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Reading Opinion 2/15: Standards of Analysis, the Court's  
Discretion, and the Legal View of the Advocate General

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## **Abstract**

In Opinion 2/15, the Commission, the European Parliament, the Council, and the Member States litigate whether the Union is exclusively competent to conclude the EU-Singapore Free Trade Agreement (EUSFTA) alone, or whether the EU ought to involve the Member States as independent parties to a ‘mixed’ agreement. The delineation of the scope of EU Common Commercial Policy following the Lisbon Treaty reform of 2009 is central to this proceeding. The Court’s opinion, which stands in the tradition of seminal EU external competence cases such as Opinion 1/78 and Opinion 1/94, will further clarify the Union’s constitutional identity in the area of EU external economic relations and is likely to have vast implications for EU external economic governance. This note, first, reviews the evolution of the Union’s Common Commercial Policy in context of the Court’s past jurisprudence and, secondly, scrutinizes the relevant methodological approaches and standards of analysis, which the Court employs in its competence enquiry. It is argued that the Court retains ample space for discretionary judicial decision-making, which surfaces, most obviously, at the intersection of the competence enquiry and the necessary determination of the appropriate legal bases. The clarification and further refinement of the Court’s analytical standards in its judgment as well as their transparent and consistent application have the potential to substantially reduce incentives for future litigation and inter-institutional political combat. The recent quarrels over the signing, provisional application, and conclusion of CETA provide sufficient emphasis to this point. Using the legal view of Advocate General as a benchmark, this paper, third, discusses the practical implications of the Court’s judgment for EU international trade and investment treaty-making. The article, fourth, proposes a number of institutional alternatives that may serve to ‘save’ EU external economic treaty-making from ‘mixity’ and the pitfalls of the associated treaty-making procedures in the EU and the member states.

## **Keywords**

Opinion 2/15, Common Commercial Policy, EU-Singapore Free Trade Agreement, mixed agreements, exclusive competence, implied powers.





## I. Introduction \*

On December 21, the Court of Justice of the EU (CJEU) published the legal view of CJEU Advocate General (AG) Sharpston as part of the Opinion 2/15 proceedings.<sup>1</sup> AG Sharpston's opinion responds to the question to the Court of whether the EU has the 'requisite competence' to conclude the EU-Singapore Free Trade Agreement (EUSFTA) alone and without including the Member States (MS) as independent parties to the treaty. The Commission had requested the Court's opinion on this matter pursuant to Article 218(11) TFEU in October 2014.<sup>2</sup> More specifically, the Commission asked the Court to clarify which parts of the EUSFTA fall within the realm EU exclusive competence; competences shared with the member states; or even MS exclusive competences, respectively.<sup>3</sup> In her submission to the Court, Advocate General Sharpston argues that certain parts of the EUSFTA fall under EU shared competence – including certain transport services, portfolio investment, labour rights and environmental protection obligations - whereas one provision, in her view, falls within the scope of exclusive competence of the member states. According to AG Sharpston, the EUSFTA hence ought to be concluded as a 'mixed agreement' by the EU and its member states independently. The Court is expected to issue its opinion on May 16 of this year. Against this background, this note aims at reviewing the constitutional fundamentals of the questions that are at stake in this important proceeding and outlines the practical implications of the Court's judgment.

This paper is divided in two parts. The first part scrutinizes the relevant methodological approaches and standards of analysis, which the Court employs in its response to the Commission's competence enquiry. Based on the examination of relevant case law, it is argued that the Court retains ample space for discretionary judicial decision-making, which surfaces in the delimitation of the substantive scope of the Common Commercial Policy; at the intersection of the competence enquiry and the necessary legal basis analysis; as well as in the Court's reading of implied powers. It is desirable, against this background, that the Court renders its choice of analytical parameters and benchmarks transparent – or: inter-subjectively verifiable - so as to advance systemic clarity in regard of the unresolved question over the delimitation of EU external competence for the CCP and other external policies beyond the specific issues addressed in Opinion 2/15. It is in this way that the Court could profoundly minimize the legal-institutional incentives for future litigation and inter-institutional political battles over both external competences and the appropriate legal bases for external economic treaty making.

With these methodological considerations in mind, the second part of this paper examines key aspects of the legal view of Advocate General Eleonor Sharpston and points at contentious issues that may still be subject to further clarification by the Court. Using the legal view of Advocate General as a benchmark, this note discusses the practical implications of the Court's judgment for EU international trade and investment treaty-making. Finally, the paper proposes a number of institutional alternatives that may serve to 'save' EU external economic treaty-making from 'mixity' and the pitfalls of the associated treaty-making procedures in the EU and the member states.

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\* I am grateful to Petros Mavroidis, Gesa Kübek, Lorand Bartels, and Hannes Lenk for comments and inspiring discussions. Opinions expressed here and remaining errors are my own.

<sup>1</sup> Opinion of Advocate General Sharpston delivered on 21 December 2016; Opinion Procedure 2/15 initiated following a request made by the European Commission.

<sup>2</sup> Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (Opinion 2/15) (2015/C 363/22), November 3, 2015.

<sup>3</sup> *ibid.*: "Question submitted to the Court: Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically: Which provisions of the agreement fall within the Union's exclusive competence? Which provisions of the agreement fall within the Union's shared competence? and Is there any provision of the agreement that falls within the exclusive competence of the Member States?"

The remainder of this introductory section reviews the constitutional evolution of the Union's Common Commercial Policy in context of the Court's jurisprudence, as well as changing patterns of international trade and trade regulation. Section II, subsequently, introduces and scrutinizes four main standards of analysis, which the Court and the AG employ in this proceeding to address the Commission's competence enquiry. Section III outlines and discusses the specific legal arguments of the AG with respect to those parts of the EUSFTA that fall, in her view, within the scope of exclusive Member States competence, exclusive EU competence, and shared competences respectively. In this section, moreover, I outline institutional alternatives – in terms of the design of EU commercial agreements with third countries – that may avoid the pitfalls of mixed economic treaty-making. Section IV offers conclusions drawn from the forgoing analysis.<sup>4</sup>

### ***1. Background: Institutional Change in EU External Economic Governance***

It is clear that the political weight of the question over the existence and nature of EU external competence derives from its link to the procedural modalities of treaty-making in the EU. EU external treaty making procedures are the very function of the answer to the question over the nature of EU competence: If the content of a treaty falls within the scope of EU exclusive competence entirely, the conclusion of the treaty by the EU alone is a legal requirement ('EU-only'). In contrast, where an agreement includes (just) a single provision that falls within the scope of exclusive competences of the member states, the EU must conclude the treaty jointly with the member states (mandatory 'mixed' agreement). If, however, parts of the treaty fall under EU exclusive competence, whereas other parts of the treaty fall under competences shared with the member states, it is left to the political discretion of the EU institutions to involve the member states as independent parties or conclude the treaty alone (facultative agreement).<sup>5</sup>

Since the entry into force of the 1957 Treaty of Rome, a number of consecutive treaty amendments have considerably broadened the scope of the primary law provisions governing Common Commercial Policy. The evolution of CCP Article 113 EEC Treaty, over Article 133 EC Treaty to, eventually, Article 207 TFEU reflects the efforts of the treaty drafters to adapt the ambit of the CCP to changing patterns in international trade over the past six decades. The treaty reforms reflect the demand for a sufficiently wide constitutional framework that enables mandated political institutions to respond to

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<sup>4</sup> It is worth taking note of two important issues, at this point, which the AG explicitly carved out from the scope of her analysis. First, the Commission did not ask the Court to assess the compatibility of the EUSFTAs ISDS mechanism with EU law. The Belgian government, however, has recently indicated its intention to ask the Court for clarification of this issue in regard of the investor-state dispute settlement mechanism that forms part of EU-Canada Comprehensive Economic and Trade Agreement (CETA). A second question that remains unaddressed – unfortunately - is whether the Commission would be in breach of its institutional obligations under Article 218(4) TFEU and Article 13(2) TEU by negotiating the EUSFTA as an 'EU-only' agreement despite the fact the Council's negotiation directive called for the negotiation of a mixed agreement. The underlying issue is whether the Council can force the Commission to include treaty content that falls under shared or even MS exclusive competence and thus retains the right or must involve the member states as independent parties to the agreement. For a detailed discussion of this question, see: Kuiper, Pieter-Jan: *Post-CETA - How we got there and how to go on*. BlogActiv, October 28, 2016.

<sup>5</sup> In his recent submission in the Opinion 3/15 proceedings, Advocate General Wahl recalled that "the choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence (or of parallel competence), is generally a matter for the discretion of the EU legislature. That decision, as it is predominantly political in nature, may be subject to only limited judicial review." (Opinion 3/15: Opinion of the Advocate General Wahl. Para 119, 120) Such discretion, however, is subject to procedural rules laid down in Article 218 TFEU: The Commission may propose the signing and conclusion of an external agreement as 'EU-only'. Member states represented in the Council can then decide to authorize the signature and conclude the treaty as an EU-only agreement by qualified majority voting (QMV), if TFEU-based unanimity requirements do not apply. Alternatively, the Council may adopt a unanimous decision to amend the Commission proposal for an 'EU-only' agreement and mandate the independent ratification by each and every member state - in addition to the Council decision on treaty signature and conclusion (Article 293(1) TFEU).

opportunities and challenges of what has been prominently termed '21<sup>st</sup> century trade' by Richard Baldwin. Baldwin notes that, "[in the 20<sup>th</sup> century], trade mostly meant selling goods made in a factory in one nation to a customer in another. Simple trade needed simple rules. (...) Today's trade is radically more complex. The ICT revolution fostered an internationalization of supply chains, and this in turn created the 'trade-investment-services nexus' at the heart of so much of today's international commerce."<sup>6</sup>

It is by no coincidence, therefore, that the CCP initially only extended to basic border measures for trade in goods.<sup>7</sup> Consecutive reforms of the primary law provisions through the treaties of Amsterdam<sup>8</sup>, Nice<sup>9</sup>, and Lisbon<sup>10</sup> have widened the scope of the CCP to cover a larger amount of policy instruments that affect external trade in goods and services as well as foreign direct investment at the border and beyond. The 1957 Treaty of Rome originally designed the CCP with a view to providing the Community with exclusive powers to establish the Common External Tariff, to enter into external negotiations over obligations that mutually reduce import duties and quantitative import restrictions within the GATT framework, and to adopt autonomous measures that define the framework of its external commercial policy. At the early stage of the evolution of this purely external area of EU competence, the judges in Luxembourg were confronted with the question whether the CCP merely extended to trade liberalization or could also encompass the regulation of international commodity trade.

In Opinion 1/78, the Court opted for a markedly dynamic interpretation of the scope of the CCP. More than two decades after the entry into force of the Treaty of Rome, the Court held that

"it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down, for Article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged. A "commercial policy" understood in that sense would be destined to become nugatory in the course of time."<sup>11</sup>

Rather than being subject to a dynamic judge-made expansion, however, it was consecutive treaty amendments, which progressively adapted the CCP to match the needs of EU external action in the WTO and then further broadened its scope to cover 'new generation' trade policy areas. The 1997 Treaty of Amsterdam saw the addition of 'services' and 'commercial aspects of intellectual property rights' to the general scope of the CCP. The 2001 Treaty of Nice placed those concepts within the

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<sup>6</sup> Baldwin, Richard: *21st Century Regionalism: Filling the gap between 21st century trade and 20th century trade rules*, World Trade Organization, 2011. p3

<sup>7</sup> The original version of CCP Article 113(1) of the 1957 Treaty Establishing the European Community reads: "The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies."

<sup>8</sup> For a contextualization of Amsterdam Treaty amendments in ECJ jurisprudence and treaty negotiation see: Cremona, Marise (2001): *EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders*, in: Weiler, JHHW (ed): 'The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?'

<sup>9</sup> For a comprehensive description and discussion of the Nice treaty amendments, see Herrmann, Christoph (2002): *Common Commercial Policy after Nice: Sisyphus would have done a Better Job*, Common Market Law Review 39, 7-29, 2002.

<sup>10</sup> Krajewski, Markus (2012): *The Reform of the Common Commercial Policy*, in: Biondi, Andrea, Piet Eeckhout, and Stefanie Ripley (eds): *EU Law after Lisbon*, CUP.

<sup>11</sup> Opinion 1/78 [1979 ECR 2871]. para 44

realm of the Common Commercial Policy competence of the Community, subject to a complex web of restrictions. The latest EU primary law reform - the 2007 Treaty of Lisbon - considerably consolidated and simplified the CCP provisions and amended its scope to include 'foreign direct investment'.<sup>12</sup>

Whether the content of the 'new generation' of external economic agreements matches or exceeds the scope of the CCP and thus Union exclusive powers over treaty-making is the very question that stands at the centre of the Opinion 2/15 proceedings. It is of particular concern here whether the Union's exclusive treaty-making competences extend to the entirety of EUSFTA obligations including portfolio investment, transport services, as well as to the *non-commercial* provisions of the agreement such as 'moral rights' of intellectual property holders and the EUSFTA chapter on 'sustainable development' (labour rights and environment protection).

As predicted by the Court in 1/78 and retrospectively observed by Baldwin, the changing nature and increasing complexity of international trade and investment patterns in the past decades has generated a demand for a constitutional framework that adapts the powers of the Community (and Union) institutions to engage in the regulation of its external economic environment. The profit and net welfare enhancing potential of commercial opportunities inherent to international trade as well as the evolving complementary international legal institutions that have facilitated and regulated international commercial transactions have further driven the demand for reform of primary legal institutions governing the EU's Common Commercial Policy.

The otherwise rare exclusive nature of EU competence for the CCP as well as the vagueness of its provisions with respect to its material scope and purpose(s),<sup>13</sup> has, however, provided strong incentives for political and judicial conflict over the operation of the CCP. It is in this context, that the interplay between policy demand generated by international economic and legal institutions; the inter-institutional political process at the Community level; primary law reform; and CJEU litigation has created a dynamic of constructive tension. It is this interplay, which has catalysed as well as constrained incremental progress towards an expansion of the scope within which EU unity in external commercial policy remains an *a priori* possibility, as well as towards greater legal clarity over the operation of the CCP provisions.

That being said, it is remarkable that the essence of the legal questions over the operation of the CCP has only marginally changed – or rather: been refined - over the past decades. The arguably most important issue for the Court remains the quest for a consistent and coherently applied method that serves to delineate the material scope of the CCP – and thus: Union exclusive competence - in isolation; in relation to other areas of external relations competences; and in relation to areas of EU internal competences.<sup>14</sup> Moreover, the enquiry concerning the Union competences for the conclusion of a comprehensive international trade agreement invites the Court to measure the status quo of the implied exclusive external competences that the Union has acquired as a result of its constantly evolving secondary legislation in areas of shared internal competence. Closely related to competence enquiries, third, stands the question over the choice of appropriate legal basis – or bases - for 'multi-purpose' external agreements. The question over the correct legal basis for the act concluding the EUSFTA has not been posed to the Court in the Commission's request for Opinion 2/15. Nonetheless, the Court, ought to address the issue as a matter of practical necessity in order to ground distinctions

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<sup>12</sup> CCP Article 207 (1) TFEU now reads: "The common commercial policy shall be based on uniform principles, particularly with regard to *changes in tariff rates*, the conclusion of tariff and trade agreements *relating to trade in goods and services*, and the *commercial aspects of intellectual property, foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of *dumping or subsidies*. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

<sup>13</sup> Cremona, Marise (2001): op. cit. n8. p6

<sup>14</sup> Cremona, Marise (2001): op. cit. n8. p6, p20

between exclusive and shared competences on appropriate treaty provisions. Whether the Court, for the purpose of its competence analysis, applies the same analytical standards it employs for pure legal basis cases – and thus advances coherence in this regard – is another question of constitutional significance that could be clarified in this proceeding. Further down the road, it is the scope of responsibilities of the political institutions – or horizontal competences – that will be clarified by implication.

Against this background, a two decades old observation made by Meinhard Hilf may still be as relevant as ever: “The lack of clarity as to the extent of foreign trade authority could pose the currently most important constitutional problem of the Union” (notwithstanding Brexit).<sup>15</sup> It is, in part, the purpose of this note to examine discernable progress that has been made over those two decades and to draw attention to specific and systemic legal questions that the Court ought to address in its Opinion 2/15 judgment.

As indicated in the forgoing paragraphs, Opinion 2/15 stands in tradition of the strand of jurisprudence, in which the Commission seeks to clarify the scope of EU (or Community) exclusive competence for its external commercial policy. Most prominently, in Opinion 1/94, the Commission requested a Court opinion on whether the Community was exclusively competent to conclude the WTO Agreement and its annexes under CCP Article 113 EC Treaty.<sup>16</sup> In contrast to the Commission’s view, the Court held that trade in certain services and intellectual property rights provisions under the TRIPs agreement were not covered by EU exclusive competence for the CCP but fell under competences shared with the member states. The Court thereby ‘enabled mixity’ and allowed for the exercise of external competence by member states as independent parties to the 1994 WTO Agreement, which thus required the ratification of the said agreement by all member states of the Community. In Opinion 1/94, the Court was arguably concerned with setting limits to the CCP in light of the nature of corresponding internal competences and shied away from advancing the dynamic interpretative approach, which the Court had chosen in Opinion 1/78 two decades earlier.

As argued elsewhere in greater detail, the Court’s findings in Opinion 2/15 are not only set to authoritatively clarify the *de jure* legitimacy of EU external action in the area of trade and investment and thus provide legal certainty over the treaty-making competences of the Union under the post-Lisbon primary legal framework. Seen in context of past political and judicial battles over competence, the Court’s judgment may have a significant bearing on the effectiveness, credibility, and efficiency of multilevel governance of EU external economic relations.<sup>17</sup> What is at stake, to use the language of EU constitutional lawyers, is nothing less than the shape and strength of the Union’s identity in its external commercial relations and the reach of the member states in EU external economic relations conduct.

Yet, as Advocate General Sharpston recalls, “the need for unity and rapidity of EU external action and the difficulties which might arise if the European Union and the Member States have to participate jointly in the conclusion and implementation of an international agreement cannot affect the question who has competence to conclude it. That question is to be resolved exclusively on the basis of the treaties.”<sup>18</sup>

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<sup>15</sup> Cited by Cremona, Marise (2001): *ibid.*: p6 Hilf, Meinhard (1997): *Unwritten EC Authority in Foreign Trade Law* (1997) 2 European Foreign Affairs Review, Issue 4, p 437

<sup>16</sup> Opinion 1/94 [1994 ECR I-5267].

<sup>17</sup> Kleimann, David and Gesa Kübek: *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU - The Case of CETA and Opinion 2/15*, Robert Schuman Centre for Advanced Studies Research Paper No RSCAS 2016/58, November 2016.

<sup>18</sup> Opinion of the AG Sharpston: para 566. This view mirrors the general and natural stance of the ECJ, as expressed elsewhere, such as Opinion 1/94: para 107 and Opinion 2/00: para 41.

The AG, of course, rightly suggests here that there is only one legitimate answer to the question of competence – notably the one that finds its basis in the authoritative interpretation of EU treaties by the Court. It is similarly obvious, however, that the methodological choices of the Court in interpreting the treaties are inherently normative and therefore political.<sup>19</sup> The more important questions may well be whether such choices are made in an intersubjectively verifiable manner, whether they are systematically coherent within the context of – or in explicit distinction from – the Court’s past jurisprudence, and whether they are consistent within themselves.

Whatever the outcome, in any case, the Court’s findings will yield important guidance for the treaty-making practice of EU institutions.<sup>20</sup> Whether the judgment serves to reduce or eliminate prevalent legal-institutional incentives for political and judicial combat between those EU institutions and the member states, however, much depends on whether the Court will offer additional clarity over its methodological approaches for the delimitation of the CCP vis-à-vis other external competences and internal competences as well as over the attribution of legal bases for acts concluding EU external economic treaties. It is in this way that the Opinion 2/15 proceedings do not only offer the Court the opportunity to guide the parties involved on the question of competence, but also to update and clarify the methods it employs to address the questions before it.

## II. Standards of Analysis: Text, Aims and Content, Predominant Purpose, and Implied Powers

The Court’s case law, read in context of the Treaties, provide for four main standards of analysis that are relevant for the determination of the existence and nature of EU competence for the conclusion of external agreements. The application of these interpretative approaches in Opinion 2/15 may or may not result in a finding that the Union has acquired exclusive external competence over the content of the EUSFTA. Conceptual clarity and a consistent application of interpretative modalities to the legal act in question are certainly crucial ingredients for coherent reasoning and legal certainty beyond the legal facts at stake in this proceeding. This section outlines and discusses the main analytical approaches, which the AG and the Court employ. I shall turn to an examination of the key substantive arguments advanced by the AG in section III.

### 1. Ordinary Meaning of the Terms of Article 207(1) TFEU

The first approach, to be sure, relies on a textual interpretation of the terms of Article 207(1) and Article 206 TFEU read in conjunction with Article 2(1) and Article 3(1)(e) TFEU, which render the EU exclusively competent to adopt legal acts falling within the scope of Common Commercial Policy. Article 207(1) TFEU reads as follows:

‘The common commercial policy shall be based on uniform principles, particularly with regard to *changes in tariff rates*, the conclusion of tariff and trade agreements *relating to trade in goods and services*, and the *commercial aspects of intellectual property, foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of *dumping or subsidies*. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action’ [emphasis added].

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<sup>19</sup> There is no need or space to enter into a discussion of this matter here. It may suffice to refer to Koskenniemi, Martti: *Symposium on Method in International Law, Letter to the Editors of the Symposium*, 93 *American Journal of International Law*, 351 April, 1999.

<sup>20</sup> For EU Commissioner for External Trade, Cecilia Malmstrom, “it’s not about winning or losing in Court. It’s about clarification. What is mixed? What is not mixed? And then we can design our trade agreements accordingly.” *Financial Times: Brussels Close to Trade Deal with Japan*, 4 December 2016.

Whether or not treaty content falls within the scope of Article 207 TFEU – and thus EU exclusive competence - depends on the conceptual ambit of these provisions, which is indicated by the ordinary meaning of their terms. It is widely acknowledged, however, that the list of regulatory areas and instruments included in Article 207(1) TFEU is non-exhaustive. It is rather indicative of the scope and limits of the CCP. It is arguably the very vagueness of its terms and the indeterminacy of its limits - in combination with the (otherwise rare) exclusive nature of EU competence - which has provoked the litigious sentiments of EU institutions and member states' governments over the past decades. It is in this context that the CCP has attracted a multitude of CJEU disputes over competence and choice of appropriate legal basis.

In Opinion 2/15, the Court is asked for the first time – among others - to determine the ordinary meaning of the term 'foreign direct investment' within the context of the CCP, which was added to the scope of Article 207(1) TFEU as a result of the Lisbon Treaty reform of 2009. Moreover, in this proceeding, the Court ought to address the conceptual distinctions between commercial and non-commercial aspects of intellectual property rights and is required to draw a clear line between the wider concept of services trade and the scope of 'transport' services. The latter is explicitly excluded from the scope of Article 207(1) TFEU by means of a carve-out codified in Article 207(5) TFEU.<sup>21</sup> Moreover, the Court will have to examine whether the ordinary meaning of the term 'restrictions' in 206(1) TFEU applies to market access for investment only, or, in line with an inferential reading of the term, encompasses post-admission standards of protection, too.<sup>22</sup>

## 2. 'Aim and Content' of EU External Agreements

A mere textual interpretation of Article 207(1) TFEU in light of any given content of international agreements is, however, not sufficiently conclusive for the delineation of the scope of the CCP and other legal bases. The Court's jurisprudence gives further guidance to the extent that

“the choice of the legal basis of a European Union act, including an act adopted to conclude an international agreement [...], must rest on *objective factors amenable to judicial review*, which include the *aim and content* of that measure” [emphasis added].<sup>23</sup>

The 'aim and content' approach, as further developed by the Court, prescribes a purposive interpretation of the act or measure in question, in light of the material scope of Article 207 TFEU. In elaboration, the Court held that

“a European Union act falls within the common commercial 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” [emphasis added].<sup>24</sup>

By distinction, the Court held

“that the mere fact that an act of the European Union, such as an agreement concluded by it, is liable to have *implications* for international trade is not enough”

for it to fall within the scope of Article 207 TFEU.<sup>25</sup>

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<sup>21</sup> Article 207(5) TFEU reads: “The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.”

<sup>22</sup> Article 206 TFEU: “By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive *abolition of restrictions* on international trade and on foreign direct investment, and the lowering of customs and other barriers” [emphasis added].

<sup>23</sup> *Parliament vs. Council* (C-263/14) para 43

<sup>24</sup> *Daiichi Sankyo* (Case C-414/11). para 51; *Commission vs Parliament and Council* (C-411/06) para 71; *Regione autonoma Friuli-Venezia Giulia and ERSA* (C-347/03) para 75

<sup>25</sup> *Daiichi Sankyo*, para. 51

The application of the ‘immediate and direct effects’ standard to post-Lisbon Common Commercial Policy in *Daiichi Sankyo* has been praised as the Court’s choice of “clarity over caution”.<sup>26</sup> Despite this commendable development in the Court’s jurisprudence it remains questionable, however, whether the Court’s method for testing ‘immediate and direct effects on international trade’, in contrast to mere ‘implications’, does in fact reduce the discretion exercised by the Court to delineate the material scope of CCP Article 207 TFEU. A purely notional examination of the quality of the link between aims and content of an agreement, on the one side, and trade (or foreign direct investment), on the other, may in fact provide for little additional clarity beyond the intrinsic value of authoritative judicial decision-making. The Court’s self-imposed requirement to determine the correct legal basis on the grounds of ‘objective factors amenable to judicial review’ may legitimately generate a demand for empirical evidence that adds meaning to these otherwise abstract relationships.

It seems that the Court has done little to operationalize – through economics-based analysis - the relationship between the content of an agreement, the specific measures it requires as a function of its obligations, and their effects (whether direct and immediate or by implication) on international trade and investment. This circumstance is problematic for both the determination of the appropriate legal basis for an act concluding an external agreement and, similarly, for the delineation of competence for the CCP, other areas of external action, and fields of internal competence. As demonstrated below, the Court was frequently satisfied by mere reference to preambular language of the agreement in question or objectives set out in its provisions, in order to determine the purpose of the said agreement within the context of the EU primary legal framework – rather than entering into an examination and comparison of actual effects of specific measures on the objectives pursued.

Admittedly, however, this task may make for a mission impossible for the Court. Creating a meaningful and empirically robust distinctions between measures that evidently have direct and immediate effects on trade versus measures that affect trade by implication could, given the state of regional and global economic integration and the corresponding regulatory environment, lead to no satisfactory outcome in terms of additional clarity after all. Accepting indeterminacy of the scope of the CCP, however, reveals the discretionary space of manoeuvre of the Court to interpret the notion of ‘direct and immediate effects on international trade’ as it deems fit on a case-by-case basis.

#### a.) ‘Aim and Content’ in Opinion 1/94 versus *Daiichi Sankyo*

To illustrate this point, we can recall the Court’s approach and reasoning in Opinion 1/94 on the question whether the Agreement on Agriculture (AoA), on the one hand, and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), on the other, fall within the scope of (then) CCP Article 113 EC Treaty, and whether these individual parts of the WTO Agreement were thus subject to exclusive treaty-making competence of the Community, or not.

Neither ‘agriculture’ nor ‘intellectual property rights’, to begin with, formed part of the terms of Article 113(1) EC Treaty. The Union’s internal competences for ‘agriculture’ and ‘intellectual property rights’ were (and still are) shared with the member states under the primary law provisions on agriculture (Article 43 EC Treaty) and the internal market (Articles 26, 100; 100a EC Treaty).

Having said this, it is abundantly evident that both the AoA and the TRIPs agreement exert effects on both EU internal and external trade and, moreover, required implementing legislation by the Community on the basis of policies set out in the treaties for which the Community shares competence with the member states. Whether the effects on international trade are deemed to be ‘immediate and

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<sup>26</sup> Larik, Joris (2015): *No mixed feelings: The post-Lisbon Common Commercial Policy in Daiichi Sankyo and Commission v. Council (Conditional Access Convention)* 52 Common Market Law Review, Issue 3. p 791



direct' or merely 'implied' remains, up until to date, a matter contingent upon the precise operationalization of these concepts and are thus subject to discretion exercised by the Court.

The Court – in Opinion 1/94 - came to distinct conclusions in response to the question whether the two distinct annexes fell under Article 113 EC Treaty. Applying a crude 'aims and content' test to the AoA, the Court liberally held that

“[t]he objective of the Agreement on Agriculture is to establish, on a worldwide basis, ‘a fair and market-oriented 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.”<sup>27</sup>

In its assessment of the TRIPs Agreement, however, the Court came to the opposite conclusion:

“Admittedly, there is a connection between intellectual property and trade in goods. Intellectually property rights enable those holding them to prevent third parties from carrying out certain acts. (...) That is not enough to bring them within the scope of Article 113. Intellectual property rights do not relate specifically to international trade; they affect internal trade just as much as, if not more than international trade.”<sup>28</sup>

The Court further argued that recognizing exclusive competence of the Community

“to enter into agreements with non-member countries to harmonize the protection of intellectual property and, at the same time, to achieve harmonization at Community level, the Community institutions would be able to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting.”<sup>29</sup>

These excerpts from Opinion 1/94 are worth highlighting for two reasons. First, they serve to illustrate that the application of the 'effects' criterion employed to further elaborate the 'aims and content' test is not an automatism but provides the Court with ample space for manoeuvre. The application of narrowly understood 'direct and immediate effects on international trade' - a criterion only developed in subsequent case law - to the 1994 Agreement on Agriculture could well result in the conclusion that the core of measures required for implementation of the agreement exerts effects on EU internal trade at least as much as on international trade. In essence, the AoA is an international instrument that prescribes limits for subsidies linked to domestic production, prices, and exporters. Measures implementing EU production subsidy commitments under the AoA - if compared to the reduction of a customs duty or even prohibition of production and circulation of counterfeited goods – exert indirect effects on international trade or only affect international trade by implication. EU subsidy commitments in line with EU obligations under Article 3, 6, and 7 of the AoA only decrease distortions of international trade indirectly by reducing the artificial incentives for domestic supply and export of agricultural produce, rather than regulating external trade directly.<sup>30</sup>

Yet, such a narrow reading of the AoA, in context of Article 207 TFEU (and then Article 113 EC Treaty), would be unwarranted given core objective pursued by the content of the agreement and its inevitable effects on international trade. The Court hence rightly concluded that the aim and content of the AoA relates specifically to international trade in goods. In its examination of the TRIPs agreement in Opinion 1/94, however, the Court appeared to be neither impressed nor convinced by the object and

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<sup>27</sup> Opinion 1/94: para 29

<sup>28</sup> Opinion 1/94: para 57

<sup>29</sup> Opinion 1/94: para 60

<sup>30</sup> For a case study on such 'indirect' effects of the WTO Agreement on Agriculture on international trade in agriculture, see: Kleimann, David (2007): *The Reform of the EU Sugar Sector: Implications for ACP Countries and EPA Negotiations*, Analytical Note prepared for the South Centre's Trade for Development Programme (SC/AN/TDP/MA/3), South Centre, Geneva.

purpose or the direct and immediate effects of TRIPs obligations on international trade and held that its conclusion is a matter subject to shared internal market competence of the Community.

The Court's finding in Opinion 1/94 with respect to the TRIPs agreement, secondly, is remarkable in that it would appear to undermine the integrity of the substantive scope of the CCP. Rendering CCP applicability – as the correct legal basis for the conclusion of external commercial treaties – contingent on whether internal measures necessary for the implementation of respective international commitments require stricter procedures than the act concluding the agreement under the CCP would hollow out the scope of the Union's exclusive competence allocated for the purpose of external commercial treaty-making from within. It seems nonsensical to subject the material scope of Article 207 TFEU – and measures falling thereunder – to a case-by-case assessment of the procedural requirements for internal legal acts necessary for implementation.

It is commendable, for this very reason, that the Court in *Daiichi Sankyo* effectively reversed its findings in Opinion 1/94. In *Daiichi Sankyo*, the Court held that

“[t]he primary objective of the TRIPs Agreement is to strengthen and harmonise the protection of intellectual property on a worldwide scale (...). As follows from its preamble, the TRIPs Agreement has the objective of reducing distortions of international trade by ensuring, in the territory of each member of the WTO, the effective and adequate protection of intellectual property rights.”<sup>31</sup>

As such, the Court found - almost two decades after its judgment in Opinion 1/94 - that the TRIPs agreement, in its entirety, falls under exclusive competence of EU Common Commercial Policy. It is certainly noteworthy that ‘commercial aspect of intellectual property rights’ were added to the terms of CCP Article 207(1) TFEU in the course of the Treaty of Lisbon reform. The Court's reasoning in *Daiichi Sankyo*, however, suggests that it is the re-consideration of the aim and content of the TRIPs agreement, and the Court's general approach to the delineation of the scope of the CCP, rather than the reform of the scope of Article 113 EC Treaty, which triggered the Court's change of mind.

Indeed, giving further way to the Court's approach taken in Opinion 1/94 would have structurally crippled the scope and exercise of Article 207 TFEU and the effectiveness and credibility of EU external action in the area international trade. I will come back to this point at the beginning of Section III. It remains worth emphasizing, for the purpose of this subsection, that it is the Court's precise analytical approach to, and its understanding of the ‘direct and immediate effects’ criterion – in addition to the interpretation of superficial objectives set out in preambular language of the agreement in question – that makes for a key determinant of the results of the Court's competence enquiry in general, and in Opinion 2/15 specifically.

#### **b.) ‘Aim and content’ of ‘deep and comprehensive’ EU Trade and Investment Agreements**

This question is of particular relevance in regard of treaty contents that are associated with the ‘new generation’ of EU external trade agreements, such as obligations on investment liberalization and protection, competition policy, government procurement, as well as sustainable development (labour rights and environmental protection). In particular, it is worth watching whether the Court is willing to subsume EUSFTA obligations under Article 207 TFEU, which do not form part of the language of that provision but are nevertheless bound to affect international trade in a more or less ‘direct and immediate’ manner.

If the answer is affirmative across the board, the correct legal basis for the conclusion of the agreement is Article 207 TFEU. Read in conjunction with Article 2(1) TFEU and Article 3(1)(e)

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<sup>31</sup> *Daiichi Sankyo*: paras 58-61

TFEU, the Union would thus be exclusively competent to conclude the agreement without participation of the member states.

It is by now common knowledge that AG Sharpston deems EUSFTA provisions on transport services, certain aspects of intellectual property rights, portfolio investment, labour rights, and environmental protection obligations to fail the aims and content test with regard to CCP Article 207 TFEU and attributes provisions and components of the agreement to the scope of TFEU provisions for which the Union and member states share external powers.

Without prejudging the reasoning of the AG in response to specific issues, her submission underlines the fact that the question over the correct legal basis for the conclusion of an international agreement is highly relevant – and inseparable – from the analysis of the existence and nature of competence.<sup>32</sup>

“In Opinion 1/08, the Court explained that the character, whether exclusive or not, of the European Union’s competence to conclude agreements and the legal basis which is to be used for that purpose are two closely linked questions. [...] Establishing that the European Union has competence to act at all in a particular field (and thus identifying the legal basis for such action) is therefore a *precondition* to determining the allocation of competences between the European Union and the Member States, in accordance with Articles 3 and 4 TFEU, as regards a specific external action” [emphasis added].<sup>33</sup>

It is in this context that the Court submitted written questions to the parties – prior to the proceeding’s hearing – requesting the parties’ opinion on the correct legal bases for the conclusion of the EUSFTA. Their diverse answers to this question shall be highlighted in the next subsection, which examines the Court’s jurisprudence with regard to the appropriate legal basis and the question of competence for ‘multi-purpose’ legal acts.<sup>34</sup>

### 3. ‘Predominant’ and ‘Incidental’ Purposes of EU External Agreements

The ‘aims and content’ test of the Court is not only reflected in its efforts to delineate the ambit of measures that, by their aim and content, fall within the conceptual realm of Article 207 TFEU or, alternatively, other EU policies frameworks. The ‘aim and content’ attributed to a legal act are similarly decisive criteria for the determination of the correct legal basis – or bases – where that act is found to comprise of *multiple components and purposes*, including objectives other than the CCP. AG Sharpston’s analysis and the wealth of Court jurisprudence reflect the fact that such acts can conceivably require reference to more than one legal basis, which may or may not include those for which the Union has not acquired exclusive competence *a priori* or by implication.

The notion of ‘multi-purpose’ legal acts is of relevance in cases that involve broader external agreements, which may carry multiple related or unrelated components and purposes and may not only advance external commercial objectives. The Court’s case law has addressed the issue of ‘multi-purpose’ acts and the corresponding question over the appropriate legal basis for the conclusion of such agreements by seeking to identify the ‘predominant purpose’ of the agreement in question. According to this strand of jurisprudence, the mere fact that an act comprises of two or multiple distinct components and purposes does not justify reference to a legal basis other than – in the present case – Article 207 TFEU:

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<sup>32</sup> Cremona, Marise (2006): *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI Working Paper, Law No.2006/22. p9

<sup>33</sup> Opinion of AG Sharpston: para 92

<sup>34</sup> Kleimann, David and Gesa Kübek: *The Future of EU External Trade Policy - Opinion 2/15: Report on the Hearing - EU Law Analysis Blog*, October 4, 2016.

“If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and *if one of those 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. By way of exception, if it is established that the measure pursues several objectives, which are *inseparably linked without one being secondary and indirect in relation to the other*, the measure must be founded on the various corresponding legal bases.”[emphasis added].<sup>35</sup>

It follows that it is not sufficient to merely identify multiple purposes and components and assign distinct legal bases on that ground. The determination of the correct legal basis for multi-purpose acts requires a second step, notably the analysis of the *relationship* between two or more identifiable components and purposes of the act concluding the international agreement. In order to determine whether the act requires reference to more than one legal basis, the identified components must be qualified as ‘predominant’, ‘incidental’, ‘secondary’, or ‘indirect’ *in relation to each other*. As such, the Court seems to ask for a qualification of distinct components *in context* of others. In other words: whether an identified objective, purpose, or component of a legal act requires reference to a distinct legal basis does not only depend on the face value attributed to that component in isolation from its legal context, but on its characteristics relative to the characteristics of other components and purposes of the agreement.

Does a methodology exist, which offers objective factors suitable for the qualification of the relationship between different purposes and components of broader external agreements or EU acts in general? Do the AG and the Court employ ‘objective factors amenable to judicial review’ to that end? More generally, is the Court required to give a definitive answer to the legal basis question in Opinion 2/15 or is the legal basis analysis only a practical necessity for the purposes of the competence enquiry? It is arguable that, as a matter of systemic coherence, the Court’s competence analysis and legal basis determination should coincide and apply the same objective factors amenable to judicial review. It appears desirable, at the very least, that the Court’s responses to either question should not generate inconsistencies among the two and therefore meet the same standards. This is even more so in light of the fact that the notion of ‘predominance’ and ‘incidentalism’ of treaty objectives and components – if applied liberally – carry the risk of judicial overreach, which is inherent in a contextual interpretation of treaty content in exercise of a competence analysis. An important question is hence what kind of characteristics of an identified component would qualify said component as predominant or secondary and incidental relative to others.

A comparison of the quantity of provisions subsumed under distinct objectives associated with identified components could serve as a simplistic indicator of ‘predominance’. A more useful indication may be the answer to the question whether a component creates new obligations or merely replicates (or incorporates) obligations that have already been assumed by the parties in context of other international agreements. As such, the enquiry would be directed at whether the treaty content in question has the effect of changing the status quo of EU obligations or not. But even if it does do so in a rudimentary (or incidental?) fashion, it may still be questionable whether such content creates rights and obligations to adopt specific measures. If not, they could be considered as incidental and secondary. More broadly, the Court could compare the effects of the provisions of a non-CCP component on the purpose that it discernibly pursues, on the one hand, with the aims / effects ratio of the CCP component, on the other. A question related to the considerations above is whether the legal quality of provisions subsumed under identified components (e.g. hard law vs. soft law; procedural vs. material obligations) factor into an analysis of whether a component is considered secondary and incidental. Distinct degrees of ‘bindingness’ and formal enforceability of provisions could serve as

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<sup>35</sup> *Commission vs. Council* (Case C-377/12), para 34

indicators for 'predominance' enquiries. A distinction could also be made in regard of whether the provisions in question establish obligations for the EU treaty partner only, or for all parties likewise.<sup>36</sup>

These considerations suggest that the Court's methodological approach and respective choice of factors to determine the answer to the question of 'predominance' have implications for the overall answer to the question of competence. More specifically, the discretion exercised by the Court in choosing 'objective factors' for the determination of 'predominant' or 'secondary' and 'incidental' components could alter the answer to the question of competence in any given legal context. If the Court identifies components and purposes other than external commerce, but considers these to be incidental (and secondary) in relation to the CCP, those components would still fall under Article 207 TFEU and hence exclusive treaty-making competence of the Union even if they do not satisfy the 'aims and content' test for Article 207 TFEU in the first place. Finding that an act pursues more than one objective and purpose and comprises of more than one component implies that at least one component has failed the aim and content test with respect to the CCP. This objective, purpose, or component is then, notwithstanding the outcome of the 'predominance' analysis, liable to being categorized as secondary and incidental to the CCP component.

That being said, and as mentioned above, permissive criteria for predominance testing are bound to generate considerable tension with the principle of conferral enshrined in Article 5 TEU. An excessively strict methodology, on the other hand, could jeopardize values of effective external treaty-making by requiring reference to multiple legal bases for treaty components (or provisions) that would otherwise be treated as 'incidental' and thus implicate the necessity to invoke multiple legislative procedures, or involve the member states as independent parties to an EU external agreement. It remains the task of the Court to resolve this tension by devising 'objective criteria amenable to judicial review' that strike a balance between the need to protect the integrity of the principle of conferral, on the one hand, and the need to advance the predominant purposes of EU external economic governance, on the other. The next sub-section reviews the Court's jurisprudence with regard to predominant and incidental treaty objectives, components, and provisions involving treaty content that relates to the CCP.

#### **a.) 'Predominant' and 'Incidental' Purposes, Components, and Provisions in CJEU Case Law**

Panos Koutrakos, in 2008, found that it is "apparent from the Court's case law that [the choice of legal basis] may not be determined on the basis of specific and easily identifiable criteria".<sup>37</sup> If further confirmed, this circumstance is regrettable given the Court's self-imposed requirements and the systemic value inherent to coherent judicial reasoning. More generally, it is worth questioning whether the Court applies the same standards and criteria in legal basis cases as in cases where it ought to determine correct legal bases for the purposes of competence analyses.

To shed further light on this question, I examine existing evidence from the Court's jurisprudence below, which illustrates the Court's sentiments with respect to its choice of 'objective factors' for the determination of 'predominance' and 'incidentalism' of external treaty objectives and effects. We can, for this purpose, distinguish between cases, in which the Court was asked to determine whether the

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<sup>36</sup> Lorand Bartels, in a discussion of the limits that apply to what he calls the 'Doctrine of Ancillary Clauses', notes that "[t]his leaves open the question whether agreements which do impose binding and-importantly-enforceable obligations on the parties, especially positive obligations to ensure respect for human rights and democratic principles, can be seen as an obligations merely 'ancillary' to the provisions of the agreement that are legitimately based on the EC Treaty." It is difficult to answer this question, but the conservative view is that they are not." Bartels, Lorand: 'Human Rights Conditionality in the EU's International Agreements', OUP, 2005. p224

<sup>37</sup> Koutrakos, Panos (2008): *Legal Basis and Delimitation of Competence in EU External Relations*, in: Cremona, Marise, Bruno de Witte, Ramses Wessel, and Paivi Leino-Sandberg (eds.): 'EU Foreign Relations Law – Constitutional Fundamentals', Bloomsbury Publishing, 2008. p184

object of the external agreement in question pursued commercial vs. non-commercial objectives, on the one hand, and cases where the parties litigated the competence and/or appropriate legal basis for the conclusion of purely commercial agreements. Moreover, we can distinguish between cases where the Court considered incidental treaty *purposes and components* versus cases, in which it considered incidental treaty *provisions*. I start with the category of non-commercial vs. commercial treaty purposes and close with an examination of the Court's case law on 'incidental' provisions.

In the *Energy Star Agreement* case, the key criterion for the Court's predominance analysis was its observation that the agreement did not establish new obligations pursuing environmental objectives whereas its effects were considered to be direct in relation to trade. The Commission and the Council litigated both competence and the appropriate legal basis for the decision concluding an agreement with the United States based on Article 175(1) EC Treaty (environmental policy), which is subject to shared external competence.<sup>38</sup> The Commission argued in favour of the annulment of that decision. In view of the Commission, the decision's correct legal basis was (then) CCP Article 133 EC Treaty and thus subject to exclusive external competence. Following its analysis of the agreement, the Court observed that "the Energy Star Agreement simultaneously pursues a commercial-policy objective and an environmental-protection objective."<sup>39</sup> In this predominance analysis, the Court considered that the treaty was indeed "devised in order to stimulate the supply of, and demand for, energy-efficient products and therefore to promote energy conservation, and second, that its extension to the Community undoubtedly helps to achieve that objective".<sup>40</sup> Nevertheless, the Court deemed decisive the fact that "the Energy Star Agreement itself *does not contain new energy-efficiency requirements*" [emphasis added], whereas it found that "the effect on trade in office equipment [...] is direct and immediate."<sup>41</sup> In line with this assessment, the Court held that the "commercial-policy objective pursued by the Energy Star Agreement must therefore be regarded as predominant, so that the decision approving the agreement should have been based on Article 133 EC".<sup>42</sup>

In Opinion 2/00, conversely, the Court held that the specific nature of obligations aimed at environmental protection established the predominant purpose of the Cartagena Protocol, whereas the mere fact that the very same obligations also exerted effects on trade was to be regarded as incidental. The task of the Court in this proceeding was to determine "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 [living modified organisms] or 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."<sup>43</sup> While the Commission's proposal for the Council decision was based on CCP Article 133 EC Treaty *and* (environment policy) Article 174(4) EC Treaty, the Council unanimously adopted the decision on the basis of Article 175(1) EC Treaty alone. The Court, this time, agreed with the Council in that it considered the essential purpose of the agreement – in light of its aim and content – to concern environmental protection, whereas its effects on trade were found to be only incidental. In view of the Court, "[t]he Commission's interpretation, if accepted, would effectively render the *specific provisions of the [EC] Treaty concerning environmental protection policy largely nugatory*, since, as soon as it was established that Community

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<sup>38</sup> *Commission vs. Council* (C-281/01 - Energy Star Agreement).

<sup>39</sup> *ibid.*: para 39

<sup>40</sup> *ibid.*: para 41

<sup>41</sup> *ibid.*: para 42

<sup>42</sup> *ibid.*: para 43

<sup>43</sup> Opinion 2/00 [ECR I-9713 2001]: para 25

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.”<sup>44</sup>

As discussed in the previous section, the Court's judgment in the *Daiichi Sankyo* case reflects a significant re-consideration of the aim and content of the TRIPs agreement - in light of its 'direct and immediate effects' -, which the Court now found – in contrast to Opinion 1/94 - to predominantly advance the purposes of international trade rather than the harmonisation of intellectual property rights legislation for the internal market. Having established that the CCP makes for the predominant purpose of the TRIPs agreement, the Court found itself at ease with the notion that

“[a]dmittedly, it remains altogether open to the European Union (...) to legislate on the subject of intellectual property rights by virtue of [shared] competence relating to the field of the internal market. However, acts adopted on that basis and intended to have validity specifically for the European Union will have to comply with the rules concerning the availability, scope and use of intellectual property rights in the TRIPs Agreement, as those rules are still, as previously, intended to standardise certain rules on the subject at world level and thereby to facilitate international trade.”<sup>45</sup>

With this important finding, the Court appears to do nothing less than to disconnect the ambit of the CCP from the scope as well as nature of internal competences and the (potentially stricter) procedural requirements for the implementation of the Union's international obligations. For the purposes of this subsection, however, it relevant to note that the Court, in this case, gives further way to the notion of a 'predominant purpose' of an agreement where that agreement clearly exerts effects on internal market harmonisation *and* international trade regulation.

In the *Conditional Access Convention* case, moreover, the Court found that certain provisions of the Convention, which prescribe confiscation measures, “are also supposed to improve the conditions for the functioning of the internal market. However, [...] that objective is *purely incidental* to the primary objective of the contested decision” [emphasis added].<sup>46</sup> The Court hence agreed with the legal view of Advocate General Kokott in that certain confiscation measures included in the Convention, if examined “in isolation, (...) may indeed be classified under the policy area of judicial cooperation in civil and criminal matters.”<sup>47</sup> Yet, the AG placed considerable emphasis on the *context* of those rules by arguing that “the confiscation measures and the related international cooperation here are not the primary object of the Convention. Because the focus of the Convention is in the area of commercial policy, the signing of the Convention as a whole must be based solely on Article 207 TFEU.”<sup>48</sup>

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<sup>44</sup> *ibid.*: para 40

<sup>45</sup> *Daiichi Sankyo*: para 59

<sup>46</sup> *Conditional Access Convention* (Case C-137/12). para 71

<sup>47</sup> *Conditional Access Convention*: Opinion of AG Kokott. para 82

<sup>48</sup> The obligations under scrutiny here are extensive. Article 6 of the Convention: “The Parties shall adopt such appropriate measures as may be necessary to enable it to seize and confiscate illicit devices or the promotional, marketing or advertising material used in the commission of an offence, as well as the forfeiture of any profits or financial gains resulting from the unlawful activity.” Article 8 of the Convention, moreover: “The Parties undertake to render each other mutual assistance in order to implement this Convention. The Parties shall afford each other, in accordance with the provisions of relevant international instruments on international co-operation in criminal or administrative matters and with their domestic law, the widest measure of co-operation in investigations and judicial proceedings relating to criminal or administrative offences established in accordance with this Convention.”

The Court has also showed itself amenable to a consideration of both incidental and ancillary ('accessory'; 'adjunct') provisions that may, in its view, not be capable of affecting the allocation of competences and do not require reference to a distinct legal basis.<sup>49</sup>

In Opinion 1/08, in the negative, the Court held 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 [...] or to be *extremely limited in scope*" [emphasis added].<sup>50</sup> The Court based its finding on the consideration of both the *quantity* of provisions and their *effect* in modifying the parties obligations compared to the status quo. Considering the scope of the provisions under scrutiny, the Court observed 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" [emphasis added].<sup>51</sup> The Court consequently found that those provisions could neither be considered ancillary nor incidental to the Common Commercial Policy component.

In Opinion 1/94 and *Portugal vs. Council*, conversely, the Court found that "the Community is entitled to include in external agreements otherwise falling within the ambit of [CCP] Article 113 ancillary provisions for the organization of *purely consultative procedures* or *clauses calling on the other party* to raise the level of protection of intellectual property rights" [emphasis added].<sup>52</sup> In Opinion 1/94, the Court had deemed a provision as 'extremely limited in scope', which obliged third treaty parties to improve domestic IPR standards to the extent that 'a level of protection similar to that provided in the Community' was achieved.<sup>53</sup> The Court's finding stands in contrast to the fact that the Community – according to the Court's findings in Opinion 1/94 – was not exclusively competent to conclude an international agreement of the type and scope of the WTO TRIPs Agreement at the time. The said provision, in view of the Court, however, did neither affect the allocation of competence or deserved reference to a legal basis other than (CCP) Article 113 EC Treaty.<sup>54</sup>

To broadly summarize the findings of the above examination of the Court's case law: The Court has, in its consideration of incidental treaty components and provisions in past jurisprudence, considered factors such as objectives set out in the preamble; the quantity of potentially 'incidental' provisions in relation to the main component; the effects of provisions on the modification of the *status quo* of EU obligations; legal quality (prescriptive vs. aspirational provisions) and enforceability; as well as EU extra-territoriality of obligations. In one case reviewed here, the Court held that hard legal and enforceable treaty provisions make for a distinct treaty component, which is, however, incidental and secondary to the main component. Most significantly, the Court has, in some instances, deemed treaty purposes, components, and provisions to be incidental, notwithstanding the distinct nature of competence that would be attributed to them if assessed in isolation from its legal context in the specific case.

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<sup>49</sup> It appears, that the meaning of the term 'ancillary' used to be applied, in older judgements such as *Portugal vs Council* (C-268/94), to both 'incidental' provisions and provisions that are 'accessory' or 'adjunct', whereas the more recent case law, such as Opinion 1/08, clearly distinguishes between autonomous incidental provisions (as in 'extremely limited in scope') and provisions that are considered to be adjunct, ancillary, or accessory to an identified main component.

<sup>50</sup> Opinion 1/08 [ECR I-11129 2009]: para 166

<sup>51</sup> *idid.*: para.168

<sup>52</sup> Opinion 1/94: para. 68 ; *Portugal vs Council* (C-268/94): para 77

<sup>53</sup> Opinion 1/94: para 67

<sup>54</sup> Opinion 1/94: paras 67, 68



The Court, in other words, has showed itself ready to attribute legal bases to acts concluding an international agreement following a contextual interpretation of its aims and content - irrespective of the face-value purpose of 'incidental' treaty components and the associated nature of EU competence that would, if read in isolation, otherwise govern such content. At the very minimum, it seems clear that the mere coverage of a policy area by the content of an external agreement does not suffice to affect the Court's conclusions on the appropriate legal basis for the conclusion of that agreement and the existence and nature of EU competences. The findings demonstrate that the Court has taken the notions of predominance and incidentalism for the determination of the appropriate legal basis of an act concluding an external agreement seriously. It remains questionable, however, whether the factors that the Court considered on a case-by-case basis can serve as credible guidance for future judgments. This is particular so with regard to the highly politicized judgment in Opinion 2/15 where the legal context - and thus the scope of analysis - extends to a uniquely large amount of specific legal obligations of heterogeneous character.

These considerations suggest, in any case, that the Court retains ample space for discretionary decision-making, precisely by having - deliberately or not - avoided the design of a clear methodology, which sets out 'objective factors amenable to judicial review' for the determination of the appropriate legal bases for acts concluding agreements that comprise of multiple components and pursue more than one objective. This finding holds true for both legal basis cases and competence enquiries, which require the determination of legal bases.

The legal view of Advocate General Sharpston has set a strict benchmark for a possible contextual attribution of legal bases for the conclusion of the EUSFTA. Very much in contrast to AG Kokott in the *Conditional Access Convention* case, for instance, AG Sharpston advances a restrictive approach to a contextual examination of treaty aims and content. Irrespective of the proportion of the agreement under scrutiny, the AG attributes 'constituent' purposes and legal bases grounded on a mere face-value assessment of the most miniscule treaty components, which she evaluates in isolation from, rather than in context of each other.

### **b.) 'Predominance' and 'Incidentalism' in View of Advocate General Sharpston**

In the preliminary considerations of her legal opinion, AG Sharpston appears to square the circle by recognizing the possibility of 'predominant' and 'incidental' treaty components, on the one hand, but limiting the realm of 'secondary' or 'incidental' treaty purposes *ex ante* to components that are 'extremely limited in scope'.

"In identifying the legal basis, it follows from well-settled case-law that, where an agreement of the European Union pursues more than one purpose or comprises two or more components of which one is identifiable as the main or predominant purpose or component, whereas the other(s) is (or are) merely incidental *or extremely limited in scope*, the European Union has to conclude that agreement based on a single legal basis, namely that required by the main or predominant purpose or component. Thus, if the predominant purpose of the EUSFTA is that of pursuing the common commercial policy and other aspects of it are *properly* to be regarded *either as constituting a necessary adjunct* to that main component or as *being extremely limited in scope*, the substantive legal basis for concluding that agreement would be Article 207(1) TFEU. It would then follow from Article 3(1)(e) TFEU that the European Union has exclusive competence to conclude the EUSFTA."<sup>55</sup>

It is true that AG Sharpston applies the semantics of this standard throughout her legal opinion. In practice, however, the AG does not test predominance or 'incidentalism' of identified components in context of each other but is strictly guided by a face-value analysis of the content of the EUSFTA.

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<sup>55</sup> Opinion of AG Sharpston: para 93

In the AG's submission in Opinion 2/15, the notion of 'incidental' or 'secondary' components and purposes – understood as relational concepts – appears to fall victim to her readiness to make reference to different legal bases wherever aims and content of the provisions of the EUSFTA can be distinguished from the CCP and discernibly attributed to the scope of other competence conferring EU treaty provisions. This preliminary observation raises the question what it would take, in view of the AG (and the Court), to qualify an identified component of an external economic agreement as 'incidental' in relation to other treaty components. For AG Sharpston – as further demonstrated in the next section – this analytical category does not exist.

Analytically, the AG proceeds as follows: In a first step, the AG identifies the content of the EUSFTA that falls within the scope of the CCP; qualifies an array of provisions as accessory, ancillary and adjunct to the CCP aims and content if they are deemed to support the effectiveness of substantive provisions falling under Article 207(1) TFEU; and identifies components that otherwise fall under exclusive competence of the EU via other legal bases associated with *a priori* exclusive competences under Article 3(1) TFEU or as an implied treaty-making power via Article 3(2) TFEU.<sup>56</sup>

In a second step, the AG identifies distinct EUSFTA components that, in her view, fall outside of the scope of the CCP and do not otherwise fall under exclusive EU competence.<sup>57</sup> Moreover, the AG determines the realm of provisions that she finds to make for a necessary adjunct or to be accessory to the substantive provisions of those components. The AG proceeds by proposing suitable legal bases, according to the presumed aims and content of those components, for which the Union and the member states share competence. In one instance, as further discussed in the next section, the AG finds that EU member states are exclusively competent to enter into the obligation under scrutiny.

Restricted by the analytical focus on the nature of external competences, the AG determines that “none of those parts can be identified as either the main or predominant component of the EUSFTA or as being ‘merely incidental’ or ‘extremely limited in scope.’”<sup>58</sup>

In a third step, the AG identifies a very limited number of incidental *provisions*, which, in her view, do not pass the threshold for being characterized as distinct components or purposes of the agreement and are “autonomous in relation to other provisions of the EUSFTA” yet ‘extremely’ or ‘very limited in scope’.<sup>59</sup> Other provisions are regarded to be ‘accessory’ to the agreement as a whole where they exempt certain regulatory areas from the application of the EUSFTA.<sup>60</sup>

As mentioned above, the AG *de facto* does not consider the possibility of incidental components of the EUSFTA once she has determined that a component in question does not fall within the scope of a Union policy, which is subject to EU exclusive competence. It is at this juncture that the legal basis

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<sup>56</sup> Certain transport services (by implication) and the conservation of marine biological resources under the common fisheries policy (*a priori*). (see para 570)

<sup>57</sup> Certain transport services; portfolio investment; moral intellectual property rights; and labour and environmental standards. (see para 570)

<sup>58</sup> Opinion of AG Sharpston: para 550

<sup>59</sup> Opinion of AG Sharpston: paras 552, 553. “Finally, Articles 17.7 (current account and capital movements) and 17.8 (sovereign wealth funds) contain rules which are autonomous in relation to the other provisions of the EUSFTA. However, those provisions are very limited in scope and therefore cannot be regarded as a distinct component of the EUSFTA. I therefore conclude that (...) for those reasons, they are not capable of altering the allocation of competences between the European Union and the Member State as regards the various components of the EUSFTA” Among these otherwise aspirational clauses, Article 17.7 EUSFTA prescribes, in hard legal language, that “[t]he Parties shall authorise, in freely convertible currency and in accordance with the provisions of Article VIII of the Articles of Agreement of the International Monetary Fund, any payments and transfers on the current account of the balance-of-payments between the Parties.”

<sup>60</sup> Clauses exempting taxation and balance of payments, for instance, are regarded as accessory to the agreement in that they preserve competences of the parties (see para 550 of the Opinion of the AG).

test for predominance and incidentalism – as restrictively applied by the AG - finds practical and - in her view - constitutional limits in the quest for an answer to the Commission's enquiry over the existence and nature of competence for the conclusion of the EUSFTA.

### **c.) Revisiting 'Gravity' - The Predominant Purpose and Incidental Components of the EUSFTA**

The AG and the Court eventually have to determine the primary law provisions under which EUSFTA content can be concluded in order to determine the existence and nature of EU competences. It is debatable, however, whether the AG and the Court are required to provide a definitive answer to the question over the appropriate legal basis (or bases) for the adoption of the act concluding the EUSFTA. The Court may treat the legal basis determination as solely relevant for the purposes of competence analysis. The more important question is whether the Court applies the same analytical standards in legal basis cases when compared to competence cases that necessarily require the determination of legal bases.

The parties, in the proceedings, have provided widely diverging answers to the Court's question over the appropriate legal basis. This circumstance reflects diverging political predispositions, which are mirrored in respective legal arguments. Disagreement among the member states, however, also surfaces the lack of clarity about the (existence of a) difference between the determination of legal basis for the purposes of competence analysis, on the one hand, and the question over the appropriate legal basis for the formal adoption of the act concluding an international agreement.

In response to the Court's enquiry, in the oral phase of the proceeding, the Commission cited Articles 207, 63, 91, 100(2), 216 (1) TFEU as the correct legal bases for the conclusion of the EUSFTA.<sup>61</sup> There was no disagreement between the parties over the fact that the CCP and transport policy (Articles 207, 91, 100(2) TFEU) constituted correct legal bases of the EUSFTA conclusion. In addition, however, the Council referred to Articles 43(2), 153, and 192 TFEU as necessary legal bases to cover EUSFTA obligations on agriculture, as well as labour and environmental protection. While some member states wished to add further legal bases, others promoted a more restrictive approach. Germany, France, and Finland expressed the opinion that Articles 207, 91, and 100(2) TFEU sufficed. These parties, however, placed great emphasis on their view that the choice of legal bases for the act concluding the EUSFTA does not need to reflect the vertical division of competences between the Union and the member states.

The projection of this apparent state of confusion over the relationship between the analysis of the conferral of competence and the attribution of the appropriate legal basis could provide for emphasis to the conclusions drawn by Panos Koutrakos: "In the multilayered system of EU external relations, it is necessary that the notion of the balance of competence should become central in the choice of the appropriate legal basis and the delimitation of competence. Attention should be paid to drawing the outer limits of not only the CCP but also the other external relations legal bases in a way which would ensure that the conditions for their application do not become irrelevant."<sup>62</sup>

Drawing the outer limits of the CCP, to be sure, requires a robust operationalization of the conceptual link between treaty content, the specific measures that its obligations set forth, and the quality of their effects on international trade. The Opinion 2/15 proceeding offers a unique yet challenging opportunity for the Court to enhance clarity on this matter. The same applies to the aims and content of obligations that pursue EU treaty objectives that are distinct from, but stand in context of the CCP. Attributing multiple legal bases to a Union act on the grounds of treaty content that is *de*

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<sup>61</sup> The Commission used the opportunity to emphasize its view that transport services covered by Article 91 TFEU fall under implied exclusive Union competence.

<sup>62</sup> Koutrakos, Panos (2008): *Legal Basis and Delimitation of Competence in EU External Relations*. op. cit. p198

*facto* ineffective in achieving the aims it superficially pursues (and exerts no direct and immediate effects to those ends) would result in a distorted image of the nature of external competence for the adoption of the respective legal act. It is for this reason that multiple identified treaty components and purposes should be assessed and weighed in context of and in relation to each other, based on objective factors, rather than in clinical isolation. If however, the Court's analysis omits a rigorous predominance test and is, rather, purely grounded on a face value assessment of competences for the conclusion of external treaty content (and attributes legal bases respectively) this choice should be made in a clear and transparent manner.

The following two paragraphs set out an alternative working hypothesis for the purpose of analyzing AG Sharpston's and – eventually - the Court's opinion. This hypothesis proposes a contextual and effects-based interpretation of the aim and content of the EUSFTA in light of EU primary law. The Court's jurisprudence, as shown above, prescribes a contextual reading of the aims and content of the EUSFTA in order to determine the 'centre of gravity' of the act concluding the agreement. Such a contextual interpretation should take account of the discernable main objective, distinct components, and their effects on the purposes they pursue.

This analysis, in application of the criteria considered by the Court as outlined above, could result in the conclusion that the primary objective and the direct and immediate effects of EUSFTA obligations extend to the promotion of *international commerce* by and between the European Union and Singapore. It is clear, however, that there is no single legal basis in EU law, which governs the Union's external economic relations. The EUSFTA, in particular, contains three distinct components to that end, notably a CCP component, a transport services component, and one component that governs investment other than foreign direct investment (portfolio).

Drawing a distinction between the commercial objectives of the EUSFTA and potentially residual non-commercial elements is not to suggest that the EU is exclusively competent to conclude the components that advance the EUSFTA's predominant commercial purpose. To the contrary, EU competence for the EUSFTA's predominant objective and the distinct components that exert effects to that end are divided in EU exclusive competence for the CCP, shared external competence for certain transport services, and member states' exclusive competence for the termination of member states bilateral investment treaties. Whether or not provisions governing portfolio investment liberalization and protection fall within the scope of EU exclusive competence or shared competence, finally, depends on whether or not the Court is willing to consider Article 63(1) TFEU as a 'common rule' within the meaning of the third ground of Article 3(2) – an issue that will be raised briefly in the next subsection before entering into an examination and discussion of AG Sharpston's analysis and findings.

The EUSFTA's *non-commercial* treaty objectives and components ('moral rights'; labour and environmental protection) may be deemed purely incidental to the main purpose of the agreement and very limited in scope - if properly assessed in context of treaty components governing commerce between the EU and Singapore. Testing for incidentalism of identified non-commercial components of the EUSFTA requires analysis that is based on objective factors. The Court, in its jurisprudence, has not set out such factors in a comprehensive or general manner. Rather, such analysis ought to be guided by the factors the Court has considered on a case-by-case basis in its past jurisprudence, which I have examined above. I shall discuss the question of incidentalism of non-commercial provisions and components of the EUSFTA in context of the analysis of AG Sharpston's opinion in Section III.

#### **4. Implied Powers under Article 3(2) TFEU**

Finally, in addition to and distinction from *a priori* exclusivity of external competence under Article 3(1) TFEU, the Union may have acquired exclusive external competence for the conclusion of international agreements *by implication* via Article 3(2) TFEU when

- 1) “its conclusion is provided for in a legislative act of the Union”
- 2) “or is necessary to enable the Union to exercise its internal competence,”
- 3) “or in so far as its conclusion [by the member states independently] may affect *common rules* or alter their scope” [emphasis added]

Beyond the apparent clarity of the first ground set out by Article 3(2) TFEU<sup>63</sup>, the second ground of the provision prescribes EU exclusive competence, according to the Court, where the “attainment of the Community objective [is] inextricably linked to the conclusion of the international agreement.”<sup>64</sup>

The third ground of Article 3(2), moreover, makes for a significant codification of the Court’s ERTA case law<sup>65</sup> and prescribes EU exclusivity when “the scope of EU rules may be affected or altered by international [member state] commitments where such commitments are concerned with an area which is *already covered to a large extent* by such rules”[emphasis added].<sup>66</sup> It suffices to say, at this point, that both the ERTA jurisprudence and its codification in Article 3(2) TFEU through the Treaty of Lisbon amendments have become a frequently used vehicle to advance exclusivity of external competence in regulatory areas where the Union has already exercised – or is in the process of exercising - its shared internal competence to an equivalent degree. In her submission to the Court, AG Sharpston advances a thorough analysis of the status quo of EU secondary legislation in areas where the Commission has alleged the existence of ‘ERTA-effects’. A comprehensive examination of AG Sharpston’s precise method for identifying implied exclusivity on the basis of existing secondary legislation, however, goes beyond the scope of this paper. Suffices to note, in any case, that the Opinion 2/15 proceeding provides a unique opportunity for the Court to assess the effect – at this very moment in time - of constantly evolving EU secondary legislation on the state of implied EU exclusive external competence.

This note focuses on another question relating to implied exclusivity of external competence. The Commission, in the proceedings, advanced a novel argument with respect to the third ground of Article 3(2) TFEU. In view of the Commission, exclusive external competence based on the Article 3(2), third ground, does not, in the specific case of EU internal competence for the movement of capital, require the exercise of internal competence (i.e. exercise of internal shared competence and – thus - existence of secondary legislation) but can be triggered by the mere existence of the ‘common rule’ codified Article 63(1) TFEU. In other words, the Commission argues that implied exclusive external competence for portfolio investment is established by reference to a primary law provision, without necessitating the exercise of the Union’s (allegedly existent) internal competence. The question that inevitably arises is the following: Can EU primary law, in this specific case, trigger an ‘ERTA-effect’? I will come back to a discussion of this issue in the final part of the next section.

### **III. The Legal Opinion of Advocate General Sharpston**

In AG Sharpston’s words, the questions addressed to the Court in the Opinion 2/15 proceeding are about “the core constitutional issue of the division of power between the European Union and its constituent member states – the principle of conferral of powers. It is about striking the desired balance between the unifying (supra-national) central authority set up under the Treaties and the

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<sup>63</sup> This trigger, in view of Krajewski (2012, op. cit.) finds its origin in Opinion 1/94: para 94

<sup>64</sup> Opinion 1/03 [ECR I-01145 2006], para 37. Opinion 1/94. para 86

<sup>65</sup> *Commission vs Council (C-22-70 ERTA)* para 22

<sup>66</sup> Opinion 1/13 [ECLI:EU:C:2014:2303], para 73 and cited case law

European Union's constituent, still sovereign, Member States. Who is competent to act within the territory of the European Union: the EU or the Member States?<sup>67</sup>

### *1. Exclusive Member States' Competences*

In the written and oral submissions to the Court, the Council and several member states had claimed that 'mixity is a must'. To that end, member states and Council argued that various provisions of the EUSFTA fall under exclusive member states' competence.<sup>68</sup> These include the agreement's rules on the expropriation of foreign direct and portfolio investment; the liberalization of portfolio investment<sup>69</sup>; diplomatic protection of investors in arbitration proceedings<sup>70</sup>; moral rights related to intellectual property protection<sup>71</sup>; certain provisions relating to environmental protection<sup>72</sup>; as well as one individual rule governing the termination of member states' bilateral investment treaties (BITs) with Singapore.<sup>73</sup>

AG Sharpston dismisses all of these 'attempts of mixity' – except one. The AG opines that "the European Union has no competence to agree to Article 9.10(1) of the EUSFTA", which provides that existing EU Member States' bilateral investment treaties with Singapore "cease to have effect and shall be replaced and superseded" by the EUSFTA. The EU cannot agree to an obligation that requires the termination of international agreements of its member states if these are not parties to the agreement containing the said obligation. Doing so would violate "the fundamental rule of consent in international law-making".<sup>74</sup> As for this single provision of the EUSFTA, in consequence, "mixity is a must".

However, there does not seem to be a good enough reason why EU trade and investment agreements ought to include a BIT termination clause in the first place. The assumption that underlies its inclusion in the EUSFTA is to treat the termination of member states' BITs as a collary of entering into obligations providing for a regime that succeeds member states BITs. EU secondary legislation, however, already requires that member states' BITs may only maintain in force "until a bilateral agreement between the Union and the same third country enters into force".<sup>75</sup> A reference to this rule in EU trade and investment agreements may suffice to assure a third country of the EU member state obligation that follows from the entry into force of the EUSFTA under EU law. The termination clause of Article 9.10(1) EUSFTA is arguably redundant with respect to future EU treaties with third parties. The Union institutions could, in practice, rely on the duty of sincere cooperation, which requires that the member states "shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."<sup>76</sup>

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<sup>67</sup> Opinion of AG Sharpston: para 57

<sup>68</sup> For a legal opinion requested by the German Ministry for Economic Affairs and Energy, arguing along these lines, see: Mayer, Franz: *Stellt das geplante Freihandelsabkommen der EU mit Kanada (Comprehensive Economic and Trade Agreement, CETA) ein gemischtes Abkommen dar?* Rechtsgutachten für das Bundesministerium für Wirtschaft und Energie, 2014.

<sup>69</sup> Opinion of AG Sharpston: para 338

<sup>70</sup> *ibid.*: para 518

<sup>71</sup> *ibid.*: para 420

<sup>72</sup> In the oral phase of the proceeding, a number of member states argued that the member states remained exclusively competent to enter into the obligation arising from Article 13.7(b) EUSFTA on Trade in Timber and Timber Products.

<sup>73</sup> Opinion of AG Sharpston. para 303

<sup>74</sup> *ibid.*: para 396

<sup>75</sup> Article 3, Regulation No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

<sup>76</sup> Article 4(3) TEU

As a result, EU exclusive member states competence identified by the AG in this particular instance, by itself, does not make for an unmovable obstacle to the signing and conclusion of 'EU-only' agreements in the future.

## **2. The Scope of EU Exclusive External Competence for the Common Commercial Policy under Article 207 TFEU**

### **a.) The Nature of EU External versus Internal Competence for Market Integration**

The European Union enjoys exclusive competence over Common Commercial Policy (CCP), which is governed by the provisions of Article 207 TFEU.<sup>77</sup> Some member states, however, claimed in their written submissions that Article 207(6) TFEU<sup>78</sup> renders the exclusivity of EU competence in the area of the CCP contingent upon the existence of parallel – or corresponding - exclusive *internal* competence for the same substantive policy areas.<sup>79</sup> The Advocate General, however, dismisses this notion, which would indeed significantly limit the exercise of exclusive CCP powers: the scope of EU exclusive competence for external commercial treaty-making, she finds, is separate and broader than internal EU exclusive competence for market integration. EU competence for internal market integration, notably, is shared between the EU and the member states.<sup>80</sup> Article 207(6) TFEU should, moreover, not be read to require the exercise of internal shared competence as a precondition for the exercise of external exclusive competence. Rather, the AG deems Article 207(6) TFEU to make for a twofold expression of the principle of conferral, which is set out in Article 2(1) and 2(2) TFEU. Article 207(6) TFEU is therefore redundant. As a result, the member states' claim of perfect parallelism between internal and external exclusivity of competence does not find the AG's support and leaves the integrity of EU competence for the CCP intact.<sup>81</sup> The AG thereby follows the important conclusions of the Court in *Daichii Sankyo*, which made for a significant and commendable departure from the Court's original position, as expressed in Opinion 1/94. I have provided a more detailed discussion of this issue in Section II(2)(i) above.<sup>82</sup>

### **b.) The Common Commercial Policy Component of the EUSFTA**

AG Sharpston's thorough response to the questions put before the Court generally and unsurprisingly confirms the expansion of the material scope of EU exclusive external competence in the area of its Common Commercial Policy under Article 207(1) TFEU.<sup>83</sup> The entry into force of the Treaty of Lisbon in 2009 has considerably widened the scope of the said provision by removing the distinction between trade in goods and services. Moreover, the treaty added 'foreign direct investment' to the realm of the Common Commercial Policy set out in Article 207(1) TFEU.

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<sup>77</sup> Article 2(1) TFEU in conjunction with Article 2(1) TFEU and Article 3(1)(e) TFEU

<sup>78</sup> Article 207(6) TFEU: "The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation."

<sup>79</sup> Opinion of AG Sharpston: For a general account on this issue, see: paras 105-110. In regard of intellectual property rights: para 440

<sup>80</sup> Article 2(2) TFEU in conjunction with Article 4 (2)(a) TFEU

<sup>81</sup> Opinion of AG Sharpston: para 109

<sup>82</sup> During the hearing, the AG asked the member states representatives and the Council: "How many hoops does the EU have to jump through to exercise exclusive external competence?" In her view, we now know, it is just one.

<sup>83</sup> Formerly: Article 133(1) EC Treaty

In *Daiichi Sankyo*, on the basis of pre-Lisbon case law, the Court applied the aims and content test to identify measures that fall within the scope of Article 207(1) TFEU. As discussed in the previous section, the Court subsumes content of EU legal acts under Article 207(1) TFEU if they ‘*specifically relate to international trade in that they are essentially intended to promote, facilitate or govern trade and have direct and immediate effects on trade*’.<sup>84</sup> The AG opines that this standard applies to EUSFTA rules and commitments on trade in goods and services indiscriminately, as well as to foreign direct investment<sup>85</sup> and commercial aspects of intellectual property rights<sup>86</sup>. Moreover, AG Sharpston finds that EUSFTA commitments on public procurement<sup>87</sup>, competition policy<sup>88</sup>, the mutual recognition of professional qualifications<sup>89</sup>, and non-tariff barriers to trade and investment in renewable energy generation<sup>90</sup> are all ‘specifically related’ to international trade or FDI by means of governance, promotion, or exerting direct effects.

Notwithstanding fierce political and public debates over investment protection standards, it is unsurprising that Article 207(1) TFEU covers, in AG Sharpston’s view, both market access liberalisation and standards applying to the protection of foreign investors and their investments ex post-admission. Her opinion confirms an inferential reading of the term ‘abolition of restrictions’ in Article 206(1) so as to encompass both ‘restrictions’ and standards of protection likewise.<sup>91</sup> With reference to the Court’s jurisprudence on this question<sup>92</sup>, the AG dismisses member states’ claims for an exclusive or shared external power to regulate property and its expropriation, which they based on Article 345 TFEU.

Both liberalization and treatment of FDI consequently fall within the ambit of EU exclusive competence.<sup>93</sup> The dispute settlement mechanisms enforcing liberalization commitments and protection standards, moreover, “are accessory to the allocation of substantive competences” – including the politically contentious Investor-to-State-Dispute-Settlement (ISDS) mechanism of the EUSFTA.<sup>94</sup>

To establish that the provisions in question do in fact exert direct effects on international trade, the AG does not review available empirical evidence of such effects but is satisfied by examining whether a notional link can be established between the content of the EUSFTA and its potential to exert ‘immediate and direct effects on international trade’. In context of her examination of chapter 12 on competition policy, for instance, the AG observes that

“[the EUSFTA] requires each party to maintain and enforce in its respective territories comprehensive legislation governing agreements between undertakings, abuses of a dominant position and concentrations between undertakings which result in a substantial lessening of competition or which significantly impede competition, provided they affect trade between the European Union and Singapore. Those types of anti-competitive conduct are considered to be liable to undermine the benefits of trade liberalisation which the EUSFTA aims to achieve, either by rendering rules on market access nugatory or by reducing the economic benefits which

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<sup>84</sup> *Daiichi Sankyo*. para 51

<sup>85</sup> Opinion of AG Sharpston: para 328

<sup>86</sup> *ibid.*: para 435

<sup>87</sup> *ibid.*: para 399

<sup>88</sup> *ibid.*: para 408

<sup>89</sup> *ibid.*: paras 205, 207

<sup>90</sup> *ibid.*: paras 484-488

<sup>91</sup> *ibid.*: para 331

<sup>92</sup> *Commission vs Portugal* (Case C-367/98). para 48

<sup>93</sup> Opinion of AG Sharpston: paras 324-343

<sup>94</sup> *ibid.*: paras 523-535



undertakings of one Party may hope to obtain by trading their goods or services in the territory of the other Party.”<sup>95</sup>

Such reasoning is as intuitively persuasive, as it is permissive and discretionary. It reveals, in this instance, that the AG is, in her analysis, not guided by a rigorous examination of the ‘direct and immediate effects on international trade’ criterion. It is sufficient for the AG that the content “[aims] at promoting, facilitating or governing trade and *thus* has direct and immediate effects on trade in goods and services.” The ‘aims and effects’ test applied in *Daichii Sankyo* and previous cases, however, seems to require that both conditions - aims *and* direct effects – are satisfied. It appears, however, that AG Sharpston’s threshold is more generous in that direct effects are assumed to logically follow from codified intentions and objectives. The AG, in this instance, does consider the context of EUSFTA rules on competition matters – which is the liberalization of international trade – identifies the parties’ intention to exert direct and immediate effects on international trade through rules and cooperation on competition policy matters. This circumstance is noteworthy to the extent that the AG’s application of the ‘aims and content’ test places considerably more emphasis on the analysis of treaty objectives than on treaty effects. While commendable on substance in this particular instance, it is questionable at least whether this methodological nuance is conducive to achieving a clearer and more definitive delimitation of the CCP and whether the Court will engage in a more elaborate operationalization of the ‘direct effects’ test.

In sum, the overwhelming share of EUSFTA commitments, according to AG Sharpston’s view, falls within the realm of EU exclusive competence for Common Commercial Policy. These conclusions are significant because they would – if upheld – subject a wide range of contemporary EU external economic policies to exclusive EU competence. The scope of the CCP, in her view, goes far beyond the legal framework of the WTO and is much wider than the limited scope proposed by EU member states, the Council, and numerous legal scholars.

The CCP content of the EUSFTA, in sum, makes for the by far largest component that aims at achieving the predominant objective of the EUSFTA, notably the promotion and governance of commerce between the EU and Singapore.

The following sections discuss components of the agreement, which, according to AG Sharpston’s interpretation of the delineation of competences, would give member states represented in the Council the right to insist on ‘mixity’.

### ***3. The Transport Exception under Article 207(5) TFEU***

AG Sharpston’s reading of Article 207(5) TFEU (re)confirms the general exclusion of international agreements in the field of transport from EU Common Commercial Policy under Article 207 TFEU. “As regards international trade in transport services, the Treaties therefore seek to maintain a fundamental parallelism between internal competence and external competence.” Those parts of the EUSFTA that concern transport services and services ancillary to transport *a priori* fall under EU shared competence for transport under Article 4(2) (g) and Title VI of Part III of the TFEU.<sup>96</sup>

The EU can only acquire *implied* exclusive competence in the field of transport if one of the three conditions of Article 3(2) TFEU is satisfied.<sup>97</sup> The third – and most frequently employed - ground of Article 3(2) TFEU triggers implied exclusive competence if the content of an external treaty is largely covered by EU common rules by means of the exercise of EU internal shared competence. EU

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<sup>95</sup> *ibid.*: para 460

<sup>96</sup> *ibid.*: paras 208-215

<sup>97</sup> *ibid.*: paras 221-269

common rules pre-empt the exercise of shared competences on behalf of the Member States.<sup>98</sup> Once common rules are adopted in a specific area, only the EU is competent to act externally. External member state action in that specific area would otherwise risk affecting or altering the scope of internal rules.<sup>99</sup> AG Sharpston thus confirms the established Court's ERTA jurisprudence and its codification in Article 3(2) TFEU.<sup>100</sup>

In light of corresponding EU secondary legislation, the AG finds that the Union has acquired implied exclusive competence on this basis over EUSFTA provisions on rail and road transport services. The Commission, in her view, failed to demonstrate, however, that the necessary conditions for conferral of implied exclusive competence in respect to air transport, maritime transport, and inland waterway transport services had been met.<sup>101</sup> They remain subject to shared external competence under Article 4 (2)(g) TFEU in conjunction with Title VI of Part Three TFEU. The transport component of the EUSFTA is thus partly covered by exclusive external competence as well as shared competence.

Following the logic of the transport exception of Article 207(5) TFEU, EU public procurement commitments in the field of transport services also fall outside the scope EU Common Commercial Policy and are thus subject to shared competence.<sup>102</sup>

The Court is likely to follow AG Sharpston's analysis of EUSFTA commitments on transport. In order to avoid 'mixity' in future EU trade and investment agreements, such treaties would have to exclude maritime, air, and inland waterway transport, as well as transport services commitments in the public procurement chapter.

Splitting transport policy commitments by separating provisions falling under EU exclusive and shared competence respectively would likely change the balance of negotiated concessions among the parties to the agreement and thus affect negotiated content. Doing so, however, appears to be unproblematic in practice. The EU has indeed negotiated stand-alone – 'mixed' - transport agreements with third countries in the past.<sup>103</sup>

Finally, the evolution of EU legislation in the area of air, maritime, and inland waterway transport services may, in the future, confer implied exclusive competence onto the EU and thus empower the Union to enter into external commitments in these areas by itself.

#### **4. (Non-)Commercial Aspects of Intellectual Property Rights: 'Moral Rights'**

As noted above, the Advocate General agrees with the Commission that essentially all EUSFTA provisions on intellectual property rights and their protection fall within the scope of Article 207(1) TFEU and thus EU exclusive competence.<sup>104</sup> In the opinion of the AG, however, EUSFTA provisions governing 'moral rights' of authors and performers are 'non-commercial' in their nature and thus cannot form part of the material scope of the protection of 'commercial aspects of intellectual property rights' under Article 207(1) TFEU. Rules on the protection of authors' and performers' moral rights

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<sup>98</sup> Article 2(2) TFEU

<sup>99</sup> Opinion of AG Sharpston: paras 117-131, 220

<sup>100</sup> *Commission vs Council* (Case 22-70), para 22, 29-31; Opinion 1/94, para 96

<sup>101</sup> Opinion of AG Sharpston: para. 268

<sup>102</sup> *ibid.*: paras 404-408. The AG opinion, however, falls short of distinguishing between public procurement commitments that are linked to different types of transport services and may thus ignore implied exclusive competence for the negotiation of public purchases of rail and road transport services.

<sup>103</sup> See, for instance, 2002 EU-China Agreement on Maritime Transport; 2007 EU-US Air Transport Agreement

<sup>104</sup> Opinion of AG Sharpston: paras 446-450

would thus not be covered by EU exclusive competence.<sup>105</sup> Rather, in her view, *non-commercial* aspects of intellectual property rights “can be regarded as necessary to achieve the objectives of the internal market” and hence fall within shared competence of the European Union and the Member States on the basis of Articles 4(2)(a), 26(1), and 216(1), second ground, TFEU.<sup>106</sup>

This view deserves further scrutiny. The discretion exercised by the Court in past judgments appears to allow for conclusions that would render the EUSFTA provisions in question subject to Article 207 TFEU - either on the basis of their effects on trade, or on the basis of their purely incidental character. The following elaborations briefly examine the provisions at stake and discuss the two lines of reasoning for their (direct or contextual) inclusion within the scope of Article 207 (1) TFEU.

Chapter 11 of the EUSFTA on Intellectual Property sets out minimum standards for the protection of copyrights; patents; trademarks; designs; topographics; geographical indications; undisclosed information; and plant variety rights.<sup>107</sup> The objective of the respective rules is to facilitate the production and commercialization of products and services and to increase the benefits from trade and investment through the adequate and effective level of protection of intellectual property rights and the provision of measures for the effective enforcement of such rights.<sup>108</sup> To that end, Article 11.4 EUSFTA also incorporates the Berne Convention on Literary and Artistic Works as well as the WIPO Treaty on Performances and Phonograms. Article 6bis of the former and Article 5 of the latter agreement contain two largely identical provisions on the protection of ‘moral rights’ of authors and performers respectively - ‘independently of their economic rights’. In essence, the two provisions protect authors’ and performers’ rights to be identified with the work or performance in question after economic rights have been transferred, even post-mortem, and the right to object to distortions or modifications of that work or performance if these would be prejudicial to his/her reputation. As such, the identifiable aim of the provisions is to protect author and performer rights where their economic rights, which are protected under these very treaties, have ceased to be effective.

The first consideration is whether such rights do – or have the potential to – exert direct and immediate effects on trade and therefore fall within the scope of Article 207(1) TFEU. While the rights protected here are inherently ‘independent of economic rights’, they do place a restriction on the exercise of commercial activities involving the use of the work or performance. It is the purpose of such rights to qualify the exercise of commercial property rights to the extent that those engaging in commercial activity involving the work or performance in question must respect certain rights of the author or performer. In this way, ‘moral rights’ – conceptually - exert a direct effect on trade and make for a significant ‘aspect’ or restriction of commercial intellectual property rights. This point may serve to illustrate the difficulty to distinguish between commercial and non-commercial aspects of intellectual property rights – and direct versus implied effects on trade - in practice.

The provisions in question are, moreover, enforceable under the dispute settlement provisions of the EUSFTA. Remedies for the violation of a EUSFTA obligation include trade sanctions. It is in this (second) way that moral rights in the EUSFTA context are specifically related to international trade and have the potential to exert direct and immediate effects. This circumstance may make for a decisive difference if compared to the Court’s agreement with Advocate General Wahl’s view

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<sup>105</sup> *ibid.*: paras 451-454

<sup>106</sup> Opinion of AG Sharpston: para 456

<sup>107</sup> Article 11.2(2) EUSFTA

<sup>108</sup> Article 11.1(1) EUSFTA

expressed in the Opinion 3/15 proceeding where he states that “[a]n example of a non-trade-related aspect of intellectual property is that relating to moral rights.”<sup>109</sup>

But even if the Court finds moral rights provisions to fall outside the scope of Article 207(1) TFEU the Court ought to consider whether the parties’ obligations concerning the protection of such rights make for an incidental and secondary objective and component of the EUSFTA Chapter 11 in relation to the EUSFTA’s predominant commercial objective; in context of the CCP component of the EUSFTA; and/or in context of EUSFTA chapter 11 on commercial aspects of intellectual property rights protection. A respective test could examine whether the EUSFTA obligations would have the effect of changing the parties’ obligations; if yes, whether the new status quo of obligations would require the EU to take specific measures; and whether such measures would have the effect of achieving an objective alternate to the external commercial objectives of the EUSFTA, such as the functioning of the internal market.

The Berne Convention has been ratified by all EU member states.<sup>110</sup> Accession to the EU requires accession to the Berne Convention.<sup>111</sup> Compliance of national laws with the provisions of the Convention thus makes for an obligation under EU law. The WIPO Treaty, moreover, has been ratified by the EU and its member states.<sup>112</sup> Singapore, moreover, is a party to both Conventions.

The obligations on ‘moral rights’ accruing to authors and performers are harmonized by EU law - in case of the WIPO Treaty - and across member states, in case of the Berne Convention. Through the incorporation – or: replication - in the EUSFTA chapter on intellectual property the EU assumes a new obligation to protect moral rights in accordance with the Berne Convention vis-à-vis Singapore. The EU institutions, however, are arguably already bound to protect such rights under EU law.<sup>113</sup> EUSFTA moral rights obligations thus arguably do not require specific EU measures. Against this background, and viewed in context of the Court’s jurisprudence on ‘incidentalism’, the ‘moral rights’ obligations in the EUSFTA could be deemed purely incidental and secondary to the predominant commercial objectives of the comprehensive economic rights, which are codified in the two conventions and incorporated in Chapter 11 EUSFTA on Intellectual Property. EUSFTA obligations on ‘moral rights’ are, at the same time, not ‘necessary to achieve the objective of the internal market’, as asserted by the AG. The provisions could, rather, be deemed as very limited in their scope and effects and thus make for an incidental non-commercial objective that is related but clearly secondary to the extension of external rights and obligations on commercial aspects of IPR protection.

In sum, it is arguable that ‘moral rights’ within the meaning of the EUSFTA fall within the scope of Article 207(1) TFEU due to the possibility to enforce such rights by means of trade sanctions. In the alternative, the examination of the relationship between the commercial and non-commercial aspects of intellectual property rights protection under EUSFTA Chapter 11, read in context of the CCP

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<sup>109</sup> Opinion 3/15 [ECLI:EU:C:2017:114]: Opinion of the Advocate General Wahl. p56; Opinion of the Court. p85 For a summary and discussion of the findings of the AG and the Court, see: Kübek, Gesa: *The Marrakesh Treaty judgment: the ECJ clarifies EU external powers over copyright law*, EU Law Analysis Blog, February 17, 2017. At: <http://eulawanalysis.blogspot.de/2017/02/the-marrakesh-treaty-judgment-ecj.html>

<sup>110</sup> List of signatories of the Berne Convention: <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>

<sup>111</sup> Article 5 of Protocol 28 of the EEA Agreement requires accession of EEA contracting parties’. This provision has also been read as an obligation to accede to the international Conventions listed there. The Court, in *Berne Convention Case* (Commission vs Ireland, C-13/00) confirmed this view. On this subject, see also Cremona, Marise (2008): *Defending the Community Interest – The Duty of Cooperation and Compliance*. in: Cremona, Marise, Bruno de Witte, Ramses Wessel, and Paivi Leino-Sandberg (eds.): ‘EU Foreign Relations Law – Constitutional Fundamentals’, Bloomsbury Publishing, 2008. p147

<sup>112</sup> List of signatories of the WIPO Treaty: [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=20](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=20)

<sup>113</sup> *Commission vs Ireland (C-13/00)*: paras 19, 20

component of the EUSFTA, can result in the conclusion that the incidental character of the moral rights provisions does not affect the allocation of competences between the EU and the member states and thus does not merit reference to a legal basis other than Article 207 TFEU.

### 5. Sustainable Development – Labour and Environmental Aspects

In the opinion of the AG, five individual articles of Chapter 13 EUSFTA on Trade and Sustainable Development (Art. 13.3.1, 13.3.3, 13.4, 13.6.2 and 13.6.3 EUSFTA) fall within the scope of EU shared competences.<sup>114</sup> These provisions concern aspects of labour and environmental policy.

In essence, the five articles reaffirm already existing international law commitments of the parties in these areas (ILO Conventions, Kyoto Protocol, UNFCCC) and broadly commit the parties to dialogue, consultations, and cooperation in this regard. Chapter 13, moreover, is excluded from the agreements dispute settlement provisions but provides for government consultations and expert panels to solve disagreements over the implementation of the chapter.<sup>115</sup>

According to the Advocate General, these five articles “essentially seek to achieve (...) minimum standards of labour protection and environmental protection, *in isolation* from their possible effects on trade.” Mrs. Sharpston observes, moreover, that Chapter 13 “*neither impose[s] a form of trade conditionality* (by enabling the other party to adopt trade sanctions in case of non-compliance or by making a specific trade benefit dependent on compliance with labour and environmental standards) nor *otherwise regulate the use of commercial policy instruments* as means to promote sustainable development”.<sup>116</sup> As a result, they do not fall within the scope of Common Commercial Policy, but should be based on social policy objectives<sup>117</sup> and environmental policy<sup>118</sup> – i.e. competences shared with the member states.<sup>119</sup>

This finding is striking in at least three regards. First, it is worth recalling that the AG applied a low threshold for the establishment of a ‘immediate and direct effect on international trade’ for the purposes of the EUSFTA chapter on competition policy. As outlined above, the notional link between anti-competitive practices and trade between the parties sufficed for the AG to deem EUSFTA competition provisions to fall within the scope of the CCP. The AG, however, does not follow the same logic in context the EUSFTA’s chapter on sustainable development. This is despite the fact that the parties, in Article 13.1(3) EUSFTA,

“recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour and environment laws.”

Arguably, the EUSFTA provisions on labour and environmental protection – by setting out minimum standards to which the parties have already committed themselves in context of other multilateral agreements – aim at reaffirming the parties’ commitment not to lower the protections afforded to labour and the environment in order to gain a competitive commercial advantage. It is in this instance, again, that the legal facts before the Court in application of its own standards of analysis surface its considerable discretion. A final decision as to whether the provisions in question, read in context of the entire agreement, are sufficiently related to trade and investment in order to fall under the CCP is hardly restricted by the Court’s own – rather liberal - standards of analysis. A requirement to employ

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<sup>114</sup> Opinion of AG Sharpston: para 502

<sup>115</sup> Articles 13.15 - 13.17 EUSFTA

<sup>116</sup> Opinion of AG Sharpston: para 496

<sup>117</sup> Article 151 TFEU

<sup>118</sup> Article 191(4) TFEU

<sup>119</sup> Articles 4(2)(b), 4(2)(e) TFEU

empirical evidence for the ‘direct and immediate effects’ criterion may remedy this circumstance in the future and render respective decisions less unpredictable.

Secondly, notwithstanding the procedural obligations on cooperation and bilateral dialogue, it is worth emphasizing that the EUSFTA does not oblige the parties to implement commitments that they have not already assumed under other international agreements. Thus, the EUSFTA only reaffirms such substantive commitments. Moreover, the provisions make for largely unenforceable soft law. It could be argued, in light of the Court’s past jurisprudence outlined further above, that the provisions in question are incidental and secondary to the main commercial purpose of the agreement and do not require reference to legal basis other than 207 TFEU. During the hearing of the proceedings, Rapporteur Judge Ilešič in fact enquired whether it is the Commission’s intention to advance this argument.

Third, the AG appears to suggest that labour and environmental protection clauses could fall within the ambit of EU exclusive competence of Article 207 TFEU if they were linked to trade conditionality. By inference, the AG’s finding – if upheld by the Court - could inspire issue linkages for the future design of agreements, i.e. the establishment of an enforcement mechanism that renders benefits accruing to the third party contingent upon compliance on labour and environment commitments. It is conceivable that it suffices, for that purpose, to render the sustainable development chapter subject to the dispute mechanism of the respective agreement – assuming the possibility of authorized retaliation in case of non-compliance.

If upheld by the Court, the Advocate General’s ‘hint’ at trade conditionality could thus still provide useful guidance for future ‘EU-only’ treaty-design. It is noteworthy, in this context, that the Joint Interpretative Instrument on CETA committed the parties “to initiating an early review of these provisions, including with a view to the effective enforceability of CETA provisions on trade and labour and trade and the environment”.<sup>120</sup>

## **6. Portfolio Investment and the Prohibition of Restrictions on Capital Movement under Article 63(1) TFEU: ‘Treaty Objective’ or ‘Common Rule’?**

A question crucial for the mode of conclusion of EU external trade and investment treaties is whether the EU enjoys external competence over portfolio investment at all. If so, what is the nature of that competence?

The EUSFTA provisions on investment liberalization and protection follow a broad asset based definition of ‘investment’ and encompasses both direct and portfolio investments.<sup>121</sup> Liberalisation, standards of post-entry treatment, and the dispute settlement mechanism under the EUSFTA apply to all investments covered by that definition. The design of the EUSFTA, in this way, corresponds to international practice. Both economically and in legal-technical terms, portfolio investment liberalization and protection standards are closely interlinked with market access and protection standards for foreign direct investment. Whether the EU enjoys exclusive, shared, or no competence at all to enter into obligations on portfolio investment thus has a great bearing for ‘EU-only’ vs. ‘mixed’ treaty design and the invocation of respective internal procedures.

It is clear from the reading of 207(1) TFEU that the CCP covers ‘foreign direct investment’. Relevant CJEU case law, moreover offers a conceptually clear distinction between foreign direct investment and portfolio investment. In view of the Court, a direct investment is characterized by

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<sup>120</sup> Paragraph 10(a) of the Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (13541/16), October 27, 2016.

<sup>121</sup> Article 9.1(1) EUSFTA

lasting economic links that confer managerial control over an undertaking upon an investor.<sup>122</sup> Indirect - or portfolio investments - in contrast are made “solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking”.<sup>123</sup> Given the omission of portfolio – or indirect - investment from the wording of Article 207(1) TFEU, it clearly remains outside of the scope of the CCP.<sup>124</sup> EUSFTA provisions governing portfolio investment could hence only fall under implied exclusive competence or EU competence shared with the member states, if at all.

In the written and oral submissions, the parties consequently litigated whether and what nature of competence the EU enjoys over portfolio investment. The arguments focus on whether Article 63(1) TFEU can give rise to EU exclusive or shared competence. Article 63(1) provides that “all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited”. In past jurisprudence, the Court held that movement of capital, within the meaning of Article 63(1), applies to both direct and portfolio investments.<sup>125</sup>

The Commission expressed the view that the EU holds implied exclusive competence on the basis of Article 3(2), third ground, in conjunction with Article 63(1) and 216(1), fourth ground. Alternatively, the Commission argued that the EU shares competence over portfolio investment with the Member States.

The AG's analysis and conclusion on this question, however, is rather puzzling both in terms of structure and substance. To begin at the end, AG Sharpston concludes that portfolio investment “falls within the shared competences of the European Union and the Member States, on the basis of Article 4(2) (a) and the *first* ground under Article 216(1) TFEU, in conjunction with Article 63 TFEU [emphasis added]”.<sup>126</sup>

It appears that AG Sharpston (accidentally) errs here by invoking the first ground of Article 216(1) TFEU. Article 216(1) TFEU provides that “[t]he Union may conclude an agreement with one or more third countries or international organisations *where the treaties so provide* (...) [emphasis added]”. The first ground of Article 216(1) TFEU thus gives the Union treaty-making powers where the treaty *explicitly* allows for or mandates the conclusion of international agreements.<sup>127</sup> The norm governing the internal and external prohibition on restrictions to capital movements, as codified in Article 63(1) TFEU, however, clearly does not *provide* for the conclusion of international agreements.

AG Sharpston's reference to the first ground of Article 216(1) TFEU also seems to contradict the argument she advances in the previous paragraphs. Here, the AG builds a case for invoking the Union's shared treaty-making competence on the basis of the *second ground* of the same provision in conjunction with Article 63(1) TFEU.<sup>128</sup> The second ground of Article 216(1) TFEU renders the Union competent to conclude an agreement with third countries “where the conclusion of an agreement is *necessary in order to achieve*, within the framework of the Union's policies, *one of the objectives* referred to in the treaties [emphasis added]”. AG Sharpston contends that “all the conditions for applying the *second ground* under Article 216(1) TFEU are satisfied here”, notably, first, the

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<sup>122</sup> *Test Claimants in the FII Group Litigation vs Commissioners of Inland Revenue* (Case C-446/04) paras 180-183

<sup>123</sup> *European Commission vs Portuguese Republic* (Case C-212/09), para 48

<sup>124</sup> Opinion of AG Sharpston: paras 319-321

<sup>125</sup> *European Commission vs Portuguese Republic* (Case C-212/09) para 48

<sup>126</sup> Opinion of AG Sharpston: para 370

<sup>127</sup> For comparison: Article 207(3) or Art. 191(4) TFEU explicitly provide for the conclusion of international agreements.

<sup>128</sup> Opinion of AG Sharpston: paras 365-368

existence of the treaty objective to remove external capital restrictions, and of, secondly, a competence to do so.<sup>129</sup>

The conferral of competence to this end is a necessary condition for the applicability of Article 216(1) TFEU, second ground. In fact, it makes for the only difference to the rule of Article 352 TFEU. Article 352 TFEU refers to the attainment of treaty objectives where the treaties do not provide for powers to do so. For Article 216(1) TFEU to be applicable, by inference, the necessity to achieve a treaty objective must coincide with the conferral of competence. The attainment of treaty objectives within the meaning of Article 21 TEU, via Article 352 TFEU, in contrast, would arguably not need to satisfy this condition.

The AG does indeed find that, “[p]ursuant to Article 63 TFEU, the European Union *clearly* has competence over the liberalization and protection of types of investment other than foreign direct investment (...) [emphasis added]”.<sup>130</sup> But does it?

Chapter 4 of Title IV TFEU does in fact not provide for a Union competence for the adoption of secondary legislation on portfolio investment liberalization or protection, nor for the conclusion of external agreements to that end. It is worth recalling, too – as the AG reminds us in her introductory remarks – that “[t]he European Union enjoys conferred powers only. It must therefore link a measure which it adopts to a *Treaty provision empowering it to approve that measure* [emphasis added].”<sup>131</sup> In regard of Article 63(1) TFEU, however, the AG treats the existence of competence and the treaty-given possibility to exercise that competence as a distinct matter: “[i]t is not necessary that the European Union be competent to adopt secondary law.” For the purposes of external treaty conclusion within the scope of the second ground of Article 216(1) TFEU a matter must merely “fall within the scope of EU law and thus its competence”.<sup>132</sup>

As such, the Advocate General interprets Article 63(1) TFEU as a treaty objective that aims at removing internal and external restrictions of capital movements *in the future* – rather than a rule prohibiting such restrictions *per se*. To achieve the objective inherent to the external dimension of the freedom of capital movements, it “may be necessary”, in her view, to conclude international agreements.

In sum, AG Sharpston deems the rule prohibiting internal and external restrictions on capital movement in Article 63(1) TFEU to confer EU competence; codify a treaty-objective; and, in conjunction with the second ground of Article 216(1), provide for a legal basis for the exercise of EU external competence.

By inference, the AG appears to argue that the corresponding internal objective codified in the same provision could be achieved by resorting to internal harmonization measures adopted under on Article 114 TFEU as well as liberalization and protection measures adopted under Article 352 TFEU. Indeed, these two articles are the only treaty provisions that allow for the exercise of a competence conferred on the basis of Article 63(1) TFEU and would thus make for a necessary logical mirror of the attainment of the so-deemed external objective.

AG Sharpston’s position presents an arguable yet debatable interpretation of Article 63(1) TFEU in conjunction with Article 216(1) TFEU. She concludes her analysis, however, with reference to the *first* rather than the *second ground* of Article 216(1), which is where the coherence of her argument, in my view, dissolves.

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<sup>129</sup> *ibid.*: para 366

<sup>130</sup> *ibid.*: para 367

<sup>131</sup> *ibid.*: para 90

<sup>132</sup> *ibid.*: para 265



### a.) ERTA-plus? EU Competence for Portfolio Investment Liberalisation and Protection

Assuming that the AG, in fact, intended to advance an argument on the basis of the second ground of Article 216(1) TFEU from the beginning to the end of her analysis, it remains nonetheless questionable whether Article 63(1) TFEU should be interpreted as constituting a 'treaty objective' – within the meaning of the second ground of Article 216(1) TFEU - or a 'common rule', within the meaning of the third ground of Article 3(2) TFEU and the fourth ground of Article 216(1) TFEU.

It is worth noting, that Article 3(2) TFEU was only added to the treaty text with the entry into force of the Treaty of Lisbon in 2009 and makes for 'summary codification' of the Court's jurisprudence on implied powers. Senior connoisseurs of the Court's ERTA jurisprudence have thus wondered whether the Court, in light of this codification, would give new meaning to its terms or "shrug its shoulders" and continue to apply a conventional reading of the ERTA case law post-Lisbon on a case-by-case basis.<sup>133</sup>

In the proceedings, the Commission did indeed argue that the prohibition of restrictions on internal capital movements in Article 63(1) makes for a 'common rule' within the meaning Article 3(2) TFEU and pre-empted Member States' exercise of external competence in the area of portfolio investment. The conclusion of member states agreements in that specific area would risk affecting the uniform application of the general rule prohibiting internal restrictions on capital movements codified in Article 63(1) TFEU. Article 63(1) TFEU in conjunction with Article 3(2) TFEU thus implied exclusive EU external competence over portfolio investment liberalization and protection.

In her argument, the Commission departs from the conventional application of the ERTA jurisprudence, which renders the conferral of implied exclusive external competence contingent on the *exercise* of an internal competence and adoption of secondary legislation. In Opinion 2/92, for instance, the Court reaffirmed the conventional ERTA contingencies in that "internal competence can give rise to exclusive external competence only if it is exercised."<sup>134</sup>

The Commission argues, in contrast, that 'common rules', within the meaning of Article 3(2) third ground TFEU, do not require the exercise of an internal competence in this specific case, but take the shape of EU *primary* law.<sup>135</sup> In the opinion of the Commission, the treaty-prescribed prohibition of capital movement restrictions between member states in Article 63(1) TFEU constitutes a 'common rule' within the meaning of Article 3(2) TFEU. The conclusion of international agreements by the Member States would risk *affecting* the uniform application of the prohibition and thus implied EU exclusive external powers in this area. The Commission did not, however, argue that Member States' external action could *alter the scope* of primary law. The Union was therefore exclusively competent for the negotiation and conclusion of agreements covering rules on portfolio investment liberalization and the protection of such investments.

AG Sharpston acknowledges the novelty of the argument that the Commission puts forward and agrees that "the text of Article 3(2) TFEU itself does not offer decisive guidance."<sup>136</sup> Yet, she finds that "the parties' arguments regarding what common rules are relevant to the application of the ERTA principle to the area (...) of investment other than foreign direct investment suggest that there are various misunderstandings about 'common rules'. The present proceedings offer an opportunity for the Court to provide the necessary clarification"<sup>137</sup>.

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<sup>133</sup> Kuijper, Pieter Jan: *From the Board - Litigation on External Relations Powers after Lisbon: The Member States Reject Their Own Treaty*, (2016)43 Legal Issues of Economic Integration (1) 1-13. p3

<sup>134</sup> Opinion 2/92 [ECR 1995 I-00521],. para 36

<sup>135</sup> Opinion of AG Sharpston: paras 120, 276, 277

<sup>136</sup> *ibid.*: para 351

<sup>137</sup> *ibid.*: para 127

The AG questions why - if the Commission's argument was correct - the treaty-drafters did not provide for an *a priori* exclusive external competence over portfolio investment in Article 3(1) TFEU.<sup>138</sup>

Perhaps more importantly, the AG insists that implied exclusive competence can only derive from common rules that result from the exercise of internal competence.<sup>139</sup> Hence, "in the light of the judgment in ERTA and subsequent case law (...) it is clear that the Commission's broad interpretation of 'common rules' cannot be accepted."<sup>140</sup> Rather than examining the purpose inherent to this strand of jurisprudence in light of the specific question before the Court, AG Sharpston strictly rejects the applicability of the implied powers doctrine to primary law provisions and holds onto the formal elements of the ERTA doctrine.<sup>141</sup>

The objective of the ERTA jurisprudence, it appears, is to establish whether the exercise of Member States' competence - by concluding external agreements in a specific area - is "capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system, which they establish".<sup>142</sup> The AG, however, does not examine whether the conclusion of member states' agreements with third countries have the potential to affect the treaty based prohibition of restrictions on capital movement as codified in Article 63(1) TFEU. The AG refrains from doing so because she treats the norm as a treaty objective, rather than a prescription.

The AG also does not seek to explain the unique character and the (presumably existent) logic inherent to the treaty provisions on the freedom of capital movement: the treaty does provide for the exercise of Union competence under Article 63(1) in regard of the harmonization of EU legislation via Article 114 TFEU. Yet, the exercise of a competence to liberalize or protect portfolio investments, notwithstanding its conferral via Article 63(1) TFEU, is not provided for in the TFEU - neither in regard of the internal market nor *vis-à-vis* third countries. The Commission, in contrast, had explained this circumstance by stating that the comprehensive scope of the 'common rule' of Article 63(1) TFEU does not further require the adoption of secondary legislation.

It seems, moreover, that the AG may overstate the potential systemic implication of the Court's response to the question of 'common rules'. The Commission did not request clarification over whether primary law provisions, in general, can confer implied exclusive competence. Rather, the Commission advanced an argument that would, if affirmed, set a precedent in regard of the nature of EU competence for portfolio investment, based on implied powers deriving from Article 3(2) TFEU in conjunction with Article 63(1) TFEU only.

In light of these considerations, it appears that the Advocate General leaves considerable space for the Court to clarify the existence and nature of EU competence over the liberalization and protection of portfolio investment. Doubts pertain in regard of the correct legal basis for both shared or EU implied exclusive competence as well as the even more fundamental questions over implied powers on the basis of Article 3(2) in conjunction with Article 63(1) TFEU.

A Court opinion that follows the conclusions of the AG and deems both EU and member states competent to conclude agreements covering portfolio investment would likely render the effective exercise of EU *exclusive* competence over foreign direct investment infeasible. The economic and

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<sup>138</sup> *ibid.*: para 358

<sup>139</sup> *ibid.*: para 353

<sup>140</sup> *ibid.*: para 352

<sup>141</sup> For analysis resembling this view, yet questioning the conferral of shared competence for portfolio investment, see: Ortino, Federico and Piet Eeckhout: *Towards an EU Policy on Foreign Direct Investment*, in Biondi, Eeckhout, Ripley (eds): 'EU Law after Lisbon', OUP 2012. pp 315-318

<sup>142</sup> Opinion 2/13: para 74

legal-technical link between direct and indirect investment does not seem to offer an opportunity for the separation of the two areas of regulation into distinct external agreements.

The EU could thus seek to conclude 'EU-only' agreements including investment provisions as a whole, subject to the political discretion of EU institutions, or accept a conclusion of future EU trade and investment treaties as mixed agreements. In the alternative, exclusive CCP agreements, on the one hand, and 'mixed' agreements on investment (and transport services), on the other, could be concluded separately.

#### **IV. Conclusions**

The Opinion 2/15 proceedings surface the vast amount of general and issue specific legal questions that lay beneath the request of the Commission for the Court to clarify EU competence for the conclusion of the EUSFTA. Some of these questions are of methodological character and demand a clarification of the Court's general approaches to competence and legal basis enquiries, as well as of its precise understanding of the relationship between the two. A considerable number of issues can be considered as genuinely novel, however, as they arise as a result of the Lisbon Treaty reform of 2009.

The examination of the Court's analytical approaches to the delimitation of exclusive vs. shared external Union competences, in general, and the CCP, more specifically, results in the conclusion that the Court has exercised and retains considerable discretion in deciding on competence and legal basis enquiries regarding acts concluding EU external agreements. The parameters the Court has considered or emphasized in its past reviews cannot be said to have advanced significant clarity or predictability of their appropriate application on a case-by-case basis. The Opinion 2/15 proceeding may offer a unique yet challenging opportunity for the Court to refine its analytical standards and approaches with a view to generating legal certainty beyond the ambit of facts specific to the case. The Court's judgment in Opinion 2/15 thus has a significant potential to reduce the incentives for litigation and decrease transaction costs of governance, which derive from uncertainties inherent to EU primary legal institutions as well as from uncertainty over the Court's analytical focus.

Such clarifications could, first, include a more refined operationalization of the 'direct and immediate effects on international trade' criterion of the CCP 'aims and content' test, which should arguably require reference to empirical evidence – in contrast to establishing mere notional links - in order to guarantee a more consistent, coherent, and hence valuable application. The fluidity of the concept of 'trade effects' of treaty content, admittedly, renders such an exercise particularly difficult.

Secondly, it seems that the Court's past jurisprudence has not served to systematically clarify the precise relationship between external competences and the attribution the appropriate legal basis – or bases - for acts concluding EU external agreements, which pursue multiple purposes and/or encompass more than one discernable component. The Court's jurisprudence provides for anecdotal evidence of factors employed in the determination of the main or predominant purpose of the acts in question. It cannot be said, however, that the Court has set out 'objective factors amenable to judicial review' for the determination of predominant vs. incidental objectives and components of such acts. It is at the intersection of the legal basis test and the competence enquiry where the Court's judgment could and should provide for enhanced clarity so as to avoid the sort of confusion that is reflected in the diverging member states' responses to the legal basis enquiry placed before them by the Court in this proceeding.

Third, Opinion 2/15 generates an important opportunity for the Court to clarify the codification of implied powers under Article 3(2) TFEU in light of its ERTA jurisprudence, with specific and lasting relevance for the answer to the question whether the Union is externally competent – and if so, in what nature – to conclude external agreements covering portfolio investment liberalization and protection.

AG Sharpston's legal view affirms the tectonic shifts of competence, which the Lisbon Treaty reform has advanced and the Court's judgment in *Daiichi Sankyo* has begun to confirm. The vast majority of EUSFTA provisions and commitments will fall to EU exclusive competence, including the contentious investment dispute settlement mechanism. Her submission, however, also indicates that the EUSFTA and other 'new generation' FTAs, in the current form, cannot be concluded as mandatory 'EU-only' agreements. Provisions on the termination of member states BITs as well as air, maritime, and inland-waterway transport services commitments are, rather obviously, not included in the scope of EU exclusive competence. Deleting the redundant 'BIT termination clause' and the negotiation of separate 'mixed' transport agreements can, however, remedy this circumstance in a technically facile and politically uncontentious manner.

The same, however, cannot be said about the agreement's *non-commercial* provisions on labour and environmental protection standards, which the AG deems to fall under competences shared with the Member States. It is questionable at least, however, whether the Court will eventually side with the AG on this matter. Both the precise application of the 'direct effects on international trade' criterion and the determination of 'incidental' treaty components could conceivably move the needle on the scope of exclusive external competence for these provisions. Be that as it may, the AG's opinion does suggest another remedy to avoid mixity in this instance, notably by linking compliance to the availability of trade benefits under future agreements. The availability of trade sanctions would establish a sufficiently specific relationship to trade and thus move labour and environmental protection provisions within the exclusive scope of EU Common Commercial Policy. It is noteworthy that this process is – at the political level – already underway with respect to the CETA.<sup>143</sup>

The Court may apply similar considerations to the issue of 'moral rights' for intellectual property, which makes for another area where the Court may exercise the discretion it retains with respect to the analytical approaches it employs. The AG, in this instance, found that moral rights, in context of the EUSFTA would serve to harmonize the laws of the member states to improve the functioning of the internal market, rather than being sufficiently related to trade to enter the realm of the CCP; or making for an incidental component of the act concluding the EUSFTA. At minimum, this finding is surprising in light of the fact that the rights in question are enforceable via trade sanctions that are available under the EUSFTA.

Portfolio investment, which the AG deems to fall under EU shared competence, may create the greatest challenge for the future design of EU-only trade and investment agreements. It appears, however, that the Advocate General has left considerable space for authoritative clarification in regard of the existence and nature of EU competence in this area. The opinion of AG does not seem to eliminate doubts over the correct legal basis for both conceivable scenarios, i.e. shared or implied EU exclusive competence over portfolio investment on the basis of Article 63(1) TFEU.

A Court opinion that follows the conclusions of the AG and deems both EU and member states competent to conclude agreements covering portfolio investment would likely render the effective exercise of EU exclusive competence over foreign direct investment infeasible. The economic and legal-institutional links between direct and indirect investments does not seem to offer an opportunity for the separation of the two regulatory areas into distinct external agreements. The EU could seek to conclude 'EU-only' agreements including investment provisions as a whole, subject to the political discretion of EU institutions, or accept the conclusion of mixed agreements. In the alternative, the Union could opt for the separate conclusion of exclusive CCP agreements, on the one hand, and 'mixed' agreements on investment and transport, on the other.

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<sup>143</sup> See Paragraph 10(a) of the Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (13541/16), October 27, 2016.

Only the Court's final verdict will end the legal uncertainty over the existence and nature of EU competences in these areas and give authoritative guidelines for the design of EU external trade and investment agreements. It is true that the Court tends to follow the legal views expressed by the respective AG. Yet, the sheer number, complexity, novelty, and systemic significance of the issues at stake, as well as the rare sitting of the Court in full session of 28 judges, may render this proceeding unlike others.

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