Deliverable 2.3

"Legal and economic analysis of the incentives to negotiate mixed agreements"

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1) Introduction

The European Union (EU) is not a sovereign state, with the ability to create its own competences (the "competence of competence"). It can only act on competences that were transferred to it by its Member States as enshrined in the Treaties (article 5.2 TEU).

Within the scope of these competences, the EU can act internationally.[1] Competences to conclude international agreements can be derived expressly from EU provisions or it can be implied where it is necessary to achieve one of the objectives of the Treaties, or when it is provided in a legally binding Union act (such as regulation or directives), or when it is likely to affect common rules or alter their scope (article 216 TFEU).

The EU can negotiate international agreements under three different types of competences foreseen in the Treaties: exclusive competences, shared competences, and competences to support, coordinate or supplement the actions of the Member States. Depending on the competences, the international agreement can be concluded by the EU on its own or must involve its Member States. When both EU and Member States are involved, the so-called "mixed" agreements must be ratified following both the ratification procedure under EU treaties (article 218 TFEU) and all the national ratifications procedure of the Member States. The latter may involve also sub-federal parliaments in the process

[1] This flows from both the legal personality given to the EU under article 47 TEU and the more general provision on EU external relations competences enshrined in article 216 TFEU, which entitles the EU to conclude agreements with one or more third countries or with international organizations.

in the case of Belgium. These procedures of ratification of mixed agreements by national parliaments are described in Table 1 in the Appendix, which shows that the conclusion of mixed agreements currently triggers the participation of at least thirty-eight national and regional parliaments in the EU.

While the Common Commercial Policy (CCP), enshrined in article 207 TFEU, is an exclusive competence, most EU free trade agreements (FTAs) have been concluded in the past as mixed agreements, since they were considered to exceed the scope of the CCP. Overtime the competence relating to trade policy has expanded (see Table 2 in the Appendix). However, differences in opinion between Commission and Member States continued, in particular with respect to the nature of competences concerning provisions on transport services, sustainable development, and investment.

With the expansion of the CCP legal basis under the Lisbon Treaty, as well as the evolution of the internal market legislation in key areas for trade agreements (such as transport policy), the European Commission requested an opinion to the Court of Justice of the European Union (CJEU) concerning the competence to conclude the FTA with Singapore, which covered the disputed competences. The Court's opinion 2/15 on the EU-Singapore FTA (hereafter the Singapore opinion) was issued in 2017 and clarified the scope of the CCP and the extent of exclusive competences of the EU. In the context of the agreement with Singapore, the only provisions that were considered to be outside the scope of the EU exclusive competences concerned portfolio investments and the dispute settlement mechanism for investment disputes.

The agreement as presented to the Court should have thus been submitted as a mixed agreement for ratification both at the EU level and at the national level. Mixity would also have entailed unanimity decisions in the Council of the European Union (hereafter called the Council), whereas a decision to conclude an agreement exclusively falling under the CCP legal basis needs only a qualified majority in the Council.[2]

Given the complexity of the ratification procedures, for the above reasons, negotiating mixed trade agreements can entail a certain legislative risk. Between the Lisbon Treaty and the Singapore ruling, there has been a controversy about what constitutes a mixed agreement, with member countries (and even regions) threatening to block trade agreements, e.g. Italy and Greece with the agreement with South Africa, the Belgian region of Wallonia and Poland with the Comprehensive Economic and Trade Agreement (CETA) with Canada, Netherlands with the association agreement with Ukraine.

[2] Article 218(8) TFEU and article 207(4) TFEU.

Following the Singapore opinion, the European Commission decided to propose to the Council to split the EU-Singapore FTA in two distinct agreements: one covering the FTA provisions, the other covering investment protection provisions and the Investor-State dispute settlement mechanism. While the former agreement would cover only exclusive competences, the latter would cover shared provisions (the dispute mechanism for investment disputes). This allowed the FTA to be concluded by the EU on its own, without the need for ratification at the national level.

The rest of the paper is structured as follows. In Section 2, we discuss in more details the implications of the Singapore opinion. In Section 3, we address the following questions: In the aftermath of the Singapore opinion, what are the incentives to negotiate mixed trade agreements? What are the costs of mixity for the EU and for third States? Under what circumstances should mixed agreements be "split"? Section 4 concludes, briefly discussing the implications for future negotiations.

2) The scope of the EU competence to conclude trade agreements and Opinion 2/15

2.1. EU competences and trade policy evolution

As mentioned in the introduction, the EU can only act internally as well as externally within the scope of its competences as defined by the Treaties.[3] There are three different types of EU competences, which will determine how the EU is entitled to act internationally.

Exclusive competences are competences where Member States' unilateral action is preempted both internally and externally.[4] In those competences, the EU is the only negotiator and Member States can only act where the EU has delegated power to them or for implementation purposes.[5] The Common Commercial Policy is expressly mentioned as an exclusive policy in article 3(1) TFEU.

Another type of competences are the *competences to support, coordinate or supplement,* where EU and Member States' actions can take place in parallel without undermining each other's actions. The latter competences include the policies mentioned under article 6 TFEU and cover areas such as industry,

[3] Article 5 TEU.
[4] Article 2(1) TFEU; The first affirmation of this principle with respect to trade policy was found in: Opinion 1/75, opinion of the Court of 11 November 1975 given pursuant to Article 228 (1) of the EEC Treaty, European Court Reports 1975 -01355.
[5] Case 174/84, Judgment of the Court of 18 February 1986. - Bulk Oil (Zug) AG v Sun International Limited and Sun Oil Trading Company, European Court reports 1986 Page 00559; article 2(1) TFEU.

culture, tourism and protection and human health. In those areas, EU action does not pursue regulatory objectives, but financial support and cooperation.

The residual competences are known as *shared competences*. Here, the EU competence to act on its own internationally depends largely on the area and the action taken. For example, in the framework of research, technological development, space and development cooperation, humanitarian aid international action, both the EU and the Member States can act in parallel (see for example the conclusion of scientific and technological cooperation agreements).[6]

In other areas of shared competences (such as for example the internal market regulations or transports), there are situations in which external competences may become EU exclusive competences. These areas of competences are known as *implied exclusive external competences*. This type of external competence is found in three circumstances:[7] i) whenever the external action is foreseen in an EU legislative act; ii) where the international agreement could affect the internal rules established; iii) or where it is necessary to enable the Union to exercise its internal competences.

An example of case i) is the bilateral agreement on prudential measures regarding insurance and reinsurance concluded with the US, where EU competence was based on the Solvency II directive.[8] Scenario ii) flows from the so-called ERTA doctrine as established by the CJEU in the context of the conclusion of European Agreement concerning the work of crews of vehicles engaged in international road transport (ERTA). In that case, the Court established that the Member States could not unilaterally negotiate and conclude ERTA, as the measures under ERTA could have affected the associated internal rules that existed in the then European Community.[9] Finally, an example of case iii) was raised in the water ways vessels opinion of 1976, where the Court acknowledged that in order to issue common rules on inland navigation of the Rhine, a new agreement with Switzerland could have been necessary.[10]

Other type of international agreements falling under shared competences, which do not fulfill the requirements for implied exclusive external competences and

[6] See article 4(2) TFEU.
[7] Article 3(2) TFEU.
[8] Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance, OJ L 258, 6.10.2017; Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) (Text with EEA relevance)Text with EEA relevance, OJ L 335 17.12.2009.
[9] Case 22/70, Judgment of the Court of 31 March 1971. Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport. European Court reports 1971 Page 00263.
[10] Opinion 1/76, Opinion of the Court of 26 April 1977 given pursuant to Article 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels'. European Court Reports 1977 -00741.

which cover areas that were not transferred to the EU (e.g. competences that remain with the Member States), are concluded jointly by the EU and its Member States as a *mixed agreement*. Mixity implies that the international agreement in question must be ratified following the EU ratification procedure under article 218 TFEU but also following the national ratification procedures.

The difficulty in assessing the exact scope of EU's exclusive competence in the context of trade created several conflicts between EU institutions to establish whether EU trade agreements had to be concluded as mixed or as EU exclusive agreements.

Most EU FTAs have been concluded in the past as mixed agreements, as they were considered to cover areas that went beyond the scope of the EU's exclusive competence. Moreover, the CCP legal basis was originally much more restrictive in scope and did not cover for example services or intellectual property rights. Therefore, at the time of signing the WTO, the General Agreement on Trade in Services (GATS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement were considered by the CJEU to fall outside the CCP legal basis.[11]

Since then, the Common Commercial Policy legal basis was constantly expanded. The Treaty of Lisbon consolidated an evolution initiated by the Nice Treaty to include services and commercial aspects of intellectual property. The Lisbon Treaty further included foreign direct investment within the CCP. [12]

Agreements that were initially concluded as mixed were acknowledged to fall within the scope of the new expanded CCP: this was the case for example of the GATS (with exception of the transport provisions) and the TRIPS agreements mentioned earlier.[13] So, on the basis of the Lisbon Treaty, the European Commission considered that also bilateral FTAs that did not include political cooperation could be adopted on the basis of the CCP legal basis and the transport legal basis as an EU only agreement, considering that it had exclusive competence in both these areas. Such a proposal was made for example for the signature of

[11] Opinion of the Court of 15 November 1994: Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty. *European Court Reports 1994 I-05267.*

[12] See Table 2 of the Appendix.

[13] For GATS that acknowledgement arrived already after the Nice and Amsterdam revisions: opinion 1/08, opinion of the Court of 30 November 2009, pursuant to article 300(6) EC - General Agreement on Trade in Services (GATS) - Schedules of specific commitments - Conclusion of agreements on the grant of compensation for modification and withdrawal of certain commitments following the accession of new Member States to the European Union, European Court Reports 2009 I-11129; On TRIPS, see: Case C-414/11, Judgment of the Court (Grand Chamber), 18 July 2013, Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon.

the FTA with Columbia and Peru.[14] However, the Council disagreed on the exclusive nature of the competences covering transport provisions in that agreement. The agreement was then signed as a mixed agreement.[15]

The issue reemerged with the signature of the EU-Singapore agreement and of Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. These agreements raised, once more, the issue of whether the amendments introduced in the Lisbon Treaty established an EU exclusive competence to conclude this trade agreements.

Because of these disagreements on the scope of competences to conclude the bilateral free trade agreements, the Commission decided to request an opinion of the court with respect to the EU capacity to conclude the EU-Singapore agreement under the EU exclusive competences.[16]

2.2. The Singapore opinion: defining the contours of the EU exclusive competences in trade agreements

The CJEU delivered its opinion 2/15 concerning the EU competence to conclude the EU-Singapore FTA (Singapore opinion) on 16 May 2017. In the Singapore opinion, the court analyses one by one the main chapters contained in the agreement and determines whether they imply exclusive competences or shared competences. Table 3 in the Appendix summarizes the conclusion of the Court with respect to each chapter in the EU-Singapore agreement.

The court found that only portfolio investments and the investor-State dispute settlement procedure were not exclusive competence of the EU. But because of these two shared competences the unamended EU-Singapore FTA agreement could not have been concluded as an exclusive EU agreement and was a mixed agreement.

Other areas that were at the heart of Commission/Council disputes, were instead found to fall under exclusive competences either because they fell under express exclusive competences under article 3(1) TFEU, such as the CCP competence or

[14] Proposal for a COUNCIL DECISION on the signing, on behalf of the European Union, of the Trade Agreement between the European Union and Colombia and Peru, COM/2011/0570 final - 2011/0245 (NLE); Proposal for a COUNCIL DECISION on the conclusion of the Trade Agreement between the European Union and Colombia and Peru, COM/2011/0569 final - 2011/0249 (NLE).

[15] Council Decision of 31 May 2012 on the signing, on behalf of the Union, and provisional application of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ L 354, 21.12.2012.

[16] Opinion 2/15, Opinion of the Court (Full Court) of 16 May 2017. Opinion pursuant to Article 218(11) TFEU — Free Trade Agreement between the European Union and the Republic of Singapore — 'New generation' trade agreement negotiated after the entry into force of the EU and FEU Treaties.

the competence with respect to competition rules, or because they fell under the implied exclusive competences under article 3(2) TFEU.

An example of the latter is the Transport Services provisions in the EU-Singapore agreement. Indeed, the Court confirmed the conclusion adopted in opinion 1/08 that transport services remained outside the scope of the CCP.[17] However, the provisions on transport services were considered to fall under exclusive competences because they were covered by EU secondary legislation. Implied exclusive external competence pursuant to Article 3(2) TFEU was then necessary as the measures under the EU-Singapore agreement could alter or affect the rules in the EU secondary legislation.

Other areas of contention were the areas related to Intellectual Property and the Trade and Sustainable Development (TSD) Chapter. Indeed, the Advocate General had expressed in his opinion that both these chapters should be considered as shared. The Court took a different stance.

The main issue with respect to Intellectual Property (IP) is whether it falls or not under the CCP definition. Indeed, the CCP legal basis (article 207 TFEU) only refers to "commercial aspects of IP rights." That lead previous jurisprudence to decide that only IP provisions which had the objective of trade liberalisation would fall under the CCP and that for example moral rights were excluded from the CCP scope.[18] Because the chapter on IP rights in the EU-Singapore agreement contained provisions related to moral rights, the Advocate General had concluded that that chapter should fall under shared competences.[19] The Court, however, concluded that the simple reference to moral rights conventions was purely instrumental to the achievement of the objective of trade liberalisation and that regulating moral rights was not an objective *per se* of the agreement. For that reason, the Court concluded that the chapter on IP rights did fall under the CCP exclusive competence.

A similar difference of opinion was found also with regard to TSD chapters. The question was whether the TSD provisions were falling under the competences with respect to environment and social policy and were therefore shared competences, or whether the chapter could be considered as purely instrumental to achieve the CCP objectives. The Court took the latter position and declared that TSD chapters were instrumental to the CCP in order to comply with the

[17] For opinion 1/08 see footnote 12. See also article 207(5) TFEU.
[18] See: Case C-414/11, Judgment of the Court (Grand Chamber), 18 July 2013, Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon; Opinion 3/15, Opinion of the Court (Grand Chamber) of 14 February 2017 — European Commission (Opinion pursuant to Article 218(11) TFEU — Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled.
[19] Opinion 2/15, Opinion of the Advocate General Sharpston, delivered on 21 December 2016.

requirements of coherence with EU values as enshrined in the Treaty: *"the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action"* (article 207 TFEU). Those values include sustainable development. As in the case above on IP rights, here too, the Court found that reference to international agreements on labour or environment did not change the finding that TSD chapters were mainly instrumental to trade. Two main arguments corroborated the Court finding that TSD chapter did not fall under the environment or the social policy legal basis. First of all, the Free Trade Agreement is not meant as an enforcement mechanism for the international agreements referred in the TSD chapters; these multilateral environment agreements or ILO conventions are enforced following the procedures stemming from these agreements. Finally, according to the Court there was no intention in the EU-Singapore agreement to regulate labour and environment standards via the TSD provisions. TSD provisions have a double trade-related goal: on the one hand, to ensure that trade is done while complying with major international commitments with respect to labour and environment, on the other hand, to guarantee that labour and environmental standards are not adopted in a protectionist manner and thus affecting trade relations. For these reasons TSD chapters were mainly instrumental to the EU trade policy and fell under the CCP provisions.

2.3 The policy consequences of the Singapore Opinion

The Singapore opinion has major policy implications.

The ruling was announced during a very difficult political situation for trade agreements. There had been rising protests against the negotiations of a trade agreement with the United States (Puccio, 2016). Moreover, the procedures to sign or ratify some agreements that were finalised were hindered because of rising opposition in few Members States. To a large extent, complaints concerned the investor-State dispute settlement, although there were concerns in other areas (see Section 3).

In this context, the European Commission proposed the following: first, to restrict the investment liberalisation provisions to foreign direct investment covered by the exclusive competence under the CCP; second, to split the EU-Singapore agreement into two separate agreements, one covering the exclusive competences of the EU and the other covering the investor-State dispute settlement that was mixed. This solution allowed to insulate the trade agreement from the more politically controversial agreement on investor-State dispute settlement.

The "splitting" was actually possible because of the decision of the Court to diverge from the General Advocate on some issues, for example with regard to

TSD chapters. As mentioned above, the Court decided that TSD chapters were only instrumental to trade. If TSD chapters had been found to fall under the social policy and environmental legal basis, they would have been shared. As TSD chapters are necessary for trade agreements to comply with the requirements of coherence, splitting TSD chapters from the rest of the FTA provisions would have been more difficult, if not impossible.

The Singapore opinion is applicable only to the EU-Singapore FTA but gives some indications and better guidance on EU competences to conclude trade agreements. From that perspective, the Singapore opinion could give some indications to what could make TSD chapters fall under shared competence. First of all, expanding the chapters to cover regulation of environmental or labour standards or including enforcement mechanism aims at enforcing compliance of international commitments undertaken by the Parties on environment and labour. Or it clarifies a little more what is needed in order for chapters in IP rights to be considered as falling outside the scope of the CCP.

With respect to implied external exclusive competence, the Singapore opinion clarifies that the ERTA doctrine only applies when the EU has enacted secondary legislation. The ERTA doctrine and the implied external exclusive competence have an important role to play in the context of rising internal market regulation and the desire for deeper regulatory cooperation in trade agreements. For example, one can think of agreements concerning certain aspects of pharmaceuticals or medical devices, financial services and insurance, or cars that could all fall under EU exclusive competence.

The EU-Singapore agreement was however prevalently a commercial agreement. As such, it cannot give much guidance on agreements that cover a much wider range of provisions and more political provisions.

For example, the energy chapter in the EU-Singapore agreement is essentially about non-tariff barriers to trade and investment in renewable energy generation. It thus covers mainly regulatory cooperation and trade-related investment measures such as licensing measures or local content requirements. For this reason, the Court found that the chapter on “Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation” in the EU-Singapore Free Trade Agreement is essentially falling under the CCP. By contrast, Association agreements with Eastern countries (such as Ukraine, Moldova and Georgia) cover a wider range of energy provisions and energy relations are a central aim of those agreements. As the three Eastern Partnership agreements mentioned above, the proposed chapter on “Energy and Raw Materials” in the agreement in principle with Mexico would also probably go beyond the CCP scope at the very least

because of a provision on sovereignty over natural resources, which would involve EU Member States competence.

The Eastern Partnership agreements and the agreement with Mexico mentioned above are all association agreements. They all cover, beyond trade matters, also political cooperation and political dialogues. The association agreements with Ukraine and Moldova are particularly extensive including security, migration, police cooperation issues, etc. Because they go beyond areas of exclusive EU competences, those agreements are by definition mixed. The Singapore opinion gives little guidance with respect to the division of competences in those agreements.

Another issue that was raised in the aftermath of the Singapore opinion was the implication of that CJEU opinion for facultative mixity. The theory first developed by Judge Allan Rosas holds that there are two sorts of mixity in EU law (Rosas, 1998): obligatory and facultative mixity.

Obligatory mixity arises when the agreement covers also areas that have not been transferred to the EU and which remain in the purview of the Member States.

Facultative mixity instead can arise when an agreement falls under implied external exclusive competences and shared competences. In that context, the EU has either the option of concluding the agreement with its Member States reflecting the presence of the purely shared competences, or the Member States can decide to make the EU conclude the agreement as an EU-only agreement. In practice (to our knowledge) this kind of agreements were always concluded as mixed. One reason for this is that allowing EU-only external action in these areas of shared competence could actually lead to pre-empt Member State actions also internally.

The Singapore opinion seems to rule out completely the possibility of facultative mixity. Indeed, the Court finds that measures liberalising portfolio fell under shared competences as the EU had not yet legislated internally on that matter. It considered that as such that section of the envisaged agreement could not have been approved by the EU alone. The same conclusion was reached by the Court in the context of the State-to-State dispute settlement as far it relates to the provisions on portfolio investment.

The position of the Court with respect to facultative mixity was however less clear in the context of the later adopted Antarctica judgement.[20] The case involved the validity of two Council decisions approving *inter alia* a reflection paper on

[20] Joined Cases C-626/15 and C-659/16, European Commission v. Council, Judgement of the Court, 20 November 2018.

the creation of a marine protected area to the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) on behalf of the Union and its Member States. In this case the Commission argued that the agreement could have been concluded as an EU only agreement even if the reflection paper did not fall only under its exclusive competence with respect to marine biological resources under the fisheries policy but also covered shared competence under the environmental policy legal basis. In other words, the Commission was arguing in favour of facultative mixity. The Court in Antarctica rejected the possibility that the EU could act on its own, but the main reason for that conclusion was not EU constitutional law but was related to international law and in particular the requirement under CCAMLR that regional economic integration organisation (REIO) such as the EU can become Member only if their constituent Members are also part of the organisation.

However, in another case (the COTIF case),[21] the Court considered that the EU could indeed act on its own in the framework of agreements also covering shared competences if the Commission could reach the required majority in the Council for the adoption of the decision. In that case, the Court considered that the conclusion in the Singapore opinion (according to which an agreement including portfolio investment could not be concluded by the EU alone had not been taken by the Court without acknowledging) were due to the fact that *there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area*. In other words, for the Court in COTIF, facultative mixity depends entirely on a political choice of the Council.

Another question however is whether political mixity is possible. By political mixity, we mean the political decision to conclude an agreement as mixed even though it falls under exclusive competences falling under article 3(1) TFEU and implied exclusive competences under article 3(2) TFEU. This is the kind of situation that had happened in the context of the Columbia-Peru FTA. Indeed, following the indications given by the Singapore opinion with respect to the nature of EU competences in EU trade agreements, that particular agreement could have been concluded as an EU only agreement as proposed by the Commission and not as it was ultimately concluded as a mixed agreement. Here too, the Singapore opinion is not completely ruling out the potential role of Member States. The Court stated that the EU *can succeed* in these areas Member States.[22] So, while it is clear, that in areas of EU exclusive competence, Member

[21] Case C-600/14, Germany v. Council, judgement of the Court, 5 December 2017.

[22] Opinion 2/15, opinion of the Court paragraph 248: '*When the European Union negotiates and concludes with a third State an agreement relating to a field in respect of which it has acquired exclusive competence, it takes the place of its Member States. It has been undisputed since the judgment of 12 December 1972, International Fruit Company and Others (21/72 to 24/72, EU:C:1972:115, paragraphs 10 to 18), that the European Union can*

States cannot anymore act *unilaterally*, the Court does not seem to exclude the possibility of a political mixity, i.e. an agreement concluded by the EU and its Member States.

3) Should the EU and its trading partners negotiate mixed trade agreements or avoid mixity?

In the context of accelerated interdependence and globalisation, EU trade agreements are increasingly "deep", and their goal is much broader than simply dismantle tariffs. They are also meant to improve market access by removing non-tariff trade barriers, liberalizing trade in services, opening markets for public procurement. And they cover provisions in many other policy areas, such as competition rules, access for foreign direct investment, and regulations to ensure sustainability (labor and environmental protection).

Still, the Singapore Opinion made it clear that the EU exclusive trade competence can be very extensive, covering provisions related to trade in goods and services, intellectual property rights, sustainable development, competition policy, and foreign direct investment. The EU can thus negotiate very broad trade agreements, without requiring joint ratification by the EU parliament and the member states.

In what follows, we discuss what are the incentives for the EU and its trading partners to negotiate trade deals as mixed agreements or to avoid mixed treaty-making.

3.1 Incentives to avoid mixity in trade agreements

As discussed before, mixed agreements involve a two-step ratification procedure, requiring approval by both the European Parliament and national (and regional, in the case of Belgium) parliaments.

The main risk of negotiating a mixed trade agreement is that a single member state may block the entry into force of agreements that are beneficial for the EU as a whole.

As an example, the Belgian region Wallonia tried to block the signature of CETA in October 2016. CETA took almost a decade to negotiate, and nearly failed due to rejection by a sub-government representing as little as 0.7 percent of the EU's

succeed the Member States in their international commitments when the Member States have transferred to it, by one of its founding Treaties, their competences relating to those commitments and it exercises those competences.'

population.[23] The Walloon government, which represents 3.6 million people, rejected the agreement demanding stronger safeguards on labor, environmental and consumer standards. Wallonia's staunch opposition to the agreement created panic in Brussels, leading Canada's trade minister, Chrystia Freeland, to walk out "on the verge of tears."[24]

Moreover, in the case of a mixed agreement like CETA or the EU-Ukraine association agreement, the EU and its trading partners can provisionally implement trade agreements, at least those parts of the agreement that fall under the exclusive competence.

Still, in the provisional application of mixed agreements resides a legal risk: national parliaments may oppose ratification and threaten to terminate the agreement.

The clearest example of this was in the context of the Netherlands' advisory referendum on the ratification of the EU-Ukraine Association Agreement on 6 April 2016, which yielded a negative result. The EU-Ukraine association agreement is a mixed agreement and therefore required ratification by all Member States. After the referendum, the Dutch government was not able politically to submit the agreement for parliamentary ratification as there was a high risk that ratification would fail. Failure to ratify by the Dutch would have put an end to the partly provisionally applied agreement.[25] EU Member States had then to negotiate a solution to allow Dutch ratification of the agreement and to finally allow the entry into force of the agreement with Ukraine.[26]

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[23] A more recent example involves the same region. In January 2020, the minister-president of threatened to block EU-Mercosur trade deal, arguing that Wallonia would be hurt by the deal, since its 9,000 beef farmers would face increase competition from South American beef "Belgian region threatens to block EU-Mercosur trade deal," https://euobserver.com/tickers/147195.

[24] "EU-Canada trade deal in crisis as Canadian minister walks out" (*The Guardian*, 22 Oct 2016).

[25] Council Decision of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof, OJ L 161, 29.5.2014; Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols, OJ L 278, 20.9.2014.

[26] Agreement was found in the form of Council Conclusions adopted on 15 December 2016 which included a Decision of the Heads of State or Government of the 28 Member States of the European Union; Council Decision (EU) 2017/1247 of 11 July 2017 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party, OJ L 181, 12.7.2017; Council Decision (EU) 2017/1248 of 11 July 2017 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party, OJ L 181, 12.7.2017.

As for CETA, it entered into force provisionally on September 21, 2017, following the approval by EU Member States, expressed in the Council, and ratification by the European Parliament (408 votes in favor, 254 votes against, 33 abstentions).[27] However, it will only enter into force fully and definitively when all EU Member States have ratified the Agreement.

After more than two years of provisional application, the actual ratification of CETA is currently threatened by the Dutch Parliament, which is concerned about meat quality standards and unfair competition for Dutch farmers.[28] Additional concerns are expressed regarding the investor-State dispute mechanism, which is claimed to strengthen the position of multinationals and undermine policies in the area of climate and sustainability.[29] While the Dutch House of Representatives has voted in favor of CETA on February 18, 2020 (72 votes for and 69 against), the European trade deal with Canada still has to be passed by the Senate, which appears to be more problematic.[30] After the Walloon opposition to the signature, the EU and its Member States and Canada had negotiated a joint interpretative instrument in order to reply to similar public concerns as those raised by the current opposition in the Netherlands.[31] Several EU Member States had issued statements attached to the Council Decision to conclude CETA to further respond to national concerns; the Netherlands instead did not issue such a Statement.[32] In this context, a failure to ratify CETA by the Netherlands would cast doubt on the future of the deal and generally raises concerns about the reliability of the EU as a trading partners in negotiating mixed agreements.

If a member state definitively fails to ratify a mixed agreement, the EU could be under an obligation to terminate the provisional application of that agreement (see Suse and Wouters, 2018). Under Article 25 of the Vienna Convention on the Law of Treaties, provisional application can only apply pending the entry into force of a treaty. If ratification fails and entry into force of the treaty becomes impossible, provisional application would also have to be lifted. The procedure following a

[27] European Parliament, 'CETA: MEPs back EU-Canada trade agreement', press release, 15 February 2017; Council Decision (EU) 2017/38 of 28 October 2016 on the 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, OJ L 11, 14.1.2017.

[28] According to Hans Wiegersma, the representative of Dutch dairy farmers: "Canadian standards in food safety are different from ours. The safety checks that we have to perform outweigh those of Canada, which leads to unfair competition. It's also bad news for consumers as our food standards are much higher" (see https://www.politico.eu/article/mark-rutte-europes-liberal-torchbearer-runs-into-trade-winds/).

[29] See https://www.ft.com/content/dfaea7c0-51da-11ea-8841-482eed0038b1.

[30] See "In Tight Vote, Dutch Lawmakers Approve EU-Canada Trade Deal," (*New York Times*, February 18, 2020).

[31] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, 12865/1/16 REV1 WTO 275 SERVICES 24 FDI 20 CDN 19.

[32] 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, 13239/16 WTO 288 SERVICES 25 FDI 21 CDN 21.

failed national ratification of a mixed agreement is not clear. In particular, it is debatable whether the provisional application would automatically cease in the context of the failure of one EU Member State to ratify the agreement, or whether the EU would still be under an obligation to first notify termination of the provisional application following the rules foreseen for that purpose under the international agreement in question.[33]

Mixity may thus prevent the EU and its trading partners to successfully complete trade agreements, even when they have reached a deal after years of negotiations. This risk is stronger for trade agreements that may have significant social and economic implications, which are often subject to extensive debates and controversies.

Trade is generally beneficial at the aggregate level, but has distributional effects, creating winners and losers at the local level. For example, China's trade expansion following its accession to the WTO had heterogeneous effects across commuting zones in the United States (e.g. Autor *et al*., 2013). A recent study by Galle *et al.* (2018) shows that, although the China shock increased average welfare, the losses experienced by some commuting zones were five times higher than the average gain.

The same logic applies to trade agreements. For example, FTAs negotiated by the EU tend to increase welfare at the aggregate level (see impact assessment studies listed in Table 4 in the Appendix). However, they can hurt regions that are specialized in comparative disadvantage sectors (see Harte *et al.,* 2017). A recent example concerns the FTA between the EU and Mercosur. After two decades of negotiations, the deal between the EU and Mercosur members Argentina, Paraguay, Uruguay and Brazil, was approved in principle in the spring of 2019. The agreement could have important distributional effects. Large producers in some industries (e.g. chemicals, pharmaceuticals automotive, wine and cheese) are likely to gain from the entry into force of the FTA, which would allow them to expand their exports to South America. However, producers in other industries are likely to suffer due to increased import competition. In particular, producers of agricultural products in the sugar, ethanol, beef and poultry sectors have expressed concerns about the agreement.[34] Regions in the EU that are specialized in these sectors may thus be against the agreement. Indeed, Elio di Rupo, the president of Wallonia, a region that relies heavily on beef production, recently declared to be "completely opposed to the deal." He argued that the FTA would

[33] An example of this procedure can be found under article 486(7) of the Association Agreement between the EU and Ukraine. The main aim of such a procedure could actually be a situation where ratification was not completed in all the EU Member States but the EU decides to terminate the application of the agreement before finishing ratification. However, some scholars considered a notification would be needed even in the case of a failed ratification by one of the EU Member States making entry into force impossible.

[34] See https://www.europarl.europa.eu/doceo/document/E-9-2019-002423_EN.html.

lead to "mass imports" of beef to flood the EU market, which would hurt around 9,000 Walloon farmers.[35]

The fact that trade agreements generate important distributional effects across sectors and regions implies that they are more likely to be approved by parliaments representing the diverse interests of large constituencies than by parliaments representing the narrow interests of small geographical constituencies.

There could be ways to prevent that FTAs, with overall beneficial effects for the EU as a whole, are opposed by small local minorities.

One solution could be to further improve existing mechanisms to compensate the losers. In 2006, the European Union established the European Globalisation Adjustment Fund (EGF) to support workers made redundant by changes in trade pattern by co-funding targeted labour market policies policies (such as job searching, training, upskilling, business start-up, etc.).[36] Since 2009, also workers negatively affected by the economic and financial crisis can be covered by the Fund.[37] A proposal to further amend the EGF was issued in the framework of the negotiations on the new Multiannual Financial Framework, so as to make the funds more accessible.[38] Another policy tool for tackling labor adjustments is the European Social Fund (ESF), which provides financial support to deal with the long-term consequences of the globalisation process, rather than focusing on the immediate consequences of a restructuring event as it is the case for the EFG (see Cernat and Mustilli, 2018). EU Member States have also used in the past funds under the European Regional Development Fund (ERDF) to help industrial reconversion and regional competitiveness (Puccio, 2017).

Another solution that has been used by the Commission is to split the agreement into an exclusive-competence FTA and a separate mixed agreement (e.g. covering provisions on investment protection). By splitting, the signature and conclusion of the trade-related agreement fall under the exclusive competence of the EU, excluding the participation of Member States in the ratification process.[39] In the case of these agreements, the ratification process, from signature to conclusion, may only take a few months, ensuring a more rapid entry into force.

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[35] See https://euobserver.com/tickers/147195.

[36] Regulation (EC) No 1927/2006 of the European Parliament and of the Council of 20 December 2006 on establishing the European Globalisation Adjustment Fund, OJ L 406/1.

[37] Regulation (EC) No 546/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EC) No 1927/2006 on establishing the European Globalisation Adjustment Fund, OJ L 167/26.

[38] The regulation had already been reformed in 2013 but the utilisation of the fund remained unequal and therefore triggered the need for further reforms. See: Puccio (2019), Reform of the European Globalisation Adjustment Fund, EU Legislation in Progress – 2021-2027 MFF briefing, European Parliamentary Research Service.

[39] The European Parliament has to give consent thus holding a veto right in the process of ratification of these trade and investment agreements, ensuring democratic control and legitimacy.

"A fast and predictable implementation of the agreement with a view to 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" (Kleimann and Kübek, 2018). Indeed, ratification of mixed agreements can take several years, as in the example of the FTA with Colombia and Peru, which was signed as a mixed agreement, and which, after nine years of partial provisional application, has not been concluded as it still awaits ratification by Belgium.[40]

Not surprisingly, important recent trade agreements have been negotiated as non-mixed. These include the FTAs with Japan, Vietnam, and Singapore. In the case of the agreements with Singapore and Vietnam, the EU and its trading partners negotiated a side agreement that covers areas of mixed competence and thus requires ratification by member states.

3.2 Incentives to negotiate mixed trade agreements

The key advantage of negotiating mixed trade agreements is that, by bundling trade with other policies that are not exclusive competence of the EU (e.g. investor-State dispute settlement, security or energy policy), the EU and its trading partners can reach mutually beneficial deals, which may not be feasible if the negotiations were limited to trade-related issues (Conconi and Perroni, 2002).

With a few exceptions, all association agreements concluded by the EU over time are mixed.[41] Association agreements cover three main pillars – political dialogue, trade liberalization, and sectoral cooperation – and are considered "the most ambitious and far-reaching types of agreements concluded with third countries in a particular geographical area" (Van Elsuwege and Chamon, 2019).

Van Elsuwege and Chamon (2019) distinguish several types of association agreements. The agreements with the European countries can be used as pre-accession instruments (e.g. Western Balkan countries) or alternative form to membership (e.g. Ukraine, Moldova, Georgia). When it comes to the non-European countries, the goal is to establish privileged relationships in a flexible legal framework with strategically important partners (e.g. Euro-Mediterranean Association Agreements, Chile).

[40] For more details on the ratification process, see https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2011057.

[41] The exceptions are the association agreements with Malta and Cyprus that focus almost exclusively on the establishment of a customs union and the Stabilisation and Association Agreement with Kosovo, concluded as an EU-only agreement due to the non-recognition of the independence of Kosovo by five EU Member States (Van Elsuwege, 2017).

As an example, consider the Association Agreements with Ukraine, Moldova and Georgia concluded in the context of the European Neighbourhood Policy (ENP), more specifically the Eastern Partnership (EaP). One of their objectives is to create deep and comprehensive FTAs (hereafter DCFTAs). However, other policies covered by the agreements are clearly of key importance, particularly for the EU, including energy, foreign and security policy and cooperation in justice and home affairs. As far as the agreement with Ukraine is concerned, it includes "common security and defence policy" to "strengthen cooperation and dialogue on international security and crisis management to address global and regional challenges and key threats." Moreover, it covers legislative approximation and deeper forms of cooperation in several shared competence areas such as: environment or energy. The EU-Ukraine agreement would be much less valuable to the EU if economic cooperation over trade and trade-related issues policy were not "bundled" with security and other political issues. The same is true of the Association Agreements with Georgia and Moldova, which cover a wide range of EU activities.[42]

As for non-EU partners, the bilateral association agreements with countries of the Mediterranean region (Tunisia, Morocco, Israel, Jordan, Egypt, Algeria and Lebanon), concluded between 1998 and 2006, aspire to establish a dialogue on political and security matters, work towards cooperation on economic, trade and financial matters including the creation of a free trade area and also envisage cooperation on social, cultural and human affairs. These agreements form the southern dimension of the ENP. In this context, the EU aims at broadening and deepening even further its relationships with Southern countries. Thus, negotiations for potential DCFTAs are pursued with Egypt, Tunisia and Morocco, but without any concrete results so far.

The Association Agreement with Chile, signed in 2002 and entered into force in 2005 represents another example of agreement relying on a pillar-approach covering: political dialogues, cooperation provisions (including on economic, financial, scientific, technological, social and cultural matters, as well as the fight against drugs and organised crime), and a trade and trade-related matters pillar. Renegotiations to modernize the agreement have been launched in January 2018, in order to keep up with the latest legal, political and economic evolutions.

All in all, given the fact that association agreements are comprehensive and cover cooperation in areas that involve not only EU exclusive competences but also

[42] For instance, as mentioned earlier in this article, the agreements with Moldova and Georgia include provisions that go beyond the exclusive competence of the EU in the area of freedom, security and justice (e.g. cooperation on migration, asylum and border management, movement of persons, combating terrorism, legal cooperation, etc.), foreign and security policy (e.g. conflict prevention and crisis management, regional stability, crimes of international concern, etc.), energy, tourism, etc.

shared competences, they are concluded as mixed agreements. Moreover, mixity allows to "avoid internal competence battles among EU and Member States" and also reflects the political interests of Member States which are able to make their voice heard during the negotiations, in the ratification process, and in the implementation process (Van Elsuwege and Chamon, 2019).

The current agreement in principle with Mercosur could appear to cover only areas of exclusive competences as defined by the Singapore opinion. However, as suggested by Baltensperger and Dadush (2019), the Commission is planning to submit it as an association agreement that includes provisions on broader political cooperation. In the context of association agreements which do not present deeper non-trade related commitments (as in the case of the Eastern Partnership DCFTAs), the choice to bundle political dialogues with the trade-related pillar is ultimately a political one.

Besides the association agreements that bundle together trade liberalisation, political dialogue and sectoral cooperation, there are mixed agreements where the negotiations of an FTA have been conducted separately from the negotiation of a more political agreement (such as the Political Cooperation Agreements), which often work as a framework or umbrella agreement for the FTA.

For instance, the relations between EU and Korea are based on an FTA and a Framework Agreement for cooperation on major political and global issues such as human rights, non-proliferation of weapons of mass destruction, counterterrorism, climate change and energy security. While the two agreements have been concluded separately, the framework agreement contains a legal link to the EU-South Korea FTA. The same idea applies to the EU-Canada relations, which are based upon CETA and a Strategic Partnership Agreement.

Another relevant example refers to the EU-Colombia/Peru relations. To start with, the EU envisaged an association agreement with the Andean Community as a whole (Bolivia, Colombia, Ecuador and Peru). Since the Andean countries have not managed to reach a consensus regarding the trade part of the agreement, regional negotiations on a Political Dialogue and Cooperation Agreement continued with the Andean community as a whole, while trade negotiations were pursued only with Peru, Colombia and Ecuador and resulted in the signature of a mixed FTA.[43] This example is particularly interesting because the unbundling of the association agreement pillars were done to accommodate the EU trading partners' requests.

[43] While the agreement was concluded in 2012 with Colombia and Peru, Ecuador joined later in 2016.

While in these examples both the FTA and the political cooperation agreement have been concluded as mixed, given the Singapore opinion, one may wonder why the EU does not conclude systematically FTAs as EU-only agreements and separate political agreements as mixed, in order to achieve non-trade overarching goals and to avoid the legal risk due to mixity.

One reason might be the fact that mixity is key when the main interest of the EU is not so much to negotiate an FTA, but to use the trade deal to obtain concessions on other policy issues from its trading partners. This is often the case of trade agreements negotiated with countries, in which the EU is trying to achieve non-trade policy objectives (see Borchert *et al.,* 2020). It could also be in the interest of the trading partner to have deeper commitments on non-trade issues to create closer ties and integration with the EU (as in the examples given of the Eastern Partnership countries).

Finally, it could be both in the interest of the EU and the third party to maintain relationships within a broader agreement covering also non-trade issues. If the parties were to negotiate a series of separate agreements (on law enforcement, security, FTA, political cooperation agreement, etc.), this could become more complex and costly both in terms of negotiation, and ratification procedures, and implementation.

That could be, for example, the case of a post-Brexit EU-UK agreement, where parties want to maintain a certain level of integration and cooperation in a wide range of non-trade matters. Following the UK's official departure from the EU on January 31, 2020, the future of EU-UK relations is uncertain. The Council recently adopted its negotiating directives for the future EU-UK partnership, which suggests that the aim of the negotiations will be: *"a new partnership between the Union, and Euratom where relevant, and the United Kingdom that is comprehensive and covers the areas of interest outlined in the Political Declaration: trade and economic cooperation, law enforcement and judicial cooperation in criminal matters, foreign policy, security and defence and thematic areas of cooperation. The envisaged partnership should form a coherent structure and be embedded in an overall governance framework".*[44] This is in line with what was announced in the revised political declaration of October 17, 2019, which suggested that an association agreement may be considered for the future EU-UK partnership.[45] Adopting an association agreement approach can also help from an institutional perspective, as it creates one single coherent institutional framework and enforcement mechanism to maintain the relationship

[44] Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, ST 5721/20 ADD 1; ST 5870/20 ADD1 REV2.
[45] See Point 122 of the revised political declaration available at: https://ec.europa.eu/commission/sites/beta-political/files/revised_political_declaration.pdf.

with the trading partner also on non-trade issues. Moreover, there are several topics where the EU has more ambitions than the UK for the future partnership (e.g. the level-playing field matters such as competition, state aid, taxation, environment) and for which the EU will need to use as negotiating leverages trade commitments or other cooperation areas requested by the UK.

4) Conclusions

Within the scope of its competences, the EU can act in the international sphere and conclude agreements with third parties and international organisations. These agreements can be concluded as EU-only agreements, whenever the agreement falls within exclusive competences of the EU, while they will be concluded as mixed agreements if they cover shared or EU Member States competences.

The Singapore opinion shed light on a long debate between the Council and the Commission on the extent of the EU exclusive competences within trade and investment agreements and whether the EU could conclude those agreements on its own. The Singapore opinion gave some clearer indications about the nature of the EU competences in the context of FTA negotiations and defined that investment protection agreements had to be concluded as mixed agreements. However, the opinion does not rule out that mixity can be in certain circumstances a political choice.

Mixity is not without consequences. Indeed, as discussed in this paper, the procedure for signing and ratifying mixed agreements entails a legal and political risk, as national or regional parliament in a single Member State can block the conclusion of an agreement. As mentioned, in the case of CETA, Wallonia (which represents 0.7% of the EU population) threaten to block the signature of an agreement that was beneficial for the EU as a whole and for its trading partner.

We argue here that this risk is particularly important if the distributional effects of trade are not properly tackled. While trade yields overall benefits at the aggregate level, it can create winners and losers at the local level. Improving trade adjustment mechanism tools, to compensate the losers from FTAs, could thus be essential for the political feasibility of these agreements.

Additionally, splitting the agreements in two parts (one covering trade and one covering shared competence provisions), as in the case of the EU-Singapore agreement, can help to insulate an FTA from the legal and political risk of mixity.

However, it is not always possible or desirable to split the agreement. Where the EU or the trading partner want to achieve deeper integration on non-trade matters,

it can be essential to bundle commitments in different policy areas. Moreover, in the case of relationships where the EU engages with the third country on a variety of topics, it could be more efficient to have a single agreement that provides a unified institutional framework and enforcement mechanism. Thus, there could be circumstances where mixity could remain *"a necessary evil"*.

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APPENDIX

Table 1: Procedures for the Ratification of Mixed Agreements

Country	National/Federal Level		Regional Level	Possible Referendum
	Approval	Chambers	Approval	
Austria	Yes	2/2	No	Yes
Belgium	Yes	2/2	Yes	No
Bulgaria	Yes	1/1	No	Yes
Croatia	Yes	1/1	No	Yes
Cyprus	Yes	1/1	No	No
Czech Republic	Yes	2/2	No	Yes
Denmark	Yes	1/1	No	Yes
Estonia	Yes	1/1	No	No
Finland	Yes	1/1	No	Yes
France	Yes	2/2	No	Yes
Germany	Yes	2/2	No	No
Greece	Yes	1/1	No	Yes
Hungary	Yes	1/1	No	No
Ireland	Yes	1/2	No	Yes
Italy	Yes	2/2	No	No
Latvia	Yes	1/1	No	No
Lithuania	Yes	1/1	No	Yes
Luxembourg	Yes	1/1	No	No
Malta	Yes	0/1	No	Yes
The Netherlands	Yes	2/2	No	Yes
Poland	Yes	2/2	No	Yes
Portugal	Yes	1/1	No	Yes
Romania	Yes	2/2	No	Yes
Slovakia	Yes	1/1	No	No
Slovenia	Yes	1/2	No	No
Spain	Yes	2/2	No	No
Sweden	Yes	1/1	No	No
United Kingdom	Yes	2/2	No	Yes
Total	27/28 Member States 38/41 Federal Chambers		1 Member State	16/28 Member States

Source: Directorate-General for the Presidency, Relations with National Parliaments, Legislative Dialogue Unit (http://www.epgencms.europarl.europa.eu/cmsdata/upload/7ce7f104-1295-48f1-962e-51eba78d5ace/Mixed_Agreements_FINAL.pdf).

Table 2: From Rome to Lisbon: the evolution of the CCP legal basis

Treaty	Treaty of Rome (1957)	TFEU (2009)
Scope of CCP legal basis	Article 133 1. The common commercial policy shall be based on uniform principles, *particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.*	Article 207 (*ex* Article 133 TEC) 1. The common commercial policy shall be based on uniform principles, particularly *with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.* The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

Source: Authors' elaboration.

Table 3: Competences and legal basis for exclusive

Competence area	Type of External Competence	Basis for Competence
Chapters related to Market Access of Goods	Exclusive competence	Article 3(1) TFEU, Article 207 TFEU
Services (except transport)	Exclusive competence	Article 3(1) TFEU, Article 207 TFEU
Transport Services	Exclusive competence	Article 3(2) TFEU, title VI of Part Three
Provisions related to Foreign Direct Investment	Exclusive competence	Article 3(1) TFEU, Article 207 TFEU
Provisions related to the non-FDI investments	Shared competence	Article 216(1) TFEU and article 63 TFEU
ISDS	Shared competence	EU and MS may both be respondent
Trade and Sustainable Development	Exclusive competence	Article 3(1) TFEU, Article 207 TFEU
IP rights	Exclusive competence	Article 3(1) TFEU, Article 207 TFEU
Competition rules	Exclusive competence	Article 3(1) TFEU, Article 207 TFEU

Source: Authors' elaboration.

Table 4: Impact assessment studies on recent FTA negotiated by the EU

FTA	Study	Annual GDP growth EU (%)	Annual GDP growth partner (%)
CETA (Canada)	EC and Government of Canada (2008)	0,08	0,77
JEEPA (Japan)	Sunsen *et al.* (2009)	(m): 0,10 (a): 0,14	0,20-0,31
	Francois *et al.* (2011)	0,4 (sr) 0,7 (lr)	0,1 (sr) 0,3 (lr)
	Benz and Yalcin (2013)	(m): 0,02 (a): 0,21	(m): 0,07 (a): 0,86
Vietnam	Eocrys (2009) (ASEAN)	(m): 0,02 (sr) (m): 0,10 (lr) (a): 0,06 (sr) (a): 0,23 (lr)	(m): 1,92 (sr) (m): 10,17 (lr) (a): 3,22 (sr) (a): 16,27 (lr)
Singapore	Eocrys (2009) (ASEAN)	(m): 0,02 (sr) (m): 0,10 (lr) (a): 0,06 (sr) (a): 0,23 (lr)	(m): 0,99 (sr) (m): 4,18 (lr) (a): 3,66 (sr) (a): 12,89 (lr)
Mercosur	DG Trade (2007)	0,1	welfare gain 9 bln/year

Note: (m) = moderate scenario, (a) = ambitious scenario, (sr) = short run scenario, (lr) = long run scenario.

Source: Authors' elaboration based on the following study: European Parliamentary Research Service (2019). "Europe's two trillion-euro dividend: Mapping the Cost of Non-Europe", 2019-24, available at: https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2019)631745. The references used in this study are: *European Commission and the Government of Canada (2008). Assessing the costs and benefits of a closer EU-Canada economic partnership; Sunesen, E. R., Francois, J. F., & Thelle, M. H. (2009). Assessment of Barriers to Trade and Investment between the EU and Japan. Copenhagen Economics: Report to the European Commission ref no. TRADE/07 A, 2; Francois, J., Manchin, M., & Norberg, H. (2011). Economic Impact Assessment of an FTA between the EU and Japan. Complementary study commissioned by DG Trade; Benz, Sebastian and Yalcin, Erdal, (2013), Quantifying the Economic Effects of an EU-Japan Free Trade Agreement, No. 4319, CESifo Working Paper Series, CESifo Group Munich; Ecorys, (2009). Trade Sustainability Impact Assessment for the FTA between the EU and ASEAN; European Commission (2007). Update of the Overall Preliminary Trade Sia EU- Mercosur.*