## Contents

Table of Cases xiii  
Table of Legislation xxxi  
List of Abbreviations xlvii  

1. Introduction 1  
   - Constitutional moment 1  
   - Subject matter and methodology 4  
   - Second Edition and Treaty of Lisbon 7  

**Part I—Constitutional Foundations: Competences and Objectives**

2. Competence in matters of commercial policy 11  
   - Introduction 11  
   - *Opinion 1/75* and the notion of exclusivity 13  
   - The rise of UNCTAD and the broad conception of 'trade' 18  
   - The bipolar world of *Commission v. Council* 21  
   - The internal market and external trade 23  
   - The Uruguay Round and Maastricht 25  
   - The joint competence settlement of *Opinion 1/94* 27  
     - Trade in goods 28  
     - Trade in services 29  
     - Transport 32  
     - Intellectual property 33  
   - Trade and foreign policy 35  
   - Trade and environment 39  
   - The Treaty of Lisbon 57  
     - Trade in services and the commercial aspects of intellectual property 58  
     - Foreign direct investment 62  
   - Conclusions 67  

3. The doctrine of implied powers 70  
   - Introduction 70  
   - The *AETR* case: implied versus conferred powers? 71  
   - The parallelism approach of *Opinion 1/76* 76  
   - The clarity of *Opinion 2/91* 82
The meanderings of Opinion 1/94 87
GATS 88
TRIPs 93
The limits of Opinion 2/94 95
The Open Skies cases 101
Opinion 1/76-type competence 102
AETR-type competence 105
The consolidation of Opinion 1/03 108
The codification by the Lisbon Treaty 112
Conclusions 113

4. Express and implied competences under the TFEU 120
Introduction: external competences after Lisbon 120
Association agreements 124
Development co-operation and other co-operation policies 127
Development co-operation prior to the TEU 127
The EC Treaty provisions on development co-operation and Portugal v. Council 130
The Small Arms and Light Weapons case 137
The Treaty of Lisbon amendments 139
Other co-operation agreements 140
Environment 141
The internal market and transport 144
The four freedoms, internal market harmonization, and competition policy 144
Investment treaties 149
Transport 151
Social policy 152
Economic and Monetary Union 153
Area of freedom, security, and justice 157
Introduction 157
Border checks, asylum, and immigration 158
Judicial co-operation in civil matters 160
Judicial co-operation in criminal matters 162
Police co-operation 163
Conclusions 163

5. Competence to conduct a Common Foreign and Security Policy 165
Introduction 165
CFSP objectives and competences 167
Scope 167
Nature of the competences 171
Delimitation of TEU and TFEU competences 172
## Part II—International Foundations: Treaties and International Law

### 6. The life cycle of international agreements

| Introduction | 193 |
| Negotiations | 195 |
| Article 218 TFEU | 195 |
| Article 219 TFEU | 200 |
| Signature and conclusion | 200 |
| Article 218 TFEU | 200 |
| Article 219 TFEU | 207 |
| Implementation, amendment, and adoption of EU positions | 208 |
| Suspension and termination | 209 |
| Conclusions | 209 |

### 7. Mixed external action and membership of international organizations

| Introduction | 212 |
| Cause and practice of mixed agreements | 213 |
| Competence | 213 |
| Practice and case law | 215 |
| Causes | 220 |
| Membership of international organizations | 222 |
| Membership and non-membership | 222 |
| International organizations, the autonomy of the Community legal order, and the exclusive jurisdiction of the Court of Justice | 231 |
| The duty of co-operation | 241 |
| Establishing the principle | 241 |
| Recent case law | 246 |
| Further issues | 255 |
| Negotiation | 255 |
| Clarification of the division of powers | 256 |
| Ratification and conclusion | 258 |
| Representation and voting | 259 |
| Implementation, interpretation, and effect | 260 |
| International responsibility | 262 |
| Partial mixity | 264 |
| Conclusions | 264 |
8. The courts and international agreements

Introduction
Requests for an Opinion
Preliminary rulings on questions of interpretation
   General issues
   Mixed agreements—first developments
   Mixed agreements—case law on TRIPs
   Mixed agreements—other case law
Review of legality
   Review of an agreement
   Review on grounds of violation of an agreement
Non-contractual liability
Enforcement actions
Methods of interpretation
   Introduction
   Early case law
   The EEA Agreement
   Recent case law
   Assessment
   Conclusions

9. The legal effects of international law

Introduction
   The effect of international law
   Agreements are binding
   Transposition and implementation
   Judicial application—direct and indirect effects
   Structure of the chapter
Agreements concluded by the EU
   A survey of the case law on direct effect
   The principle of consistent interpretation
   The principle of implementation
      Origins
      Rationale and further application
   The effects of international litigation
   The legal effects of EU agreements: an assessment
General international law
   Early case law
   Conclusion and suspension of agreements: Opel Austria and Racke
   Recent case law
   Assessment
Agreements binding on the Member States
   General issues
Contents xi

UN law: the Kadi judgment 401
  Yusuf and Kadi (Court of First Instance) 402
  Kadi and Al Barakaat (Court of Justice) 404
  Kadi: an assessment 414
Agreements pre-dating accession 421
  First paragraph 422
  Second paragraph 430
Conclusions 434

Part III—Policies

10. Common commercial policy 439
  Introduction 439
  Principles 440
    The principle of uniformity 441
    The principle of assimilation 444
    Towards a principle of non-discrimination? 446
  Instruments 447
    Conventional and autonomous instruments 447
    Common Customs Tariff 448
    Generalized tariff preferences 451
    Applying the CCT 452
    General import regulations 454
    Anti-dumping 454
    Anti-subsidy 456
    The trade barriers instrument 457
    Export policy 457
  Actors 458
  Judicial review of commercial policy measures 460
Conclusions 465

11. Common Foreign and Security Policy 467
  Introduction 467
  Instruments 469
    Introduction and overview 469
    Decisions on Union actions 471
    Decisions on Union positions 473
    Decisions on strategic interests and objectives 475
    The exclusion of legislative acts 478
    Budget 483
  Actors 485
    European Council 485
    Council 486
12. **Sanctions policy**  
   **Introduction**  
   **A short history**  
   **Competence issues**  
   **Protection of fundamental rights**  
      *Bosphorus*  
      *Yusuf and Kadi*  
      *OMPI and PMOI*  
      *Kadi and Al Barakaat*  
      *Kadi II*  
   **Interpretation and application**  
      **Sanctions against the FRY**  
      **Counter-terrorism sanctions**  
      **Sanctions by the Member States**  
   **Conclusions**