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The Signing, Provisional Application, and Conclusion  
of Trade and Investment Agreements in the EU  
The Case of CETA and Opinion 2/15

David Kleimann and Gesa Kübek



European University Institute  
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## **Abstract**

The ‘Wallonian Saga’ has illustrated a number of structural weaknesses of the European Union as an external treaty-maker in the field of EU Common Commercial Policy that concern issues of both democratic representation and effectiveness of EU multilevel governance. The legal question of competence that determines the Union’s power to conclude external commercial treaties by itself or, in the alternative, jointly with the member states will be clarified by the CJEU in its forthcoming judgement in Opinion 2/15. We provide an overview of the relevant CJEU case law and the main issues that arose during the Court’s hearing in the Opinion 2/15 procedures; discuss the law and practice of the provisional application of international treaties by the EU and legal avenues that enable the entry into force of a mixed agreement despite its rejection by an individual member state. We argue in favour of adjusting the scope of future EU trade and investment agreements to the realm of EU exclusive competences as clarified by the CJEU to remedy the functional deficiencies of EU treaty-making that were exposed in the ‘CETA-drama’. At the same time, we emphasize the need for – and outline a path towards – a qualitative change in EU and member state institutional practice that fully employs the channels of vertical political participation in the Union’s multilevel governance structures so as to strengthen the legitimacy of EU economic treaty-making.

## **Keywords**

Common Commercial Policy, CETA, Opinion 2/15, CJEU, trade, portfolio investment, European Union, EU-only, competence, mixed agreement.





## I. Introduction and Overview\*

On 1<sup>st</sup> August 2014, negotiations of a free trade agreement between the EU and Canada, known as the Comprehensive Economic and Trade Agreement (CETA) were completed. The signature, provisional application, and conclusion of CETA have sparked a fierce political debate across the Union and its member states. At the centre of this debate stands the question whether the EU has the legal competence to conclude CETA as an ‘EU-only’ agreement, i.e. in participation of its own institutions alone. A negative answer implies that CETA will be concluded as a so-called ‘mixed agreement’. Mixed agreements, in turn, require joint unanimous signing and ratification by the EU and its member states. In practice, the conclusion of mixed agreements currently triggers the participation of at least 38<sup>1</sup> national and regional parliaments in the EU.

The European Commission has emphasised that it legally views CETA as an ‘EU-only’ agreement and – until July of this year – intended to propose the signing and conclusion of the agreement as such. If followed through, CETA would have made for the first ‘EU-only’ trade agreement in the history of the Union – an instance that some deem consequential and even mandatory in light of the considerable expansion of the scope of EU Common Commercial Policy following the entry into force of the Lisbon Treaty in 2009. The Commission’s plan, however, has been vigorously opposed by the member states represented in the Council.<sup>2</sup> In 2014 already, a majority of national parliaments urged then EU Trade Commissioner Karel De Gucht to propose the conclusion of contemporary EU trade and investment treaties as mixed agreements as they feared that an ‘EU-only’ conclusion would compromise their legitimacy “in view of the important role national parliaments have in the democratic decision making process in the EU”.<sup>3</sup> On July 5<sup>th</sup> 2016, in the eleventh hour, the Commission, in a U-turn that has been widely attributed to a personal decision of President Juncker, caved in to mounting political pressure in the Council – from Germany and France in particular - and proposed the signing, provisional application, and conclusion of CETA as a mixed agreement.

Against this background, this article discusses and examines five related issues that are pertinent to the process and substance of the application and conclusion of contemporary trade and investment agreements in the EU. It is our general enquiry over the legitimacy, efficiency, and effectiveness of EU Common Commercial Policy that informs the legal questions we raise and discuss in this article.

### *‘EU-only’ vs. ‘Mixity’ – A Question of Competence*

The first question that we examine relates to the fact that the choice as to whether the member states are included as independent parties to an external treaty - and hence the choice between two different modes of treaty-making in the EU -, is not a matter of political preference of the political institutions of the EU or the member states. It is not for the Commission, the Council, the EP or the member states to decide over the “correct” procedure. The choice of procedure follows from an answer to a question of law: Have the member states conferred treaty-making powers to the Union that are sufficient for an

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<sup>1</sup> The exact number of national parliaments that are required to vote on the conclusion of CETA is currently unclear. Member states are still debating the extent to which national constitutional requirements necessitate the additional involvement of all or some of their national or regional legislatures.

<sup>2</sup> 8737/16, “Outcome of the Council Meeting”, at 3463<sup>rd</sup> Council Meeting Foreign Affairs Trade Issues, Brussels, 13 May 2016, p. 4 <<http://data.consilium.europa.eu/doc/document/ST-8737-2016-INIT/en/pdf>> (last visited 8 Oct. 2016).

<sup>3</sup> “Letter to Mr. de Gucht in the framework of the political dialogue: the role of national parliaments in free Trade agreements”, 25 Apr. 2016, <[http://www.ttip2014.eu/files/content/docs/Full%20documents/Letter\\_to\\_Mr\\_De\\_Gucht\\_-\\_role\\_of\\_national\\_parliaments\\_in\\_free\\_trade\\_agree...\\_181-238913.pdf](http://www.ttip2014.eu/files/content/docs/Full%20documents/Letter_to_Mr_De_Gucht_-_role_of_national_parliaments_in_free_trade_agree..._181-238913.pdf)> (last visited 8 Oct. 2016).

‘EU-only’ conclusion of 21<sup>st</sup> century trade and investment agreements, or not? The 2009 Lisbon Treaty reform, which provided for a considerable expansion of EU exclusive competence for its Common Commercial Policy, was arguably intended to facilitate the conclusion of ‘EU-only’ trade and investment agreements. But given the continuous inter-institutional disagreements, it is now for the Court of Justice of the European Union (CJEU), through its interpretation of EU primary and secondary law, to authoritatively decide on respective questions and is expected to do so in its judgment in *Opinion 2/15* by spring 2017. In *Opinion 2/15*, the Commission had asked the Court to provide legal clarity and resolution over diverging interpretations of the 2009 Lisbon Treaty amendments of the TFEU and the exact delineation of EU and member states’ competences: “Does the European Union have the ‘requisite competence’ to conclude the EU – Singapore Free Trade Agreement [EUSFTA] alone?” More specifically, the Commission, in October 2014, asked the Court to clarify whether and which areas of the EUSFTA fall under EU-exclusive, shared, or member states’ exclusive competences respectively.

### *Opinion 2/15 – The Crux of the Case*

The crux of the matter brought before the Court lies exactly in this precise delineation of EU external competences: If the content of the EUSFTA falls under EU exclusive powers in its entirety, its conclusion as ‘EU-only’ is mandatory. If certain treaty provisions are regarded as exclusive national competences, the agreement has to be concluded as a ‘mixed’ agreement, which, in consequence, includes all EU member states as independent contracting parties. Should the CJEU find, however, that the FTA falls under EU exclusive as well as shared competences, the decision to propose the conclusion (on behalf of the Commission) and to conclude the agreement (on behalf of the Council) as either ‘EU only’ or ‘mixed’ is legally optional and subject to the political discretion of the EU institutions involved in the applicable procedures set out in Article 218 TFEU in conjunction with Article 207 TFEU.

The importance of the Court’s *Opinion 2/15* for EU commercial treaty-making powers, and, by inference, for the *modus operandi* of treaty conclusion, can thus hardly be underestimated. The Court judgment in *Opinion 2/15* could possibly mark the beginning of the era of ‘EU-only’ trade and investment agreements and, conversely, the end of the EU member states lengthy parallel ratification procedures required by ‘mixity’. At the very least, the judgment will produce important guidelines for the Commission negotiators as to how the Union can avoid mixed agreement signing and ratification requirements by limiting the content of future agreements to provisions falling under EU exclusive competences. As reflected by the inter-institutional political debate on the legal status of the EU Canada Comprehensive Economic Trade Agreement (CETA) as well as the Wallonian CETA-drama, the eventual outcome of *Opinion 2/15* has important implications for the effectiveness, credibility, and efficiency of EU trade and investment policy formulation as well as the *de jure* legitimacy of multi-level economic governance in the European Union.

### *The “Bypassing of National Parliaments” – Dispelling an Urban Myth*

This contribution, third, contests the popular belief that an ‘EU-only’ approach to the conclusion of CETA and other EU trade and investment agreements ‘bypasses national parliaments’. It is true that distinct modalities of treaty conclusion in the EU allocate different participatory rights among the political institutions of the Union and its member states in the decision-making process. It is beyond doubt, however, that member state parliaments retain various participation and control right in the ratification process irrespective of the mode of treaty conclusion - whether ‘EU-only’ or ‘mixed’. The difference between member state parliamentary participation in the conclusion of ‘EU-only’ or, in the alternative, ‘mixed’ agreements is not a choice between involvement and exclusion. Rather, the procedures that apply to the conclusion of ‘EU-only’ and ‘mixed’ agreements provide for a qualitatively different involvement of member state parliaments in the ratification process. ‘EU-only’ agreements do not “bypass” national parliaments. National parliaments remain formally involved via

parliamentary rights that are anchored in national constitutions. In a mode of vertical integration in multi-level EU governance, parliamentary control rights at the national level shape the voting behaviour of member states' governments in the Council. The 'EU-only' conclusion of trade agreements, at the same time, elevates the role of the European Parliament (EP), which holds a veto-right, in the democratic process. The conclusion of mixed agreements, in contrast, requires the horizontal participation of member states' political institutions. Mixed agreements endow all member state parliaments with decision-making rights that can, under certain circumstances, resemble the veto-right of the EP and thus result in an extremely cumbersome and lengthy political process that sets inefficient incentives for political blackmail and paralysis.

### *Who's afraid of Provisional Application?*

A fourth argument advanced in this note relates to popular misconceptions over the nature, purpose, and legitimacy of a commonplace legal instrument in international relations, notably the provisional application of international treaties in general and of EU trade agreements in particular. The effectiveness of the system of international treaty-making arguably hinges upon the use of this customary tool of international law. While it is the very purpose of the instrument to apply agreements before domestic legislators have completed sometimes lengthy ratification procedures, EU institutions have informally agreed to endow provisional application of trade and investment agreements with enhanced democratic legitimacy by making a respective decision contingent on the formal consent of the EP. In the public debate, allegations claiming the attempted circumvention of formal ratification requirements by means of provisional application of CETA have mushroomed widely. In this note, we argue that these claims are unfounded and deceptive. Moreover, we scrutinize claims that seek to limit the scope of provisional application to areas of EU exclusive competences, or, in addition, competences shared with the member states. Examining the relevant EU primary law and past EU practice, we find that there is no discernible obligation for the involved institution to limit the provisional application of treaties to either standard. Against this background, we discuss the recent decision of the German *Bundesverfassungsgericht*, practical aspects of CETA provisional application, and the final Council decision on CETA of October 27, 2016.

### *CETA 'Wallonaise'*

Finally, we examine the legal implications of a member states' refusal to sign or ratify a mixed trade and investment agreement generally, and CETA specifically. First, we scrutinize the immediate legal effect of a national parliamentary 'no'. Operating under the assumption that a member state government decides to follow a negative parliamentary vote, the second part of the section addresses the scope and impact of a potential national executive rejection for the signature and ratification of CETA. In particular, we question whether a member state, in the context of a mixed agreement, can *de jure* reject a treaty's application in areas of EU exclusive, shared and exclusive member state competences, respectively. We outline two scenarios that would allow for the entry into force of the (predominant) parts of a mixed agreement that fall under EU exclusive competence, even after a member state government has refused to sign or ratify the treaty. We argue that these legally viable options should only be considered as a last resort in order to avoid paralysis of EU Common Commercial Policy by a single member state or regional government veto. Yet, these options should, now more than ever, be considered in order to safeguard the democratic governance of EU treaty-making and reinforce the credibility of the EU as an external treaty-maker vis-à-vis partner countries' governments.

### *Structure and Content*

The underlying purpose of this contribution is to emphasize the need for a more nuanced and constructive debate about the *de jure* legitimacy and quality of alternate democratic processes that apply to the signing, provisional application, and conclusion of 21<sup>st</sup> century trade and investment

agreements in the EU. With this objective in mind, section II builds the foundation for a discussion of the aforementioned issues and questions by providing for an explanatory account of the division and nature of treaty-making competences in the EU. It is the answer to the question of competence that determines the Union's power to conclude external commercial treaties by itself or, in the alternative, jointly with the member states – a question that will be clarified by the CJEU in Opinion 2/15. Section III outlines the distinct modalities and procedures that the conclusion of international treaties as 'EU-only' or 'mixed' requires respectively. Section IV gives an overview of the case law of the CJEU that is relevant for the purposes of this paper and produces an account of the main and most contentious issues that arose during the Court's hearing in the Opinion 2/15 procedures, generally, and portfolio investment, in particular. Section V examines the purpose, law, and practice of the provisional application of international treaties by the EU and embeds the Council decision on the provisional application of CETA into this context. Section VI discusses the legal effects of a potential rejection of CETA by a member state parliament and/or government and outlines two legal avenues that enable the entry into force of a mixed agreement despite its rejection by an individual member state government. Section VII concludes this article with an outline of EU Common Commercial Policy governance in 2020 that would, in our view, render external treaty-making more democratic, more effective, more efficient, and more reliable. We argue in favor of adjusting the scope of future EU trade and investment agreements to the realm of EU exclusive competences as clarified by the CJEU in order to remedy the functional deficiencies of EU treaty-making that were exposed in the 'CETA-drama'. At the same time, we emphasize the need for – and outline a path towards – a qualitative change in EU and member state institutional practice that fully employs the channels of vertical political participation in the Union's multilevel governance structures and thereby strengthens the legitimacy of EU economic treaty-making in its substance beyond formal rights of political participation.

## II. 'EU-only' vs. 'Mixed' Trade and Investment Agreements: A Question of Competence

In this section we, first, provide a basic discussion of the scope of *a priori* and implicit EU exclusive competences in regard of trade and investment treaty making, in general, and CETA in particular. Drawing upon the notional distinction between EU exclusive, shared, and member state exclusive competences, we discuss three categories of EU external agreements, notably 'EU-only', 'mixed' agreements, and 'facultative' mixed/EU-only agreements. Having built the necessary conceptual framework, we then proceed to examine the significance and likely implications of the CJEU's forthcoming judgement in Opinion 2/15 for the EU's external economic treaty making powers. Finally, we place the Commission's decision to propose CETA as a 'mixed' agreement in the context of the legal opinions held by the respective parties in the ongoing Opinion 2/15 procedures.

### *The Scope and Nature of EU Competences*

International agreements can be concluded by the EU, by its member states, or by both the EU and its member states together. The first case is now known as 'EU-only' agreements. Such treaties can be concluded by the Union's institutions alone. The conclusion of mixed agreements, in contrast, includes both the Union and its member states as contracting and ratifying parties.

Legally, the decision as to whether an agreement is concluded as 'EU-only' or 'mixed' depends on the *scope* and *nature* of EU external treaty-making competences. The *scope* of competences, at a general level, concerns the division of competences between the EU and the member states. It determines whether and which competences the MS have conferred to the EU. The *nature* of EU competences, secondly, qualifies the scope of Union competences in an important aspect: it identifies to which extent the EU is permitted to exercise its competences *independently* from the member states. The Treaty on the Functioning of the European Union (TFEU) provides that the nature of external EU

competences can either be exclusive<sup>4</sup> or shared.<sup>5</sup> If the EU holds an exclusive competence, the Member States are prevented from legislating internally and may not negotiate and enter into international commitments.

## **2. Exclusive EU Competences**

Exclusive competences are listed in Article 3(1) TFEU. This list includes the Common Commercial Policy (CCP) – i.e. the EU external trade competence –, which is codified in Article 206 and 207 TFEU. The scope of the CCP has been expanded in several treaty reforms over the last decades in adaptation to the requirements of the negotiation and conclusion of multilateral and bilateral trade and investment treaties as well as implementing legislation. The inclusion of services, trade related intellectual property rights, and foreign direct investment in the scope of exclusive EU competence as a result of the 2009 Treaty of Lisbon was arguably intended to adjust the scope of CCP exclusivity to the content of contemporary EU trade policy in general and EU preferential trade and investment agreements with third countries in particular.

### 2.1. The Scope of Article 207 TFEU

Nonetheless, the exact scope of Article 207 and the question whether the entire content of CETA falls under this legal basis, has been subject to much debate among legal scholars and practitioners. Generally speaking, the choice of legal basis, according to settled case law, “must rest on objective factors (...), which include the aim and content of that measure.”<sup>6</sup> To facilitate the determination of the legal basis for measures which may touch upon the scope of more than one of the legal bases of the TFEU, the Court developed the ‘centre of gravity’ theory, which entails an ‘aims-test’ that determines the predominant purpose of the measure in question. The Court, in its earlier judgments, held that “[i]f [the] examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component.”<sup>7</sup> This test is of particular relevance for the determination of the correct legal basis for those parts and provisions of contemporary trade and investment agreements that are merely *related* to trade and investment, such as environmental protection and labour rights provisions in sustainable development chapters.

In application of the ‘centre of gravity’ theory post-Lisbon case-law, the Court has 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”.

A broad application of the ‘gravity theory’ would, to be sure, allow for a broader scope of the Union’s exclusive competence under Article 207, whereas a restrictive interpretation may force the use of other legal bases, which are non-exclusive in their nature. The ‘centre of gravity’ theory, in this way, has become one of the main lines of reasoning of the European Commission in the Opinion 2/15

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<sup>4</sup> Art. 3(1) TFEU.

<sup>5</sup> To be precise: For the scope of this article, we mainly refer to shared pre-emptive competences (Art. 4 (3) TFEU); shared competences may also be parallel (Art. 4 (3), (4) TFEU) or supporting (Art. 5, 6 TFEU).

<sup>6</sup> See, for instance, Case C-130/10, *Parliament v. Council*, EU:C:2012:472, para 42 or Case C-377/12, *Commission v. Council*, EU:C:2014:1903, para 34.

<sup>7</sup> Case C-377/12, *Commission v. Council*, para 34. See also Case C-155/07, *Parliament v. Council* EU:C:2008:605, para 34 -37; Case C-300/89, *Commission v. Council* (‘Titanium Dioxide’), EU:C:1991:244, para 17 – 21; Case C- 411/06, *Commission v. Parliament and Council* (‘Shipments of Waste’), EU:C:2009:518, para 45 -47; Case C- 130/10, *Parliament v. Council*, para 43-45.

proceedings to justify the exclusivity of trade-related parts and provisions of the EU-Singapore FTA as well as contemporary EU trade and investment agreements more generally.

Yet, some elements of the modern generation of EU trade and investment agreements may still fall within the realm of EU shared competences. This notion has inspired much of the current inter-institutional legal conflict over EU treaty-making powers and the conclusion of CETA. Member states are generally permitted to adopt legal acts in areas of shared EU competences.<sup>8</sup> However, they may only exercise their competence to the extent that the EU has decided to cease the exercise of its competence (Art. 2 (2) TFEU). As soon as the EU exercises a shared competence individual member states are pre-empted from doing so.

It is important to note, in this regard, that the internal exercise of a shared competence on behalf of the Union may, under certain conditions, imply exclusive external EU competence. As such, parts of trade and investment agreements that correspond to uniform EU rules, which result from the internal exercise of shared competences may thus broaden the scope of EU exclusive treaty-making competences by implication and, in turn, narrow the substantive scope of treaty parts that require EU member states to become independent parties to the agreement. We turn to the question of implied exclusive EU competences in the following section.

## 2.2 Implied Exclusive EU Competences

In addition to the *a priori* exclusive competences that are explicitly listed in the TFEU, EU exclusive treaty-making powers can be *implied*. Article 3 (2) TFEU provides for three situations where “[t]he Union shall also have [implied] exclusive competence for the conclusion of an international agreement”. First, the EU acts alone externally when an EU legislative act requires the Union to do so. The EU may, secondly, obtain exclusive implied exclusive powers to conclude international agreements when this is necessary for the exercise and achievement of the objectives of its otherwise internal competences.<sup>9</sup> Finally, the Union may act alone externally where the exercise of national member states’ competence could affect common rules or alter their scope.<sup>10</sup>

In practice, implied exclusivity of external treaty-making powers under Article 3(2) TFEU is often a result of the adoption of EU internal legislation in an area of shared competence (Art. 3 (2), third situation). EU legislation in an area of shared competence, first, pre-empts independent member state action. A sufficient degree of internal harmonisation via EU legislation may then imply an EU exclusive power to act externally. The rationale behind this trigger of implied exclusivity of treaty-making powers, as mentioned above, is to prevent that member state agreements with external partners affect or alter the scope of common Union rules (Art. 3 (2) TFEU, third condition). This legal paradigm – the so-called ERTA doctrine as developed in the case law of the CJEU – generally requires the exercise of EU competence in the policy area in question.

Yet, the Court has, in the development of the ERTA-doctrine through pre- and post-Lisbon case law, advanced a rather permissive standard for the generation of the ‘ERTA-effect’: First, “[i]t is *not necessary* for the areas covered by the international agreement and the Community legislation to *coincide fully*.”<sup>11</sup> Moreover, the Court held that “[t]he scope of EU rules may be affected or altered by international commitments where such commitments are concerned with an area which is already

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<sup>8</sup> On shared competences, see *supra* note 5.

<sup>9</sup> Opinion 1/76, *Inland Waterways*, EU:C:1977:63, para 3-4 as clarified in in the ‘*Open Skies*’ judgments, in particular Case C-467/98, *Commission v. Denmark*, EU:C:2002:625, para 56; in this respect, see also Opinion 1/03, *Lugano Convention*, EU:C:2006:81, para 36.

<sup>10</sup> 1/75, *ERTA*, EU:C:1975:145, para 17; as clarified in Opinion 1/03, *Lugano Convention*, para 116.

<sup>11</sup> Opinion 1/03, *Lugano Convention*, para 126, highlights added; see also Opinion 2/91, EU:C:1993:106, para 25-26.

covered to a large extent by such rules."<sup>12</sup> Finally, the Court finds it “necessary to take into account not only the current state of Community law in the area in question but also *its future development*.”<sup>13</sup>

The precise ambit of implied exclusive powers, therefore, evolves over time either in parallel or complementary to the scope of the exercise of shared competences by the EU. As a result, the precise scope of exclusive implied powers remains unclear and is hence subject to legal and political debate and requests for authoritative clarification. In Court proceedings, implied powers, and the ERTA doctrine in particular, serve the Commission as a potent line of reasoning to justify competence exclusivity in regard of the content of contemporary trade and investment agreements. Member states, in contrast, are naturally wary of a liberal application of the ERTA doctrine.

### **3. Opinion 2/15 – The Crux of the Case**

The Commission, in its preliminary questions to the Court in Opinion 2/15, asked the CJEU to clarify the scope of EU implied exclusive powers, in particular, and the legal status of EU trade and investment agreements that include provisions falling under shared EU competences, in general. In contrast to previous cases (e.g. in *Opinion 1/94*<sup>14</sup>) the Commission does not only inquire whether it has the exclusive competence to conclude the international agreement in question alone. Instead, the Commission now asks whether the Union possesses the “requisite competence” to conclude the EU-Singapore FTA alone.<sup>15</sup> In its written submission in the *Opinion 2/15* proceedings, the Commission, “has expressed the view that the Union has exclusive competence to conclude the EUSFTA alone and, in the alternative, that it has at least shared competence in those areas where the Union's competence is not exclusive.”<sup>16</sup> The Commission is in fact of the opinion that agreements, which are covered by EU competence, can be concluded by the Union alone - whether or not the Union competence is exclusive or non-exclusive. The member states “have expressed a different opinion”.<sup>17</sup>

Opinion 2/15 is thus concerned with the precise delineation of the scope of exclusive and implied exclusive competences in contrast to shared competences. It is this very question, which stands at the beginning of the current legal, political, and broader public debate about the two alternative democratic processes that apply to the ratification of EU trade and investment agreements.

Indeed, in its written and oral submissions to the Court, the Commission questions whether the member states ought to become parties to an EU trade and investment agreement, which partly falls within the ambit of shared EU competences that are *not* implicitly exclusive in the sense of Article 3(2)

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<sup>12</sup> Opinion 1/13, EU:C:2014:2303, para 76, highlights added; see also Opinion 1/03, *Lugano Convention*, para 126 and Case 114/12, *Commission v. Council*, EU:C:2014:2151, para 69.

<sup>13</sup> Opinion 1/03, *Lugano Convention*, para 126, highlights added; see also Opinion 2/91, para 25.

<sup>14</sup> Prior to the 2009 Lisbon Treaty reforms, the Court of Justice has facilitated the recourse to mixed agreements as soon as the Community's competences were non-exclusive. In the proceedings of Opinion 1/94, some member states argued that the TRIPS agreement concerned exclusive national competences. The ECJ, however, held that the Community was competent to harmonise national legislation in the field of trade related intellectual property rights. The Community had, however, refrained from exercising its shared competence. Member state action was thus not pre-empted. Without implied exclusivity, the community and the Member States were, as the CJEU put it, ‘jointly competent’ to conclude the TRIPS agreement (Opinion 1/94, EU:C:1994:384, para 99 – 105).

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

<sup>16</sup> COM(2016) 443 final, “Proposal for a Council Decision on the conclusion of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part”; COM(2016) 470 final, “Proposal for a Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part”; COM(2016) 444 final, “Proposal for a Council Decision on the signature of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part”; all p. 4.

<sup>17</sup> *Ibid*, p. 4.

TFEU. In other words, the Commission argued that the member states are not required to become parties to an agreement that covers non-exclusive shared competences, it is then left to the political discretion of the responsible EU institutions – here: the Council on proposal by the Commission – to allow the member states to become parties to the agreement, or not. ‘Mixity’ of an EU trade and investment agreement, in this case, would not be mandatory but *facultative*. By inference, treaty disciplines that fall into areas of shared competence still permit an EU-only conclusion of the agreement. For the purposes of this paper, it is sufficient to distinguish three different categories of external agreements.

### 3.1 Mandatory ‘EU-only’ vs. Mandatory ‘mixed’ Agreements

First, the content of an EU trade and investment agreement with third countries may fall within the scope of EU (*a priori* and *implied*) exclusive treaty-making powers in its entirety. The main question that arises here regards the exact scope of exclusivity. While the Commission and the EP frequently argue for a broader scope, the Member States tend to interpret the scope of exclusive EU competence narrowly. EU exclusivity of competences prevents member states from acting in the respective policy area. The conclusion of the treaty as ‘EU-only’ is mandatory.<sup>18</sup> The member states must not become parties to the agreement.

The conclusion of an agreement as ‘mixed’ is mandatory when a treaty, in addition to content covered by EU exclusive competence or shared competences, includes rules that fall within the exclusive competence of the member states. In this case, the member states must act as independent parties to the treaty in order to assume the legal obligations of the external agreement that are not covered by any EU competence. In Court, EU institutions and the member states traditionally disagree as to whether certain treaty rules fall within the scope of exclusive member states competences, or not.

### 3.2 At Political Discretion: Facultative Agreements

A third and more contentious category concerns EU external agreements that cover rules, which fall under (*a priori* or *implied*) exclusive as well as non-exclusive EU competences without touching upon exclusive member states competences. In this case, legal scholars find themselves in fundamental disagreement over the appropriate and necessary legal consequence in regard of member states participation. The most conservative – or ‘etatistic’ - legal scholars, such as ‘Foodwatch’ legal advisor and expert representative of *Die Linke* in the German Bundestag, Wolfgang Weiß, argue that ‘mixity’ is mandatory as soon as only miniscule parts of an external agreement fall outside the scope of EU exclusive competence: “A treaty is necessarily a mixed agreement as soon as only one of its provisions falls outside of the scope of EU exclusive competences, even if that provision is of marginal importance seen in context of the entire agreement.”<sup>19</sup> In other words: A single treaty provision that falls within the ambit of shared EU competences, according to Weiß, triggers mandatory member states participation in the treaty conclusion and national ratification procedures in 28 member states in addition to the Commission, the Council, and the EP.

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<sup>18</sup> The EU may, however, for practical or political reasons, decide to delegate such treaty powers back to the MS. The 2012 Investment Regulation (O.J. 2012. L 351/40, Regulation No 1219/2012), to name one, grants the European Commission the right to authorize individual MS, upon request and on a case-by-case basis, to negotiate and conclude bilateral investment treaties with third countries.

<sup>19</sup> Weiß, “Verfassungsprobleme des Abschlusses und der vorläufigen Anwendung des CETA Freihandelsabkommens mit Kanada“, Stellungnahme zur Öffentlichen Anhörung des Ausschusses für Wirtschaft und Energie des Deutschen Bundestages am 5. September 2016, p. 18, <[http://www.bundestag.de/blob/438052/9f45bd9ca1de30f51726df5d391b8702/stgn\\_weiss-data.pdf](http://www.bundestag.de/blob/438052/9f45bd9ca1de30f51726df5d391b8702/stgn_weiss-data.pdf)> (last visited 08 Oct. 2016).



This view, however, is unconvincing. The broad scope of EU treaty-making powers under Article 216 (1) TFEU contradicts the view that deems member state participation as mandatory where Union competences cover the content of a treaty in its entirety. As long as treaty content falls within the scope of EU competences, whether exclusive or non-exclusive, there is no discernible legal obligation to include member states as independent parties to the agreement.<sup>20</sup> However, there is no requirement that would prevent EU institutions from including member states as parties to such an agreement either. Whether the agreement is concluded as EU-only or mixed is a discretionary political decision of the responsible EU institutions – i.e. the Council on proposal of the Commission - subject to the procedural requirements of Article 218 TFEU.

### 3.3 Prospects: The Future of EU Trade Policy in light of Opinion 2/15

As explained above, it is thus the task of the Court to decide whether and which parts of the EU – Singapore FTA fall within the scope of EU *a priori* exclusive competence, EU *implied* exclusive competence, EU shared competence, or member states' exclusive competence, respectively. In light of the its findings on this matter, the Court needs to decide, secondly, whether the agreement's content, requires mandatory EU-only conclusion, mandatory mixed conclusion, or allows for a facultative conclusion as an EU-only agreement or mixed agreement at the discretion of the involved EU institutions.

Given the broad and deep material coverage of the EUSFTA, the judgment will serve as a precedent for the conclusion of the vast majority of future EU trade and investment agreements. As such, the Court judgment in Opinion 2/15 could possibly mark the beginning of the era of 'EU-only' trade and investment agreements and, conversely, the end of the EU member states lengthy parallel ratification procedures required by 'mixity'. At the very least, the judgment will produce important guidelines for Commission negotiators, amongst others, as to how the Union can avoid mixed agreement signing and ratification requirements by limiting the content of future agreements to provisions falling under EU exclusive competences. By the same token, the CJEU may thereby provide credible legal benchmarks that inform the political discourse within and amongst the member states with a view to safeguarding the effectiveness of the CCP and the credibility of the EU as an international actor in economic affairs.

In sum, as reflected by the inter-institutional political debate on the legal status of the EU Canada Comprehensive Economic Trade Agreement (CETA) as well as 'the Wallonia Saga', the eventual outcome of Opinion 2/15 has important implications for the effectiveness, credibility, and efficiency of EU trade and investment policy formulation as well as the *de jure* legitimacy of multi-level economic governance in the European Union.

## 4. The Commission's CETA Proposals in Light of Opinion 2/15 Proceedings

According to the European Commission, "CETA has identical objectives and essentially the same contents as the EUSFTA". The Commission's legislative proposals for the signing, provisional application, and conclusion of CETA, however, include the member states as independent parties and therefore propose a mixed agreement. As such, the proposals appear to be incoherent with the legal opinion, which the Commission presented to the Court in its written and oral submissions in the *Opinion 2/15* procedures. During the announcement of the CETA proposals, however, EU Trade Commissioner Malmström took pains to emphasize that the Commission is of the view that the

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<sup>20</sup> The majority of academic literature appears to agree with this point. See, for instance, Ehlermann, "Mixed Agreements: A list of Problems", in O'Keefe & Schermers (eds.), *Mixed Agreements* (Deventer: Kluwer Law and Taxation Publisher and Europa Instituut Leiden, 1983), p.5; Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States*, (The Hague: Brill J Nijhoff, 2001), p. 36 ff.; Eckhoud, *EU External Relations Law*, Second Edition (Oxford: OUP, 2011), p. 212 ff.

contents of CETA fall under EU exclusive competences. The Commission, according to Malmström, only opted for ‘mixity’ as a last resort in response to political opposition – most prominently from Germany and France - in the Council. In expression of their dissenting legal opinion, member states had indeed threatened to amend potential ‘EU-only’ proposals to include the member states as independent parties. Under EU law, amendments to Commission proposals require unanimity in the Council.<sup>21</sup> While Italy originally considered supporting the Commission’s quest for ‘EU-only’, the government in Rome reportedly changed its mind in the last minute and thereby significantly increased the probability of a Council amendment to the CETA proposals.

More importantly, moreover, Germany and others indicated that they may revert to the ‘nuclear option’ and vote against the signing of the agreement, if the Commission proposals did not include the member states as parties. By proposing CETA as a mixed agreement, the Commission arguably aimed at preserving the effectiveness of EU Common Commercial Policy rather than insisting on its previous political position, which is based on its unchanged legal interpretation of the treaties. With Opinion 2/15 pending and in context of mounting pressure from key member states, the Commission President Juncker’s last-minute change of plans sought to enable a timely signature and provisional application of CETA, yet resulted in an unprecedented debacle of EU Common Commercial Policy practice in the run-up to the CETA signing ceremony.<sup>22</sup> Commissioner Malmström’s clarifications in regard of the Commission’s legal opinion served to preserve the integrity of the arguments that the Commission has advanced in its written and oral submissions to the Court in *Opinion 2/15*.

### III. Procedures: Signing and Conclusion of Trade and Investment Agreements in the EU

#### 1. Signature and Conclusion of ‘EU-only’ Agreements

As before-mentioned, ‘EU-only’ trade agreements are signed and concluded in sole participation of the Union’s principal institutions – the Commission, the Council and the EP – without formally requiring national parliamentary approval as part of the ratification process. EU primary law prescribes that the Council adopts decisions both on the signing and the subsequent conclusion of trade agreements on the basis of proposals made by the Commission.<sup>23</sup> The Council may choose to amend the proposals. Such an amendment, however, is subject to a unanimity requirement.<sup>24</sup> The conclusion of a trade agreement (but not its signature<sup>25</sup>) further necessitates the consent of the EP.<sup>26</sup> Assuming that the EP gives its consent for the conclusion, the proposals for both signature and conclusion can be adopted in the Council by qualified majority vote (QMV), notwithstanding policy-specific unanimity requirements spelled out in Article 207 TFEU and elsewhere in the treaties.<sup>27</sup> From signature to conclusion of the respective treaty, the ratification period may only last a few months. ‘EU-only’ agreements, therefore, are likely to ensure a speedy entry into force of an agreement that has been negotiated over years. Legal certainty for governments, citizens, and businesses, a fast and predictable implementation of the agreement with a view of reaping commercial benefits, as well as the efficiency of the public decision-making process, are some of the advantages that the ‘EU-only’ ratification track carries with it.

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<sup>21</sup> Art. 293(1) TFEU.

<sup>22</sup> The Commission refers to the goal of a timely signature in its proposals for the signature, conclusion and provisional application of CETA, op. cit. *supra* note 16, p.4.

<sup>23</sup> Art. 218 TFEU, read in conjunction with Art. 207 TFEU.

<sup>24</sup> Art. 293 (1) TFEU.

<sup>25</sup> Art. 218 (5) TFEU.

<sup>26</sup> Art. 218 (6) (a) (v) TFEU.

<sup>27</sup> Art. 207 (4) and 218 (8) TFEU.

But contrary to the views held by some commentators, the conclusion of ‘EU only’ agreements does anything but preclude national parliamentary participation in the ratification process. EU law does not prevent national governments from requesting or requiring a national parliamentary vote on an executive proposal to adopt an international agreement in the Council. Member state constitutions frequently contain provisions that allow for the parliamentary control rights or even render respective votes mandatory. For instance, Germany’s Chancellor Angela Merkel, one day in advance of the Commission’s CETA proposals, clarified that “[t]he participatory rights of the German Bundestag allow that we, as the federal government, will, of course, involve the Bundestag. The parliamentary vote will play an important role in the German voting behaviour [in the Council] in Brussels”.<sup>28</sup> The German Bundestag has indeed weighed in on the matter expeditiously and voted – with a majority of more than two thirds – in favour of a pertinent motion by the governing party factions. The motion demands that the German representative in the Council votes in favour of the EU signature and provisional application of CETA if the provisional application of the agreement does not encroach upon potential exclusive member state competences.<sup>29</sup> For the signing, provisional application, and conclusion of EU-only agreements, such modalities of national parliamentary participation may serve as an example *par excellence*.

At the EU level, the Lisbon Treaty of 2009 has greatly enhanced the participatory, information and control rights of the EP in the process of concluding Common Commercial Policy agreements with third countries. Most importantly, the EP is equipped with a right to veto international trade and investment agreements and receives regular reports on the progress of negotiations from the Commission.<sup>30</sup> Members of the EP, and its Committee for International Trade (INTA), have made extensive use of the newly acquired rights and responsibilities throughout the past years. The EP is arguably most responsive to the political participation of European citizens in respect of Common Commercial Policy issues and is characterized by great proximity to the policy-making processes. These two factors alone may – over time - render the EP the best-suited EU institution to provide EU trade agreement ratification procedures with the necessary democratic legitimacy in accordance with the high standards of European parliamentary democracies. For EU-only agreements, in any case, it is the EP that is *de jure* responsible to guarantee democratic control and legitimacy.

## **2. Signature and Conclusion of ‘Mixed’ Agreements in the EU**

Procedurally, the conclusion of a mixed agreement requires two parallel ratification processes that are of paramount significance. Ratification by both EU and Member State institutions gives justice to the fact that both the EU and the member states become parties to the treaty under international law in their own right. On the EU-side, the above-mentioned procedures for the signature and conclusion of trade and investment agreements apply. In addition, in case of a mixed treaty, the agreement ought to be ratified by each member state in accordance with the respective national constitutional requirements. At the time of writing, the constitutions of the EU-28 prescribe, in sum, affirmative votes by at least 38 national and regional parliaments. Some member states may even require national referenda. Mixed agreements hence significantly prolong the duration of the ratification process that starts with the signature and ends with the entry into force of an agreement. Given the duration necessary to acquire the consent of all chambers and notification thereof by all governments, the ratification of mixed agreements causes a great amount of legal uncertainty for both governments and businesses in the EU and for EU treaty partners. The ratification period of the EU Free Trade

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<sup>28</sup> Die Bundesregierung, „Freihandelsabkommen CETA. Merkel: Bundestag muss mitstimmen“, <<https://www.bundesregierung.de/Content/DE/Artikel/2016/06/2016-06-29-merkel-will-bei-ceta-bundestag-mitreden-lassen.html>> (last visited 08. Oct. 2016).

<sup>29</sup> Deutscher Bundestag: Antrag der Fraktionen der CDU/CSU und SPD, Drucksache 18/9663, 20.9.2016, <<http://dip21.bundestag.de/dip21/btd/18/096/1809663.pdf>> (last visited 07. Nov. 2016).

<sup>30</sup> Art. 207 (3), Art. 218 (6) TFEU

Agreement (FTA) with Korea (KOREU), for instance, lasted no less than five years.<sup>31</sup> The conclusion of an ‘EU-only’ agreement in contrast, as noted above, may only take a few months.

The answer to the question of whether a treaty’s content qualifies, in sum, as ‘EU-only’ or ‘mixed’ thus has important implications for the efficiency and effectiveness of public decision-making in the EU system of multi-level governance and the procedures that are employed to endow the conclusion of the treaty with democratic legitimacy – in addition to the approval through elected governments represented in the Council. ‘Efficiency and effectiveness of governance’, in case of ‘EU-only’ treaties, however, does not implicate a trade-off with the value of ‘democratic legitimacy’. We have noted above that member state parliaments may well - and should indeed - play an important role in the national deliberation process that determines a member state’s vote in the Council, in accordance with participatory rights granted to a national parliament under the constitution of the respective member state. Moreover, the central role of the EP in the process of concluding EU trade and investment agreements gives justice to the inherently *collective* nature of the EU’s external trade and investment policy and the need for a *common* democratic process that legitimises and exercises control over policy-formulation in the area of the Union’s Common Commercial Policy.

#### IV. CJEU Case Law and Arguments of the Parties in Opinion 2/15

Arguments in favour or against ‘efficiency of governance’ as well as vertical vs. horizontal modes of parliamentary participation in multi-level governance decision-making reflect individual normative preferences and political interest configurations. Respective public or inter-institutional debates, however, need to be separated from a positive legal analysis of how EU Member States have decided to answer these questions in the EU treaties and member states’ constitutions. Legitimacy, above all, can only be derived from a democratic process that abides by the rule of the law, which is codified in the EU Treaties and member state constitutions. To settle respective political differences over the question of the appropriate applicable procedure for the conclusion of CETA and EU trade and investment agreements in general, we ought to return to the legal question of whether the member states have conferred treaty-making powers to the Union that are sufficient for an ‘EU-only’ conclusion of 21<sup>st</sup> century trade agreements, or not. The ongoing legal and scholarly debate on this issue - as well as the political positions of different institutions - can give important insights. In the end, however, only the Court of Justice of the European Union can decide upon such matters authoritatively and is expected to do so by April 2017. The Court’s anticipated judgement in *Opinion 2/15* stands in context of a number of pertinent CJEU judgements, in which the Court provided answers to some of the questions at stake.

In the following subsection, we outline the respective case law, which sets out the legal reasoning that the Court has advanced in prior disputes. Subsequently, we present an account of the legal arguments of the Commission representatives, on the one hand, and Council and member states representatives, on the other, on the question of competence in regard of portfolio investment, which the parties put forward during the hearing of the Opinion 2/15 proceedings. A more comprehensive account of the Court hearing has been made available elsewhere.<sup>32</sup>

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<sup>31</sup> Council of the EU, Press Release 691/15, “EU-South Korea free trade agreement concluded”, <<http://www.consilium.europa.eu/en/press/press-releases/2015/10/01-korea-free-trade/>> (last visited 8 Oct. 2016).

<sup>32</sup> For a more comprehensive account of the substantive arguments of the parties voiced during the hearing, see: Kleimann and Kübek: *The Future of EU Trade Policy – Opinion 2/15: Report from the Hearing*, at: <http://eulawanalysis.blogspot.de/2016/10/the-future-of-eu-external-trade-policy.html>

## **1. Case Law of the Court of Justice of the European Union**

Prior to the entry into force of the Treaty of Lisbon, the Court emphasized the mixed nature of contemporary trade agreements. In its famous *Opinion 1/94*, the Court clarified that the European Community lacked the exclusive powers necessary for an ‘EC-only’ conclusion of the agreements that resulted from the Uruguay Round of multilateral trade negotiations, in general, and the General Agreements on Trade in Services (GATS) and Trade Related Aspects of Intellectual Property (TRIPs), in particular.<sup>33</sup> The decision is consistent with the fact that pre-Lisbon versions of Article 207 TFEU did not include services and trade related intellectual property rights in exclusive Community competences. Moreover, the Court held that, in the absence of the internal exercise of shared competence, e.g. in the area of trade related intellectual property rights protection, external Community action in that area could not be deemed exclusive by implication. In absence of an ERTA-effect, the Court considered both the Community and the member states competent to conclude the WTO agreements in areas of shared competences. The 2009 Treaty of Lisbon, however, expanded the exclusive scope of Common Commercial Policy considerably by adding these two policy areas as well as foreign direct investment (FDI) to the realm of CCP exclusivity.

Two recent CJEU judgements have confirmed the extended scope of the CCP post-Lisbon and may give a first indication of how far the CJEU may go in its interpretation of *Opinion 2/15*. In *Daiichi Sankyo*, the Court placed the entire TRIPs agreement under the CCP.<sup>34</sup> In *Commission v. Council (Conditional Access Convention)* the Court, in application of its gravity theory, held that Article 207 TFEU is the sole and correct legal basis of a treaty if the ‘main purpose’ of an international agreement is the external harmonisation of EU norms that intend “to promote, facilitate or govern trade” and has “direct and immediate effects on trade”.<sup>35</sup> ‘Incidental’ internal harmonisation (of trade in services in this case) did not require reference to another legal basis, according to the Court. The decisions thus consolidate EU exclusivity of trade related policies and significantly reduce the potential for ‘mixture’ of EU trade and investment agreements in the future.

## **2. Opinion 2/15: Arguments of the Parties on Portfolio Investment**

Much of the political as well as legal debate over the mixed nature of CETA revolves around one important component of the new generation of EU trade agreements: the liberalisation and protection of investments. CETA includes a wide range of rules that govern foreign direct as well as portfolio investment liberalisation and protection. A particularly contested issue is whether portfolio investment is covered by the scope of Article 207 and hence falls within the scope of EU exclusive competence. The text of Article 207 TFEU explicitly refers to foreign direct investments (FDI) only.<sup>36</sup> In a prior judgement, the Court had clarified the conceptual difference between FDI and portfolio investment. FDI, according to the Court, presupposes lasting and direct economic links that enable the investor’s effective participation in the management of a company. Conversely, portfolio investments merely transfer equity securities without implicating managerial control.<sup>37</sup> A textual interpretation Article 207 TFEU hence suggests that portfolio investment falls outside of the scope of the CCP. In turn, some EU member states’ governments have argued that they remain exclusively competent for matters of portfolio investment, necessitating the conclusion of CETA as a mixed agreement.

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<sup>33</sup> *Opinion 1/94*, EU:C:1994:384, para 98 and 105.

<sup>34</sup> Case C-414/11, *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, EU:C:2013:520, para 49 ff.

<sup>35</sup> Case C-137/12, *Commission v. Council (Conditional Access Convention)*, EU:C:2013:675, para 57ff.

<sup>36</sup> Art. 207(1) TFEU.

<sup>37</sup> Case C-446/04, *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue*, EU:C:2006:774, para 181-182.

The competence for the conclusion of external agreements covering portfolio investment liberalisation and protection is of great significance for the practice of ‘EU-only’ treaty conclusion: even if the Court confirms EU exclusive competence for FDI liberalisation and protection, it would be, in the practice design EU external economic agreements, technically challenging to separate foreign direct from portfolio investments, given the broad asset based definition of investment in EU economic agreements.<sup>38</sup> In contrast, a separation of investment protection rules from liberalisation disciplines, or the adaptation of future EU external economic agreements to a more narrow scope of exclusive competences in regard of other contentious policy areas – as defined by the Court - would cause much less of a technical problem for the design of EU external agreements. A Court judgement that excluded portfolio investment from EU exclusive competences would thus render the deliberate design of EU external trade agreements in adaptation to respective Court ‘guidelines’ on the exact scope of ‘EU-only’ agreements increasingly difficult – unless future trade agreements were to exclude investment policy provisions in their entirety. The systemic importance of this policy area as an integral part of EU economic agreements justifies a presentation of the details of respective arguments, as they were put forward by the parties during the Opinion 2/15 hearing. Other contentious treaty contents featured in the Court hearing include transport services, intellectual property rights protection, and sustainable development provisions in the EUSFTA. Even if respective treaty provisions in these areas fell under EU shared or member states’ competences, it would be technically feasible to separate these treaty parts from the predominant share of rules that fall under EU exclusive competences. As such, the Court’s findings on portfolio investment carry additional significance for the practice and practicability of EU Common Commercial Policy in the future.

*Opinion 2/15 – Arguments on Portfolio Investment presented in the Hearing*

In the oral phase of the proceedings, the Commission presented an unprecedented treaty interpretation that provides reasoned support for the implied exclusivity of Union competence over portfolio investment. In its submissions to the Court, the Commission departed from the so far uncontested notion that existing *secondary* EU legislation is the only contingency that can trigger an ‘ERTA effect’. As noted above, the ‘ERTA effect’ confers exclusive competence in areas where member states exercise of external competence would otherwise affect already existing or even prospective ‘common rules’ (Art. 3 (2) 3<sup>rd</sup> situation TFEU). Such ‘common rules’, according to the Commission, however, could also take the shape of EU *primary* law. With reference to Article 63 (1) TFEU, the Commission representatives voiced the opinion that the treaty-prescribed freedom of capital movement between member states (as well as member states and third countries) sufficed to constitute ‘common rules’ within the meaning of Article 3 (2) TFEU. The conclusion of international agreements by member states could affect the prohibition of restrictions on capital movements as codified in Article 63 (1) implied EU exclusive external powers in this area. The Union was therefore exclusively competent for the negotiation and conclusion of agreements covering rules on portfolio investment liberalisation and the protection of such investments. In the alternative, according to the Commission, portfolio investment liberalisation falls under the Union’s shared competences.

The Council and the member states, in the Opinion 2/15 hearing, took pains to counter the Commission’s line of reasoning with a larger number of sometimes diverging arguments. First and foremost, the parties noted the fact that Article 63 (1), by itself, only codifies a prohibition of restrictions, but falls short of conferring legislative powers upon the Union. Using Article 63 (1) TFEU as a legal basis for external action was merely a “legal fix” that constituted an instance of “legal imagination” on behalf of the Commission. To the Council, it appeared inconceivable that a provision, which did not suffice as a basis for internal legislation could imply an (exclusive) external competence. Only the exercise of an internal competence may pre-empt external member state action. Belgium and Germany, secondly, argued that such a wide interpretation of Article 3 (2) 3<sup>rd</sup> situation TFEU

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<sup>38</sup> See CETA Art. 8.1 ‘investment’.

facilitated an undue circumvention of the deliberate choice of the treaty makers to exclude portfolio investment from the scope of Article 207 TFEU and Article 64 TFEU. The two parties insisted on exclusive member state competence for portfolio investment. Others appeared to suggest that the member states may share external powers with the Union in this area.

Contrary to the Council's arguments, the Commission - in response to an oral question posed by the Court - held that there was a "simple but very good reason" for the fact that the treaties did not codify a legal basis for the *internal* liberalisation of portfolio investment: Article 63 (1) TFEU itself prescribed a comprehensive prohibition of restrictions to that end.

In another unprecedented interpretation of the treaties, the Commission cited Article 216 (1) TFEU in conjunction with Article 63 (1) TFEU as the correct legal bases for *external* Union acts that covered portfolio investment liberalisation. The Council and several member states, in contrast, insisted that Article 216 (1) TFEU only conferred general treaty-making powers upon the Union and was unsuitable to serve as a legal basis for the conclusion of international agreements by the EU.

In light of the circumstance that the Commission partly relied on a legal basis for an external competence, which allegedly did not require its internal exercise *ex ante*, Advocate General Sharpston questioned the Commission on the precise difference between the third situation governed by Article 3 (2) TFEU (as referred to by the Commission) and the second situation provided for by the same rule. Mrs. Sharpston's enquiry, however, remained unanswered. Moreover, the Advocate General questioned the Commission's perception of the risk that member state agreements could 'alter the scope of common rules', whereas the common rules that the Commission referred to were in fact EU treaty provisions. The only way to alter the scope of primary law, Sharpston stated, was a treaty reform via the applicable constitutional provisions. In response, the Commission, in reference to the terms of Article 3 (2) TFEU, clarified that its argument did not extend to the *alteration* of the scope of treaty rules, but to the probability that the primary legal norm of Article 63 (1) TFEU could be *affected* by independent international member state agreements.

## **V. Provisional Application: EU Practice, Termination, and the Council Decision on CETA**

The provisional application of international agreements is a frequently used instrument of international law. It is vaguely regulated in Article 25 of the Vienna Convention of the Law of the Treaties (VCLT) of 1969, which codifies longstanding international legal customs.<sup>39</sup> Provisional application describes a situation where the governments of the states that sign an international agreement decide to give effect to the rights and obligations of the said agreement as a whole or in parts, upon signature or on an agreed date, pending the entry into force of the treaty. Hence, provisional application bridges the time period that passes between the signature of a treaty and its entry into force.

Provisional treaty application has been an effective instrument in the context of mixed agreements where national parliamentary participation substantially prolongs the ratification process. The effectiveness of EU external action, and the effectiveness of international relations more generally, much hinge upon the provisional application of international treaties.<sup>40</sup> Yet, despite the heavy reliance

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<sup>39</sup> Art. 25 VCLT: 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) The treaty itself so provides; or (b) The negotiating States have in some other manner so agreed. 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

<sup>40</sup> The likely most prominent example of the provisional application of a trade agreement is the 1947 General Agreement on Tariffs and Trade (GATT). In fact, the 1947 GATT was applied provisionally right until the foundation of the World Trade Organisation in 1995 (30 October 1947, UNTS 55 (1950), 308. Protocol of Provisional Application of the General Agreement on Tariffs and Trade (PPA)) The PPA was drafted to bring GATT provisions into effect whilst negotiations

of the international community on this tool of customary legal practice, it remains a legal instrument of choice: neither EU law nor international law provide for any obligation to apply intergovernmental agreements provisionally before ratification procedures have been completed.

The VCLT provides that the “negotiating States” may agree to apply a treaty, in view of pending ratification procedures, provisionally in its entirety or in parts. As such, Article 25 VCLT ought to be understood to recognize and codify an executive prerogative of nation states’ governments to apply international treaties upon or after signature until their entry into force. Given the circumstance that neither the European Community nor its successor, the European Union, can formally be regarded as a ‘State’ under the VCLT it remained unclear, for a long time, whether the Community had the powers to apply external treaties provisionally. It was only with the EC treaty reform of Amsterdam in 1997 that the member states delegated a power of provisional application to the Community institutions.<sup>41</sup>

Up until to date, the EU treaties still give little guidance as to the permissible substantive scope, duration - or conditions for the end of - provisional treaty application. Article 218(5) TFEU stipulates that “the Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.”<sup>42</sup> By omitting a reference to EP approval or consent, the provision arguably still reflects the notion of an executive prerogative of nation state governments, as provided for in Article 25 VCLT. It is the ‘EU executive’ - the European Commission – and the EU chamber representing the executives of EU Member States’ - the Council -, which determine the scope of provisional application in substance and time, subject to the permissive guiding principle set out in Article 25 VCLT and mutual agreement with the external party to the agreement.

### ***1. Past EU Practice***

Past EU practice has reflected a broad and permissive interpretation of Article 218 (5) TFEU on behalf of the Commission and the member states represented in the Council. The (‘mixed’) EU-Korea FTA serves as an example par excellence. The EU ratification period, as noted above, lasted no less than five years, whilst the parties provisionally applied the agreement six months after its signature. The Commission initially proposed to provisionally apply the agreement in its entirety.<sup>43</sup> The Council decision, however, excluded two miniscule parts of the treaty, notably provisions relating to the criminal enforcement of intellectual property rights and cultural cooperation, which may arguably touch upon exclusive member state competences.<sup>44</sup>

It is important to note, however, that the Council decision did not exclude other provisions that fall within the scope of competence areas that are now contested in Opinion 2/15, such as portfolio investment,<sup>45</sup> or maritime transport services.<sup>46</sup> The EU-Colombia/Peru trade agreement or the EU trade

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over the establishment of an ITO were on-going. Eight GATT contracting parties signed the PPA on 30 October 1947, with the remaining fifteen original contracting parties agreeing soon thereafter.

<sup>41</sup> Article 228 (2) of the Treaty of Rome did not include a respective provision. The Treaty of Amsterdam replaced Article 228 (2) by Article 300 (2) TEC, which introduces the power of provisional treaty application for the Community institutions. Article 218 (5) TFEU now contains revised wording.

<sup>42</sup> Art. 218(5) TFEU.

<sup>43</sup> COM(2010)136 final, “Proposal for a Council Decision authorising the signature and provisional application of the Free Trade Agreement between the European Union and its Member States and the Republic of Korea”, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010PC0136&from=EN> (last visited 8 Oct. 2016).

<sup>44</sup> O.J. 2011, L 127. 2011/265/EU, “Council Decision on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part”, [http://eur-lex.europa.eu/resource.html?uri=cellar:a2fb2aa6-c85d-4223-9880-403cc5c1daa2.0022.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:a2fb2aa6-c85d-4223-9880-403cc5c1daa2.0022.02/DOC_1&format=PDF) > (last visited 8 Oct. 2016).

<sup>45</sup> Art. 8.2 (2) (c) EU-Korea FTA.



agreement with Central America similarly included transport rules in the scope of provisional application. Yet, the delegation of the power to provisionally apply EU external agreements as foreseen in the Council decisions “does not prejudice the allocation of competences between the Union and its Member States in accordance with the Treaties”.<sup>47</sup> It remains noteworthy, however, that the Council appeared to be of the legal opinion, reflected in past practice, that it is empowered to apply treaty parts provisionally, which, according to the views expressed by the member states in the Opinion 2/15 proceedings, fell outside of the scope of EU exclusive competences (such as maritime transport) or even within the scope of member states exclusive competence (e.g. portfolio investment).

In sum, member states have, in past practice, evidently supported and enabled the provisional application of treaty parts that they otherwise deem to fall within the scope of shared or exclusive member states competences. This fact seems to underline the distinct nature of provisional application as an international legal instrument and EU treaty conclusion. Decisions of the Council under Article 218 (5) TFEU, in accordance with EU law and practice, may give effect to treaty provisions irrespective of the division of competences.

Some legal scholars - and ‘Foodwatch’<sup>48</sup> legal adviser and expert representative of *Die Linke* in the German Bundestag, Wolfgang Weiß in particular – have argued that EU institutions act *ultra vires*, if they give provisional effect to parts of modern trade agreements that fall within the exclusive scope of member states’ competences or even competences shared with the Union.<sup>49</sup> This argument stands at odds with consistent member state practice in the Council as well as the provisions of EU primary law: the Council may well decide to limit the scope of provisional application proposed by the Commission as it deems fit by amending the Commission proposal unanimously. However, EU primary law does not require the Commission or the Council, in the legislative proposal or the final decision respectively, to reflect the division of competences between the EU and the member states. To the contrary, the decisions frequently entail disclaimers to that end.

As noted above, Article 218 (5) TFEU does not attribute - in the decision as to whether and to what extent a treaty may be given effect on a provisional basis - any role to the EP. In post-Lisbon practice, however, the EP has been informally granted the right to give formal consent to EU trade agreements before an agreement is applied. The modality to achieve this end was, so far, to coordinate the date of provisional application, as decided by the Council, with the voting schedule of the EP. The EU-Korea FTA set an important precedent in this regard. With respect to CETA, EU Trade Commissioner Malmström has similarly assured the EP that the agreement “will not be applied until after the EP has voted on it”.<sup>50</sup> This practice is set to continue if, and once, contemporary EU trade and investment agreements are signed and concluded as “EU-only” agreements in the future. Among EU institutions and the member states, we find a broad consensus on the view that EP consent prior to provisional application of a treaty provides necessary democratic anchor to executive decision-making at the EU level that affects the livelihoods of European citizens. Respective intra- and inter-institutional discussions, at this point in time, aim at clarifying whether such practice could be formalized and

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<sup>46</sup> Art. 7.47 EU-Korea FTA.

<sup>47</sup> 2011/265/EU, Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Recital (9). At: [http://eur-lex.europa.eu/resource.html?uri=cellar:a2fb2aa6-c85d-4223-9880-403cc5c1daa2.0022.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:a2fb2aa6-c85d-4223-9880-403cc5c1daa2.0022.02/DOC_1&format=PDF)

<sup>48</sup> Foodwatch e.V., “CETA durch die Hintertür: Wirtschaftsminister Gabriel plant Entmachtung des Bundestages“ <<http://www.foodwatch.org/de/presse/pressemitteilungen/ceta-durch-die-hintertuer-wirtschaftsminister-gabriel-plant-entmachtung-des-bundestages/>> (last visited 8 Oct 2016)

<sup>49</sup> Ibid, p4; Weiß, op. cit. *supra* note 19, p. 21-23.

<sup>50</sup> P-004200/2016, “Parliamentary Questions: Answer given by Ms Malmström on behalf of the Commission”, 18 Jul. 2016, <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2016-004200&language=EN>>, (last visited 8 Oct. 2016).

required by including a respective provision on the necessity of EP consent prior to provisional application in the Council decisions on the signature and provisional application of the future respective treaties.

## 2. Provisional Application of CETA – Practical Aspects

On July 5<sup>th</sup>, the Commission formally proposed that CETA will be provisionally applied in its entirety. The CETA text itself explicitly provides for either full or partial provisional application of its provisions.<sup>51</sup>

The scope of CETA's provisional application has been subject to discussion between the Commission and Member States in the Council's Trade Policy Committee (TPC) on July 15. In this meeting, the Commission agreed with the member states on the exclusion of certain parts of CETA from provisional application.<sup>52</sup>

To that end, the Commission agreed to Member States' demands to exclude CETA provisions governing the criminal enforcement of intellectual property rights,<sup>53</sup> rules relating to administrative procedures,<sup>54</sup> as well as investment protection provisions including the Investment Court System.<sup>55</sup> The Commission argued that the exclusion of the aforementioned parts of the treaty from provisional application were in line with precedents of past practice, which we have outlined above. As for investment protection, the Commission welcomed member states' efforts to garner political support for this novel area of EU external economic policy-making domestically before giving effect to the respective rules of the agreement *ex ante*. In a non-paper<sup>56</sup> circulated before the TPC meeting, however, the Commission pleaded for the expeditious application of CETA rules on investment liberalisation including portfolio investments,<sup>57</sup> as well as maritime transport services – citing the Union's strong commercial interests to do so.<sup>58</sup>

As we have noted above, the separation of FDI liberalisation disciplines from portfolio investment liberalisation from the scope of provisional application is a conceptually and technically difficult task. The exclusion of investment protection disciplines from the scope of provisional application, however, would retain the operability of the CETA's investment liberalisation chapter.

If the Council followed the inclusive compromise proposed by the Commission in the TPC meeting, the Union would act consistently with EU law and past practice, safeguard EU commercial interests, as well as delay the application of the most fiercely debated investment protection rules until member states have completed their respective national ratification procedures.<sup>59</sup>

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<sup>51</sup> Art. 30.7(3)(a), (b) CETA.

<sup>52</sup> [Unofficial] European Commission: Notes on the Meeting of the Trade Policy Committee (members), July 15th 2016, <http://www.politico.eu/wp-content/uploads/2016/08/Notes-TPC-July-15.pdf> (last visited 08. Oct. 2016).

<sup>53</sup> Art. 20.47 CETA.

<sup>54</sup> Art. 6.10 CETA.

<sup>55</sup> Art. 8.9 - 8.45 CETA.

<sup>56</sup> 182/16, Trade Policy Committee, "Non-Paper: Analysing the impact of exclusions from provisional application of CETA", 13 Jul. 2016, <<http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2016/08/COM-nonpaper-182-16.pdf>> (last visited 8 Oct. 2016).

<sup>57</sup> Art. 8.13 CETA.

<sup>58</sup> Art. 14.1 – 14.4 CETA.

<sup>59</sup> P-004200/2016, "Parliamentary questions: Answer given by Ms Malmström on behalf of the Commission", 18 Jul. 2016, <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2016-004200&language=EN>> (last visited 8. Oct. 2016).

### **3. CETA Provisional Application *ultra vires*? The Decision of the Bundesverfassungsgericht**

A recent decision of the German Federal Constitutional Court, however, stands at odds with past EU practice and the permissive scope of Article 218 (5) TFEU. In its rejection of an application for a preliminary injunction in the CETA proceedings – demanded by Foodwatch, *die Linke*, and others – the *Bundesverfassungsgericht* (BVerfG) held that “CETA does indeed contain provisions that could qualify the decision of the Council on the provisional application as an *ultra-vires* act in the principal proceedings. An encroachment on the constitutional identity protected under Art. 79 sec. 3 GG can also not be ruled out.”

With reference to the position of the German Federal Government, however, the BVerfG was appeased by the fact that “exceptions to the provisional application can be made that at least result in ensuring that the upcoming Council decision on the provisional application of CETA should not qualify as an *ultra-vires* act. To the extent that these reservations suffice, any concerns regarding how the provision in question affects constitutional identity should be dispelled. Moreover, the Federal Government has made it clear that it will only lend approval in the Council to those parts of CETA that lie beyond doubt within the competences attributed to the European Union under primary law. According to its submission, it will not approve the provisional application for areas that remain subject to the competence of the Federal Republic of Germany. This affects, in particular, the provisions on investment protection, including the dispute settlement system (Chapters 8 and 13 CETA), on portfolio investments (Chapter 8 and 13 CETA), on international maritime transport (Chapter 14 CETA), on the mutual recognition of professional qualifications (Chapter 11 CETA) and on labour protection (Chapter 23 CETA).”<sup>60</sup>

The BVerfG appears to contest the broad scope of power delegation to the Council that is reflected in the provision of Article 218 (5) TFEU. In doing so, the BVerfG does not seem to address or take into account past EU practice and *opinio iuris* of the member states represented in the Council to the effect that the provisional application of EU external treaties does not prejudge the division of competences between the Union and the member states. In contrast, the BVerfG insists that MS exclusive competences are necessarily excluded from provisional application and reserves the right to otherwise find a violation of the German constitution as a future result of the main proceeding of the case.

The assertive stance taken by the BVerfG may well prove to be inconsequential if the CJEU, in Opinion 2/15, finds that all or the vast majority of provisions of contemporary EU trade and investment provisions fall under EU exclusive competence. It is unlikely that the BVerfG would be willing to pick a battle and contest such a finding. But what if the Council decision for provisional application includes CETA provisions that fall – according to the forthcoming CJEU judgment in Opinion 2/15 - within the scope of exclusive member state competence? In such a scenario, the BVerfG would need to examine the constitutionality of the Council decision. Secondly, the BVerfG would have to invest time and thinking into the scrutiny of the scope of power delegation that is codified in Article 218 (5). In this exercise, in turn, the BVerfG may find it necessary to request a preliminary ruling from the CJEU on the interpretation of the scope of 218 (5) TFEU. Such handling would avoid even further disruptions of the conduct of EU external action and associated political process through an institutionalized mode of vertical judicial cooperation.

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<sup>60</sup> Bundesverfassungsgericht: ‘Applications for a preliminary injunction in the CETA proceedings unsuccessful’ Press Release No. 71/2016 of 13 October 2016. At: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-071.html>

#### 4. Terminating CETA Provisional Application (in Berlin?)

Moreover, the BVerfG, in its decision, encouraged the German government to ensure that “it has, as a final resort, the possibility of terminating the provisional application of the Agreement for the Federal Republic of Germany by means of written notification”.<sup>61</sup> At the occasion of the adoption by the Council of the decision authorizing the signing of CETA, Germany and Austria declared - in a separate statement - that “as Parties to CETA they can exercise their rights which derive from Article 30.7(3)(c) of CETA. The necessary steps will be taken in accordance with EU procedures.”

But can an individual member state in fact terminate the provisional application of CETA unilaterally? It is certainly true that all member states act as independent contracting parties to CETA. It appears that the BVerfG therefore believes that Germany, as a party to the agreement, has the right to unilaterally terminate the provisional application of the agreement. Neither the BVerfG, nor the German or Austrian representative, however, elaborated on the question of how an individual member state could single-handedly terminate the provisional application of a treaty that is applicable to the Union in its entirety via a legal act adopted by the Council.

There are two ways to think about the Germano-Austrian position: First, it may presume the right of full or partial termination of the provisional application of CETA on the territory of that respective member state only. In the alternative, it may presume that a member state has the right to terminate the provisional application of CETA on behalf of the EU and the remaining member states.

The BVerfG guideline for the German government, first, seems to suggest that each member state remains competent to terminate the application of CETA in its own territory vis-à-vis the EU, Canada and the remaining member states. As a member of the EU’s single market and customs union, it is, however, technically impossible for a member state to unilaterally terminate the application of CETA in its territory without terminating the provisional application of the treaty in its entirety for all contracting parties.<sup>62</sup>

CETA does allow for a partial provisional application through mutual consultation between the parties prior to the date of provisional application (Art. 30. 7 (b) CETA).<sup>63</sup> A partial termination of the agreement’s application by one contracting party, at a later stage, is not foreseen in CETA. According to the text of the agreement, the signing member states may therefore not unilaterally terminate the provisional application of CETA in their respective territories, irrespective of whether such exemptions would be technically feasible or not.

In the alternative, does the BVerfG - as well as the Germano-Austrian position - indicate that a single member state, by acting as an independent party to the agreement, has the competence to terminate the provisional application of CETA on behalf of the EU and all remaining member states? As stated above, it is the Council that decides on the provisional application of a treaty following on a proposal by the Commission. Art. 218 (9) TFEU stipulates that the decision to terminate the application of an agreement shall be proposed by the Commission and then adopted by the Council. Hence, the decision to end the provisional application of an agreement under EU law cannot be adopted by an individual member state alone. Instead, the termination of an agreement’s (provisional) application has to be adopted by a qualified majority in the Council. As a result, the decision to

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<sup>61</sup> Press Release No. 71/2016 of 13 October 2016, ‘Applications for a Preliminary Injunction in the “CETA” Proceedings Unsuccessful’, 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvE 3/16, <<http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-071.html>> (last visited 21 Oct. 2016), para. 3 cc).

<sup>62</sup> To name just one example: A member state may not individually decide to charge tariffs and quotas on I imports from third countries while the rest of the EU agreed to abolish custom duties.

<sup>63</sup> As we will outline in the following section, the Council decided to exempt a number of substantive provisions from the scope of the provisional application of CETA - above all in the field of investment.

terminate the provisional application of an agreement ought to be taken by the Union in accordance with Article 218 (9) TFEU - and not by individual member states.

### **5. Provisional Application of CETA – The Council Decision**

The vast majority of CETA rules will be applied provisionally, starting on March 1<sup>st</sup>, 2017, unless the EP (in a highly unlikely scenario) does not give assent to the agreement. Yet, the Council decision on the provisional application of CETA, as adopted on October 27, 2016, reflects an intricate legal - political compromise among the member states, negotiated in the darkness of legal uncertainty and in anticipation of the Opinion 2/15 CJEU judgment.

In legal terms, the substance of the decision is characterized by both an attempt to maximize the scope of partial application of the agreement, on the one hand, and the Council's reluctance to apply CETA provisions provisionally that may potentially – pending the CJEU's judgment in Opinion 2/15 - fall within the ambit of member states' exclusive competences. This observation indicates that member states, contrary to some past practice, move towards more nuanced employment of the instrument that clearly limits its scope to treaty parts falling under EU exclusive and shared competences but categorically avoids the application of provisions that could fall within the realm of member states exclusive competences. To that end, the Council states that “only matters within the scope of EU competence will be subject to provisional application.”<sup>64</sup> The Council statement seems to acknowledge and address the BVerfG decision that we discussed above. In addition, the Council decision mirrors a great sense of caution among the member states. Given the legal uncertainty over the exact delineation of EU exclusive, shared, and MS exclusive competences, the decision and 38 attached statements and declarations repeatedly emphasize that the scope of provisional application of CETA “shall respect the allocation of competences between the European Union and the Member States”<sup>65</sup> and “does not prejudice the allocation of competences between the EU and the Member States.”<sup>66</sup>

Yet, the decision appears to reflect greater member states caution in regard of CETA provisions that are, in addition to prevalent legal uncertainty, also politically contentious. The decision, first, excludes all investment protection disciplines from provisional application. Secondly, the Council shied away from including portfolio investment liberalisation in the scope of provisional application. The decision hence provides for an application of CETA investment liberalisation provisions “only in so far as foreign direct investment is concerned.”<sup>67</sup> Moreover, the financial services chapter of CETA (Chapter 13) “shall not be provisionally applied in so far as [it] concern[s] portfolio investment, protection of investment or the resolution of investment disputes between investors and states”.<sup>68</sup> In contrast, the Council decision provides for the application of CETA's sustainable development chapters (Chapters 22-24), which “shall respect the allocation of competences between the EU and the Member States”<sup>69</sup>, and provisions on moral rights protection in the agreement's IPR chapter. Other legally contentious policy areas, such as the agreement's transport services disciplines as well as the

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<sup>64</sup> Council of the European Union (13463/1/16 Rev 1): ‘Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part – Statements to the Council minutes’, Brussels, October 27, 2016, statement 16. At: <http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>

<sup>65</sup> Art. 1 (1) (d), Council Decision (10974/16): ‘Provisional Application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part’, Brussels, October 27, 2016. At: <http://data.consilium.europa.eu/doc/document/ST-10974-2016-INIT/en/pdf>

<sup>66</sup> Statements to the Council Minutes, supra note 64, statements 2-4.

<sup>67</sup> Art. 1 (1) (a), Council Decision, supra note 65.

<sup>68</sup> Ibid. Art. 1(1) (b)

<sup>69</sup> Ibid. Art. 1 (1) (d)

mutual recognition of professional qualifications will also be applied provisionally. For these two areas, the Council decision appears to indicate the acceptance, on behalf of the member states, that respective CETA provisions fall, at minimum, within the realm of competences shared with the EU.

As much as the decision of the Council marks a legal-political compromise that will give effect to the overwhelming majority of CETA rules and provisions, it also casts doubts over issues of implementation of the agreement. As we have discussed in sub-section 2 of this section, EU agreements employ a broad asset-based definition of ‘investment’. The Council decision of October 27, 2016, clarifies, however, that the application of CETA must distinguish between foreign direct and portfolio investment liberalisation and exclude the latter from implementation prior to the entry into force of the agreement. The decision, however, remains remarkably silent on how this separation should be conducted in commercial practice and thus defers decisions about the technical implementation of this political choice to the EU executive arm – the European Commission.

## VI. CETA ‘Wallonaise’ – What happens if...

The mixed conclusion of CETA enables the member states, as independent contracting parties, to subject the agreement to national constitutional treaty-making procedures. Does this fact imply that an individual member state can veto the signing and conclusion of the entire agreement? This question was raised by Advocate General Sharpston at the very end of the oral proceedings in Opinion 2/15. In this section, we examine the legal implications of a member states’ refusal to sign or ratify CETA. First, we scrutinize the immediate legal effect of a national parliamentary ‘no’. Operating under the assumption that a state government decides to follow a negative parliamentary vote, the second part of the section addresses the scope and impact of a potential national executive rejection for the signature and ratification of CETA. In particular, we question whether a member state, in the context of a mixed agreement, can *de jure* reject a treaty’s application in areas of EU exclusive, shared and exclusive member state competences, respectively. In doing so, this section outlines two legal options that allow for CETA’s entry into force even after a member state’s government has refused to sign or ratify the agreement.

These legally feasible avenues for the signing and conclusion of an EU trade agreement - despite a member states’ rejection of its ratification -, however, should be understood as a last resort to safeguard the effectiveness and integrity of EU Common Commercial Policy formulation in context of broad general support for the conclusion of the treaty. In short: we present two available options that can overcome a single member states’ opposition in regard of the signing, national ratification, and EU conclusion of a mixed agreement.

### 1. CETA ‘Wallonaise’ *Classique*: Rejection of a Mixed Agreement by a Member State Parliament

The conclusion of CETA as a mixed agreement requires that the treaty will be subjected to the vote of national and, in some EU member states, regional parliaments. The mere fact that a national parliament rejects CETA, however, does not have any direct legal effect on the signature, provisional application or ratification of the agreement. Under international law, the rejection of a treaty’s signature or its ratification requires a written executive notification in conformity with the provisions of the treaty.<sup>70</sup> Hence, under international law, it is the member state governments’ prerogative to decide if, and to what extent, a negative parliamentary vote ought to be respected. National constitutional law may entail national legal obligations to that extent. Under both international and European law, however, it is the decision adopted by a national government that gives legal effect.<sup>71</sup>

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<sup>70</sup> Art. 65 (1) and 67 (2) VCLT.

<sup>71</sup> The Belgian constitution, for instance, requires the approval of all three regional parliaments for the signature and conclusion of an international agreement. By inference, the rejection of CETA by a single regional

The following part of the section focuses on the legal consequences of a scenario in which a member state's government - be it for legal constitutional or political reasons - decides to follow the decision of its parliament and intends to veto CETA.

## **2. CETA 'Wallonaise' Avantgarde: Rejection of a Mixed Agreement by a Member State Government**

Advocate General Sharpston's enquiry, to be precise, concerns the legal implications of an executive rejection of a mixed agreement. In other words: Can CETA enter into force even if one or several member state governments refuse to sign or ratify the agreement?

The procedures governing an agreement's entry into force are specified by international law. According to Art. 24 (1) VCLT "[a] treaty enters into force in such a manner and upon such a date as it may provide or as the negotiating States may agree". CETA article 30. 7 (1) stipulates that "[t]he Parties shall approve this Agreement in accordance with their respective internal requirements and procedures". The second paragraph of the same article prescribes that "[t]he Agreement shall enter into force on the first day of the second month following the date *the Parties exchange written notifications certifying that they have completed their respective internal requirements and procedures* or on such other date as the Parties may agree" [emphasis added].<sup>72</sup>

The wording of Article 30.7 (1), (2) CETA, and, in particular, the unequivocal reference to each party's internal (constitutional) ratification procedures renders the entry into force of CETA contingent upon the exchange of written notifications by all contracting parties. As a result, CETA may only enter into force after Canada, the EU and all member states have signed and ratified the agreement. By inference, the lack of one party's signature or ratification instrument may prevent CETA's entry into force. These established legal modalities have led some legal scholars to believe that an individual member state can veto the Union's signature and conclusion of a mixed agreement.<sup>73</sup>

This line of reasoning, however, presumes that member states enjoy the prerogative to reject mixed agreements in their entirety. Yet, the concept of exclusivity as enshrined in Article 2 (1) TFEU precludes independent internal as well as external member state action. Member states are hence prevented from concluding international agreements with third parties in areas that fall under EU *a priori* and implied exclusive competence.<sup>74</sup> By inference, we argue that exclusivity also prevents member states from vetoing the application of those areas of a mixed agreement that fall under EU exclusive powers in their territory. Member states can only reject the signature and conclusion of a mixed agreement for the parts that fall under exclusive national competences as well as shared competences that the EU has chosen not to exercise.<sup>75</sup> Areas of shared competences, in which the Union has adopted internal EU rules, however, remain outside the member states' external legislative prerogatives in accordance with the 'ERTA-doctrine' (Art. 3 (2) TFEU, 3<sup>rd</sup> condition). In accordance with the conclusion that member states can only reject the application of CETA in areas of non-

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parliament, such as the regional parliament of Wallonia prevents the signature and ratification of the agreement under Belgian constitutional law. Under international law, however, it is the Belgian prime minister, who is competent to sign CETA. The former EU Commissioner for trade, Karel de Gucht, therefore reportedly encouraged the Belgian prime minister, Didier Reynders, to sign CETA despite the rejection of the Walloon parliament. While problematic under domestic constitutional law, Reynders' signature would be valid under international law. <http://www.demorgen.be/politiek/karel-de-gucht-didier-reynders-moet-akkoord-met-canada-gewoon-ondertekenen-b4c4c7b4/>

<sup>72</sup> Article 30. 7 (2) CETA

<sup>73</sup> See, for instance, Weiß, op. cit. *supra* note 19, p. 27 or Heliskoski op. cit. *supra* note 20, p. 92f.

<sup>74</sup> See section II sub-section 2 of this article

<sup>75</sup> To be precise: MS will also be able to retain their legislative prerogatives in areas of shared non-preemptive competences, see *supra* note 5.

exclusive EU external competences in a legally effective way, there are at least two scenarios that allow for the entry into force of CETA irrespective of a member states' refusal to sign or ratify.

#### A. The 'Inclusive' Scenario

Legally speaking, the Commission proposals for the signature, provisional application and conclusion of CETA can be adopted by qualified majority vote in the Council.<sup>76</sup> As such, a dissenting member state could be overruled by the Council and is then bound by the decision. Article 30.7 (1) (2) CETA requires, however, that each contracting party approves the treaty by signature and notifying ratification.

One option to oblige a dissenting member state to act upon a Council decision taken is the invocation of the principle of sincere cooperation that is enshrined in Article 4 (3) TEU. Accordingly, "[t]he Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or *resulting from the acts of the institutions of the Union.*" Moreover, the third paragraph of the article stipulates that the member states "shall facilitate the achievement of the Union's tasks and *refrain from any measure which could jeopardise the attainment of the Union's objectives* [emphasis added]." As we have argued above, exclusivity prohibits (external) member state action. If the Council decides to sign and conclude CETA (by QMV), a unilateral member state measure that prevents the entry into force of those areas of the agreement that fall under exclusive EU competences therefore jeopardises the attainment of Union objectives. As a result, Article 4 (3) TEU prescribes a duty for member states to fulfil their obligations resulting from the decisions of the Council: they are bound to sign and ratify the parts of a mixed agreement that fall under EU *a priori* and implied exclusive competence.

The decision not to apply any provisions that remain under external member state competences remains a legislative choice of each member state's government. In practice, a dissenting member state could, for instance, formulate a reservation upon signing or ratifying the 'EU-exclusive' parts of the agreement that specifies the provisions that will not apply on its territory (Art. 19 VCLT). CETA can, in this scenario, enter into force in accordance with the procedures laid down in the first and second paragraph of Article 30.7 CETA.

#### B. The 'Exclusive' Scenario

In the alternative, the EU has the option to exclude a member state that refuses to sign or ratify CETA as contracting party. Confronted with such a situation, CETA can be 're-proposed' as an 'imperfect mixed agreement', that includes all other member states, as well as the Union and Canada, as independent treaty parties. The dissenting member state would, irrespective from being excluded as an independent contracting party, be bound by the areas of the agreement that fall under EU external competences. All areas that fall under external member state competence would, in turn, not apply in the territory of that respective member state. Similar to the 'inclusive' scenario, such an approach builds on the presumption that the necessary Council decision on the signature and conclusion of the agreement can be taken by QMV, so that the dissenting member state cannot veto the treaty in the Council and is then bound by the treaty.

If the Court decides, in Opinion 2/15, that the EU is, in fact, competent to conclude contemporary EU trade and investment agreements alone, the EU might, according to this scenario, similarly choose to 're-propose' CETA as an "EU-only" agreement.

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<sup>76</sup> The proposals currently suggest Articles 91 and 100 (2) TFEU on transport and Art. 207 TFEU on the CCP as legal bases. If these legal bases remain unaltered, the Commission's proposals can – legally speaking - be adopted by a qualitative majority vote of Council members as none of the policy-specific unanimity requirements under Art. 207 (4) TFEU apply.



## **VII. Conclusions and Prospects: ‘EU Common Commercial Policy 2020’**

The ‘Wallonian Saga’ has – in a brutal manner – laid bare a twofold structural weakness of the European Union as an external actor. It is when the Union includes the member states as independent contractors in the process of international treaty-making that the Achilles heel of European external action is fully exposed to attempts of political blackmail, rent-seeking, and ideological opposition of miniscule political factions.

Europe’s first weakness is one of democratic representation. The fact that a constituency of 3.5 million inhabitants is able to credibly threaten to bloc the signature of a treaty otherwise supported by the political representatives of 500 million EU citizens has reinforced already existing incentives for political blackmail, rent-seeking behaviour, and, eventually, political paralysis of EU multi-level economic governance. The current form of ‘mixed’ treaty-making puts the fate of the European Union as an international actor into the hands of regional dukes rather than European citizens and the Union’s legitimate political institutions. Those who defend the mixed *modus operandi* under the banner of democratic legitimacy seem to either nostalgically cling onto a nation-state centred view of European affairs conduct or purport a perverted sense of democracy that places desired ends above liberal democratic processes and prioritize self-serving political objectives over genuine democratic representation and governance.

Europe’s second weakness is mirrored in the results that stem from deeply conservative – or false ‘progressive’ – notions of the European project and its political process: the Union increasingly suffers from a creeping ineffectiveness of its policy formulation process and paralysis of its multi-level governance polity, a loss of its credibility as an international actor, and policy outcomes that are distorted and rendered inefficient by giving private or public rent-seekers overly generous institutional access or power in the decision-making process. The EU, in its current mode of governance, will remain inapt to tackle the vast amount of economic and political challenges that it is confronted with in the early years of the 21<sup>st</sup> century. The CETA process, at best, may serve as a final warning that Europe is about to lose its ability to act in policy areas that make for the very core of its purpose and functions. At worst, it may be remembered as one of the last episodes of joint external action in the dawn of a new age of European nationalism.

In the wake of the CETA-crisis, some commentators were quick to advocate for ‘EU-only’ treaty-making as the appropriate alternative to ‘mixity’ in order to mend the second category of problems we outlined above. ‘EU-only’ agreements, indeed, would do away with the political unanimity requirement for EU member states governments and subject national democratic deliberations and decisions on the approval of EU external treaties to qualified majority voting in the Council. As we have demonstrated in this article, however, treaty-making in the ‘EU-only’ procedure is, in the first instance, not a question of political preference, but a question of legal competence. It is the exact delineation of EU exclusive competences – codified in EU primary law and mirrored in constantly evolving EU secondary legislation - that determines whether the content of a treaty mandates ‘EU-only’ conclusion, or not.

The CJEU is set to clarify this delineation in its Opinion 2/15 judgement next year. In light of the Lisbon treaty expansion of the scope of the EU’s Common Commercial Policy, the Court will find a considerably broadened scope of EU exclusivity and hence facilitate the mandatory ‘EU-only’ conclusion of external agreements that, in their substance, fall within the scope of EU exclusive treaty-making powers. How far EU exclusive competences reach, in view of the Court, remains to be seen. After the publication of the judgement, in any case, EU institutions and member states will have clear guidelines for the design of mandatory or facultative ‘EU-only’ agreements. Political will permitting, this circumstance could greatly facilitate a more effective, reliable, and efficient external economic governance in the EU. Moreover, the judgement will clarify whether and which policy areas remain within the ambit of member states’ exclusive competences. Such clarity can render the legally viable limitation of the applicable scope of member states’ veto powers in regard of the signing and

conclusion of mixed agreements, such as CETA, feasible in practice. A legally mandatory - or politically discretionary - shift from mixed to 'EU-only' treaty conclusion would certainly help mending second category governance failures.

Such a significant change of formal institutional practice, however, must not come at the expense of democratic accountability and representation. To the contrary, EU 2020 institutional practice needs to strengthen democratic governance of EU external trade and investment policy and reconnect to citizens' concerns over economic policies in a representative, visible, and functional manner.

The achievement of this objective, however, requires a considerable re-think, adaptation, and a sense of ownership of national parliaments regarding the economic policy-making process in the EU. In pre-Lisbon institutional practice, national parliaments often only engaged in the political process long time after a respective mixed agreement was signed by national governments and, essentially, rubber-stamped agreements that were put before them for ratification. The run-up to the CETA signature has, somewhat ironically, shown early signs of the necessary and desirable shift of member states' parliaments political engagement to the phase of the process where it is most needed for EU-only treaty-making. Prior to the signing of CETA, indeed, national parliaments have now made more extensive use of their constitutionally guaranteed role in national decision-making processes in a visible fashion. In context of 'EU-only' agreements, national parliamentary deliberation, scrutiny, and control of executive decisions ought to shift to this stage of the treaty-making process in order to endow QMV Council decisions on the signature and provisional application of EU economic agreements with democratic legitimacy. Vertical inter-parliamentary co-operation can help to build trust in EU commercial policy making. The EP INTA committee, for instance, is frequently informed about on-going policy and negotiation developments, holds similar information rights to those of the Council, has built an intra-institutional infrastructure for an efficient division of labour, and has greatly improved its informational capacity over the last years. The development of vertical - formal or informal - links between the economic affairs committees of national parliaments and the INTA committee in the EP can facilitate issue specific problem-solving, build mutual trust, and function as an early warning system in regard of potential political or technical roadblocks.

Beyond the change of national institutional practice, secondly 'EU-only' treaty-making must go hand in hand with a notional and practical elevation of the EP, in addition to its acquisition of information, control, and veto-rights via the Lisbon Treaty of 2009. Addressing a long-standing deficiency, public perception of the EP as a significant governing institution ought to be enhanced and fostered. National electoral reforms that do away with party lists and allow for direct elections of MEPs in regional districts of the member states can contribute to the achievement of this objective. Moreover, the central role of the EP as the democratic institution that effectively controls EU external economic policy making should be reinforced by a further strengthening of the EPs technical, research, and staff capacity in regard of EU trade and investment policy matters.

Finally, member states governments and the EP ought to actively engage in restoring the public trust in and political support for the European Commission, which is functionally necessary for it to continue to serve as the agent of the Council and the EP in negotiating EU external economic agreements. Since the inception of TTIP negotiations, the Commission has become the main target of post-factual political campaigns that aim at imposing a digital dominance of fundamental opposition and targeted misinformation of citizens rather than contributing to democratic deliberation processes or technical debates in a constructive manner. It is the member states' governments as represented in the Council, the EP, and eventually the national parliaments that are equipped with the communication channels that are necessary to counter post-truth political campaigns and win public support for EU economic policies through political leadership.

Political change towards an institutional practice that affirms the Union's multilevel governance structures; that buys into the legally viable European democratic process; and that builds on the design of EU economic agreements can, in our view, remedy the two main structural weaknesses that the

recent CETA episode has exposed. Our notion of the EU Common Commercial Policy governance in 2020, as outlined above, would render EU external treaty-making more democratic, more effective, more efficient, and more reliable.

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