia and Ukraine.

The EU’s Enhanced Partnership Agreements (EPAs) with Armenia and Kazakhstan do not establish as close political and economic cooperation with the EU regulatory space as in the AAs with Ukraine, Georgia and Moldova. Nevertheless, the EPAs play a role of almost equivalent “substitution” of the AAs for those post-Soviet countries that opted out to transfer part of their sovereignty to the Russia-led Eurasian Economic Union (EAEU). The EU-Kazakhstan Enhanced Partnership is depicted by Zhenis Kembayev in his contribution “The EU-Kazakhstan Enhanced Partnership: An Overview and Evaluation”. The author examines the development of the EU-Kazakhstan partnership, states its major problems and identifies the prospects of its future progress by discussing the applicable provisions of the EPA and comparing them with the PCA and the AAs, in particular the one concluded between the EU and Ukraine.

Anna Khvorostiankina looks into the EPA with Armenia, another post-Soviet state and its partnership with the EU. Her contribution is entitled “EU-Armenia Comprehensive and Enhanced Partnership Agreement: A New Instrument of Promoting EU’s Values and General Principles of EU Law”. It deals with the EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA) as an instrument of promoting EU common values and general principles of EU Law.

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12 Gabrichidze, Chap. 9.
13 Smyrnova, Chap. 10.
14 Kembayev, Chap. 11.
15 Khvorostiankina, Chap. 12.
contribution stresses that Armenia is a unique case of a state which is a member of the EAEU and, at the same time, is eager to strengthen its ties with the EU in frames of Eastern Partnership and to implement the required reforms. The author analyses the objectives and legal basis of the Agreement and assesses the potential influence of CEPA on Armenian legal order.

4 The EU and the Eurasian Economic Union

Thereby, we are turning to the third strain of the volume, the relationship of the EU with the EAEU and its Member States. The EAEU is partly replicating the EU legal order by establishing a common customs zone but is also very different from it. For instance, it is not build on shared values and stresses the untouchability of the sovereignty of its Member States.16 Rilka Dragneva-Lewers explores the said relations in her chapter called “Pork, Peace and Principles: the Relations Between the EU and the Eurasian Economic Union”17 by assessing the Eurasian integration against the dimensions of EU’s external policy. The analysis starts with a discussion of the status quo of EU’s relations with the Eurasian region and the tensions already observed before exploring the institutional nature and practice of the EAEU.

Paul Kalinichenko focuses on the interesting but challenging relationship between Russia and the EU. His contribution on “The EU and Russia: Old Legal Grounds for New ‘Selected Engagement’ Relations”18 analyses the modern legal aspects and political and legal circumstances surrounding the EU-Russia relations in the light of recent events and the deterioration of relations between Russia and the EU in general. In 2019, the EU and Russia celebrated the 25th anniversary of the EU-Russia Partnership and Cooperation Agreement (PCA), but most of the agreement’s provisions are not in force anymore, and most of them became mostly obsolete. Unfortunately, the negotiations on a new basic agreement between the EU and Russia have stagnated. In best-case scenarios, this situation has led to the increase of soft law instruments of the mutual cooperation. Interestingly, on another strain a certain Europeanization of Russian law can be detected.

Finally, the challenges of the Belarus-EU relations are explored by Maksym Karliuk. His chapter on “The EU and Belarus – Current and Future Contractual Relations”19 scrutinizes the contractual relations between the EU and Belarus as they stand today and the future possibilities given the rocky history of the bilateral relations. The main international agreement between the parties still comes from the Soviet era. Nevertheless, more engagement between parties has been happening, which has already led to new frameworks being established and interest in some

16 See http://www.eaeunion.org/?lang=en.
17 Dragneva-Lewers, Chap. 13.
18 Kalinichenko, Chap. 14.
19 Karliuk, Chap. 15.
continuation seems to be present. The author analyses the effect of international contractual obligations in Belarus, the peculiar case of WTO law being applicable in the country without membership thereof in the organization, the way the EAEU constrains possible deeper engagement of the country with the EU and the role of values.

5 New Shores?

The analyses collected in this volume have shown that the EU will remain a very active player at the international stage. Externally, its relations with the countries of the Eastern Partnership are structured differently, depending on the intention of the other party to integrate in or to accept parts of the Union’s acquis in its domestic legal order. The range is from a rather deep approximation of laws as achieved by the AAs with Ukraine, Georgia and Moldova to rather loose contacts with Belarus and even more limited and strained relations with Russia. However, countries willing to establish closer relations with the EU have to agree to a shared set of values determined by the Union followed by close monitoring and conditionality by the EU institutions.

Internally, the EU’s relation with its Member States is determined by the allocation and nature of powers enshrined in the founding treaties. These powers are a common battleground because questions of competence are barometers of power.20 Thus, special attention has to be carried out by the EU institutions and its Member States. Issues of exclusive or shared competence and the challenge of mixity in all its forms will remain problematic and can only be solved in the course of time by the acting persons, if not the “society” of the Union and its Member States and the judiciary. The judicial organs of the Union and the Member States should use their entrusted internal powers carefully and in the spirit of cooperation because unresolved conflicts and unexpected natural and health emergencies (COVID-19) would hamper the concept of European integration and its promotion externally.21 Thus, and all in all, the “post-Treaty of Lisbon” EU may have not been put in a position to explore new horizons of its internal and external competences, but it still may explore new shores and develop its policies gradually and not evolutionary.

20 See Opinion of Advocate General Kokott in joined cases C-626/15 and C-659/15, AMP Antartique, ECLI:EU:C:2018:362, para. 2.
21 In this context see the rather problematic decision of the German Federal Constitutional Court of 5 May 2020, BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -, http://www.bverfg.de/e/rs20200505_2bvr085915en.html.
6 Post Scriptum

In the course of working on and editing this volume, we learned about sudden departure of our friend and colleague Prof. Zhenis Kembayev in early 2019. This is a sad and irrevocable loss for international and Kazakh academic legal community. Professor Kembayev was one of pioneers of promotion of EU Law and EU Studies in the entire post-Soviet area. He was the first Kazakh academic to be awarded prestigious Jean Monnet Chair in EU Law to be published in leading international books and journals. Zhenis will be remembered as a competent and prolific contributor on various issues of legal reform in Kazakhstan, Europeanization of post-Soviet countries, evolution of the EAEU and future of the Silk Road. This volume is designated to Prof. Zhenis Kembayev’s memory.

Stefan Lorenzmeier is working at the University of Augsburg’s (Germany) Law Faculty and researches and teaches in the areas of Public International Law and European Law. He is a lecturer at various universities and authored numerous works on European Union law.

Roman Petrov is a Jean Monnet Chair in EU Law and the Head of the Jean Monnet Centre of Excellence at the National University “Kyiv-Mohyla Academy” in Ukraine. Areas of Prof. Dr. Petrov’s research and teaching include: EU Law, EU External Relations Law; Approximation and Harmonization of Legislation in the EU; Rights of Third Country Nationals in the EU, Legal Aspects of Regional Integration in the Post-Soviet Area.

Christoph Vedder is a professor emeritus who previously held the Chair of Public Law, Public International Law and European Law as well as Sports Law, a Jean Monnet Chair of European Law ad personam at the University of Augsburg, Germany. He studied law and history in Göttingen, Geneva, and Nice, graduated and earned his doctoral degree from the University of Göttingen. He has been appointed as an assistant professor at the Institute for Public International Law of the University of Munich where he also received his habilitation. He has been a visiting scholar at several universities and is a member of the conference of the State Parties of the OPCW and the author of numerous works on European Union law and its external relations.