EU Trade Agreements: To Mix or Not to Mix, That Is the Question*

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The European Union (EU) can only act internationally on competences that have been transferred to it by its Member States. Trade agreements negotiated by the EU that include provisions outside its exclusive competences should be concluded as 'mixed'. Mixed trade agreements must be ratified following not only the procedures set out in the EU treaties, but also the national ratification procedures of the Member States. As a result, national or even regional parliaments may block trade deals agreed between the EU and its trading partners after years of negotiations. Should the EU then avoid negotiating mixed trade agreements? We argue that the answer to this question depends crucially on the objectives of the EU when negotiating with its trading partners. If the EU is mostly driven by market-access motives, it should restrict the agreement to policy areas under its exclusive competence, thus insulating the trade deal from the legal and political risks of mixity. When instead its motives are mostly political, mixity is a 'necessary evil' to achieve non-trade objectives.

Keywords: Trade Agreements, European Unity, Competences, Ratification Procedures

1 INTRODUCTION

The European Union (EU) is not a sovereign state, it does not have the capacity to create its own competences. Under Article 5.2 of the Treaty on European Union (TEU), the EU can only act on competences that have been transferred to it by the Member States.

Within the scope of its competences, the EU can act internationally.[1] The EU can negotiate international agreements under three different types of competences:

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1 This flows from both the legal personality given to the EU under Art. 47 TEU and the more general provision on EU external relations competences enshrined in Art. 216 of the Treaty on the Functioning of the European Union (TFEU), which entitles the EU to conclude agreements with one or more third countries or with international organizations. Competences to conclude

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exclusive competences, competences to 'support, coordinate or supplement' the actions of the Member States, and shared competences. Agreements negotiated by the EU that include provisions outside its exclusive competences should be concluded as 'mixed'.

Mixed agreements must be ratified following not only the procedures set out in the EU treaties (Article 218 Treaty on the Functioning of the European Union (TFEU)), but also the national ratification procedures of the Member States. Table A-1 illustrates the current procedures for the ratification of mixed agreements. These are extremely complex, as they may require the approval of twenty-six Member States in their national parliaments, involving thirty-six chambers. In the case of Belgium, regional parliaments must also approve the agreement.[2]

The EU has been negotiating trade agreements since the 1970s (see Table A-2 in the Appendix). The Common Commercial Policy (CCP) is an exclusive competence of the EU enshrined in Article 207 TFEU and the role of the EU in trade policy has been expanded under the Lisbon Treaty (Article 3(1) TFEU). It may thus seem surprising that virtually all EU trade agreements have been negotiated as mixed. There are three main exceptions: the agreements negotiated with Singapore, Japan, and Vietnam. These have all been signed after 2017, when the Court of Justice of the European Union (CJEU) clarified the scope of the CCP in its opinion 2/15.[3] In the context of the agreement with Singapore, the Court ruled that the only provisions outside the scope of the EU exclusive competences concerned portfolio investments and the procedure for the settlement of investment disputes.

Mixity may prevent the EU and its trading partners to successfully complete trade agreements. For example, after almost ten years of negotiations, the EU and Canada agreed on a Comprehensive Economic and Trade Agreement (CETA), which was classified as a mixed agreement. Just before its signature, the parliament of the Belgian region of Wallonia, which represents less than 1% of the EU's population, threatened to block CETA. Even today, after more than two years since the agreement has been approved by the European Parliament and has provisionally entered into force, parliaments in some Members States are threatening to block its ratification.

In light of this, should the EU avoid mixed trade agreements, restricting the negotiations with its trading partners to policy areas under its exclusive

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 (Art. 216 TFEU).

[2] In the case of Malta, the ratification of a mixed agreement does not require parliamentary approval.

[3] The only non-mixed agreements negotiated before the Court's ruling were those with Andorra and San Marino.

competence? We argue that the answer to this question depends on what the objectives of the EU are. Trade agreements lead to the reciprocal reduction of trade barriers, such as tariffs, among a set of countries. Starting from Johnson (1954), a large literature emphasizes the gains of trade agreements resulting from exchanges in 'market access' (e.g. Bagwell and Staiger, 1990; Grossman and Helpman, 1995). If this is the main motivation for negotiating a trade agreement, the EU should avoid the legal and political risks of mixity, leaving out of the trade deal policy areas that would require national ratification procedures.

However, market access is often not the only or even the main motivation of the EU, which often enters trade agreements with smaller countries to obtain concessions on non-trade policy issues, such as security, human rights, or trade and environmental standards (e.g. Limão, 2007; Borchert et al., 2020). When this is the case, we argue that mixity in trade agreements is a 'necessary evil' to achieve non-trade policy objectives.

The rest of the paper is structured as follows. In section 2, we discuss the scope of EU trade competences and the implications for the ratification of trade agreements. In section 3, we examine the incentives of the EU to avoid negotiating mixed trade agreements. In section 4, we discuss the circumstances under which mixity cannot be avoided. Section 5 concludes, discussing the implications for future trade agreements.

2 THE SCOPE OF EU COMPETENCES IN TRADE AGREEMENTS

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 (Article 5 TEU). There are three different types of EU competences, which determine how the EU is entitled to act internationally.

First, in the case of exclusive competences, unilateral action by Member States is preempted both internally and externally (Article 2(1) TFEU).[4] 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]

A second type of competences are those to 'support, coordinate or supplement' the actions of the Member States. In this case, the EU and Member States can act in parallel, without undermining each other. EU action does not pursue regulatory objectives, but financial support and cooperation (Article 6 TFEU).

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[4] The first affirmation of this principle with respect to trade policy was found in: Opinion 1/75, Opinion of the Court of 11 Nov. 1975 given pursuant to Art. 228 (1) of the European Economic Community (EEC) Treaty, European Court Reports 1975–01355.

[5] Case 174/84, Bulk Oil (Zug) AG *v.* Sun International Limited and Sun Oil Trading Company, European Court reports 1986 p. 00559; Opinion 1/78, International Agreement on Natural Rubber, European Court Reports 1979–02871; Art. 2(1) TFEU.

Finally, the remaining competences are known as 'shared competences'. Here, the EU competence to act on its own depends largely on the area and the action taken. While 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 (Article 4(2) TFEU), most policy areas under the shared competences category require that both EU and Member States participate alongside in the agreement. However, within the large category of shared competences, there are situations in which the EU alone is entitled to act. These areas of competences are known as implied exclusive external competences. As specified in Article 3(2) TFEU, this particular type of external exclusive competence is found in three circumstances:

1. whenever the external action is foreseen in an EU legislative act[6];
2. where the international agreement could affect the internal rules established (also known as European Agreement on Road Transport (ERTA-AETR) doctrine)[7];
3. or where it is necessary to enable the Union to exercise its internal competences.[8]

Since the Treaty of Rome, the CCP is an exclusive competence of the EU. Moreover, EU trade policy competences have expanded over time. The Treaty of Lisbon consolidated the introduction of services and intellectual property rights (IPRs) under the CCP legal basis and further expanded EU trade policy competences to foreign direct investment (FDI).[9]

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[6] An example of this 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. Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance, OJ L 258, 6 Oct. 2017; Directive 2009/138/EC of the European Parliament and of the Council of 25 Nov. 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), OJ L 335, 17 Dec. 2009.

[7] This scenario is named ERTA doctrine after the early CJEU case that framed this very important legal principle. The case concerned the conclusion of the 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 already existing in the then European Community. Case 22/70, Commission of the European Communities *v.* Council of the European Communities – European Agreement on Road Transport, European Court reports 1971 at 00263.

[8] This principle of necessity was originally established in the 1976 CJEU opinion on waterways vessels, 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. Opinion 1/76, Opinion of the Court of 26 Apr. 1977 given pursuant to Art. 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels', European Court Reports 1977–00741.

[9] The Treaty of Nice in 2001 already introduced services and IPRs within the scope of the CCP. Before that, some modes of trade in services and IPRs were considered to fall outside the CCP, which is why, 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 to fall outside the. *See* Opinion of the Court of 15 Nov. 1994: Competence of the Community to conclude

After the Lisbon Treaty, the European Commission considered that trade agreements that did not include political cooperation could be adopted as EU-only agreements. Such a proposal was made for example for the signature of the Free Trade Agreement (FTA) with Columbia and Peru.[10] However, the Council disagreed on the exclusive nature of the competences, so the agreement was signed as a mixed agreement.[11]

The FTA between with Singapore raised once more the issue of whether the amendments introduced in the Lisbon Treaty established an EU exclusive competence to conclude these trade agreements, creating disagreements between the Commission and the Council. The Commission then decided to request an opinion to the CJEU with respect to the EU capacity to conclude the EU-Singapore agreement under the EU exclusive competences.

2.1 The singapore opinion

The CJEU delivered its opinion concerning the EU competence to conclude the EU-Singapore FTA (Singapore opinion) on 16 May 2017. In this opinion, the Court analysed the main chapters contained in the agreement and determined whether they imply exclusive or shared competences. Table A-3 in the Appendix summarizes the conclusion of the Court with respect to each chapter of the EU-Singapore agreement.

The Court found that only portfolio investments and the investor-State dispute settlement (ISDS) procedures were not exclusive competence of the EU. All other policy areas covered by the EU-Singapore agreement were found to fall under exclusive EU competence, either because they fell under express exclusive competences under Article 3(1) TFEU, such as the CCP competence or the competence with respect to competition rules, or because they fell under the implied exclusive competences under Article 3(2) TFEU.[12]

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international agreements concerning services and the protection of intellectual property – Art. 228 (6) of the EC Treaty. European Court Reports 1994 I-05267.

[10] 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).

[11] 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 Dec. 2012.

[12] The transport Services provisions in the EU-Singapore are an example of the latter. Indeed, the Court confirmed the conclusion reached in its opinion 1/08 that transport services remained outside the scope of the CCP as provided by Art. 207(5) TFEU. Still, transport services provisions fell under implied exclusive external competence pursuant to Art. 3(2) TFEU. Indeed, these provisions of the EU-Singapore agreement covered areas regulated by EU secondary legislation and therefore the EU-Singapore agreement could alter or affect the EU internal rules.

The CJEU ruling differed from the opinion that had been previously expressed by the Advocate General, in particular with respect to the chapters on Intellectual Property and Trade and Sustainable Development (TSD). The Advocate had ruled 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 under the CCP definition. The CCP legal basis (Article 207 TFEU) only refers to 'commercial aspects of IP rights'. That led previous jurisprudence to decide that only IP provisions which had the objective of trade liberalization would fall under the CCP and that for example moral rights were excluded from the CCP scope.[13] 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.[14] The Court, however, concluded that the simple reference to moral rights conventions was purely instrumental to the pursuit of the objective of trade liberalization 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 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 labor or environment did not change the finding that TSD chapters were mainly instrumental to trade. Two main arguments corroborated the Court finding that the 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 conventions of the International Labour Organization (ILO) are enforced following the procedures stemming from these agreements. Finally, according to

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[13] *See* Case C-414/11, Judgment of the Court (Grand Chamber) of 18 July 2013, Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH *v.* DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon, ECLI:EU:C:2013:520; Opinion 3/15, Opinion of the Court (Grand Chamber) of 14 Feb. 2017 – European Commission (Opinion pursuant to Art. 218(11) TFEU – Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, ECLI:EU:C:2017:114).

[14] Opinion 2/15, Opinion of the Advocate General Sharpston, delivered on 21 Dec. 2016, ECLI:EU:C:2016:992.

the Court there was no intention in the EU-Singapore agreement to regulate labor 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 labor and environment, on the other hand, to guarantee that labor and environmental standards are not adopted in a protectionist manner and thus affecting trade relations. For these reasons the TSD chapters were mainly instrumental to the EU trade policy and fell under the CCP provisions.

The ruling of the CJEU 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 finalized were hindered because of rising opposition in few Members States. To a large extent, complaints concerned the ISDS, although there were also concerns in other areas (see section 3.1).

In this context, the European Commission proposed to amend the FTA with Singapore as follows: first, to restrict the investment liberalization 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 (not mixed) covering the exclusive competences of the EU and the other (mixed) covering the ISDS. This solution allowed to insulate the trade agreement from the more politically controversial agreement on ISDS.

2.2 Implications of the Singapore opinion for EU competences

Although the Singapore opinion is applicable only to the EU-Singapore FTA, it gives some broader guidance on EU competences to conclude trade agreements and therefore on the need for mixity.

The opinion clarifies those policy areas where mixity is not needed, as they clearly fall under EU exclusive competences. It also highlights some of the areas where doubts can persist with regard to the nature of the EU competence and thus also the nature of the agreement. These grey areas mainly include shared policy areas where there could be implied external exclusive competences under Article 3(2) TFEU. In that context, the Singapore opinion clarifies that the ERTA doctrine only applies when the EU has enacted secondary legislation.[15] This sets an important limit to the expansion of EU exclusive competences via the use of implied external competences. The ERTA doctrine

[15] In Opinion 2/15, this discussion was crucial to determine that portfolio investments were shared competences. Consequently, in order to maintain the EU-Singapore FTA as an EU-only agreement, the EU renegotiated the investment liberalization provisions of the EU-Singapore FTA so as to exclude portfolio investments, as the latter would have required mixity.

and the derived implied external exclusive competences have an important role to play in the context of rising internal market regulations 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 other policy areas, where the nature of the competence depends essentially on the aim and content of the trade provisions included, are those treaty chapters that could in theory fall under two or more legal bases. In that context, the determination of the nature of the competence depends on the application of the so-called absorption test, in order to determine if one of the legal bases is predominant and the other legal bases are simply instrumental, or if dual (or multiple) legal bases are needed. In the Singapore opinion, this test was used both for the TSD chapter and the IP rights provisions. While these chapters were declared as part of the CCP, it is clear that if their contents had been slightly different, they would have fallen under shared competences. The opinion even hints at what could make TSD chapters fall under shared competence, e.g. expanding them to cover regulations on environmental or labor standards or including mechanisms aimed at enforcing compliance of international commitments undertaken by the Parties on environment and labor. It also clarifies what is needed in order for IPR chapters to be considered as falling outside the scope of the CCP.

The EU-Singapore agreement was prevalently a commercial agreement. 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.

As a result, the Singapore opinion does not provide clear guidance with respect to the division of competences in agreements with non-trade provisions going beyond those included in the EU-Singapore FTA. For example, compared to the EU-Singapore FTA, the Association Agreements with Ukraine, Moldova and Georgia include a wider range of energy provisions, which go beyond the CCP scope. These agreements also cover several provisions that fall outside the EU exclusive competences (e.g. on security, migration, police cooperation) and are thus by definition mixed.

We can thus divide traditional policy areas included in EU trade agreements into three categories:

1. Policy areas that do not require mixity (those will correspond to areas where the EU has an express exclusive competence under Article 3(1) TFEU);
2. Policy areas that require mixity;
3. Policy areas that may or may not require mixity, depending on the specific aim and content covered by the agreement.

Table 1 below highlights these different policy areas. In the Appendix, we expand this table, specifying the relevant jurisprudence and the tests needed to assert the need for mixity in the areas where the nature of the competence depends on the aim and content of the provisions (see Table A-4).

Table 1: Policy Areas and Mixity in EU Trade Agreements

Main Policy Area	*Requirement of mixity*
Market Access Goods	No mixity
Technical Barriers to Trade (TBT), Sanitary/Phyto-Sanitary (SPS) measures	No mixity
Services market access and national treatment (transport services excluded)	No mixity
FDI	No mixity
Trade related aspects of Energy	No mixity
Competition and state-owned enterprises	No mixity
Investor-state dispute settlement (as currently designed)	Mixity
Portfolio Investment	Mixity
Environment	Mixity
Energy (beyond trade related)	Mixity
Security	Mixity
Justice and Home Affairs	Depends on content
Sectoral regulatory cooperation	Depends on content
Transport services	Depends on content
IP rights	Depends on content
Trade and Sustainable development	Depends on content
Culture (including audiovisual provisions)	Depends on content

Note: Authors' elaboration.

2.3 Beyond competence: Political and facultative mixity

The Singapore opinion clarifies which competences have not been transferred to the EU.[16] 'Obligatory mixity' implies that trade agreement that include provisions related to these competences require national ratification procedures.

'Political mixity' may also be possible. This occurs when an agreement is negotiated as mixed, even though it could fall under exclusive competences under Article 3(1) TFEU and/or under implied exclusive competences under Article 3(2) TFEU. This should not be legally possible, as the EU substitutes its Member States in areas of exclusive competences. However, in cases where there have been doubts on the competences engaged to conclude the agreement, the Council has been able to push forward mixity.[17] For example, this is what happened in the case of the Columbia-Peru FTA, which was concluded as a mixed agreement. In light of the later Singapore opinion by the CJEU with respect to the nature of EU competences in EU trade agreements, one could argue that the Columbia-Peru FTA could have been concluded as an EU-only agreement, as initially suggested by the Commission. There are two ways in which the Council can push for a modification of a Commission's proposal in order to introduce mixity. First, if the Commission's proposal does not obtain the qualified majority needed for adoption in Council, the procedure for adoption can remain blocked. In this case, the Commission can be obliged to negotiate with the Council and submit a modified proposal in order to resume the procedure.[18] In CETA, the initial proposal of Council Decision that was submitted by the Commission was subsequently modified in order to obtain a mixed legal basis.[19] Second, if the Council has unanimity among its members, it can directly modify the Commission's proposal following Article 293 TFEU and adopt a modified act introducing a mixed legal basis. If the

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[16] This is e.g. the case of investor-state dispute settlement. Following opinion 2/15, ISDS chapters as currently negotiated by the EU affect the national court's jurisdiction to hear cases and therefore involve a competence that remains in the purview of EU Member States.

[17] It should be stressed that the Singapore opinion does not necessarily exclude mixity as a political choice of the EU and its Member States. In para. 248, the Court stated that '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 Dec. 1972, International Fruit Company and Others (21/72 to 24/72, EU:C:1972:115, paras 10 to 18), that the European Union can 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'. The Court here uses the formulation 'can succeed the Member States', which seems to suggest i.e. not obliged to do so.

[18] The Commission can modify a proposal under the conditions of Art. 293 TFEU.

[19] Following the Singapore opinion, CETA remains a mixed agreement because of its investment chapters. However, following that same opinion, several legal bases (e.g. the environmental legal basis and the financial services legal basis), which were added to introduce mixity in the adopted Council Decision to sign the agreement, would not have been applicable to CETA.

Commission believes that the act falls under the exclusive competences of the EU, it can bring a case to the CJEU in order to annul the modified act adopted by the Council.[20]

Besides political mixity, 'facultative mixity' can arise when an agreement falls under implied external exclusive competences and shared competences. In this case, the EU has in principle the option of concluding the agreement as mixed – reflecting the presence of the purely shared competences – or as EU only – on the basis of a political decision of the Member States. In practice, this kind of agreements have always been concluded as mixed.[21] One reason for this is that allowing EU-only external action in areas of shared competences, where the EU has not acted internally, may preempt Member States from also acting internally on these same matters.

The Singapore opinion appears to rule out completely the possibility of facultative mixity. Indeed, the Court found that measures liberalizing portfolio investments fell under shared competences, as the EU had not yet legislated internally on this matter. It considered that 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 as 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 judgment.[22] The case involved the validity of two Council decisions approving inter alia a reflection paper on 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 and also covered shared competence under the environmental policy legal basis. In other words, the Commission was arguing in favor 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

[20] This is e.g. what happened in the Antarctica judgment. In that case, the Court endorsed the mixed approach claimed by the Council. Joined Cases C-626/15 and C-659/16, European Commission *v.* Council, Judgment of the Court of 20 Nov. 2018, ECLI:EU:C:2018:925.

[21] The only example of facultative mixity seems to be the trade agreement concluded with Andorra, an enclaved microstate between France and Spain. The agreement has been given both the CCP as well as the taxation legal basis. Taxation is a shared competence and would have thus required mixity. However, the agreement was concluded as EU-only (i.e. it did not require national ratification procedures); the agreement still required unanimity voting in the Council because of the taxation legal basis.

[22] Joined Cases C-626/15 and C-659/16, European Commission *v.* Council, Judgment of the Court of 20 Nov. 2018, ECLI:EU:C:2018:925.

constitutional law but was related to international law and in particular the requirement under CCAMLR that a regional economic integration organization (REIO) such as the EU can become Member only if their constituent Members are also part of the organization.

However, in another case (the Convention concerning International Carriage by Rail (COTIF) case),[23] 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) was 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, the use of mixity depends entirely on a political choice of the Council.

3 INCENTIVES TO AVOID MIXITY IN TRADE AGREEMENTS

Over the last few decades, EU trade agreements have not only risen in number, but have also become 'deeper'. They improve market access not only by dismantling tariffs, but also by removing non-tariff trade barriers, liberalizing trade in services, and opening markets for public procurement. Moreover, they encompass provisions that go beyond traditional trade policy, such as competition, foreign direct investment, intellectual property rights, labor and environmental standards, human rights and security. The Singapore opinion made it clear that the EU exclusive trade competence can be very extensive, implying that the EU can conclude very broad trade agreements, without requiring joint ratification by the EU and its Member States. In this section, we discuss under what conditions the EU should avoid the legal and political risks of mixed trade agreements.

3.1 The legal and political risks of mixed trade agreements

The main risk of mixity is that trade agreements that are beneficial for the EU as a whole may be blocked by the legislators of a single Member State, or even of a region within it.

[23] Case C-600/14, Germany *v.* Council, judgment of the Court of 5 Dec. 2017, ECLI:EU:C:2017:935.

After signing a mixed trade agreement, the EU can provisionally implement it, at least those parts that fall under the exclusive competence of the EU.[24] However, national parliaments may later oppose ratification and threaten to terminate the agreement. 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 (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 the entry into force of the treaty becomes impossible, the provisional application would have to be lifted.[25]

A notable example of the legal risks of mixity is the trade agreement with Canada. In October 2016, after almost ten years of negotiations, the signature of the agreement nearly failed due to opposition by the Belgian region of Wallonia, which represents as little as 0.7% of the EU's population.[26] The Council adopted the decision to provisionally apply the agreement in September 2017, after the European Parliament gave its approval to the conclusion of CETA (408 votes in favor, 254 votes against, thirty-three abstentions).[27] However, it will only enter into force fully and definitively when all EU Member States have ratified it. After almost three years of provisional application, the actual ratification of CETA is currently threatened by the Dutch Parliament, due to concerns 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 18 February 2020 (seventy-two votes

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[24] The Council can decide to provisionally implement an agreement before approval by the European Parliament.

[25] The procedure following a 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 have to notify termination of the provisional application following the rules foreseen for that purpose under the international agreement in question.

[26] The Walloon government, which represents 3.6 million people, rejected the agreement demanding stronger safeguards on labour, 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' ('*EU-Canada Trade Deal in Crisis as Canadian Minister Walks Out*', The Guardian 22 Oct. 2016).

[27] Press release of the European Parliament: 'CETA: MEPs back EU-Canada trade agreement', 15 Feb. 2017; Council Decision (EU) 2017/38 of 28 Oct. 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 Jan. 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.

for and sixty-nine against), the European trade deal with Canada still has to be passed by the Senate, which appears to be more problematic.[30] A failure to ratify CETA by the Netherlands would cast doubt on the future of the deal and would generally raise concerns about the reliability of the EU as a trading partners in negotiating mixed agreements. The credibility of the EU is even more at risk if one considers that the EU, its Member States, and Canada already negotiated a 'Joint Interpretative Instrument on the CETA', which addresses concerns similar to those raised by the current opposition in the Netherlands. Another threat to CETA was the plenary vote on July 31, 2020 by the parliament of Cyprus, which voted against ratification of the agreement due to concerns about the protection halloumi cheese. The government of Cyprus decided further protections for the Cypriot halloumi cheese before submitting again the agreement to the parliament for approval.

Another example of the risks of mixity is the EU-Ukraine Association Agreement. In April 2016, the Netherlands organized an advisory referendum on the ratification of this agreement, which yielded a negative result.[31] Turnout was low (32.28%), but 61% of the votes cast were against the approval, which accounted for only 19.5% of eligible voters. The Dutch government decided not to submit the agreement for parliamentary ratification, since there was a high risk that ratification would fail. The Dutch government was thus faced with the question of how to get parliamentary support for the ratification to prevent a situation in which a small part of the Dutch electorate would block the EU-Ukraine agreement, potentially putting at risk the broader geo-political EU's strategy towards the Russian Federation. A solution was found at an EU summit in December 2016, in which Member States issued a declaration which was meant to address the concerns of the Dutch no-voters.[32] Following this declaration, the Association Agreement with Ukraine entered fully into force in 2017, after ratification by the Dutch House of Representatives and Senate.

3.2 The distributional effects of trade agreements

Trade is generally beneficial at the aggregate level, but has distributional effects, creating winners and losers at the local level. For example, Autor et al. (2013) document heterogeneous effects across commuting zones in the United States, as a result of China's trade expansion. Galle et al. (2017) show that, although this expansion increased average US welfare, the losses experienced by some commuting zones were five times higher than the average gain.

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

31 The referendum question was: 'Are you for or against the Approval Act of the Association Agreement between the European Union and Ukraine?'.

32 In particular, the declaration noted that the treaty does not guarantee EU membership to Ukraine, and that the Netherlands is not obliged to provide Ukraine military assistance.

The same logic applies to trade agreements. For example, most studies suggest that various FTAs negotiated by the EU increase welfare at the aggregate level (see Bellora et al., 2019; Berlingieri et al., 2018; Decreux et al., 2010; Lakatos and Nilsson, 2017). However, these agreements can hurt regions that are specialized in comparative disadvantage sectors (see Harte et al., 2017).

A recent example concerns the EU-Mercosur agreement. After two decades of negotiation, the EU and Mercosur members – Argentina, Paraguay, Uruguay, and Brazil – reached an agreement in principle. 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.[33] 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 lead to 'mass imports' of beef to flood the EU market, which would hurt around 9,000 Walloon farmers.[34]

The fact that trade agreements generate important distributional effects across sectors and regions implies that they are more likely to be approved by the European Parliament, which represents the diverse interests of all European citizens, than parliaments of Member States, which represent the interests of voters in narrower geographical constituencies.

3.3 How to avoid that EUtrade agreements are hijacked by small minorities

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. When the EU negotiates mixed trade agreements, a small minority of losers can effectively hijack the whole process, blocking deals that are beneficial for the EU as a whole.

There are two possible solutions to this problem. A first solution is to 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 patterns by co-funding targeted labor market policies

[33] *See*, https://www.europarl.europa.eu/doceo/document/E-9-2019-002423_EN.html.
[34] *See*, https://euobserver.com/tickers/147195.

(e.g. job searching, training, upskilling).[35] Since 2009, also workers negatively affected by the economic and financial crisis can be covered by the Fund.[36] 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.[37] 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 globalization process, rather than focusing on the immediate consequences of a restructuring event as it is the case for the Equity Facility for Growth (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 is to negotiate an exclusive-competence FTA, and possibly a separate mixed agreement covering policy areas in which Member States have competence (e.g. investment protection). In this case, the signature and conclusion of the trade agreement fall under the exclusive competence of the EU, excluding the need for Member States' national ratification producers. 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. This is the solution chosen by the EU in its recent agreements with Singapore, Japan and Vietnam (see Table A-2). 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.

This solution prevents small minorities from blocking the ratification of agreements negotiated by the EU. It also speeds up considerably the ratification process. In the case of mixed agreements, ratification can take several years.[38] In the case of exclusive-competence FTAs, the ratification process is much faster, taking only a few months between the signature of the agreement and the approval by the European Parliament. It has been argued that 'a fast and predictable implementation of the agreement with a view to reaping commercial benefits, as well as the efficiency of

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

[36] 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 Globalization Adjustment Fund, OJ L 167/26.

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

[38] For example, the FTA with Colombia and Peru has been signed in 2012 and, after several years of partial provisional application, still awaits ratification by Belgium. For more details on the ratification of this agreement, *see*, https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2011057.

the public decision-making process, are some of the advantages that the EU-only ratification track carries with it' (Kleimann and Kübek, 2018).

In light of the Court's ruling on the EU-Singapore agreement, one could argue that some of the earlier FTAs could have been negotiated as exclusive-competence trade agreements. For example, in the case of agreement with South Korea, mixity could have been avoided by excluding the Protocol on Cultural Cooperation. This covers provisions on cultural cooperation and exchanges, audiovisual cooperation and co-production, and temporary movement of artists and culture practitioners. In the TFEU, culture in not an exclusive competence of the EU.[39] In the case of CETA, the EU and Canada could have negotiated a side agreement covering areas of mixed competence, such as ISDS, thus isolating the trade deal from the legal and political risks of mixity.[40]

4 INCENTIVES TO NEGOTIATE MIXED TRADE AGREEMENTS

The discussion in the previous section emphasizes the costs of mixity. Should the EU then restrict negotiations with its trading partners to policy areas under its exclusive competence?

We argue that the answer to this question depends crucially on the objectives of the EU. A large literature starting from Johnson (1954) emphasizes that trade agreements eliminate the temptation governments have to manipulate their terms of trade and allow countries to exchange 'market access' (e.g. Bagwell and Staiger, 1990; Grossman and Helpman, 1995).[41] If this is the main motive for negotiating a trade agreement, the EU should insulate it from the legal and political risks of mixity, including only provisions related to its exclusive competences.

However, trade agreements may also be driven by non-trade motives. The EU often negotiates with smaller countries, exchanging better access to its market with concessions on non-trade policy issues, such as security, human rights, labor and environmental standards (e.g. Limao, 2007; Borchert et al., 2020). When this

[39] If the provisions go beyond trade-related aspects of culture foreseen under Art. 207 TFEU, the culture legal basis under Art. 167 TFEU is needed. Under Art. 6, culture is one of the policy areas in which actions can be undertaken by the EU to 'support, coordinate or complement the action of Member States'. Art. 167(3) specifies that 'the Union and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of culture'. The use of this legal basis will require the agreement to be concluded as mixed as it will touch upon EU Member States competences in the field of culture.

[40] The EU negotiated separate framework agreements with Korea and Canada covering cooperation on political and socio-economic issues, such as non-proliferation of weapons of mass destruction, counterterrorism, human rights, climate change and energy security.

[41] *See* G. M. Grossman, *The Purpose of Trade Agreements*, in *Handbook of Commercial Policy* (K. Bagwell & R. Staiger eds, Elsevier, Amsterdam, North-Holland 2016) for a review of the literature on the purpose of trade agreements.

is the case, mixity in trade agreements is a 'necessary evil' to achieve non-trade policy objectives. The key advantage of negotiating mixed trade agreements is that, by bundling trade with other policies that are not exclusive competence of the EU, 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).

4.1 Trade agreements with non-trade objectives

Association Agreements are the clearest example of agreements in which the EU is at least partially driven by non-trade motives.[42] They cover three main pillars – political dialogue, trade liberalization, and sectoral cooperation – and are considered as 'the most ambitious and far-reaching types of agreements concluded with third countries' (Van Elsuwege and Chamon, 2019).

Association Agreements with European countries can be used as pre-accession instruments (e.g. Western Balkan countries) or alternative form to membership (e.g. Ukraine, Moldova, Georgia). 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. However, other policies covered by the agreements, such as security, energy, and cooperation in justice and home affairs, are clearly of key importance, particularly for the EU. For instance, the agreement with Ukraine 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 and energy. The EU-Ukraine agreement would be much less valuable to the EU if economic cooperation over trade and trade-related policy issues 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 policies.[43]

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[42] With a few exceptions, Association Agreements have been negotiated as mixed agreements. The exceptions are the Association Agreements with Malta and Cyprus, which focus almost exclusively on the establishment of a customs union, and the Stabilization and Association Agreement with Kosovo, which was concluded as an EU-only agreement due to the non-recognition of the independence of Kosovo by five EU Member States (P. Van Elsuwege, *Legal Creativity in EU External Relations: The Stabilisation and Association Agreement Between the EU and Kosovo,* Eur. Foreign Aff. Rev. 393–410 (2017)).

[43] As mentioned earlier, the agreements with Moldova and Georgia include provisions that go beyond the exclusive competence of the EU in various areas, such as freedom, security and justice (e.g.

When it comes to Association Agreements with non-European countries, the goal of the EU is to establish privileged relationships in a flexible legal framework with strategically important partners. For example, 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.

Association Agreements are thus examples of trade agreements that cover deep cooperation in areas that involve not only EU exclusive competences but also shared competences. This can be seen by examining the coverage of security provisions across all EU trade agreements. To this purpose, we use the data compiled by Lechner (2016) in the context of the DESTA (Design of Trade Agreements) project on the degree of legalization of security issues.[44] When looking at all EU trade agreements, the security legalization scores range between 0 to 12, with an average score of 5. Association Agreements have the highest scores. For example, the agreements with Algeria, Tunisia, Morocco, and Ukraine have a security score of 8, the agreements with Serbia and North Macedonia a score of ten, and the agreements with Albania and Montenegro have respectively scores of eleven and twelve.

In principle, the trade agreement could be split from the political part of the Association Agreements. However, this would not be interesting for the EU, if its strategy is to offer preferential access to its market in exchange for cooperation on security and other non-trade policy objectives. This requires bundling into one agreement provisions related to EU exclusive competences with provisions related to shared policy. Mixity is thus a 'necessary evil' to achieve non-trade policy objectives.

5 CONCLUSION

Within the scope of its competences, the EU can act in the international sphere and conclude agreements with third parties and international organizations. These

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, and tourism.

[44] The method used to compute the degree of legalization in trade agreements is detailed in L. Lechner, *The Domestic Battle Over the Design of Non-Trade Issues in Preferential Trade Agreements*, 23 Rev. Int'l Pol. Econ. 840–871 (2016). Other non-trade policy objectives (e.g. civil and political rights, economic and social rights, and environmental protection) are also considered. The concept of legalization is based on three criteria: obligation, precision, and delegation. The legalization score for security issues is computed aggregating these three dimensions. The maximum possible legalization score for security issues is twenty-five.

agreements should be concluded as EU-only agreements whenever they fall within exclusive competences of the EU, while they should 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. 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 article, 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, the Belgian region of Wallonia (which represents 0.7% of the EU population) threatened 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 mechanisms to compensate the losers from FTAs could thus be essential for the political feasibility of these agreements. 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 also 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. When the EU is mostly motivated by non-trade objectives (e.g. cooperation on security), it can be more efficient to have a single agreement that provides a unified institutional framework and enforcement mechanism. In these cases, mixity in trade agreements is necessary to achieve non-trade policy objectives, allowing the EU to offer market preferential access to its trading partners in exchange for concessions in other policy areas.

We conclude by discussing the implications of our analysis for future trade agreements. In some cases, the EU is likely to negotiate mixed trade agreements, notwithstanding the legal and political risks involved in the national ratification procedures. This is for example the case of the agreement with Mercosur. The current agreement in principle appears 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 Deep and Comprehensive Free Trade Areas

(DCFTAs)), the choice to bundle political dialogues with the trade-related pillar is ultimately a political one.

Another mixed agreement is the new FTA with the United Kingdom. On December 29, 2020, the Council signed the Trade and Cooperation Agreement with the United Kingdom under the legal basis for Association Agreements (Article 217 TFEU).[45] An Association Agreement will help from an institutional perspective, by creating one single coherent institutional framework and enforcement mechanism to maintain the relationship with the trading partner also on non-trade issues. Moreover, the EU has more ambitions than the UK in some areas (e.g. the level-playing field matters such as competition, state aid, taxation, and environment), while the opposite is true in other areas (e.g. security, financial services). A unified mixed agreement will also allow the EU and the UK to exchange concessions across policy areas, thus reaching a more beneficial deal.

With other trading partners, the EU will probably choose to negotiate exclusive-competence trade agreements. By splitting the FTA from the side agreement covering areas of mixed competence, as it has done with Singapore, the EU will be able to isolate the trade deal from the risks of mixity. For example, this could be the outcome of the ongoing negotiations with Australia and New Zealand, in which the market access motives are likely to dominate the political motives. The negotiating directives for these agreements[46] suggest that they will include provisions on foreign direct investment (which is part of the EU CCP), but exclude a dispute settlement mechanism for investment, a highly politically sensitive issue for both Australia and New Zealand. Regulatory areas will most probably fall under areas of ERTA doctrine and implied exclusive competences.

6 REFERENCES

D. H. D. Dorn & G. H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States,* 103 Am. Econ. Rev. 2121–2168 (2013).

K. Bagwell & R. W. Staiger, *A Theory of Managed Trade*, 80 Am. Econ. Rev. 779–795 (1990).

M. Baltensperger & U. Dadush, *The European Union-Mercosur Free Trade Agreement-Prospects and Risks*, Bruegel Policy Contributions 32541 (2019).

[45] Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (OJ L 444, 31.12.2020).

[46] *See*, http://data.consilium.europa.eu/doc/document/ST-7661-2018-ADD-1-DCL-1/en/pdf and, http://data.consilium.europa.eu/doc/document/ST-7663-2018-ADD-1-DCL-1/en/pdf.

C. Bellora, J. Fouré & L. Fontagné, *Macroeconomic Impact of the CETA*, CEPII (2019)

Research Report 2019–01.

G. Berlingieri, H. Breinlich & S. Dhingra, *The Impact of Trade Agreements on Consumer Welfare – Evidence from the EU Common External Trade Policy*, 16(6) J. Eur. Econ. Association 18811928 (2018).

I. Borchert, P. Conconi, M. Di Ubaldo & C. Herghelegiu, *The Pursuit of Non-Trade Policy Objectives in EU Trade Policy,* CEPR Discussion Paper 14655 (2020).

L. Cernat & F. Mustilli, *Trade and Labour Market Adjustments: What Role for the European Globalisation Adjustment Fund?*, 53 Intereconomics 79–86 (2018).

P. Conconi & C. Perroni, *Issue Linkage and Issue Tie-In in Multilateral Negotiations,* 57 J. Int'l Econ. 423–447 (2002).

Y. Decreux, C. Milner & N. Péridy, *The Economic Impact of the Free Trade Agreement (FTA) Between the European Union and Korea,* CEPII Research Report, 2010–02 (2010).

S. Galle, A. Rodriguez-Clare & M. Yi, *Slicing the Pie: Quantifying the Aggregate and Distributional Effects of Trade*, NBER Working Paper 23737 (2017).

G. M. Grossman, *The Purpose of Trade Agreements*, in *Handbook of Commercial Policy* (K. Bagwell & R. Staiger eds, Elsevier, Amsterdam, North-Holland 2016).

G. M. Grossman & E. Helpman, *The Politics of Free-Trade Agreements*, 85 Am. Econ. Rev. 667–690 (1995).

R. Harte, L. Puccio & M. Szczepanski, *Interactions Between Trade, Investment and Trends in EU Industry*, in-depth analysis PE 608.695, European Parliamentary Research Service, Members' Research Service (2017).

H. G. Johnson, *Optimum Tariffs and Retaliation*, 21 Rev. Econ. Stud. 21, 142–153 (1954).

D. M. Kleimann & G. Kübek, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15,* 45 Legal Issues Econ. Integration 13–45 (2018).

C. Lakatos & L. Nilsson, *The EU-Korea FTA: Anticipation, Trade Policy Uncertainty and Impact,* Rev. World Econ. 153, 179–198 (2017).

L. Lechner, *The Domestic Battle Over the Design of Non-Trade Issues in Preferential Trade Agreements*, 23 Rev. Int'l Pol. Econ. 840–871 (2016).

N. Limão, *Are Preferential Trade Agreements with Non-Trade Objectives a Stumbling Block for Multilateral Liberalization?,* 74 Rev. Econ. Stud. 821–855 (2007).

L. Puccio, *EU-US Negotiations on TTIP: A Survey of Current Issues*, in-depth analysis, European Parliamentary Research Service (2016).

L. Puccio, *Policy Measures to Respond to Trade Adjustment Costs*, Briefing, European Parliamentary Research Service (2017).

A. Suse & J. Wouters, *The Provisional Application of the EU's Mixed Trade and Investment Agreements*, Working Paper No. 201 (2018).

P. Van Elsuwege, *Legal Creativity in EU External Relations: The Stabilisation and Association Agreement Between the EU and Kosovo',* Eur. Foreign Aff. Rev. 393–410 (2017).

P. Van Elsuwege & M. Chamon, *The Meaning of 'Association' Under EU Law: A Study on the Law and Practice of EU Association Agreements,* European Parliament (2019).

6 APPENDIX

Table A-1 Current 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	No	0/1	No	Yes

Country	National/Federal Level		Regional Level	Possible Referendum
	Approval	Chambers	Approval	
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
Total	26/27 Members		1 Member State	16/27 Member States
	36/39 Federal Chambers			

Note: Authors' elaboration based on a Background Briefing for National Parliaments by 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 A-2 List of EU Trade Agreements Notified to the WTO

Agreement	Year of Signature	Current Status (Date of Application)	Mixed	Type
EU – Switzerland - Liechtenstein	1972	In force (1973)	Yes	FTA
EU – Iceland	1972	In force (1973)	Yes	FTA
EU – Norway	1973	In force (1973)	Yes	FTA
EU – Andorra	1991	In force (1991)	No	CU
EU – San Marino	1991	In force (2002)	No	CU
European Economic Area (EEA)	1992	In force (1994)	Yes	EIA
EU – Turkey	1995	In force (1996)	Yes	CU
EU – Tunisia	1995	In force (1998)	Yes	FTA
EU – Israel	1995	In force (2000)	Yes	FTA
EU – Morocco	1996	In force (2000)	Yes	FTA

Agreement	*Year of Signature*	*Current Status (Date of Application)*	*Mixed*	*Type*
EU – Faroe Islands	1996	In force (1997)	Yes	FTA
EU – Palestinian Authority	1997	In force (1997)	Yes	FTA
EU – Jordan	1997	In force (2002)	Yes	FTA
EU – Mexico	1997	In force (2000)	Yes	FTA & EIA
EU – South Africa	1999	In force (2000)	Yes	FTA
EU – North Macedonia	2001	In force (2004)	Yes	FTA & EIA
EU – Egypt	2001	In force (2004)	Yes	FTA
EU – Algeria	2002	In force (2005)	Yes	FTA
EU – Lebanon	2002	In force (2003)	Yes	FTA
EU – Chile	2002	In force (2003)	Yes	FTA & EIA
EU – Albania	2006	In force (2009)	Yes	FTA & EIA
EU – Montenegro	2007	In force (2010)	Yes	FTA & EIA
EU – Serbia	2008	In force (2013)	Yes	FTA & EIA
EU – Bosnia and Herzegovina	2008	In force (2015)	Yes	FTA & EIA
EU – CARIFORUM	2008	Provisionally applied (2008)	Yes	FTA & EIA
EU – Côte d'Ivoire	2008	Provisionally applied (2016)	Yes	FTA
EU – Cameroon	2009	Provisionally applied (2014)	Yes	FTA
*EU – Pacific	2009	Provisionally applied (2009)	Yes	FTA
*EU – Eastern and Southern Africa	2009	Provisionally applied (2012)	Yes	FTA
EU – South Korea	2010	In force (2015)	Yes	FTA & EIA
*EU – Colombia/Ecuador/Peru	2012	Provisionally applied (2013)	Yes	FTA & EIA
EU – Central America	2012	Provisionally applied (2013)	Yes	FTA & EIA
EU – Georgia	2014	In force (2016)	Yes	FTA & EIA
EU – Moldova	2014	In force (2016)	Yes	FTA & EIA
EU – Ukraine	2014	In force (2017)	Yes	FTA & EIA

Agreement	*Year of Signature*	*Current Status (Date of Application)*	*Mixed*	*Type*
EU – Southern African Development Community	2016	Provisionally applied (2016)	Yes	FTA
EU – Ghana	2016	Provisionally applied (2016)	Yes	FTA
EU – Canada	2016	Provisionally applied (2017)	Yes	FTA & EIA
EU – Japan	2018	In force (2019)	No	FTA & EIA
EU – Singapore	2018	In force (2019)	No	FTA & EIA
EU – Vietnam	2019	Signed	No	FTA & EIA

Note: Authors' elaboration based on information available at (sources consulted on 29 April 2020), http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=918&lang=1&redirect=1 and, https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_in-place. ⋆ Some countries within the group joined the agreement at a later date. FTA, CU and EIA stand for Free Trade Agreement, Customs Union and Economic Integration Agreement, respectively.

Table A-3 Competences and Legal Basis within EU-Singapore Agreement

Competence Area	*Type of External Competence*	*Basis for Competence*
Chapters on 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 on FDI	Exclusive competence	Article 3(1) TFEU, Article 207 TFEU
Provisions on the non-FDI investments	Shared competence	Article 216(1) TFEU, article 63 TFEU
ISDS	Shared competence	EU and MS may both be respondent

Competence Area	*Type of External Competence*	*Basis for Competence*
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

Note: Authors' elaboration based on Opinion 2/15.

Table A-4 Competences and Legal Basis in EU Trade Agreements

Main Policy Area	*Requirement of Mixity*	*Competence(s) Involved*	*Competence Type*	*Legal Tests for Determining Mixity or Non-mixity in Areas Depending on Content*	*Selected Jurisprudence References for Legal Basis and (Tests)*
Investor-state dispute settlement (as currently designed)	Mixity	FDI, portfolio investment and jurisdiction of national courts	EU and Member States		Opinion 2/15
Portfolio Investment	Mixity	Internal Market	Shared under Article 4 TFEU		Opinion 2/15
Environment	Mixity	Environment (Article 192 TFEU)	Shared under Article 4 TFEU		Opinion 2/00; Joined Cases C-626/15 and C-659/16
Energy (beyond trade related)	Mixity	Energy (Article 194 TFEU)	Shared under Article 4 TFEU		Case C-490/10
Security	Mixity	CFSP/ CSDP (Title V TEU)	Member States		Case C-658/11

Main Policy Area	*Requirement of Mixity*	*Competence(s) Involved*	*Competence Type*	*Legal Tests for Determining Mixity or Non-mixity in Areas Depending on Content*	*Selected Jurisprudence References for Legal Basis and (Tests)*
Transport services	Depends on content	Transport (Part III, Title VI TFEU)	Either shared under Article 4 TFEU or exclusive under Article 3(2) TFEU	Article 3(2) TFEU: agreement foreseen in EU legislation; ERTA doctrine; necessity test	Opinion 1/08; Opinion 2/15; 'Open Skies' agreements cases such as Case C-471/98; (Reference for ERTA doctrine and necessity test: Case 22/70; opinion 1/76)
IP rights	Depends on content	CCP (Article 207 TFEU) or/ and Internal Market	Either exclusive under Article 3(1) TFEU or shared under Article 4 TFEU	Test 1: does content go beyond 'commercial aspect of IP rights'; if Test 1 is positive then absorption test needed to assess single or dual legal basis	Case C-414/11, Daiichi Sankyo and co; Opinion 3/15; Opinion 2/15
Trade and Sustainable development	Depends on content	CCP (Article 207 TFEU) or/ and Environment and Labour	Either exclusive under Article 3(1) TFEU or shared under Article 4 TFEU	Absorption Test to assess the need for Single or Dual Legal basis	Opinion 2/15 (References on absorption test and dual legal basis: opinion 1/78; opinion; opinion 2/00)
Justice and Home Affairs	Depends on content	Area of Freedom, Security and Justic (Part III, Title V TFEU)	Either shared under Article 4 TFEU or exclusive under Article 3(2) TFEU	Article 3(2) TFEU: agreement foreseen in EU legislation; ERTA doctrine; necessity test	For example: opinion 1/03 (Reference for ERTA doctrine and necessity test: Case 22/70; opinion 1/76)

Main Policy Area	*Requirement of Mixity*	*Competence(s) Involved*	*Competence Type*	*Legal Tests for Determining Mixity or Non-mixity in Areas Depending on Content*	*Selected Jurisprudence References for Legal Basis and (Tests)*
Sectoral regulatory cooperation	Depends on content	Depends on cooperation area covered	Either shared under Article 4 TFEU or exclusive under Article 3(2) TFEU	Article 3(2) TFEU: agreement foreseen in EU legislation; ERTA doctrine; necessity test	(Reference for ERTA doctrine and necessity test: Case 22/70, ERTA; opinion 1/76)
Culture (including audiovisual provisions)	Depends on content	CCP (article 207(4) TFEU) or/ and Culture (Article 163 (3) TFEU)	Either exclusive under Article 3(1) TFEU or EU competences under Article 6 TFEU with MS competences	Absorption Test needed to assess if provisions go beyond CCP and if they fall under Article 163(3) TFEU	(References on absorption test and dual legal basis: opinion 1/78; opinion 2/00)

Note: Authors' elaboration.