A Natureza Jurídica dos Acordos de Comércio Livre de Nova Geração: Lições da Saga CETA

The Legal Nature of New Generation Free Trade Agreements: Lessons from the CETA Saga

Francisco Pereira Coutinho

Abstract—O Acordo Económico e Comercial Global (CETA) é um acordo bilateral "misto" de comércio livre de "nova geração" assinado a 30 de outubro de 2016 entre o Canadá e a União Europeia, juntamente com os seus Estados-Membros. Na União Europeia, os acordos comerciais "mistos" seguem um procedimento de adoção que determina, na melhor das hipóteses, um atraso substancial à sua entrada em vigor, e, na pior, um veto por parte dos Estados-Membros que prejudica a posição internacional da União Europeia. A Comissão Europeia cedeu à pressão dos Estados-Membros e decidiu qualificar o CETA como um "acordo misto" em vez de um "acordo exclusivamente europeu". Que a "guardiã dos Tratados" não tinha qualquer margem de manobra constitucional na escolha da forma de aprovação do CETA tornou-se claro após a decisão do Tribunal de Justiça sobre o acordo de comércio livre negociado entre a União Europeia e Singapura (Parecer 2/15). A natureza "mista" do CETA determina que a sua aplicação seja limitada e provisória, e esteja sob uma ameaça existencial permanente de uma espada de Dâmocles na forma de um veto nacional.

Palavras-Chave — Canadá; CETA; Tribunal de Justiça; União Europeia; Acordos mistos.

Abstract—The Comprehensive Economic and Trade Agreement (CETA) is a "new generation" bilateral "mixed" free trade agreement signed on 30 October 2016 between Canada and the European Union alongside its Member States. In the European Union, "mixed" trade agreements follow an adoption procedure that determines, in the best-case scenario, a substantial delay to their entry into force, and, in the worst, a veto by Member States that damages the international standing of the European Union. The European Comm̌mission bowed to Member States' pressure and decided to qualify CETA as a "mixed agreement" instead of an "EU-only agreement". That the "guardian of the Treaties" had no constitutional leeway on the choice of CETA's approval form became clear after the decision of the Court of Justice on the free trade agreement negotiated between the European Union and Singapore (Opinion 2/15). CETA's "mixed" nature determines that its application is limited and provisional, and under a permanent Damocles sword existential threat.

Keywords — Canada; CETA; Court of Justice; European Union; Mixed Agreements.

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• ***Francisco Pereira Coutinho.***

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1 Introduction

The European Union emerged in the middle of the twentieth century as an economic federal union of States (Forsyth 1982, 5). Negotiating and adopting free trade agreements remains one of its raisons d'être. Contrary to Boris Johnson's claim that the post-Brexit United Kingdom would be easily "striking free trade deals around the world" (Rayner 2020), the negotiating power of a State, even a G7 member, is pale in comparison to the world largest economy. Ever since the Rome Treaty (1957) granted the European Economic Community ius tractandi (Article 113), dozens of international agreements were concluded with third countries and international organisations[1]. The importance of international agreements for the European economy cannot be overstated: about 31 million jobs in the Union (1/7 of the total) are, directly or indirectly, linked to external commerce (Rueda-Cantuche and Sousa 2016, 1).

The Lisbon Treaty substantially enlarged the legal capacity of the Union to adopt "new generation" bilateral free trade agreements (Cremona 2017); i.e. "a trade agreement which contains, in addition to the classical provisions on the reduction of customs duties and of non-tariff barriers to trade in goods and services", provisions that reflect new trends of contemporary international law, "such as intellectual property protection, investment, public procurement, competition and sustainable development" (Court of Justice 2017, §17)[2] .

The Comprehensive Economic and Trade Agreement (CETA) is an example of a "new generation" bilateral free trade agreement signed on 30 October 2016 between Canada, on one part, and the European Union and the Member States, on the other part. It is estimated to increase bilateral trade by more than 23 per cent and an annual growth of 12 billion Euro of the Union's GDP[3].

In stark contrast with the political bonhomie that usually encircles the conclusion of free trade agreements, CETA is being fiercely challenged by anti-globalization movements, which contend that it promotes a dilution of social, environmental, and public health standards in Europe, and is a trojan horse for big corporations to forfeit the jurisdiction of national courts (Foodwatch 2022). Such a public outcry transformed the negotiation, approval, and ratification of CETA into an unprecedented saga of the Union's Common Commercial Policy (CCP).

On 28 June 2017, the President of the European Commission, Jean-Claude Juncker, informed the Heads of State and Government of the Member States that it would be seeking CETA's approval as an "EU-only agreement" (Vicenti 2017) i.e., an agreement to be adopted solely by the Union and Canada, as its provisions fell under legal basis granting exclusive external competence to the Union.

This initiative met staunch resistance. Several representatives of European affairs national parliament commissions declared, under the political dialogue mechanism, that CETA needed national ratification, as it "contains provisions that concern policy areas which are within the competences of the Member States"[4] . The same perspective was taken by national ministers for commerce in the Council[5].

1. The complete list can be found here: https://eur-lex.europa.eu/browse/directories/inter-agree.html.

2. Opinion 2/15, 16 May 2017, *Free Trade Agreement between the European Union and the Republic of Singapore*, ECLI:EU:C:2017:376, §17.

3. European Commission, "EU-Canada agree deal to boost trade and investment", Memo, 26 September 2014, available at http://europa.eu/rapid/press-release_MEMO-14-542_en.htm. Since September 2017, CETA's provisional application triggered a substantial increase in the trade of goods and services between Canada and the EU. See https://carleton.ca/tradenetwork/an-overview-of-canada-eu-trade-performance/

4. "Letter to Mr De Gucht Role of national Parliaments in free trade agreements", 26 June 2014, available at http://www.ipex.eu/IPEXL-WEB/scrutiny/COM20140153/huors.do. See also the position of the German Bundestag [Drucksache 18/8072, 12 April 2016, "Die transatlantischen Beziehungen zukunftsfest weiterentwickeln", available at http://dip21.bundestag.de/dip21/btd/18/080/1808072.pdf, §9], or the French National Assembly [Résolution Européenne sur le projet d'accord économique et commercial entre l'Union européenne et le Canada, Texto No 428 ("Petite Loi"), Ordinary Session 2014/2015, 23 November 2014, available at http://www.assemblee-nationale.fr/14/ta/ta0428.asp, §1].

5. Foreign Affairs Council (Commerce), 8737/16, Meeting No. 3463, 13 May 2016, available at http://www.consilium.europa.eu/pt/meetings/fac/2016/05/12-13/.

The pressure paid off with the Commission announcing on 5 July 2017 that CETA would after all be submitted to the Council as a "mixed agreement"[6]. According to Commissioner Cecilia Malmström, this was a political stance:

"From a strict legal standpoint, the Commission considers this agreement to fall under exclusive EU competence. However, the political situation in the Council is clear, and we understand the need for proposing it as a ńmixedż agreement, in order to allow for a speedy signature"[7].

"Mixed agreements" are international agreements which, for legal or political reasons, are jointly adopted by the Union and by all or some of its Member States with one or several third States and/or international organisations (Schermers 1983, 25). They serve pragmatic purposes:[8] beyond avoiding constitutional questions related to the delimitation of vertical external competences (Maresceau 2010, 12-13; Eeckout 2011, 221; Möldner 2011, §5), "mixed agreements" provide Member States greater visibility in the international relations (Rosas 2000, 201; Schütze 2011, §17), preventing at the same time the "freezing" of the Union's competences[9].

Taking the "mixed path" for the approval of an international agreement is not without consequences. While a "EU-only agreement" is ratified, usually in a few months, after being approved by a simple majority in the European Parliament and by a qualified majority in the Council[10], the entry into force of a "mixed agreement" requires national ratification. It is estimated that CETA requires the approval of thirty-eight national and regional parliaments (Kleimann and Kübek 2016, 1; Silva Pereira 2017, 187). Even referenda cannot be excluded: a consultative referendum was called in the Netherlands on the ratification of the (mixed) association agreement between the EU and Ukraine[11].

CETA showcases that the spectre of the Union becoming a vetocracy in what regards the approval of "mixed agreements" is all but real. Although subjected to qualified majority under Article 207(4)(§1) TFEU[12], CETA's signature approval by the Council was threatened by Bulgaria and Romania for domestic reasons related to visa entry requirements of their citizens into Canada (Gotev 2017)[13], and more notoriously in Belgium,

6. *Proposal on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part*, and the European Union and its Member States, of the other part, 5 July 2016, COM (2016) 444 Final, at 4.

7. European Commission Press Release, European Commission proposes signature and conclusion of EU-Canada trade deal, 5 July 2016, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2371.

8. Advocate-General Eleanor Sharpston, C-240/09, 15 July 2010, Lesoochranárske zoskupenie VLK, ECLI:EU:C:2010:436, para. 56.

9. Baere (2014, 738), which argues that a precise delimitation of competences between the Union and the Member States could hinder the development of the Union's constitutional order.

10. Article 218(8)(§1) TFEU. Unanimity is necessary: i) when the agreement covers a field for which unanimity is required for the adoption of a Union act (Article 218(8)(2§) TFEU); ii) in association agreements (Articles 217 and 218(8)(2§) TFEU); iii) in agreements that establish an economic, financial and technical cooperation with accession candidate countries (Articles 212 and 218(8)(2§) TFEU); iv) in the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6(2) TEU and Article 218(8)(2§) TFEU); v) in agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, whenever such agreements include provisions for which unanimity is required for the adoption of internal rules (Article 207(4)(2§) TFEU); vi) in agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity (Article 207(4)(3§)(a) TFEU); vii) in agreements in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them (Article 207(4)(3§)(b) TFEU).

11. On 6 April 2016, 61,1% of voters rejected the agreement. Although the electoral turnout of 32% was less than what it was required for a binding result (30%), the Dutch Parliament ratified the agreement after the Dutch Government obtained clarifications on its interpretation from the other Member States (Van der Loo 2017a).

12. See, however, Kempen (2016, 11), which contends that CETA had to be approved by the Council by unanimity, as it constitutes "a step backwards in Union Law as regards the liberalisation of the movement of capital to or from third countries" (Article 64(3) TFEU), and because it discriminates against EU citizens. The threat paid off with the Canadian Government promising to implement a visa waiver by December 2017 (Novinite, 2017).

13. The threat paid off with the Canadian Government promising to implement a visa waiver by December 2017 (Novinite, 2017).

by the veto of the Walloon parliament[14]. By October 2022, six years after signature and five years after a provisional application which began on 21 September 2017 (Article 30.7.3), CETA had been ratified by only sixteen Member States[15]. CETA's current application is limited to the parts of the agreement falling within the competence of the Union[16], and (indefinitely) pending on the completion of national ratification procedures. CETA must be ratified by every Member State before it will come into force. In another words, *definitive* failure of ratification in one Member State determines the termination of the agreement:

"If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated"[17].

This article aims at ascertaining whether CETA had to be adopted as a "mixed agreement", or whether the European Commission was entitled to present it for approval as an "EU-only agreement". I will argue that this is a constitutional question pertaining to the division of competences between the Union and the Member States not subjected to the political will of the "guardian of the Treaties" (section two). In light of the case law of the Court of Justice, CETA had to be approved as a "mixed agreement" as it includes subject-matters falling within shared competences of the Union and the Member States (section three). Adopting CETA as a "mixed" bilateral free trade agreement determines, at best, a substantial delay on its entry into force, and, at worst, a veto to its ratification that will severely damage the international standing of the European Union. I will finish with an analysis of the solutions that could be pursued to prevent and mitigate a definitive refusal of ratification of CETA by a Member State (section four).

2 The European Unions Ius Tractandi

2.1 General Remarks

The European Union participates in international relations through the conclusion of agreements with third States and international organisations. The principle of conferral restricts the legal capacity of the Union to the adoption of agreements based on external competences bestowed upon it by the Member States (Article 5(2) TEU). According to Article 216(1) TFEU,

14. In the Byzantine Belgium constitutional system, the federal Government requires consent from five regional parliaments to decide on the signature and approval of international agreements in the Council (Economist, 2016a). On 14 October 2016, the Parliament of Wallonia rejected granting federal authorization for the signature of CETA ("Projet de motion déposé en conclusion du débat sur les projets de Traité CETA et de Déclaration interprétative du traité, en application de l'article 70 du Règlement, par Mmes Zrihen, Simonet et Ryckmans (Doc. 605 (2016-2017) n.ř 1), C.R.A. No 3 (2016-2017), 14 October 2016, available at http://nautilus.parlement-wallon.be/Archives/2016_2017/CRA/cra3.pdf]. This stance was reversed two weeks later after the federal Government's pledge of submitting a request to the Court of Justice on the validity of CETA's Investor-State dispute settlement system ["Motion déposée en conclusion du débat sur l'Accord économique et commercial global (AECG-CETA)", 633 (2016-2017), No. 3, 28 October 2017, available at http://www.dirittounioneeuropea.eu/images/Mozione_Parlamento_Vallone.pdf.

15. See CETA ratification tracker, available at https://carleton.ca/tradenetwork/research-publications/ceta-ratification-tracker/.

16. Recital 4 of Council Decision (EU) 2017/38 of 28 October 2016. The provisional application of CETA does not include matters listed in the "Notice concerning the provisional application of the Comprehensive Economic and Trade" (JO, 16 September 2017, L 238/9).

17. Declaration 20 (Statement of the Council regarding the Termination of Provisional Application of CETA), 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, 13463 REV 1, 27 October 2016, Brussels, at 14. See also the German Federal Constitutional Court decision of 13 October 2016, 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvE 3/16, triggered by a constitutional complaint of 193.086 citizens, that declared that Germany has the power to terminate provisional application in its territory of CETA's provisions covered by the sphere of competences of the Member States through the written notification referred to in Article 30.7(3)(c) CETA.

the European Union may pursue international agreements in four circumstances: i) where the Treaties so provide; ii) where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties; iii) where it is provided for in a legally binding Union act; iv) where it is likely to affect common rules or alter their scope.

The *ius tractandi* of the Member States remains intact concerning external competences not conferred upon the Union (Article 4(1) TEU). This means that an international agreement concluded by the Member States and/or by the Union with third States and/or with other international legal persons may either be: i) an "EU-only agreement", when adopted solely by the Union; ii) a "national-only agreement", when adopted solely by Member States; iii) a "mixed agreement", when adopted jointly by the Union and its Member States. Ascertaining whether the EU may conclude an international agreement or whether it needs its Member States is thus a constitutional question related to the nature of a given external competence (2.2.), and to the scope of the treaty legal basis chosen for the conclusion of the international agreement (2.3.).

2.2 The External Competence of the Union

2.2.1 Exclusive Competence

Whenever the Union is granted an exclusive competence, Member States are, in the domestic realm, prevented from unilaterally enacting binding legal instruments, and, externally, from concluding international agreements without the Unions approval (Article 2(1) TFEU).

Article 3(1) TFEU portrays an exhaustive list of exclusive competence domains of the Union. Among them is the CCP, which is a rare example of a purely external competence of the Union[18].

The exclusivity of an external competence conferred upon the Union may stem explicitly from Article 3(1) TFEU (a priori exclusive competences) or from the fulfilment of one of the conditions set forth in Article 3(2) TFEU: the Union has an (implicit) exclusive external competence to adopt international agreements when the conclusion of an international agreement is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its internal competence, and so far as such a conclusion may affect common rules or alter their scope.

The Union has an exclusive competence to conclude international agreements in four circumstances: i) when such a possibility is provided for in the Treaties (first situation provided for in Article 216(1) TFEU); ii) when, according to the principle of complementarity, the conclusion of the international agreement "is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties" (second situation provided for in Article 216(1) TFEU) in one of the Union's exclusive competences set forth in Article 3(1) TFEU, or when an internal competence cannot be exercised by the Union without the recognition of an external competence (second situation provided for in Article 3(2) TFEU); iii) when the ius tractandi of the Union is provided for in a legislative act of the Union (third situation provided for in Article 216(1) TFEU and first situation provided for in Article 3(2) TFEU)[19]; iv) when the conclusion of an international agreement affects common rules or alters their scope (fourth situation provided for in Article 216(1) TFEU and third situation provided for in Article 3(2) TFEU).

The exclusivity of the Union's *ius tractandi* stems frequently from the internal exercise of a shared competence. According to Article 4(1) TFEU, the Union shares competences with the Member States where the Treaties confer upon it a competence which does not relate to an exclusive (Article 3 TFEU) or supporting (Article 6 TFEU) competence. The shared nature of the competence implies that it may be exercised either by the Union or by the Member States. The principle of pre-emption determines, however, that if the Union decides to exercise a shared competence, Member States can no longer exercise that competence (Article 2(2) TFEU). This means that from

18. General-Advocate Eleanor Sharpston, Opinion 2/15, 21 December 2016, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2016:992, §63.

19. A legislative act is, according to Article 289(3) TFEU, a legal act adopted through a legislative procedure.

that moment on, the Union acquires a de facto exclusive competence.

Pre-emption covers the elements governed "by the Union act in question and therefore does not cover the whole area"[20]. Pre-emption is, moreover, temporary: Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence concerning a specific part of a shared competence (Article 2(2) TFEU).

The recognition to the Union of an implicit exclusive external competence to conclude international agreements derives directly from the principles of primacy and sincere cooperation, as an independent external action of the Member States could affect the application of common rules adopted internally by the Union. To avoid the latter scenario, the Court of Justice developed the "ERTA doctrine": the exercise by the Union of an exclusive internal competence determines the automatic recognition of an external competence (parallelism of competences principle (in foro interno, in foro externo))[21]. The "ERTA effect" is triggered whenever there is a risk that common EU rules might be adversely affected by international commitments adopted by the Member States[22]. Such a finding does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully, being enough that those commitments fall within an area which is already largely covered by such rules[23]. Such an assessment must be based not only on the scope of the rules in question but also on their nature and content, as well as take into account not only the current state of EU law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis[24].

2.3 Shared Competence

Beyond shared competences subjected to pre-emption (*stricto sensu* shared competences), the TFEU recognizes as *latu sensu* shared competences: i) parallel or irregular competences, which cover the fields of research, technological development and space, development cooperation and humanitarian aid (Article 4(3) and (4) TFEU), in which the Union lacks pre-emption; ii) supporting competences listed in Article 6, in which the Union can only carry out actions to support, coordinate or supplement the action of the Member States, which can take the form of legal binding acts as long as they do not affect the competence of the Member States, and do not entail harmonisation of Member States' laws or regulations (Article 2(5) TFEU); iii) the competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy (Article 2(4) TFEU), which does not include the adoption of legislative acts (Article 24 (2)(2ğ) TEU), and does not affect the

20. Protocol No. 25 TFEU on the Exercise of Shared Competence (OJ, 115, 9 May 2008, at 307).

21. 22/70, 31 March 1971, AETR, ECLI:EU:C:1971:32, §§12-19.

22. C-114/12, 4 September 2014, Commission v. Council, EU:C:2014:2151, §68; Opinion 1/13, 14 October 2014, Convention on the civil aspects of international child abduction, EU:C:2014:2303, §71; or Opinion 3/15, 14 February 2017,*Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled*, EU:C:2017:114, §105.

23. Opinion 2/91, 19 March 1993, Convention Nž 170 of the International Labour Organization concerning safety in the use of chemicals at work, ECLI:EU:C:1993:106, §§25-26; Opinion 1/03, 7 February 2006,*Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, EU:C:2006:81, §126; C 114/12, Commission v. Council, EU:C:2014:2151, §§69-70; Opinion 1/13, 14 October 2014, Convention on the civil aspects of international child abduction, §§72-73; or Opinion 3/15, 14 February 2017, Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, EU:C:2017:114, §§106-107.

24. Opinion 2/91,*Convention Nž 170 of the International Labour Organization concerning safety in the use of chemicals at work*, ECLI:EU:C:1993:106, §25; Opinion 1/03, 7 February 2006, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, ECLI:EU:C:2006:81, §126.

competences of each Member State to formulate and conduct its own external policy[25].

The shared nature of a competence subjected to pre-emption *(stricto sensu)* which has not yet been exercised internally by the Union pursuant to Article 3(2) TFEU cannot be used to base the adoption of an "EU-only agreement". The same does not hold true regarding shared external competences not subjected to pre-emption, which cover domains that do not prevent the Union nor the Member States from exercising in tandem their *ius tractandi*, as long as they respect the reciprocal obligations stemming from the principle of sincere cooperation (Klamert 2014, 163-171).

The exercise of a shared external competence by the Union can be based: i) on Treaty provisions that foresee such a competence (first situation provided for in Article 216(1) TFEU)[26]; ii) be "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties" in shared competence domains (second situation provided for in Article 216(1) TFEU); or iii) be based in a legally binding act of a non-legislative nature (third situation provided for in Article 216(1) TFEU) or a legislative act that foresees the conclusion of international agreements in parallel competence domains (research, technological development and space, development cooperation and humanitarian aid) (third situation provided for in Article 216(1) TFEU and Article 4(3) and (4) TFEU)[27].

2.4 Choosing a Legal Basis

The principle of conferral mandates the Union to explicitly base the exercise of a competence to conclude an international agreement in a Treaty provision (legal basis)[28]. Determining the scope of a Treaty legal basis is, therefore, a condition to ascertain whether the Union alone has the competence to conclude an international agreement or whether such competence is shared with the Member States[29].

According to the Court of Justice, the choice of a legal basis for the conclusion of an international agreement must rest on objective factors that are amenable to judicial review, including the aim and content of the agreement[30]. Whenever doubts arise on which treaty legal basis should be adopted, the Luxembourg court follows the "centre of gravity" theory: if the examination of the agreement reveals that it pursues more than one purpose or that it includes two or more components, and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that agreement must be based on a single legal basis, namely that required by the main or predominant purpose or component[31]. If the international agreement includes, both as regards the aims pursued and its contents, two indissociably linked purposes or components, neither of which can be regarded as secondary or indirect as compared with the

25. Declarations 13 and 14 concerning the common foreign and security policy mention, in this regard, that the provisions in the TEU covering the Common Foreign and Security Policy "do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations", and "do not prejudice the specific character of the security and defence policy of the Member States".

26. E.g., in the domains of: i) the common foreign and security policy (Article 37 TEU); ii) the cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe (Article 166(3) TFEU), culture, in particular with the Council of Europe (Article 167(3) TFEU), and public health (Article 168(3) TFEU); iii) research, technological development and space (Article 186 TFEU), cooperation (Article 209(2) and 212(3) TFEU) and humanitarian aid (Article 214(4) TFEU).

27. Advocate-General Eleanor Sharpston, Opinion 2/15, 21 December 2016, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2016:992, footnote 24.

28. Opinion 2/00, 6 December 2001, Cartagena Protocol, EU:C:2001:664, §22.

29. Opinion 1/08, 30 November 2009, Conclusion of agreements in the context of the General Agreement on Trade in Services (GATS), EU:C:2009:739, §112.

30. C-137/12, 22 October 2013, Commission v. Council, EU:C:2013:675, para. 52; C-263/14, 14 June 2016, Parlament v. Council, ECLI:EU:C:2016:435, §43.

31. C-137/12, Commission v. Council, EU:C:2013:675, §53. In this case, the Court of Justice declared that the decision to approve the international agreement on the legal protection of services pursued "an objective that has a specific connection to the common commercial policy, which means that, for the purposes of the adoption of that decision, Article 207(4) TFEU, together with Article 218(5) TFEU, must be cited as the legal basis and which also means that the signing of the Convention on behalf of the European Union falls within the exclusive competence of the European Union, pursuant to Article 3(1)(e) TFEU. By contrast, the improvement of the conditions for the functioning of the internal market is an ancillary objective of that decision that provides no justification for its adoption on the basis of Article 114 TFEU"(idem, para. 76).

other, the decision of the Union approving that agreement should be based on the corresponding legal basis[32].

3 The Competence of the European Union to Approve CETA

3.1 The Common Commercial Policy

The CCP is an exclusive external competence of the Union based on the "conclusion of tariff and trade agreements relating to trade in goods and services" (Articles 3(1)(e) and 207(1) TFEU). The Lisbon Treaty broadened the scope of the CCP through the inclusion, in Article 207(1) TFEU, of references to the protection of foreign direct investment and to commercial aspects of intellectual property. This material enlargement had immediate effects in the case law of the Court of Justice: if before the entry into force of the Lisbon Treaty, the European Community was not entitled to adopt TRIPS (Trade Related Aspects of Intellectual Property) as an "EU-only agreement"[33], afterwards that agreement was considered to fall within the CCP[34].

May then Article 207(1) TFEU be exclusively invoked for the conclusion of CETA? If not, can CETA still be approved as an "EU-only agreement" based also on exclusive implicit competences?

Since CETA "has identical objectives and essentially the same contents as the Free Trade Agreement with Singapore (EUSFTA)", and therefore the Union's competence is the same in both cases[35], the answer to these questions can be found in the opinion of the Court of Justice concerning the bilateral free trade agreement concluded with Singapore (Opinion 2/2015)[36]. Although it did not use of the "centre of gravity" theory (3.1.1.), the Court of Justice considered that almost the entirety of EUSFTA provisions were comprised within the exclusive competence of the Union (3.1.2.). In the shared competence with the Union were only included the provisions regarding portfolio investments and the investor-State dispute settlement mechanism (3.1.3).

3.1.1 The Centre of Gravity Theory

Without surprise, as even the European Commission recognized that provisions concerning cross-border transport services and non-direct foreign investment do not fall within the CCP[37], the Court of Justice did not apply the "centre of gravity" theory in Opinion 2/2015, thereby assuming that EUSFTA is an agreement that pursues several purposes and has multiple components, neither of which can be identifiable as the main or predominant and the others merely as incidental or having a very limited scope.

The Luxembourg court recognized as autonomous components of EUSFTA: i) the provisions falling within the CCP; ii) the provisions that liberalize transport services between the EU and Singapore, which fall within the transport policy; iii) the provisions concerning non-direct foreign investment, which fall within the free movement of capital provisions of the TFEU.

3.1.2 Exclusive Competence of the European Union

The main conclusion to draw from Opinion 2/15 is that the Union is competent to negotiate and adopt "new generation" free trade agreements as "EU-only agreements".

The Court of Justice considered that almost the entirety of EUSFTA provisions fall within the CCP, and therefore are included in the exclusive

32. C-94/03, 10 January 2006, Commission v. Council, EU:C:2006:2, §51; C-263/14, 14 June 2016, Parlament v. Council, ECLI:EU:C:2016:435, §44.

33. Opinion 1/94, 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, ECLI:EU:C:1994:384, §§98 and 105.

34. C 414/11, 18 July 2013, Daiichi, ECLI:EU:C:2013:520, §61.

35. Proposal on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part, 5 July 2016, COM (2016) 444 Final, at 4.

36. Opinion 2/15, 17 May 2017, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376.

37. Idem, §§14 and 16.

competence of the Union (Article 3(1) TFEU and first situation provided for in Article 216 (1) TFEU). This is the result of the amendments introduced in Article 207(1) TFEU by the Lisbon Treaty, and from a broad jurisprudential interpretation of the exclusive CCP's external competence of the Union, according to which an international agreement provision falls within the CCP whenever it relates specifically to international trade, "in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade", not being enough the mere fact that "is liable to have implications for international trade"[38].

A specific connection to international trade was found in provisions of EUSFTA concerning: i) market access for goods[39] (Chapters 3 to 6); ii) non-tariff barriers to trade and investment in renewable energy generation[40] (Chapter 7); iii) trade in services (Chapter 8), with the exception of supply of services in the field of transport, which is excluded from the CCP by Article 207(5) TFEU[41]; iv) the protection of foreign direct investment (section A of Chapter 9)[42]; v) public procurement (Chapter 10)[43]; vi) intellectual property (Chapter 11)[44]; vii) competition (Chapter 12)[45]; viii) sustainable development (Chapter 13)[46], thereby proving that the CCP is not confined to the pursuit of economic objectives related to the gradual liberalization of trade (Van der Loo 2017b, 4).

The "ERTA doctrine" (fourth situation provided for in Article 216(1) TFEU and third situation provided for in Article 3(2) TFEU) was invoked to include provisions of EUSFTA concerning cross-border transport services (Chapters

38. C-414/11, Daiichi, ECLI:EU:C:2013:520, §51; C-137/12, 22 October 2013, Commission v. Council, EU:C:2013:675, §57; Opinion 3/15, 14 February 2017, Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, EU:C:2017:114, §61.

39. Opinion 2/15, 17 May 2017, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376, §§40-48.

40. Idem, §§72-74.

41. Idem, §53-57. The Court upheld the case law according to which provisions that cover the four modes of supply of services that follow the classification used by the World Trade Organization (WTO) fall within the CCP (Opinion 1/08, 30 November 2009, Conclusion of agreements in the context of the General Agreement on Trade in Services (GATS), EU:C:2009:739, §§4, 118 and 119).

42. Opinion 2/15, 17 May 2017, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376, §§78 and 110. The Court pursued a declarative interpretation of Article 207(1) TFEU, considering that the use, by the framers of the TFEU, of the words "foreign direct investment" "is an unequivocal expression of their intention not to include other foreign investment in the common commercial policy" (§83), and rejected the restrictive interpretation of the concept of "foreign direct investment" proposed by the Council and by some Member States, according to which the CCP includes the admission but not the protection of foreign direct investment (idem, §§85-87). It also declared that the EU/Singapore agreement does not include any compromise governing the system of property ownership, which is an exclusive competence of the Member States according to Article 345 TFEU, considering that Article of 9.6. EUSFTA "seeks solely to make any nationalisation or expropriation decisions subject to limits which are intended to guarantee investors that such a decision will be adopted under equitable conditions and in compliance with general principles and fundamental rights, in particular with the principle of non-discrimination" (idem, §107).

43. Idem, §§75-77. Excluded from the CCP but subjected to an implicit exclusive external competence of the Union, are the commitments concerning public procurement in the field of transport (idem, §§219-224).

44. Idem, §§111-130.

45. Idem, §§131-138.

46. Idem, §§139-167. According to the Court of Justice, the provisions concerning sustainable development "govern trade between the European Union and the Republic of Singapore by making liberalisation of that trade subject to the condition that the Parties comply with their international obligations concerning social protection of workers and environmental protection" (§166). This conclusion is based in the obligation to pursue the CCP according to the principles and objectives of the Union's external action (Article 21(3) TEU and 205-207(1) TFEU), which include sustainable development linked to the preservation and improvement of the quality of the environment and the sustainable management of global natural resources (Article 21(1)(f) TEU) (§147). The possibility of Article 21 TEU broadening the material scope of the CCP was rejected by General-Advocate Eleanor Sharpston (C-240/09, 15 July 2010, Lesoochranárske zoskupenie VLK, ECLI:EU:C:2010:436, §495) with the argument that such provision serves only the purpose of obliging the Union to contribute to certain objectives in its policies and activities.

8 and 10) within the implicit exclusive external competence of the Union. Although the conclusion of international agreements in the field of transports is based in the transports common policy (Article 207(5) TFEU), which is a shared competence (Article 4(2)(g) TFEU), the Court considered that the compromises assumed in EUSFTA concerning the transport sector could affect, or even alter, the common rules laid down in EU secondary law which apply to the supply of those services in that domain[47].

In the exclusive external competence of the Union were, finally, included: i) institutional provisions, namely those concerning exchange of information, notification, verification, cooperation, mediation, decision-making power and transparency (Chapters 14, 16 and 17), which have an ancillary nature, and thus fall within the same competence as the provisions they support[48]; ii) provisions that institute the dispute settlement mechanism between the parties on the interpretation and application of Chapters 2 to 12 EUSFTA (Chapter 15), since the competence of the European Union to conclude international agreements necessarily entail the power to submit itself to the decisions of a body which, whilst not formally a court, essentially performs judicial functions, such as the Dispute Settlement Body created within the framework of the WTO Agreement[49].

3.1.3 Shared Competences

The only material domain of EUSFTA which the Court of Justice considered not to be included in the exclusive competence of the Union concerned non-direct investment (Chapter 9, section A), namely portfolio investment, which is an investment that takes place in the form of the acquisition of company securities with the intention of making a financial investment without any intention to influence the management and control of the undertaking.

The European Commission argued that EUSFTA provisions concerning portfolio investment fall within the exclusive competence of the Union through the "ERTA doctrine" (fourth situation provided for in Article 216(1) TFEU and third situation provided for in Article 3(2) TFEU), as they "affect" TFEU provisions on free movement of capital (Article 63 TFEU). The argument that "common rules" (Article 3(2) TFEU) also include primary law was, however, rejected by the Court of Justice:

> *"(...) in the light of the primacy of the EU and FEU Treaties over acts adopted on their basis, (...) agreements concluded by the European Union with third States, derive their legitimacy from those Treaties and cannot, on the other hand, have an impact on the meaning or scope of the Treaties' provisions. Those agreements accordingly cannot "affect" rules of primary EU law or "alter their scope", within the meaning of Article 3(2) TFEU"*[50].

This conclusion does not prevent an overlap between commercial and investment policies. According to the Court of Justice, the provisions that cover portfolio investment fall in the shared competence, as an international agreement concerning such investment may be necessary to achieve, "within the framework of the Union's policies, one of the objectives referred to in the Treaties" (second situation provided for in Article 216(1) TFEU). Since the free movement of capital and payments between Member States and third States, laid down in Article 63 TFEU, is not formally binding on third States, the conclusion of international agreements which contribute to the establishment of such free movement on a reciprocal basis may be classified as necessary in order to fully achieve such free movement, which is one of the objectives of Title IV ("Free movement of persons, services and capital"), which falls within

47. Opinion 2/15, 17 May 2017, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376, §193 (services of international maritime transport), 202 (rail transport services), §211 (road transport services) and ğ224 (public procurement in the transport domain). The Court considered that the provisions concerning internal waterways transport were accompanied, at most, by commitments of extremely limited scope that had no relevance when examining the nature of the competence (idem, §§216-217).

48. Idem, §§275 and 282.

49. Idem, §299.

50. Idem, §235.

the shared competence relating to the internal market (Article 4(2)(a) TFEU)[51].

Also covered by the shared competence between the Union and the Member States is the EUSFTA Investor-State Dispute Settlement mechanism (Chapter 9, Section B). Arbitration is an exclusive discretionary prerogative of an investor conditioned to the withdrawal of any pending similar claim submitted to a domestic court (Article 9.17.1(f) EUSFTA). Since Member States cannot oppose the investor submission of arbitration, the mechanism removes disputes from the jurisdiction of national courts, and cannot, therefore, be established without the Member States' consent[52].

3.2 CETA's Typology

"Mixed" agreements can be theoretically by classified as: i)*mandatory*, when they include provisions falling within the exclusive competence of the Union and the Member States; ii) *facultative*, when they include provisions falling under the exclusive competence of the Union and the shared competence, or only under shared competence; iii) *false*, when they include provisions falling under the exclusive competence of the Member States or under the exclusive competence of the Union[53]; iv) *incomplete*, when they are concluded by the Union with only some of the Member States (Schermers 1983, 23-33; Rosas 1998, 129-132; 2000, 203-206; Maresceau 2010; Möldner 2011, §§7-15; Klamert 2014, 183-185).

In Opinion 2/15, the Court of Justice declared that every provision of the agreement with Singapore fell under the exclusive competence of the Union, with the exception of those concerning investment portfolio and the Investor-State Dispute Settlement mechanism, which fell under the shared competence. Since no provision of EUSFTA was considered to fall under Member States exclusive competence, could CETA then be approved as an"EU-only agreement"? Or the fact that it included provisions falling under shared competences mandated its approval as a "mixed" agreement?

According to Advocate-General Juliane Kokott:

"Individual aspects of an agreement for which the (Union) has no competence internally "infect" the agreement as a whole and make it dependent on the common accord of the Member States. The picture created by the Commission itself in another context is also absolutely true in relation (to Article 207 TFEU). Just as a little drop of pastis can turn a glass of water milky, individual provisions, however secondary, in an international agreement based on the first subparagraph of (Article 207 TFEU) can make it necessary to conclude a shared agreement"[54].

The pastis metaphor was never used by the Court of Justice. It is, however, impressive as it demonstrates that the existence of a provision not merely instrumental or ancillary *included in the Member States competence* to force the approval of an international agreement as "mixed" is sufficient.

The possibility of the Union concluding as "EU-only agreements" international agreements that include provisions that fall under shared competence domains was endorsed by Advocate-Generals Whal and Sharpston[55]. This would en-

51. Idem, §§239-241.

52. Idem, §§288-293. To bypass the severe criticism of EUSFTA's Investor-State Dispute Settlement mechanism, CETA created an innovative institutionalized arbitration system that involved the establishment of a permanent investment dispute settlement tribunal, the Investment Court System (ICS). The procedural condition regarding the withdrawal or discontinuance of "any existing proceeding before a tribunal or court under domestic or international law" [Article 8.22 (1)(f)] remains untouched. See Diogo (2018).

53. Article 2(1) TFEU mentions that Member States, when empowered by the Union, may legislate and adopt legally binding acts in the Union's exclusive competence domains. The Union may thus authorize Member States to adopt jointly international agreements in its external exclusive competence domains (Baere 2014, 720), which means that, in practise, an exclusive competence of the Union is not exercised as such (Rosas 2013, 33).

54. C-13/07, 26 March 2009, Commission v. Council, ECLI:EU:C:2009:190, §121.

55. Advocate-General Nils Whal, Opinion 3/15, Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, §§119-120, and Advocate-General Eleanor Sharpston, Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2016:992, §§73-75. See also Klamert (2014, 184).

tail broadening the scope of the typology of "facultative mixed agreements" or "facultative EU-only agreements". These are agreements which include provisions falling under the exclusive competence of the Union and shared competences or only shared competences, whose decision on approval form is political, and remains ultimately with the Council (Rosas 1998, 132)[56]. Provisions falling under shared competences in EUSFTA or CETA would then be a variety of "pastis" (competence) which did not turn a glass of water (international agreement) *necessarily* milky (mixed).

In Opinion 2/15, the Court of Justice rejected, however, the possibility of EUSFTA taking the form of an "EU-only agreement" by declaring that it could not be concluded solely by the Union, as it includes provisions falling under shared competences[57]. The external shared competence *stricto sensu* (subjected to pre-emption) is thus, in practise, identical to an external exclusive competence of the Member States: both are "drops of pastis" whose inclusion in a trade agreement implies its conclusion as a "mixed agreement"[58]. This means that the typology of "facultative mixed agreements" is limited to *latu sensu* shared competence domains (not subjected to pre-emption; i.e. parallel competences, supporting competences, and international agreements in the field of the common foreign and security policies).

In conclusion, the decision of the President of the European Commission to propose CETA as a "mixed agreement" was prescient, as a Council decision approving it as an 2EU-only agreement" would be invalid.

4 Consequences and solutions for CETAs ratification refusal by a Member State

CETA's parties are, on the one side, Canada, and on the other side, the Union and each Member State. It is a bilateral "mixed" agreement, in which both the Union and the Member States are contracting parties that assume jointly one of the sides of the treaty relationship[59].

The entry into force of CETA will happen "on the first day of the second month following the date the Parties exchange written notifications certifying that they have completed their respective internal requirements and procedures" (Article 30.7 (2)). The conclusion of ratification procedures in twenty-nine legal orders Canada, the European Union and each of the twenty-seven Member States is required. A ratification refusal in a single Member State prevents the entry into force of CETA, being irrelevant whether the agreement was already ratified by Canada, the European Union, and every other Member State (Kleimann and Kübek 2016, 23) (Van der Loo and Wessel 2017, 743).

The Union usually binds itself to a "mixed" agreement through a Council Decision only after the Member States have deposited their ratification instruments, thus following the rule set forth in Article 102 of the Treaty on the European Atomic Energy Community (Euratom)

56. An example of a "facultative EU-only agreement" is, according to Van der Loo and Wessel (2017, 738), the Stabilisation and Association Agreement between the European Union and Kosovo. According to Recital 5 of the Council Decision (UE) 2015/1988, 22 October 2015, this is an "EU-only agreement", in which the commitments and cooperation to be entered into by the Union relate only to the areas covered by EU acquis or existing Union policies. Contrary to every other association agreements (Maresceau 2010, 17-20), the EU/Kosovo agreement is not "mixed", notwithstanding the fact that it is based on Article 37 TEU, concerning agreements concluded within the common foreign and security policy, and a report from a British parliamentary commission that labelled it as a unique case of a "EU-only agreement" that included shared competence provisions [European Scrutiny Committee of the House of Commons, 27. The EU and Kosovo: Stabilisation and Association Agreement (SAA), 21 July 2015, para. 27.9, available at https://publications.parliament.uk/pa/cm201516/cmselect/cmeuleg/342-i/34230.htm. This was clearly a political decision aimed at preventing that, through ratification, some Member States (Cyprus, Spain, Slovakia, Greece and Romania) de facto recognized Kosovo as a sovereign State. See Dui (2015, 17) or Van der Loo and Wessel (2017, 738).

57. Opinion 2/15, 17 May 2017, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376, paras. 243-244 and 292.

58. Before the entry into force of the Lisbon Treaty, this was the legal framework applicable in the shared competence domains foreseen in Article 133(6)(§2) (trade in cultural and audio-visual services, educational services, and social and human health services), which required common accord of the Member States for negotiation, and also mandated that the conclusion of an agreement to be made jointly by the Community and the Member States.

59. In a bilateral "mixed agreement", the Union and the Member States declare, in a single legal instrument, their will to be bind to a third party, while the latter simultaneously accept the Union and the Member States as contracting parties (Maresceau 2010, 12).

(1957), which states that "agreements or contracts concluded with a third State, an international organisation or a national of a third State to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws" (Rosas 2000, 208) (Eeckout, 2011, 260) (Klamert, 2014, 202) (Baere, 2014: 739)[60].

A definitive refusal of ratification by a Member State entails a *de facto* veto to the conclusion of a "mixed" agreement by the Union. Kleimann and Kübek (2016, 24) argue, however, that such a veto would be tantamount to a breach of the principle of sincere cooperation. Member States are thus obliged to sign and ratify the components of a "mixed agreement" that fall under the exclusive competence of the Union; if they wish not to be bound by other provisions, they must formulate a reservation.

Beyond suggesting that the formulation of a reservation could have the effect of withdrawing a party from obligations stemming from a bilateral treaty[61], Kleimann and Kübek's proposal would neutralize the sovereign prerogative of ratification of international agreements. Member States do not enter "mixed agreements" as "a mere appendage of the European Union"[62], and retain the sovereign power to refuse ratification[63]. From the requirement of unity in the international representation of the Union and from the principle of since cooperation[64], stems merely an "obligation of means" to proceed without undue delay to ratification[65] e.g., it would breach good faith obligations to suspend CETA's ratification to extract commercial benefits from Canada (Eeckout, 2011: 260) (Klamert 2014, 202-203)[66].

"Mixed" agreements ratification must also respect the vertical repartition of competences between the Union and the Member States. Although national parliaments frequently address "mixed" agreements in its entirety[67], in the absence of any delegation of competences by the Union, their competence is restricted to the approval of provisions falling under shared competences, which means that they cannot refuse ratification based on motives related to provisions that fall under the exclusive competence of the

60. Van der Loo and Wessel (2017, 746), mention as the sole exception the "Agreement between the European Union and its Member States, of the one part, and Iceland, of the other part, concerning Iceland's participation in the joint fulfilment of commitments of the European Union, its Member States and Iceland for the second commitment period of the Kyoto Protocol to the United Nations Framework Convention on Climate Change" [Council Decision (UE) 2015/1340, 13 July 2015].

61. In bilateral treaties, disagreements between the parties should be discussed during negotiations and settled in the text of the treaty (Bacelar Gouveia 2017, 247). For that reason, Article 20(2) of the Vienna Convention of the Law of the Treaties (VCLT) (1969) which, although not ratified by every Member State, codifies international customary law states that "when it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties".

62. Advocate-General Eleanor Sharpston, General-Advocate Eleanor Sharpston, Opinion 2/15, 21 December 2016, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2016:992, §77, which adds that the fact that the Union may have played the leading role in negotiating the "mixed" agreement is, for these purposes, irrelevant.

63. Member States are also free to vote against the adoption of a "mixed agreement" by the Council, even if they had previously approved its signature.

64. Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, ECLI:EU:C:1994:384, §108; C-246/07, 20 April 2010, Commission v. Sweden, ECLI:EU:C:2010:203, §73.

65. See Van der Loo and Wessel (2017, 762), which derive this obligation from Article 18(a) VCLT that states that a "State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty".

66. Rosas (2010, 368-369) gives as an example the cases of Italy and Greece, which conditioned the provisory entry into force and ratification of the EU/South Africa trade agreement to the protection of the designations of origin "grappa" and "ouzo".

67. See the Portuguese parliament's resolution proposal 49/XIII/2 ("Aprova o Acordo Económico e Comercial Global entre o Canadá, por um lado e a União Europeia e os seus Estados-Membros, por outro, assinado em Bruxelas, em 30 de outubro de 2016"), available at https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=41344.

Union[68].

A veto threat to CETA's ratification could be prevented in several ways. One would be to follow the path taken to solve the "Walloon veto" crisis: the adoption of an interpretative instrument of CETA by the parties to the agreement. This is a document which, according to Article 31(2)(b) VCLT[69], has a binding nature concerning the interpretation of several provisions of the agreement, namely those related to investment protection and dispute resolution[70].

Another possibility would be to adopt the solution found to prevent the ratification refusal of the Netherlands stemming from the popular rejection of the EU/Ukraine association agreement: on the margin of a European Council meeting, the Heads of State and Government of the Member States, using their "intergovernmental hats", adopted a Decision which reflects their "common understanding" of that association agreement[71]. This Decision is an executive international agreement between the Member States which does not affect the other parties (Ukraine and the Union)[72]. According to the Council's legal services it limits itself to:

"exclude, as among the Member States of the EU, certain interpretations that could be given to the language of the agreement and certain forms of action that could be considered on its basis. In case the EU Court of Justice would have to interpret the provisions of the association agreement in the future, the draft Decision could also be used in its reasoning to assess the intentions of the EU Member States as to the scope of the commitments undertaken when becoming parties"[73].

If CETA's ratification refusal by a Member State in the end is not overcome, two possibilities could be ultimately pursued: i) CETA's approval by the Council as an "EU-only agreement" after securing Canada's approval of the extraction of provisions not supported by legal basis granting exclusive competence to the Union; ii) the transformation of CETA into an "incomplete mixed agreement", through the conclusion of a new agreement by the Union, Canada and the other Member States. In both cases, except for the provisions concerning portfolio investment and the investor-State dispute settlement mechanism, the remaining provisions would be applicable in the Member State that initially refused to ratify CETA (Mayer 2016) (Kleimann and Kübek 2016, 24) (Van der Loo and Wessel 2017, 746-749).

5 Conclusion

The European Union's external competences are exercised within a complex multilevel federal system that comprises sovereign States vested with *ius tractandi* (Baere 2014, 749). Opinion 2/15 of the Court of Justice introduced some order into the system's "jungle" of external competences through a broad interpretation of the exclusive competence of the Union under the CCP. Although this jurisprudential stance clearly allows for the conclusion of "new generation" free trade agreements as "EU-only agreements", it is

68. Advocate-General Eleanor Sharpston, General-Advocate Eleanor Sharpston, Opinion 2/15, 21 December 2016, *Free Trade Agreement between the European Union and the Republic of Singapore*, ECLI:EU:C:2016:992, para. 568.

69. Which states that the context "for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".

70. See para. 1(e) of the Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (OJ, 2017, L 11/3, 14 January 2017).

71. European Council conclusions on Ukraine, Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on 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, 15 December 2016, available at https://www.consilium.europa.eu/en/press/press-releases/2016/12/15/euco-conclusions-ukraine/

72. The European Council stated that the Decision "is legally binding on the 28 Member States of the European Union, and may be amended or repealed only by common accord of their Heads of State or Government. It will take effect once the Kingdom of the Netherlands has ratified the agreement and the Union has concluded it. Should this not be the case, the Decision will cease to exist" (ibid.).

73. Opinion of the Council Legal Service, Draft Decision of the Heads of State or Government, meeting within the European Council, on 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, EUCO 37/16, 12 December 2016, para. 7.

unlikely that agreements so contentious as CETA will take such a path. Member States can still request the inclusion of provisions falling within their exclusive competence, or in the shared competence, forcing the conclusion of such an agreement as "mixed"[74], or request is approval as a "false mixed agreement". Either possibility require unanimity to amend the Commission's proposal[75], and may trigger a conflict with the "guardian of the Treaties", which can retaliate by using the "nuclear option" of withdrawing its proposal[76], thereby blocking the Council's approval of the agreement.

74. CETA's negotiating mandate provided by the Council to the Commission in April 2009 implicitly assumes the mixed nature of the agreement when it authorizes the Commission to negotiate, on behalf of the European Community and its Member States, an Economic Integration Agreement with Canada (European Council, 9036/09, 24 April 2009, "Recommendation from the Commission to the Council in order to authorize the Commission to open negotiations for an Economic Integration Agreement with Canada", available at http://data.consilium.europa.eu/doc/document/ST-9036-2009-EXT-2/en/pdf.

75. Article 293(1) TFUE. This procedure was followed, for instance, in free trade agreements concluded with Peru and Colombia, which were proposed by the Commission as "EU-only agreements" and approved by the Council as "mixed" agreements. See European Commission, 16 October 2016, C(2014) 7557 final, p. 2, available at http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-7557-EN-F1-1.pdf.

76. C-409/13, Comissão c. Conselho, 14 April 2015, ECLI:EU:C:2015:217. The Commission also has, a fortiriori, the power to withdraw the recommendation concerning the opening of negotiations of an international agreement (Article 218(3) TFEU), if does not want to follow the directives of the Council that mandate the modification of the nature of the agreement.

References

[1] Bacelar Gouveia, Jorge. (2017). *Direito Internacional Público,* Coimbra: Almedina.

[2] Baere, Geert De. (2014). "EU external action", *European Union Law*, edited by Catherine Barnard and Steve Peers, 704-750. Oxford: Oxford University Press.

[3] Cremona, Marise, (2017), "A Quiet Revolution: The Common Comňmercial Policy Six Years after the Treaty of Lisbon". In SIEPS 2. http://www.sieps.se/sites/default/files/Siep%202017_2%20web.pdf.

[4] Diogo, João Francisco. (2018). "Resolução de Litígios de Investimento no CETA: uma resposta aos críticos?". In *O Acordo Económico Global entre a União e o Canadá (CETA)*, edited by Francisco Pereira Coutinho, Lúcio Tomé Feteira and Ruth Santos, 159-185. Lisboa: CEDIS/FDUNL.

[5] Dui, Dunja. (2015). "What is the Future of Stabilization and Association Agreement with Kosovo (risk of incoherence in the EU law)?". In *Review of European Law* 2-3: 5-23

[6] Economist, (2016a),"Tears over the colapse of the EU-Canada trade deal". In The Economist, 21 October 2016. Available at https://www.economist.com/news/europe/21709145-grumpy-insular-moodň-european-union.

[7] Economist. (2016b). "Wallonia is adamantly blocking the EU's trade deal with Canada". In *The Economist*, 22 October 2016.

[8] Eeckout, Piet, (2011). EU External Relations, 2sd Edition. Oxford: Oxford Uni-versity Press

[9] Foodwatch. (2022). "CETA. An Attack on Health, the Environment, Consumer Protection and Democracy". In Report 22, July 2022. https://www.foodwatch.org/en/news/2022/ceta-a-trojan-trade-agreement/

[10] Forsyth, Murray. (1982). *Unions of States: The Theory and Practice of Confederation.* New York: Leicester University Press.

[11] Gotev, Georgi. (2017). "Bulgaria and Romania maintain reservaňtions on CETA". In Euroactiv.com, 19 October. https://www.euractiv.com/secňtion/trade-society/news/bulgaria-and-romania-maintain-reservations-on-ceta/.

[12] Kempen, Bernhard. (2016). Legal Opinion on the majority requirements in the Council of the European Union. 4 October 2016. https://www.mehrň-demokratie.de/fileadmin/pdf/2016-10-14_Kempen_Legal_Opinion_CETA.pdf.

[13] Klamert, Marcus. (2014). *The Principle of Loyalty in EU Law.* Oxford: Oxford University Press.

[14] Kleimann, David and Kübek, Gesa. (2016). "The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15". In *EUI Working Papers* 28.

[15] Maresceau, Marc. (2010), "A Typology of Mixed Bilateral Agreements". In *Mixed Agreements in EU Law Revisited The EU and its Member States in the World,* edited by Christophe Hillion and Panos Koutraňkos, 11-29. Oxford: Hart.

[16] Mayer, Franz C.. (2016). "European Vetocracy? How to Overcome the Wallonian CETA Probňlem". In VerfBlog, 24 October 2016. http://verfassungsblog.de/european-vetocracy-how-to-overcome-the-wallonian-ceta-problem/.

[17] Möldner, Mirka. (2011). "European Community and Union, Mixed Agreements". In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press.

[18] Novinite. (2016). "Canada Officially Confirms Visa Waiver for Bulgaria, Romania as of Dec 2017". In novinite.com, 1 November 2016. http://www.novinite.com/articles/177134/Canada+Officially+Confirms+Visa+Waiver+for+Bulgaria%2C+Romania+as+of+Dec+2017

[19] Pereira Coutinho, Francisco. (2018). "A Natureza Jurídica do Acordo Económico e Comercial Global (CETA)". In *Themis* 6: 295-331.
[20] Rayner, Gordon. (2020). "Boris Johnson hails "new chapter" as MPs prepare to back Brexit deal. In The Telegraph 29 December. https://www.telegraph.co.uk/politics/2020/12/29/boris-johnson-hails-new-chapter-mps-prepare-back-brexit-deal/.
[21] Rosas, Allan. (1998). "Mixed Union-Mixed Agreements". In *International Law Aspects of the European Union*, edited by Martti Koskenniemi, 125-148. The Hague: Kluwer.
[22] Rosas, Allan. (2000). "The European Union and Mixed Agreements". In *The General Law of EC External Relations*, edited by Alan Dashwood and Christophe Hil-lion, 200-220. London: Sweet Maxwell.
[23] Rosas, Allan. (2013). "Exclusive, Shared and National Competence in the Context of EU External Relations: do such distinctions mattter?". In *The European Union in the World Essays in Honour of Marc Maresceau*, edited by Inge Govaere, 17-43. Leiden: Martinus Nijhoff Publishers.
[24] Rueda-Cantuche, José M. and Sousa, Nuno.(2016), "EU Exports to the World: Overview of Effects on Employment and Trade". In *Chief Economist Note* 1. http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154244.pdf.
[25] Scherňmers, Henry G., (1983). "A Typology of Mixed Agreements". In *Mixed Agree-ments* edited by David OKeeffe and Henry G. Schermers, 23-33. Boston: Kluwer Law.
[26] Schütze, Robert. (2011). "European Community and Union, Party to International Agreements", In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press.
[27] Silva Pereira, Pedro. (2017). "Acordo CETA: o Parlamento Europeu fez a diferença". Análise Europeia 3: 183-197.
[28] Van der Loo, Guillaume. (2017a). "The Dutch Referendum on the EU-Ukraine Association Agreement: Whats Next?". In *Netherlands Yearbook of International Law* 2016 47: 337-350.
[29] Van der Loo, Guillaume. (2017b). "The Courts Opinion on the EU-Singapore FTA: throwing off the schakles on mixity?". In *CEPS Policy Insights* 2017/17
[30] Van der Loo, Guillaume, and Ramses A. Wessel. (2017). "The Nonň-Ratification of Mixed Agreements: Legal Consequences and Solutions". In *Common Market Law Review* 54: 735-770
[31] Vicenti, Daniela. (2017). "EU leaders on collision course with Commission over CETA". In *Euroactiv.com* 29 June. https://www.euractiv.com/section/trade-society/news/eu-leaders-on-collision-course-with-commission-over-ceta/.

Francisco Pereira Coutinho is Associate professor at Nova School of Law (Lisbon, Portugal). Bachelor (2002), PhD (2009), and Habilitation (agregação) (2021) in law from Nova School of Law. Vice Dean at Nova School of Law (2018-2021), President of Jurisnova (2015-2022) and Professor at the Institute for Political and Social Sciences of the University of Lisbon (2010-2015) and at Lisbon Autónoma University (2009-2012), as well as legal advisor at the Diplomatic Institute of the Portuguese Ministry for Foreign Affairs (2005-2011) and at the Secretary of State of the Presidency of the Council of Ministers of the Portuguese Republic (2003-2004). Member of CEDIS - RD Centre for Law and Society, of the Portuguese Society of International Law, and of the Portuguese Association of European Law. Coordinator of SPARC, the Compliance Lab and the observatories for data protection and Portuguese Legislation.
ORCID: https://orcid.org/0000-0001-9075-2537