Contents

Table of Figures	
Preface	Xiii
Chapter 1 Introduction	XV
1.1 The Subject Matter 1.2 Approaches	1
1.2.1 The Framework Approach in Legal Dogmatics 1.2.2 Analysing Legal Discourses 1.3 Structure	244
PART I EXTERNAL RELATIONS AUTHORITY IN THE COMMUNITY AREA	10
Chapter 2 The Dual Federal Perspective	
 2.1 Mapping the Perspective 2.2 Structure of Part I 	15
Chapter 3 The Community's Express External Relations Authority 3.1 Introduction and a	15 18
Commercial Policy Commercial Policy Commercial Policy	21
3.1.1 The Growth of Express Treaty-Making Competences in the EC Treaty The Case of the Common Competences	22
3.1.2 The Case of the Common Commercial Policy The EC Treaty: Objectives and Competence Conferral	22 24 25

•	4	
V1		Contents
A T		COTTUCTUS

2 2		
3.3	Four Basic Conceptions of the CCP	28
	3.3.1 Opinion 1/75: The State Analogy Opinion 1/79: Developments in International	28
	3.3.2 Opinion 1/78: Developments in International Trade Relations. Effects on the Common Market	29
		29 34
	3.3.3 Opinion 1/94: The Structure of the EC Treaty 3.3.4 In Sum	34 40
3.4	The Four Conceptions at Work: The Method for Determining	40
J.4	the Legal Basis of a Measure	41
	3.4.1 The 'Essential Objective' Doctrine	41
	3.4.2 A Case Study: CCP vis-à-vis Environmental Policy	43
	3.4.2.1 Chernobyl	43
	3.4.2.2 Cartagena Protocol	44
	3.4.2.3 The Energy Star Agreement	46
	3.4.2.4 The Rotterdam Convention	48
3.5	Conclusions	50
Chaj	oter 4	
The	Community's Implied External Relations Authority	53
4.1	Introduction and Structure	53
4.2	The AETR Principle: The Affect Ratio	55
4.3	Opinion 1/76: The Necessity Ratio	56
	4.3.1 Establishing the 'Necessity Ratio': Opinion 1/76	56
	4.3.2 Necessity as Subsidiary (Complementary) Competence	58
	4.3.3 Necessity as Political Discretion: Parallelism	59
	4.3.4 Necessity as an Inextricable Linkage	61
4.4	Concluding Remarks	67
Chaj	oter 5	
Rest	raints on the Community's Exercise of External Competence	69
5.1	Introduction and Structure	69
5.2	Community Objectives	70
	5.2.1 The Objective of Trade Liberalization	71
	5.2.2 The 'Community Preference'	73
5.3	General Rules and Principles of Community Law	74
	5.3.1 'Extension' of Principles of Non-Discrimination	75
	5.3.2 A 'Dedicated' Restraint on the Community's	
	External Relations: The Principle of Autonomy	79
	5.3.2.1 Opinion 1/76	80
	5.3.2.2 The EEA Agreement Opinions	82
	5.3.2.3 Opinion 1/00	85
	5.3.2.4 In Sum	87
5.4	Concluding Remarks	89

	•	•
17	1	1
V	T	L

_	pter 6 usion of Member States' E	xternal Competence	91
6.1	Introduction and Structure		91
6.2	Types of Exclusivity		92
6.3	A Priori Exclusivity		93
	6.3.1 The Common Cor	nmercial Policy	93
	6.3.2 Fisheries Conserva	ation Measures	96
6.4	AETR Exclusivity		97
	6.4.1 Meaning and Ratio	onale: The Affect Ratio	97
	6.4.2 The Scope of App	olication of AETR Exclusivity:	
	The AETR Test		101
	6.4.2.1 The Sco	pe of the Internal Community	
	System		101
		re Internal Community Measures	1 0 0
	'Affecte	d'?	108
	6.4.3 In Sum		115
6.5	Opinion 1/76 and Exclusiv		116
6.6	Exceptions to Exclusivity a		119
	6.6.1 Common Commen		119
	6.6.2 Fisheries Conserva	ation	121
67	6.6.3 The AETR Case	daina tha Can batrrrann I agai	122
6.7		dging the Gap between Legal	100
	Language and Its Context		122
Char	pter 7		
_		Exercise of External Competence	125
7.1	Introduction and Structure		125
7.2	'Extended' External Relati	ons Restraints	127
1 . 2		Temporal Scope of the Duty	
		tion, Article 10 EC	128
	A	ciples of Non-Discrimination	131
7.3		lations Restraint: Article 307(2)	136
	Concluding Observations		144
	pter 8		
	ed Agreements before the E	CJ	147
8.1	Introduction		147
	Introduction A Community Law Definition	tion of Mivity	147
8.3	Gradual Acceptance of Mi		147
0.5	of Close Co-operation	ary subject to the Duty	153
	_	y is Incompatible with the Treaty	153
	•	nce and Introduction of a	133
	Duty of Close Co-		154
		T	

	4	
V111		Contents

	8.3.3 Full Acceptance and Reinforcement of the Duty of Close Co-operation	156
8.4	Legal Obligations Derived from the Duty of Close Co-operation 8.4.1 The Legal Basis, Scope and Nature of the Duty 8.4.2 Legal Consequences at the Different Stages in the	158 158
8.5	Life of a Mixed Agreement Concluding Remarks	160 163
PAR'	T II ERNATIONAL LAW IN COMMUNITY LAW	
Chap The	ter 9 Community's International Law Filter	167
0 1	Manaina tha Dansaatirra	167
9.1	Mapping the Perspective Structure of Part II – the European Community's	167
	International Law Filter	169
9.3	Segregation of Legal Orders: Distinguishability and Hierarchy	172
_	ter 10 ral Principles of Reception: Kupferberg and Racke	177
10.1	The Community's Responsibility under International Law 10.1.1 International Agreements Concluded by the Community 10.1.2 Other Instruments of International Law	177 177 179
		181 183
Chap	ter 11	
	Legal Consequence of Reception: The Requirement niform Application	185
	Establishing the Requirement of Uniform Application The (Vertical) Limits of the Requirement of Uniform	185
113	Application The Rationale for Uniform Application (I): The Two-fold	187
	Community Interest	189
	The Rationale for Uniform Application (II): Proper Compliance with International Obligations Conclusions	191 193
Chan	ter 12	
	ption of International Law (II): Alternatives	195
12.1	Introduction	195

*

Contonts	1 V
Contents	IV

	12.2	Substitution and Delegation	195
	Ar	12.2.1 International Fruit: The Doctrine of Substitution	195
		12.2.2 Libor Cipra: The Doctrine of Delegation	202
		12.2.3 Concluding Remarks	204
	12.3	Mixity: The Community Sphere of Mixed Agreements	205
		12.3.1 Preliminary Rulings	206
		12.3.1.1 Demirel	206
		12.3.1.2 Hermès	208
		12.3.1.3 Dior/Assco	213
		12.3.2 Direct Actions	219
		12.3.2.1 The Berne Convention Case	219
		12.3.2.2 Étang de Berre	222
		12.3.2.3 MOX Plant	224
		12.3.3 Synthesis	227
		12.3.3.1 General Considerations	228
		12.3.3.2 General Principles	230
	~17		
	_	oter 13	
		lusions to Chapters 10–12 and Introduction to	
	Chap	oters 14–16	235
	13 1	Principles of Reception of International Law in Community Law	235
		The Legal Effects of International Law in Community Law	239
	Chap	oter 14	
	A Fr	amework for Direct Invocability	243
	1 1 1	The Madieus of Discort Large of Lilians	242
		The Notion of Direct Invocability	243
	14.2	Direct Invocability of International Agreements	245
		14.2.1 Individuals Invoking International Agreements	245
V		14.2.1.1 The General Conditions for Direct Effect	245
		14.2.1.2 Modifications?	249
		14.2.2 Privileged Litigants Invoking International Agreements 14.2.2.1 Privileged Litigants Invoking International	253
		Agreements against Community Acts	254
		14.2.2.2 Privileged Litigants Invoking International	
		Agreements against Member State Acts	259
	14.3	Direct Invocability of Other Instruments of International Law	263
	14.4	A General Framework for Analysis of Direct Invocability	269
	Chan	ter 15	
	_	Substantive Analysis of International Agreements'	
		et Invocability	273
	15.1	The Agreement of the Parties	274

-1

	Contents
	COMMON

15.2	The Pu	pose and N	Vature of Agreements	275
	15.2.1	The GAT	Γ and WTO Agreements	276
		15.2.1.1	GATT 1947	276
		15.2.1.2	The WTO Agreements	280
	15.2.2	Other Inte	rnational Agreements	288
		15.2.2.1	ACP-EC Conventions	288
		15.2.2.2	Early European Association Agreements	
			Envisaging Accession	290
		15.2.2.3	Free Trade Agreements etc. with	
			European Countries	292
		15.2.2.4	Euro-Mediterranean Co-operation and	
			Association Agreements	295
		15.2.2.5	The Europe Agreements	296
			Other Directly Invocable International	
			Agreements	297
	15.2.3	Synthesis?		298
Chan	ter 16			
		of Interna	ntional Law	305
16.1	Introdu	ction		305
			International Law	305
		Introduction		305
	16.2.2	The Exter	nal Duty of Constructive Interpretation	306
			A Dual Legal Basis	307
			Scope: Which Rules are Covered?	309
			Content: What Does the Duty Require?	310
			Concluding Remarks	312
	16.2.3		mentation Doctrines – Fediol	
		and Nakaj	ima	313
		16.2.3.1	Fediol: The 'Express Reference' Doctrine	314
			Nakajima: The Legislator's Intent	315
			Unresolved Issues	318
	16.2.4	Concludin	g Remarks	321
16.3			mber State Liability for Breach of	
		ional Oblig		322
		Introduction		322
	16.3.2	Scope		323
	16.3.3	Content: 7	The Three Conditions for Liability	324
			Liability – Compensation in the Absence	
		of Unlawf		332
	16.3.5	Concludin	g Remarks	334
16.4		tative Tech		334

		S AND DISCOURSES IN EC EXTERNAL S LAW	
	ter 17 duction		343
	ter 18	cuctivism and Discourse Analysis	347
	The Ro 18.2.1	a Social Construction ble of Language in the Construction of Social Ontologies Structure and Change: Structuralism and Post-structuralism Structure and Agency (Discourse and Discursive Event)	347 348 350 353
Anal	ter 19 ytical To ions Lav	ools for a Discourse Analysis in EC External	357
The second secon		vel of Discourse: What is (in) a Discourse?	357 360 260
100	19.2.2	Foucault: Rules for the Formation of Discourse Laclau & Mouffe: Competing Discourses and Floating Signifiers	362364
19.5		vel of Discursive Event: Strategies to Construct or truct Discourses	366
_	ter 20 l Discou	rses in EC External Relations	369
20.1		eating and Distinguishing EC External Relations Law as an 'Order of Discourse' and 'Legal Issues' as Floating Signifiers	369370
	20.1.2	Three Guiding Distinctions	371
20.2		line of Five Sub-Discourses in EC External Relations Law	373
	20.2.2	The Discourse of Internal Integration The Discourse of External Actorness The Discourse of International Co-operation	374377381
	20.2.5	The Discourse of Internal Constitutionality A Discourse of Individual Rights? Conclusions	385 388 391
20.3	The Le	vel of Discursive Event Discursive Struggles: Strategies to Strengthen or	395
	20.3.2	Dismantle Discourses Interdiscursivity: Mixing Discourses in Discursive Events	395 398

Chapter 21		
Legal	Analysis in EC External Relations Law	401
21.1	Introduction	401
21.2	The Janus Head of Dogmatic Legal Analysis: Flexibility	
	Versus Rationalization	403
21.3	Orthodox Legal Analysis	407
	EC External Relations Law and Its Contexts	409
	21.4.1 Law and Legal Reasoning as a Distinguishable Domain	409
	21.4.2 Interaction between Law and Context	409
21.5	Coherence	414
	21.5.1 Coherence as an Ideal in Legal Reasoning	414
	21.5.2 Intra-Systemic Coherence	418
	21.5.3 Extra-Systemic Coherence	420
21.6	Coherence in a Discursively Constructed Domain	423
	21.6.1 The Dogmatic Lawyer's Dilemma	423
	21.6.2 Intra-Discursive and Inter-Discursive Coherence	
	in Legal Reasoning	424
	ter 22	
Analy	yzing the Direction and Reach of EC External Relations Law	427
22.1	Introduction	427
	The Example of Direct Invocability of WTO	428
	22.2.1 A Discursive Divide on Direct Invocability: External	
	Actorness vis-à-vis International Co-operation	428
	22.2.2 Alternative (I): The Discourse of International Co-operation	431
	22.2.2.1 A Narrow Focus on WTO Law	432
	22.2.2.2 A Broader Focus on the WTO System	433
	22.2.3 Alternative (II): An Individual Rights Discourse	438
	22.2.3.1 The Intention of the WTO Members	438
	22.2.3.2 WTO Law from a Community Perspective	438
22.3	Discursive Readings of Other Legal Issues	441
	Concluding remarks	446
	4 22	
	ter 23 Iusions	449
23.1	Legal Framework Analysis of the Vertical Aspects of EC	
	External Relations Law	450
23.2	Doctrines and Discourses in EC External Relations Law	452
Table	Table of Cases (Numerical)	
Bibliography		467
Table of Abbreviations		495
Index		100
LILUCA		マノノ