INSIGHT

MIXITY IN EU FOREIGN TRADE POLICY IS HERE TO STAY: ADVOCATE GENERAL SHARPSTON ON THE ALLOCATION OF COMPETENCE FOR THE CONCLUSION OF THE EU-SINGAPORE FREE TRADE AGREEMENT

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ABSTRACT: It has been two decades since the Court of Justice had the chance to comprehensively assess the scope of the common commercial policy. In Opinion 2/15 on the EU-Singapore free trade agreement (FTA) the Court is now asked to determine how far the EU's external competence stretches post-Lisbon. Ahead of the decision, AG Sharpston has recently rendered her legal view on the question of whether the EU is endowed with exclusive competence to conclude the EU-Singapore FTA, or whether and to what extent the requisite competences are shared or remain exclusively with the Member States. Unsurprisingly, the AG concludes that the agreement in its entirety is not covered by exclusive competence. Particularly, transport services and non-commercial aspects of intellectual property, but also foreign investment other than direct investment remains the territory of shared competence. Furthermore, the EU enjoys no competence to terminate existing bilateral agreements between Member States and Singapore. Its conclusion as a mixed agreement is therefore mandatory. Indeed, the EU-Singapore trade deal is paradigmatic of the new generation of EU deep and comprehensive FTAs, and the Court's decision is thus likely to have broader ramifications for other on going and recently finalized negotiations. Should the Court follow the AG, mixity in EU foreign trade policy is everything but a thing of the past.

KEYWORDS: foreign direct investment – investment protection – common commercial policy – external relations – competences – free trade agreement.

I. INTRODUCTION

On December 21, 2016 AG Sharpston delivered her long-awaited Opinion on the allocation of competences for the conclusion of the EU-Singapore Free Trade

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Agreement (EUSFTA).[1] In accordance with Art. 218, para. 11, TFEU, the Commission requested from the CJEU an assessment as to whether or not the Union is endowed with the requisite competence to conclude the agreement alone.[2] A mixed agreement, i.e. concluded by all EU Member States in addition to the EU, would subject the EUSFTA to ratification in all national parliaments before taking full effect. Considering the developments leading up the conclusion of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, mixity appears to be increasingly burdensom approach to EU foreign trade policy. In light of the ever more comprehensive and heterogenic nature of EU trade agreements, Opinion 2/15 on the EUSFTA is likely to have significant impact on ongoing and recently concluded negotiations with for instance Vietnam,[3] Canada,[4] and the US,[5] thus defining the very scope of the EU common commercial policy post-Lisbon.

This contribution discusses the AG's Opinion[6] and its significance for other EU trade agreements. The next section provides background information both on the EUSFTA as well as the development of the common commercial policy. Section III then presents the conclusions of the AG Sharpston on the allocation of competences *vis-à-vis* individual parts of the agreement. Section IV finally discusses the AG's findings in the context of investment protection in more detail. The present paper concludes with a few remarks on what to expect from the Court's final decision.

II. Setting the scene

II.1. EU-Singapore FTA: a new era for EU foreign trade policy

The case of the EUSFTA is symbolic in many respects. Having been initiated before but concluded after the coming into force of the Lisbon Treaty the EUSFTA is the first comprehensive trade and investment agreement under the post-Lisbon common commercial policy. In fact, bilateral negotiations with Singapore were the result of the unsuccessful regional effort to conclude a free trade deal with the ASEAN countries in 2007.[7]

[1] Free Trade Agreement of May 2015 (authentic text) between the EU, on the one part, and Singapore, on the other part (hereinafter EUSFTA).

[2] Request for an Opinion submitted by the European Commission pursuant to Art. 218, para. 11, TFEU.

[3] Free Trade Agreement of January 2016 (agreed text) between EU and its Member States, on the one part, and Vietnam, on the other part (hereinafter Vietnam FTA).

[4] Comprehensive Economic and Trade Agreement of 30 October 2016 between the EU and its Member States, on the one part, and Canada, on the other part (hereinafter CETA).

[5] Transatlantic Trade and Investment Partnership Agreement of July 2015 (textual proposal) between the EU, on the one part, and the US, on the other part (hereinafter TTIP).

[6] Opinion of AG Sharpston delivered on 21 December 2016, in Opinion procedure 2/15.

[7] EU to launch FTA negotiations with individual ASEAN countries, beginning with Singapore, in Commission Press Release 09/1991 of 22 December 2009.

Unsurprisingly, the 2009 negotiating mandate for the EUSFTA was effectively identical to what the Commission was provided with in the context of ASEAN negotiations. When it transpired that the agreement could not be concluded under the old regime, i.e. before the coming into force of the Lisbon Treaty, the Council decided to broaden the negotiating mandate in accordance with the new common commercial policy by incorporating a comprehensive chapter on investment protection, including investor-State dispute resolution (ISDS). The final text of the agreement was published in 2013,[8] with the exception of the investment chapter, which delayed finalization of the deal for another year.[9] As the first of its kind, it is, thus, unsurprising that the EUSFTA raised fundamental questions as to the impact of the Lisbon Reform on the scope of the common commercial policy and, consequently, the allocation of competences for the conclusion of deep and comprehensive free trade agreements which have become the solid foundation on which EU foreign trade policy is build.[10]

Additionally – and somewhat related to this first point – the Lisbon Treaty did not only broaden the material scope of the common commercial policy, affecting the "ownership" of future EU trade agreements. More fundamentally it streamlined the procedure to be applied for the negotiation and conclusion of international agreements, for which clarity and predictability is pivotal. Dwelling on the difference between exclusive and shared competence, AG Sharpston emphasizes in this respect that in an area of shared competence the conclusion of an international agreement as EU-only – i.e. exclusive – through the exercise of the right of pre-emption is a political choice, taken by the Member States in their capacity as members of the Council.[11] Where EU competence falls under *a priori* exclusive competence, or indeed within the scope of Art. 3, para. 2, TFEU, no such choice exists. Certainty as to the nature of EU competence is therefore of utmost relevance for deliberations in the Council at the stage of signing and concluding the EUSFTA, and the room for political decision-making in this context.

Lastly, the EUSFTA is viewed as less controversial, or rather it has been scrutinized less intensely in the public. Since the initiation of the EU-US Transatlantic Trade and Investment Partnership (TTIP) agreement, public debate has been dominated by criticism of investment protection and in particular ISDS provisions. This remains also a contentious issue in the context of CETA, but has received only little or no attention in respect of the recently concluded EU-Vietnam FTA[12] or, indeed, the EUSFTA. However, the public outcry over the inclusion of ISDS, in connection with the overwhelmingly negative re-

[8] Commission Press Release 13/849 of 13 September 2013.

[9] Commission Press Release 14/1172 of 17 October 2014.

[10] See Communication COM(2015) 497 final of 14 October 2015 from the Commission on Trade for all – towards a more responsible trade and investment policy.

[11] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 74.

[12] Paradoxically, the Vietnam FTA is the first EU trade and investment agreement including an investment court system.

plies to the Commission's public consultation on this issue, have sparked significant changes in EU foreign investment policy. In addition to a strong protection of the right to regulate and restrictive definitions of investment standards such as fair and equitable treatment or indirect expropriation, this includes above all a remarkable shift from investor-state arbitration to the establishment of a permanent – albeit treaty-centred – investment court system (ICS).[13] Indeed, the ICS is included into all but one post-Lisbon trade and investment agreement, namely the EUSFTA. This is likely to have only limited impact on the overall significance of this judgement for the definition of the post-Lisbon common commercial policy. However, for those that were hoping for the CJEU to venture *ex officio* into a more substantive assessment, pre-empting public criticism and political opposition on above all ISDS, Opinion 2/15 may be of little relevance. Notably, AG Sharpston invites the Court explicitly to refrain from entering into such an assessment on principled grounds, arguing that the substantive assessment of the agreement with the Treaties falls outside the ambit of the referred question.[14]

II.2. WTO OPINION 2.0

The common commercial policy has always been conceived of as *dynamic* in nature. In its first ever Opinion on what is now Art. 207 TFEU (ex Art. 113 EEC) the Court of Justice emphasized that:

> "It is therefore not possible to lay down, for Art. 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanism such as appear in the agreement envisaged. A 'commercial policy' understood in that sense would be destined to become nugatory in the course of time".[15]

Hence, the Court of Justice concluded that the objective of facilitating trade liberalization, which is, and always has been, at the very heart of the common commercial policy, does not limit the range of measures available to the EU under that heading to tariffs and quantitative restrictions. Opinion 1/78 is in this respect emblematic both, of an evolving global trend in the regulation of international trade, and the need of an effective common commercial policy to be able to adapt to those trends. In other words, if international trade regulation develops dynamically, the common commercial policy –

[13] L. PANTALEO, *Lights and Shadows of the TTIP Investment Court System*, in L. PANTALEO, W. DOUMA, T. TAKÀCS (eds), *Tiptoeing to TTIP: What Kind of Agreement for What Kind of Partnership?*, Asser: Asser Instituut Inter-University Research Centre, CLEER Papers 2016/1, p. 77 *et seq.,* available at www.asser.nl. C. TITI, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead*, in *Transnational Dispute Management*, 2016, p. 1 *et seq*.

[14] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 85.

[15] Court of Justice, Opinion 1/78 of 4 October 1979, para. 44.

the gateway of the EU's interaction with international trade – cannot be conceived of as static.[16] Fast forward four decades, the new deep and comprehensive free trade agreements at the core of the EU's post-Lisbon common commercial policy reflect even more systemic and profound changes in the regulation of international trade. Tariffs and quantitative restrictions, historically the heart of free trade agreements, has given way to non-tariff barriers, regulatory cooperation, public procurement, trade in services, intellectual property, rules of origin, amongst others. Moreover, the inseparability of investment and trade renders investment protection more and more visible in trade agreements. Whether or not the common commercial policy is sufficiently dynamic to embrace these new developments is a natural question to ask.

However, the common commercial policy does not necessarily reflect the broadest available definition of international commerce – nor, for that matter, any internationally accepted definition of that term. Its limits became first visible in the course of negotiations of the WTO agreement. Tasked with the determination of the legal basis for the negotiation and conclusion of *inter alia* the General Agreement on Tariff and Trade (GATT), General Agreement on Trade in Services (GATS) and the Agreement on Trade – related Aspects of Intellectual Property (TRIPs), which were annexed to the WTO agreement, the Court of Justice firmly established in Opinion 1/94 that the scope of the WTO mandate cannot conclusively determine the scope of the EU's common commercial policy. Accordingly, the Court of Justice concluded that only non-transport related services within mode 1 of GATS, i.e. the cross-border supply of services not involving the movement of persons, fell within the common commercial policy.[17] Similarly, TRIPs was covered only in as far as it related to the free circulation of counterfeit goods.[18]

In order to match EU competence under the common commercial policy with the actual scope of activity within the WTO, subsequent Treaty reforms have gradually broadened the scope of the common commercial policy. Art. 207, para. 1, TFEU now reads as follows:

> "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to *trade in goods and services*, and the *commercial aspects of intellectual property*, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies" (emphasis added).

[16] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 99.
[17] Court of Justice, opinion 1/94 of 15 November 1994, paras 47 and 53.
[18] *Ibidem*, para. 71.

It has since been accepted that both, GATS and TRIPs, fall within the framework of the common commercial policy and, thus, under *a priori* exclusive competence.[19] However, Art. 207, para. 5, TFEU continues to explicitly exclude transport services and covers intellectual property only in so far as it relates to "commercial aspects".

Furthermore, the scope of foreign direct investment has not yet been assessed by the CJEU; neither has the post-Lisbon common commercial policy been exposed to a comprehensive assessment in the light of the EU's predominant trade strategy, which is founded, since the end of the seven-year moratorium, on strengthening the EU's bilateral network.[20] It is therefore that Opinion 2/15 is of such great relevance. Not unlike Opinion 1/94 on the WTO agreement, Opinion 2/15 will define the limits of the common commercial policy, and determine whether the latest Treaty reforms tell the tale of the EU's empowerment in international trade and investment policy, or rather that of inevitable mixity.

III. The Advocate General's opinion

III.1. Exclusive competence

AG Sharpston emphasizes that the common commercial policy has always covered trade in goods, in particular. Indeed, if Opinion 1/94 was critical about trade in services and intellectual property, it firmly established the Union's exclusive competence over the General Agreement on Tariff and Trade (GATT), as well as 12 other agreements[21] essentially relating specifically to international trade, i.e. "promote, facilitate, or govern trade and having direct and immediate effects on trade".[22] On this backdrop the AG observes that EUSFTA chs 2 through 5 cover areas corresponding to a number of these agreements and fall therefore clearly within the scope of the common commercial policy.[23] Further, she rejects the formalistic argument by which customs cooperation is to

[19] Court of Justice, opinion 1/08 of 30 November 2011; Court of Justice, judgment of 18 July 2013, case C-414/11, *Daiichi Sankyo Co. Ltd. v. DEMO*, paras 54-58.

[20] Commission Staff Working Document SEC(2010) 1268/2 of 9 November 2010 on Report on Progress Achieved on the Global Europe Strategy, 2006-2010, p. 3; Commission Staff Working Document SEC(2006) 1230 of 4 October 2006 on Global Europe: Competing in the World: A Contribution to the EU's Growth and Jobs Strategy; see also B. Rigod, *"Global Europe": the EU's new trade policy in its legal context*, in *Columbia Journal of European Law*, 2012, p. 277 *et seq.*

[21] Opinion 1/94, cit., para. 34.

[22] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 145. Notably, while Opinion 1/94 required that measures relate specifically to international trade (para. 57), it was not until *Regione autonoma Friuli-Venezia Giulia* (Court of Justice, judgment of 12 May 2005, case C-347/03, *Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v. Ministero delle Politiche Agricole e Forestali*, para. 75) and later *Daiichi Sankyo* (cit., para. 51) that the 'direct and immediate effect on trade' test was established in the manner in which AG Sharpston applies it consistently throughout her Opinion.

[23] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., paras 147-148.

be excluded from the common commercial policy. Art. 206 TFEU on the customs union refers explicitly to Arts 28 to 32 TFEU, not, however, to Art. 33 TFEU, the internal market provision on customs cooperation. This has prompted the argument that Art. 206 TFEU simply does not comprise customs cooperation. However, customs validation and trade facilitation, which is also covered by the EUSFTA ch. 6, is partly regulated by GATT, the Customs Validation Agreement and the WTO Trade Facilitation Agreement. Cooperation also plays a central role in many of the WTO agreements for which exclusive EU competence has already been established. Ch. 6 of the EUSFTA, therefore, falls in its entirety under the common commercial policy.[24]

Moreover, reiterating developments since Opinion 1/94, AG Sharpston emphasizes that the Lisbon Treaty removed the distinction between trade in goods and trade in services that was prevailing after the Treaty of Nice.[25] Ch. 8, sections B through D, of the EUSFTA – on cross-border supply, consumption abroad, establishment and temporary presence of national persons for business purposes – essentially corresponds to the four modes of supply in GATS, which are now covered by the common commercial policy without restrictions.[26] Furthermore, the regulatory framework set out in section E, including the recognition of professional qualifications (sub-section 1), as well as in sections F and G, respectively on electronic commerce and exceptions, have a direct and immediate effect on trade, thus falling within the purview of Art. 207, para. 1, TFEU.[27]

An exception to this is transport services, which, in accordance with the general exception in Art. 207, para. 5, TFEU fall under the common transport policy. This is discussed in greater detail below. Suffice it to mention here that according to the AG exclusivity on the basis of Art. 3, para. 2, TFEU could only be established with regards to rail and road transport, considering the comprehensive regulation in both areas through Directive 2012/34,[28] and Regulations 1071-73/2009[29] and Directive 2014/66,[30] respectively.[31] The AG observes in this respect that the EUSFTA is liable to affect the

[24] *Ibidem*, para. 152.

[25] *Ibidem*, paras 196-197.

[26] Opinion 1/08, cit., paras 118-119 and 122.

[27] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 201.

[28] Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area.

[29] Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC. Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006.

[30] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

[31] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., paras 255, 256 and 264.

common provisions thereby established,[32] and the conditions laid out by Art. 3, para. 2, TFEU are, thus, fulfilled. Notably, exclusivity is not derived from a broad reading of Art. 207, para. 1, TFEU *vis-à-vis* trade in services. Exclusive external competence of the Union covering rail and road transport in the EUSFTA is therefore not *a priori* but rather established on the basis of Arts 91 and 100, para. 1, TFEU in conjunction with Arts 3, para. 2, and 216, para. 1, TFEU. Although some transport areas are now within the Union's exclusive competence, not much has changed since the Court's decision in Opinion 1/08 on the exemption of transport services from the common commercial policy.[33]

Another *a priori* exclusive competence for the EU under Art. 207, para. 1, TFEU is the newly acquired competence over foreign direct investment, which is discussed in greater detail in the subsequent part of the present paper. In her reasoning the AG emphasizes the importance of telling "direct" from "portfolio" investment, excluding the latter strictly from the ambit of the common commercial policy. Her definition of "foreign direct investment" ultimately embraces the establishment or maintenance of a lasting economic link in the form of effective participation in the management or control of an economic operator.[34] Without detailed discussions of the definition of "investment" in Art. 9.1 of the EUSFTA, she concludes that ch. 9, section A on investment protection, falls within the ambit of Art. 207, para. 1, TFEU only in so far as it concerns "direct" investments.[35] As a result, investor-state dispute settlement (ch. 9, section B, and Annex 9-F) is also only covered in as far as it is ancillary to foreign direct investment.[36] These rather unsurprising, and perhaps inevitable, conclusions are likely to have more far-reaching ramifications for the implementation of the EUSFTA with regards to investment protection. Lastly, it is noteworthy that she finds no trouble allocating competence over post-admission treatment exclusively with the Union under the common commercial policy observing *inter alia* the substantive overlap of foreign direct investment in the services sector with national treatment and most favoured nation (MFN) treatment obligations in GATS *vis-à-vis* mode 3 and TRIMs *vis-à-vis* trade in goods.[37] Similarly, protection from expropriation[38] and fair and equitable treatment[39] have a direct and immediate effect on trade and are therefore part of the common commercial policy.

Large parts of ch. 10 of the EUSFTA on public procurement – with the exception of transport services and services inherently linked to transport – fall equally under *a priori* exclusive competence, according to AG Sharpston. The relevant provisions reflect

[32] *Ibidem*, paras 257, 258 and 265.
[33] Opinion 1/08, cit., para. 166.
[34] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 332.
[35] *Ibidem*, para. 337.
[36] *Ibidem*, para. 535.
[37] *Ibidem*, paras 327, 328 and 336.
[38] *Ibidem*, para. 342. Notably, AG Sharpston rejects objections on the basis of Art. 345 TFEU.
[39] *Ibidem*, para. 334.

(and indeed largely replicate) the WTO Agreement on Government Procurement, which seeks to guarantee procedural fairness and transparency where governments engage as market actors in the purchasing of goods and services, an area generally falling within the ambit of the common commercial policy.[40]

At the forefront of the AG's assessment of ch. 11 of the EUSFTA is the contentious issue of differentiating commercial from non-commercial aspects of intellectual property. Relying on the Court's previous ruling in *Daiichi Sankyo*[41] she concludes that generally all aspects covered by the WTO TRIPs Agreement are now covered by Art. 207, para. 1, TFEU.[42] This includes as much references to the specific provisions in TRIPs as well as their substantive incorporations into the text of the agreement. Indeed, one might argue that the AG's conclusions on this point are broader than that of the CJEU in *Daiichi Sankyo*. Although the AG accepts that the wording used in Art. 207 TFEU (i.e. *commercial aspects* of intellectual property) appears to have been deliberately chosen so as to cover the TRIPS Agreement (i.e. *Trade-Related Aspects* of Intellectual Property), she points out that the "essence of *Daiichi*" is not restricted to establish a relationship between the common commercial policy and the primary WTO agreement.[43] Rather, what is relevant within the context of Art. 207, para. 1, TFEU is whether the intellectual property rights that are covered by the EUSFTA are economic in nature. In other words, Art. 207, para. 1, TFEU covers rights in as far as "their exercise is essential to the commercial exploitation of the protected intellectual property in a cross-border market".[44] It is noteworthy that this was also a contentious point in Opinion 3/15 on the Marrakesh Agreement.[45] AG Wahl suggested that the commercial value of an activity or transaction, which regulated under the international agreement (*in casu* cross-border exchange of accessible format copies), is irrelevant as long as it reflects cross-border trade.[46] The Court did not agree with the AG on this issue. Rather, the judgment places considerable emphasis on the commercial nature of the transaction.[47] AG Sharpston's Opinion equally reflects a strong emphasis on trade for commercial purposes as central to the delineation of commercial aspects of intellectual property within the meaning of Art. 207, para. 1, TFEU.

Be that as it may, there is little disagreement amongst AG Wahl in Opinion 3/15 and AG Sharpston to the effect that moral rights are to be considered non-commercial aspects of intellectual property, and, thus, to be excluded from the common commercial

[40] *Ibidem*, paras 402 and 408.

[41] *Daiichi Sankyo*, cit.

[42] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 430.

[43] *Ibidem*, paras 432, 433 and 435.

[44] *Ibidem*, para. 436.

[45] Court of Justice, Opinion 3/15 of 14 February 2017; for an analysis of the case see G. KÜBEK, *The Marrakesh Treaty judgment: the ECJ clarifies EU external powers over copyright law*, in *EU Law Analysis*, 17 February 2017, www.eulawanalysis.blogspot.com.

[46] Opinion of AG Wahl delivered on 8 September 2016, in Opinion procedure 3/15, para. 51.

[47] Opinion of AG Wahl, in Opinion procedure 3/15, cit., paras 67, 81 and 82.

policy.[48] It is not immediately clear why this single provision of the EUSFTA is not considered "incidental" or "ancillary", taking into account its extremely limited scope. In fact, the AG's reasoning throughout her Opinion would have benefited significantly from more transparency regarding the factors to be applied when distinguishing the predominant from the incidental purpose of commitments under the EUSFTA. Supposedly, she felt uncomfortable for exclusivity to trespass on areas that are explicitly excluded from the common commercial policy. If that understanding is correct, non-commercial aspects of intellectual property could never be considered incidental or ancillary in EU trade and investment agreements, however limited their scope.

With regards to sustainable development, the AG is quick to observe that, although certain of the provisions of ch. 13 clearly and directly concern the regulation of trade between the parties, other provisions are considerably wider. Accordingly, she identifies four "components" of public policy in EUSFTA.[49] First, Art. 13.6, para. 4, on disguised trade restrictions resulting from the implementation of international environmental agreements, Art. 13.12 governing effects on trade by non-compliance or ineffective application of domestic labour and environmental laws, and Arts 13.11, para. 1, and 13.11, para. 2, facilitating the investment in and promoting the removal of barriers to trade in environmentally-friendly goods and services, are but examples of those parts of ch. 13 with a direct and immediate effect on international trade.[50] The second, Art. 13.8 on trade in fish products, falling under the common fisheries policy in accordance with Art. 43, para. 2, TFEU, also pertains to the Union's *a priori* exclusive external competences.[51] Provisions aiming to establish minimum standards for labour and environmental protection (the third and fourth component), on the other hand, exist "in isolation" from their effects on trade and are not reinforced through trade conditionality or any form of commercial policy instrument, and therefore not part of the Union's competence under Art. 207, para. 1, TFEU.[52]

Less problematic for the AG were issues of non-tariff barriers to trade and investment in renewable energies (ch. 7) and competition (ch. 12). Ch. 7 fundamentally addresses regulatory and technical barriers to trade in the green energy sector.[53] Non-trade objectives of environmental protection, such as "promoting, developing and increasing the creation of energy from renewable and sustainable non-fossil sources", are only pursued in as far as this may affect trade and investment between the parties.[54] Similarly, despite the absence of a comprehensive set of rules on competition within the

[48] Opinion of AG Wahl, in Opinion procedure 3/15, cit., para. 56; Opinion of AG Sharpston, in Opinion procedure 2/15, cit., paras 453 and 454.

[49] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 497.

[50] *Ibidem*, paras 489 and 500.

[51] Art. 3, para. 1, let. d), TFEU.

[52] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 490.

[53] *Ibidem*, para. 486.

[54] *Ibidem*, para. 484.

framework of the WTO, ch. 12 of the EUSFTA clearly attempts to regulate the harmful effects of anti-competitive practices and other private or public measures distorting competition on trade between the parties.[55] The AG has no doubt, therefore, that both chapters essential facilitate, promote and govern trade, having a direct and immediate effect on international trade, and, thus, falling in is entirety within the scope of the common commercial policy.[56]

Finally, a number of chapters are merely ancillary in nature. The horizontally applicable provisions on transparency, administrative and judicial review in ch. 14 aims at streamlining administrative procedures and establishes a standard of transparency and procedural fairness, ultimately improving effective implementation and enforcement of the EUSFTA. Mrs Sharpston applies a similar reasoning to horizontal provisions on mediation and dispute resolution (chs 15 and 16), and dispute settlement in trade and sustainable development (ch 13). Consequently, competence to conclude these parts of the EUSFTA should, so the AG observes, principally follow the nature of competence for substantive provisions to which they relate.[57] In other words, in as far as the substantive provisions fall within the purview of the common commercial policy, so do the better administration, cooperation and transparency commitments in ch. 14 as well as the relevant disputed settlement provisions, which ensure effective implementation and enforcement of the EUSFTA.

III.2. Shared competence: the peculiar case of transport services and non-commercial aspects of intellectual property

The preceding section already highlighted that several chapters of the EUSFTA are only partly covered by exclusive external competence – be that on the basis of the common commercial policy or otherwise. This section provides detail as to the legal bases on which, according to the AG, shared competence can be established for the remaining components. Of particular interest are in this respect intellectual property protection and transport services, having regards to the development of the common commercial policy since Opinion 1/94. According to AG Sharpston, ch. 9 of the EUSFTA on investment protection is also split between exclusive and shared competence but will be discussed separately below. Minimum standards for labour and environmental protection are generally outside the scope of the common commercial policy. As far as labour protection is concerned, the Union's shared competence to conclude Arts 13.3, para. 1, 13.3, para. 3, 13.4. is derived from Art. 4, para. 2, let. b), TFEU – on the basis of Arts 151 and 153, para. 1, TFEU – in conjunction with the second alternative in Art. 216, para. 1,

[55] *Ibidem*, para. 460.

[56] *Ibidem*, para. 487 on renewable energies, and para. 466 on competition.

[57] *Ibidem*, para. 513 on ch. 14, para. 526 on section B of ch. 9 and chs 13 and 15, para. 527 on ch. 16 and Annex 9-E.

TFEU.[58] Shared competence for environmental protection standards (i.e. Arts 13.6, para. 2, 13.6, para. 3), follows from Art. 4, para. 2, let. e), TFEU and the first alternative of Art. 216, para.1, TFEU – on the basis of Art. 191, para. 4, TFEU, which explicitly endows the Union with external competence to pursue environmental policy objectives.[59]

With regards to transport services ch. 8 on trade in services and ch. 10 on government procurement are particularly relevant. The CJEU was already in Opinion 1/94 confronted with the problem transport as part of the service sector regulated by GATS, and then again in Opinion 1/08. Although competence for the conclusion of GATS has since been transferred to the Union, it remains disputed whether or not this includes also transport services. AG Sharpston, observed that despite all otherwise progressive changes with regards to *inter alia* trade in services, the Lisbon Treaty did not remove the general exclusion of transport from the common commercial policy. Art. 207, para. 5, TFEU stipulates that, "[t]he negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Art. 218." It is clear from the Court's reasoning in Opinion 1/08 that aspects of transport in international agreements fall, irrespective of the mode of service under which they are supplied, within the scope of a common transport policy.[60] This includes, according to the AG, also establishment in the transport sector, which is governed by Art. 91, para. 1, let. b), TFEU. Furthermore, she advocates a broad interpretation of Art. 207, para. 5, TFEU, covering not only "pure" transport services but also those services that are "inherently and indissolubly" connected with – and conditional upon – transport services.[61] Services not inherently linked to the primary transport services of transporting goods and persons, such as customs clearance services, are not, however, excluded from the common commercial policy by virtue of Art. 207, para 5, TFEU.[62]

Notably, the AG acknowledges that establishment in the transport sector is largely covered by Arts 49 and 55 TFEU on establishment. Indeed, unlike Art. 58, para 1, TFEU, which excludes transport services from the Treaty provisions on free movement of services to allocate them explicitly to transport policy, the Treaty establishes no such exception for establishment. At the same time however, she rejects the argument that exclusivity in accordance with Art. 3, para 2, TFEU can be established by reference to Treaty provisions as "common rules".[63] As a result, the threshold to establish that transport is comprehensively regulated on the internal market, including establishment (i.e. GATS

[58] *Ibidem*, para. 502.

[59] *Ibidem*, para. 503.

[60] Opinion 1/08, cit., para. 164.

[61] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., paras 217-218, this includes amongst others cargo handling, repair and maintenance, related IT infrastructure such as internet booking systems, etc.

[62] *Ibidem*, para. 219.

[63] *Ibidem*, para. 239.

mode 3), is considerably high. If the CJEU follows this reasoning, transport services, particularly in the area of maritime transport, are likely to remain a shared competence for the foreseeable future.[64] Exceptions to this are, of course, rail and road transport where secondary legislation largely regulates the supply of services through common rules.[65] In a similar vein, Mrs Sharpston concludes that government procurement in the area of transport services covered by shared external competence on the basis of Art. 4, para. 2, let. e), TFEU in combination with Art. 26, para. 1, and Art. 216, para. 1, TFEU.[66]

With regards to intellectual property AG Sharpston recalls the importance of distinguishing commercial from non-commercial aspects of intellectual property. Accordingly, property rights that are liable to limit the free circulation of goods are clearly within the purview of the common commercial policy but not so moral rights, i.e. "the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation", which, albeit complementary, exist separate of the economic rights. "To conclude otherwise would mean striking out the words 'commercial aspects' from Art. 207, para. 1, TFEU so that both commercial and non-commercial aspects of intellectual property fall within the common commercial policy", the AG observes.[67] She finds support for this conclusion in Art. 6*bis* of the Berne Convention, which distinguishes clearly between economic and moral rights, and which Art. 11.4 of the EUSFTA explicitly incorporates.[68] Shared competence for these parts of the EUSFTA can be established on the basis of Art. 4, para. 2, comma 1, and 26, para. 1, TFEU in conjunction with Art. 216, para. 1, TFEU, accepting that the provisions in the EUSFA on moral intellectual property rights are necessary to achieve the objectives of the internal market.[69]

IV. Chapter 9: investment protection

IV.1. Differentiating foreign direct investment from other forms of investment

With Opinion 2/15 the CJEU has, in many respects, the possibility to revisit its earlier case law on the common commercial policy, and in particular Opinion 1/94 on the WTO Agreement. However, the EUSFTA also includes novel elements. In the context of Art. 207, para. 1, TFEU this is particularly true for the reference to foreign direct investment. The

[64] Art. 4, para. 2, let. g), TFEU and the second ground under Art. 216, para. 1, TFEU, in conjunction with Arts 91 and 100, paras. 1 and 2, TFEU.

[65] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., paras 255, 256 and 264.

[66] *Ibidem*, para. 408.

[67] *Ibidem*, para. 437.

[68] *Ibidem*, paras 452 and 453.

[69] *Ibidem*, para. 456.

term lacks definition, and does not occur elsewhere in the Treaties, although some references to "direct investment" can be found in *inter alia* Art. 64, para. 1, TFEU, secondary legislation and the Court's case law. Given the particularity of the formulation it becomes obvious that the use of "direct" rather than simply "foreign investment" was a deliberate limitation on investment measures adopted on the basis of the common commercial policy. It is, therefore, not surprising that AG Sharpston spends some time to examine secondary legislation and case law on the use of the term "direct investment" in the context of free movement of capital, to which she draws some analogies.[70] Searching for a comprehensive definition of the term, she recalls the value of the Nomenclature in Annex I to the Directive 88/361 implementing Art. 67 of the EEC Treaty, if only as an interpretive aid. Accordingly, and drawing some comparison also to the OECD, IMF and UNCTAD, she arrives at the conclusion that foreign direct investments are:

> "[I]nvestments made by natural or legal persons of a third State in the European Union and investments made by EU natural or legal persons in a third State which serve to establish or maintain lasting and direct links, in the form of effective participation in the company's management and control, between the person providing the investment and the company to which that investment is made available in order to carry out an economic activity."[71]

Portfolio investment, by contrast, is characterized by the absence of an "intention to influence the management or control of a company".[72]

The AG stays closely the Court's established case law determining the conditions for shareholdings to fall either under capital movement or establishment provisions of the Treaty. [73] These cases are, however, less clear and concise than the AG acknowledges. In *Commission v. Portugal* the Court of Justice stated:

> "Direct investments, that is to say, investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the company to which that capital is made available in order to carry out an economic activity, fall within the scope of Art. 56 EC on the free movement

[70] *Ibidem*, para. 316.

[71] *Ibidem*, para. 322.

[72] Court of Justice, judgment of 21 October 2010, case C-81/09, *Idrima Tipou AE v. Ipourgos Tipou kai Meson Mazikis Enimerosis*, para. 48; Court of Justice, judgment of 10 November 2011, case C-212/09, *Commission v. Portugal*.

[73] Court of Justice, judgment of 16 March 1999, case C-222/97, *Manfred Trummer and Peter Mayer*, paras 20 and 21; see also the Court's Golden Shares cases: Court of Justice, judgment of 4 June 2002, case C-483/99, *Commission v. France*, para. 37; Court of Justice, judgment of 4 June 2002, case C-367/98, *Commission v. Portugal*, para. 38; Court of Justice, judgment of 4 June 2002, case C-503/99, *Commission v. Belgium*, para. 38.

> of capital. That object presupposes that the shares held by the shareholder enable the latter to participate effectively in the management or control of that company".[74]

Indeed, the Court of Justice differentiated between portfolio and direct investment, but ultimately concludes that investments related to controlling as well as non-controlling interests in an undertaking are governed by the Treaty provisions on capital movement.[75] Accordingly, the right of establishment is only relevant in as far as the ownership of controlling interests are concerned.[76] The approach towards "foreign direct investment" deviates at least in this respect significantly. Externally, as will become clearer in due course, the contested points with respect to Art. 207, para. 1, TFEU concern above all the question of whether or not post-admission treatment is covered by exclusive external competence under the common commercial policy – all the while market access is generally undisputed. Internally, post-admission in particular is what differentiates "direct investment" elements falling within the purview of capital movement from those aspects governed by the right of establishment.

In *Test Claimants*[77] and *Haribo*[78] the Court of Justice suggested that 10% is an adequate threshold for the requisite stake to determine the controlling interest in a company. As a result, investments falling below this threshold are presumed to lack direct influence in the management or control of a company, and are therefore classified as portfolio investments. Also AG Sharpston adopts the minimum threshold of 10 percent voting rights as "evidentiary guidance" for the determination of control.[79]

It must be recalled at this point that the rather technical differentiation of portfolio from direct investment, which is at the heart of the AG's analysis is indeed of utmost relevance for the determination of the competences allocated under the Treaties. Furthermore, it is not the purpose of an Opinion rendered in accordance with Art. 218, para. 11, TFEU to allocate responsibility for the fulfilment of obligations under an international agreement (i.e. its implementation).[80] It nonetheless may have repercussions on the implementation of the EUSFTA. An investment tribunal established under the EUSFTA will be far less interested in the portfolio / direct investment differentiation, as this is largely irrelevant for the determination of tribunal's jurisdiction. In any case, it is not guaranteed that an investment tribunal would differentiate direct investors from

[74] *Commission v. Portugal*, cit., para. 43.

[75] Court of Justice, judgment of 22 October 2013, joined cases C-105-107/12, *Staat der Nederlanden v. Essent and others*, para. 40.

[76] *Commission v. Portugal*, cit., para. 42 and case law cited.

[77] Court of Justice, judgment of 13 November 2012, case C-35/11, *Test Claimants in FII Group Litigation*, para. 196.

[78] Court of Justice, judgment of 10 February 2011, joined cases C-436-37/08, *Haribo and Österreichische Salinen AG v. Finanzamt Linz*, explicitly in para. 137.

[79] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 322.

[80] Court of Justice, Opinion 2/00 of 6 December 2001, paras 6 and 17.

shareholders along conditions that are similar to any definition of the CJEU. In particular, the 10% controlling interest may not have a similar indicative value in investment disputes brought under the EUSFTA. Rather, what becomes relevant is whether such a dispute is covered by the definitions of investor and investment in Art. 9.1 of the EUSFTA. Once jurisdiction on these terms has been established, the investment tribunal is unlikely differentiate between the rights accorded to direct investors and those accorded to shareholders. AG Sharpston's differentiation is not, therefore, merely a point of semantics, but reinforces an elusively clear – albeit inevitable – dividing line between exclusive and shared external competence in the field of investment protection.

IV.2. Post-admission treatment

It is generally undisputed that the common commercial policy covers market access and promotion of foreign direct investments. Contested, however, is whether or not post-admission treatment is also covered. In other words, do the substantive standards of treatment fall squarely within the scope of Art. 207, para. 1, TFEU? The AG observes in this respect that the Union's exclusive external competence covers investment protection at least in as far as services are concerned. This appears obvious in light of the substantive overlap of ch. 9 of the EUSFTA with national treatment and most-favoured nation (MFN) treatment obligations in GATS, particularly with regards to mode 3 (i.e. supply of services through a commercial presence).[81] In a similar fashion, the TRIMs agreement lays down national treatment obligations for investment measures related to trade in goods.[82] It follows, therefore, from the Court's conclusions in Opinion 1/08[83] and Opinion 1/94[84] that national treatment and MFN obligations fall broadly within the scope of the common commercial policy.

The AG draws an analogy to the test generally applied for the purpose of assessing which measures are covered by Art. 207, para. 1, TFEU. Accordingly, "measures that are essentially intended to promote, facilitate or govern foreign direct investment and have direct and immediate effects on foreign direct investment and investors"[85] are part and parcel of the common commercial policy. This fairly broad test allows her to include everything from national treatment to protection from expropriation, transfer clauses, and even fair and equitable treatment into the Unions exclusive competence.[86] With respect to expropriation AG Sharpston rejects in particular the argument made by some Member States that Art. 345 TFEU would exclude provisions on expropriation from the

[81] Arts I, para. 2, let. c), X and XVI, General Agreement on Trade in Services.
[82] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 327.
[83] Opinion 1/08, cit., para. 119.
[84] Opinion 1/94, cit., para. 34.
[85] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 328.
[86] *Ibidem*, paras 333 and 334.

scope of the Union's exclusive competence. Art. 9.6 of the EUSFTA merely establishes certain conditions for expropriation and nationalization of property but does not otherwise affect the Member States right to nationalize or expropriate within the remits of their own respective systems of property ownership.[87] This is, indeed, a broad interpretation of Art. 206 TFEU, which in principle only provides for the progressive abolition of restrictions on foreign direct investment. The AG solves this by adopting a broad interpretation. Accordingly, she observes that, "[o]ther types of rules relating to, in particular, domestic instruments are also needed because otherwise the benefits of market access could be rendered nugatory by, inter alia, discriminatory domestic measures".[88] Albeit broad in nature, it generally corresponds with the approach taken by the CJEU *vis-à-vis* trade liberalization under the common commercial policy. In fact, this is the core of its often-referred-to dynamic nature.[89]

IV.3. Treaty provisions as "common rules" for the purpose of Art. 3, para. 2, TFEU

In its written submission and during the course of the hearing the Commission insisted that exclusive competence of the Union over portfolio investment could be established on the basis of Art. 3, para. 2, TFEU in conjunction with Art. 63 TFEU on capital movements. Art. 63 TFEU, which prohibits restrictions on capital transfers and payments between Member States and third countries, lays down common rules, which according to the Commission fall within the meaning of Art. 3, para. 2, TFEU and are affected by the EUSFTA. However, the composition of Art. 3 TFEU foresees exclusive external competence either where the treaty explicitly provides for it (Art. 3, para. 1, TFEU) or, in the absence of an explicit Treaty reference, where the prerequisites of Art. 3, para. 2, TFEU are fulfilled. It would render Art. 3, para. 1, TFEU nugatory if exclusive external competence could be established for any subject matter falling broadly within EU law. Hence, allowing Treaty provisions to account for common rules within the meaning of Art. 3, para. 2, TFEU even though they do not explicitly transfer exclusive external competence to the Union circum-

[87] *Ibidem*, para. 340; for a discussion see J. Bischoff, *Just a little BIT of "mixity"? The EU's role in the field of International Investment Protection Law*, in *Common Market Law Review*, 2011, p. 1527 *et seq.*, p. 1543 *et seq*. Bischoff argues that, since international agreements become integral parts of the EU legal order by virtue of Art. 216 TFEU, limitations on Member States systems of attribution of property is ultimately derived from EU law. Concretely, as a consequence of Art. 9.6, para. 1, let. b), of the EUSFTA Member States would no longer be allowed to expropriate or nationalize property for purposes other than public purposes, as a matter of EU law. See also F.C. Mayer, *Rechtsgutachten: Stellt das geplante Freihandelsabkommen der EU mit Kanada (Comprehensive Economic and Trade Agreement CETA) ein gemischtes Abkommen dar?*, p. 15, 28 August 2014, www.bmwi.de.

[88] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 332.

[89] Opinion 1/78, cit., para. 44; Opinion 1/94, cit., para. 39.

vents the very limitation, which Art. 3, para. 1, TFEU imposes. It is not, therefore, difficult to understand why the AG disagreed with the Commission on this point.

"Common rules", so AG Sharpston observes, are "rules adopted by the European Union in the *exercise* of its internal competence"[90], and cannot therefore stem from primary Union law. Legislative power, whatever its scope, is thus insufficient. Rather, it must have been exercised internally before the conditions of Art. 3, para. 2, TFEU are fulfilled.[91] In as far as an international agreement affects primary EU law or alter its scope, the problem is one of material compatibility of the agreement in question with the Treaties. Accepting the Commission's argument would result in a strange alternative where those cases are remedied by shifting further external competences to the Union, eroding the very system of allocation of competences and the very principle of conferred powers.

IV.4. Portfolio investment

The exercise, or indeed existence, of legislative competence is not necessary, the AG observes, in order to establish external competence in accordance with Art. 216, para. 1, TFEU second alternative, i.e. the conclusion of an international agreement in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties. Suffice it to demonstrate that the particular field falls within the purview of Union law. [92] Naturally, Mrs Sharpston resorts to Art. 63 TFEU, which places the liberalization of capital flows and payments between Member States and between Member States and third countries under Union law, in order to establish shared external competence over portfolio investment. The fairly broad definition of "movement of capital" in the Nomenclature to Directive 88/361 investments other than direct investments has already been discussed above. A closer look at the EUSFTA reveals that Art. 9.1 of the EUSFTA broadly corresponds to the scope of Art. 63 TFEU, i.e. Art. 9.1, para. 1, let. a) (real estate, rights of pledge), Art. 9.1, para. 1, let. c) (securities, units of collective investment undertakings, current and deposit accounts with financial institutions, credits related to commercial transactions or to the provision of services, financial loans and credits, sureties, other guarantees), Art. 9.1, para. 1, let. d) (other instruments on the money market), Art. 9.1, para. 1, let. f) (transfers in performance of insurance contracts), Art. 9.1, para. 1, let. g) (patents, designs, trade marks and inventions). On this backdrop, the AG concludes:

> "The free movement of capital aspect of the internal market has both an internal and external component. An agreement seeking to achieve reciprocal liberalisation between the European Union and a third country, such as the EUSFTA, falls within the framework of that policy. Since such reciprocal commitments cannot be obtained without that third

[90] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 353.
[91] Court of Justice, opinion 2/92 of 24 March 1995, para. 33; Opinion 1/94, cit., para. 77.
[92] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 365.

country's consent, it may be necessary, [...] to conclude an international agreement to achieve that objective".[93]

Finally, AG Sharpston observes that investments other than direct investments, which fall outside the scope of Art. 63 TFEU may be adopted on the basis of Art. 114 TFEU in as far as their objective is the approximation of laws.[94] In as far as ch. 9 of the EUSFTA governs investments other than direct investments, it is subject to shared competence on the basis of Arts 4, para. 2, let. a), and 216, para. 1, TFEU, in conjunction with Art. 63 TFEU.

Other than what the AG's reasoning appears to suggest, it has become obvious from the above discussion on the definition of "foreign direct investment" that there is no true parallelism between the internal legal categorization of investment flows into capital movement and establishment, on the one hand, and the external legal conceptualization of foreign investments into "direct" and "portfolio". As we have seen, the CJEU has demonstrated in a number of cases, that even "direct investment" related capital flows are generally covered by the Treaty provisions on the free movement of capital, rather than the right of establishment.[95] In accordance with Mrs Sharpston's definition, however, these are more accurately classified as foreign direct investment in the context of the common commercial policy. Paradoxically, therefore, Union competence for the acquisition of a controlling interest in an undertaking falls under the common commercial policy, even though the imposition of restrictions on these transactions by Member States remains subject to Art. 63 TFEU in addition to Art. 9.7 of the EUSFTA on transfers. Be that as it may, for the purpose of this contribution suffice it to point out that portfolio investment for the purpose of delimiting the Unions external competences cannot be equated with investment flows covered by Art. 63 TFEU. The Court's case law and, in particular, the Nomenclature to Directive 88/361 may be indicative for reasons of conceptual delimitations, it says little, however, about the relationship between Art. 63 TFEU and provisions in international agreements on the protection of foreign direct investment.

IV.5. The termination of existing bilateral agreements between Member States and Singapore

Lastly, AG Sharpston addresses an issue that lies directly at the crossroads of EU institutional law and public international law. Art. 9.1, para. 1, of the EUSFTA purports to terminate all existing bilateral agreements between Member States and Singapore. Accordingly, Annex 9-D lists a total of twelve bilateral investment agreements that would cease to exist upon the coming into force of the EUSFTA. Indeed, in areas where the Un-

[93] *Ibidem*, para. 369.
[94] *Ibidem*, para. 368.
[95] E.g. *Essent*, cit., para. 40; *Commission v. Portugal*, cit., para. 43 and case law cited.

ion has gained exclusive competence, Member States are no longer competent to act independently. This fundamental premise applies also to the conclusion of international agreements. According to the Commission Member States have, therefore, lost the competence to act internationally in the area of investment protection, they can neither conclude new agreements, nor terminate existing ones.[96] As a consequence the competence to manage existing bilateral investment agreements has been transferred to the Union under Art. 207, para. 1, TFEU. Notably, this is an issue only if the Union were found to be exclusively competent to conclude the EUSFTA, as mixity inevitably requires Member States consent.

Addressing this question, Mrs Sharpston emphasizes that EU action in this respect must generally be in compliance with public international law.[97] The CJEU has previously confirmed that the EU subsumes obligations under an international agreement to which all Member States are party in the event that competence for the subject matter covered by that agreement is transferred from the Member States to the Union.[98] Indeed, this was the case with GATT.[99] Being a result of the application of the principle of conferral under EU law, this does not have a *prima facie* effect on the rights and obligations of the contracting parties to the international agreement. In other words, EU law requires the Union to fulfil the obligations of the agreements, while international law does not relieve the Member States of international responsibility as long as they remain signatories. The AG argues that the effect of subrogation of international obligations through the accumulation of competences at EU level makes the Union also the primary responsible actor under international law.[100] This is of course an issue in the context of mixed agreements, where the Union is responsible only in as far as it has competence.[101] The issue of responsibility is in this context often addressed through declarations of competence annexed to EU agreements such as UNCLOS.[102] Albeit of questionable value,[103] these declarations are indeed a strong indication of the complex-

[96] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 372.

[97] *Ibidem*, para. 378.

[98] Court of Justice, judgment of 21 December 2011, case C-366/10, *Air Transport Association of America v. Secretary of State for Energy and Climate Change*.

[99] Cort of Justice, judgment of 12 December 1972, joined cases 21 to 24/72, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, para. 18.

[100] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 379.

[101] This being said, in the absence of an explicit reference to this effect international law makes no connection between the competence and responsibility, see J. HELISKOSKI, *EU Declarations of Competence and International Responsibility*, in M.D. EVANS, P. KOUTRAKOS (eds), *The International Responsibility of the European Union: European and International Perspectives*, Oxford: Hart Publishing, 2013, p. 189 *et seq*., pp. 196-200.

[102] Annex IX, Art 6, para. 1, UN Convention on the Law of the Sea (adopted 10 December 1982).

[103] A. SEMERTZI, *The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements*, in *Common Market Law Review*, 2014, p. 1125 *et seq*; H. LENK, *Issues of Attribution: Responsibility of the EU in Investment Disputes under CETA*, in *Transnational Dispute Management*, 2016, p. 1 *et seq*., p. 18; A.D.

ity of competence division in mixed agreements.[104] The dynamic shift in competences over time, and in dependence of internal regulatory developments, is creating an uncertainty as to the allocation of responsibility for compliance with the agreement at a particular point in time.[105]

This reasoning cannot, however, extend to international agreements to which the EU is not a party. In these circumstances the rights and obligation under the agreement shift to the Union as a matter of EU law only. The transfer of competence alone cannot have an effect under international law on the responsibility of the signatories to comply with the international commitments. Mrs Sharpston acknowledges that as a matter of international law, Member States could not justify non-compliance with an international agreement by reference to internal law.[106] This is a fundamental principle of public international law, enshrined in Art. 27 of the 1969 Vienna Convention on the Law of Treaties (VCLT) and Art. 46 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations. Additionally, the principle of *pacta sunt servanda* obligates Member States to perform their obligations under international agreements to which they are a contracting party. Neither the application (i.e. Art. 3, para. 2, TFEU) nor a change of primary EU law can abrogate those principles. As far as the termination of international agreements is concerned, Art. 59 VCLT is fundamentally build on the consent of the contracting parties. Consent cannot be implied from the EU acting as a proxy for the signatory Member State. As a matter of international law, therefore, the right to terminate existing bilateral investment agreements remains exclusively with the Member State, irrespective the allocation of competences.

As a question of EU law, the allocation of the responsibility to perform or manage international investment agreements is governed by, on the one hand, Art. 351 TFEU in conjunction with Art. 4, para. 3, TEU, and, on the other, Regulation 1219/2012.[107] First, Art. 351 TFEU authorizes Member States to keep international agreements in place, which have been concluded before their accession to the EU. Albeit subject to the requirement to take all appropriate steps to resolve incompatibilities with the Treaties,[108]

CASTELEIRO, *EU declarations of competence to multilateral agreements: a useful reference base?*, in *European foreign affairs review*, 2012, p. 491 *et seq*., p. 498; J. HELISKOSKI, *EU Declarations of Competence,* cit., p. 206.

[104] P.J. KUIJPER, E. PAASIVIRTA, *EU International Responsibility and its Attribution: From the Inside Looking Out*, in M.D. EVANS, P. KOUTRAKOS (eds), *The International Responsibility,* cit., p. 35 *et seq*., p. 57.

[105] It must be recalled that the AG differentiates sharply between the role of the CJEU to rule on the allocation of competence for the conclusion o fan international agreement in the context of Art. 218, para. 11, TFEU, and the determination of competence for the fulfilment of particular international commitments in the implementation of the agreement, see Opinion 2/00, cit., paras 6 and 17.

[106] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., para. 381.

[107] Regulation (EU) 1219/2012 of the European Parliament and of the Council of 20 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

[108] Art. 351, para. 2, TFEU.

this must be understood as defining obligations for Member States rather than endowing the Union with additional external competence.[109] Similarly, despite falling outside of the scope of Art. 351 TFEU, a general obligation to resolve incompatibilities with the Treaties with regards to international agreements concluded subsequent to EU accession can be derived from the principle of sincere cooperation in Art. 4, para. 3, TEU.

Secondly, Regulation 1219/2012 lays out a general system for the grandfathering of existing bilateral investment agreements between the Member States and third countries. Accordingly, Member States can maintain their bilateral investment agreements in force,[110] subject to the control of the Commission which is tasked to assess compatibility of the agreements with the Treaty and, indeed, with the overall exercise of Union's competence in the area of foreign investment policy.[111] As a result, Member States are under an obligation to terminate bilateral investment agreements if the Union is about to conclude an investment agreement with the same third country. Again, this provision must be read as obligating the Member States to act in the spirit of sincere cooperation in order to remove obstructions to the effective exercise of Union competence. Nothing in the Regulation indicates that competence to terminate the agreement has shifted from the Member State to the Union. Lastly, it should be recalled at this stage that the EU under no circumstances assumes obligations under a bilateral agreement between a single Member State and a third country.[112]

In conclusion, Member State action is required for the termination of existing international agreements between Member States and third countries both, under EU as well as international law. It is irrelevant in this respect whether that consent is exercised in parallel or as an intrinsic part of the EU agreement. In the latter case, however, it demands a mixed conclusion, irrespective the nature of Union competences *vis-à-vis* the particular subject matter of the agreement.

IV.6. Synopsis

Although the AG's conclusions with regards to ch. 9 of the EUSFTA are all but surprising, her reasoning is in many respects remarkable. This short assessment focuses first, on the differentiation of portfolio from direct investment, and second, on the right to terminate. It was already mentioned above that the particular drafting of Art. 207, para. 1, TFEU indicates a certain differentiation between foreign direct investment and other types of foreign investment (i.e. portfolio investment). It cannot, and never seriously has

[109] Court of Justice, judgment of 3 March 2009, case C-205/06, *Commission v. Republic of Austria*, para. 44; Court of Justice, judgment of 19 November 2009, case C-118/07, *Commission v. Finland*, paras 48-50; Court of Justice, judgment of 3 March 2009, case C-249/06, *Commission v. Sweden*, para. 35.

[110] Art. 3, of Regulation 1219/2012.

[111] Arts 5 and 6, of Regulation 1219/2012.

[112] See, *inter alia*, *Air Transport Association of America v. Secretary of State for Energy and Climate Change,* cit., para. 60.

been, argued that Union competence for the regulation of foreign investment under the common commercial policy is all embracing. In other words, the drafters of the Lisbon Treaty did not attempt to endow the Union with the requisite competence to conclude international investment agreements exclusively on the basis of Art. 207, para. 1, TFEU. Logically, this prompts the quest for a definition, or at least an ascertainable dividing line between "direct" and "portfolio" investment. In her reasoning Mrs Sharpston reaffirms the continuous relevance of the Nomenclature to Directive 88/361, which has in fact expired long ago, but has frequently been drawn upon by the CJEU as an indicative guidance. Her definition is elaborate and comprehensive. While referring briefly to the definitions of investment in the OECD, IMF and UNCTAD, it is unfortunate that the AG does not look for support in jurisprudence of ICSID and other investment tribunals.

As a consequence of the structure of Art. 207, para. 1, TFEU the importance of telling "portfolio" from "direct" investments will remain relevant throughout the implementation of the EUSFTA. Wherever a dispute is brought before a tribunal (whatever its form), the distinction and its ramifications for the allocation of competence internally is likely to resurface. Member States are as a general rule no longer competent to act internationally in areas covered by exclusive Union competence. Similarly, as Mrs Sharpston observes in her preliminary remarks on the allocation of competences, whether or not the Union acts in an area of shared competences is ultimately a political decision taken in the Council. This is not true, however, in as far as the determination of the respondent to investment disputes is concerned, which is a decision taken by the Commission in accordance with the relevant internal Regulation.[113] Moreover, the role of the Council and the Member States in the dealings of the EUSFTA Trade Committee continues to be unclear, particularly given the power of the Trade Committee to adopt authentic interpretations of the provisions of ch. 9.[114] Noteworthy in this context is the set up provided for in other EU trade and investment agreements, which provides for the Commission to be the predominant actor in these committees.[115] It might very well be argued that these questions of implementation are less relevant for the purpose of determining the allocation of competences for the conclusion of the EUSFTA.[116] It nonetheless demonstrates to complexity of the issue and allows a glimpse at the future legal and political battles that are likely to be fought over these matters.

The right of termination has already been discussed at length above and shall not be repeated. One aspect of AG Sharpston's Opinion that warrants particular emphasis,

[113] Regulation (EU) 912/2014 of the European Parliament and of the Council of 28 August 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

[114] Art. 9.30 EUSFTA.

[115] E.g. CETA Joint Committee, Art. 26.1, in conjunction with Arts 26.5 ICSID, let. e), 8.10, para. 3, and 8.31, para.3, CETA.

[116] Opinion 1/08, cit., para. 127; Opinion 2/00, cit., para. 41; Opinion 1/94, cit., para. 107.

however, is her effort to integrate her reasoning into the wider international legal context. Arguably, whether or not Art. 9.10, para. 1, and Annex 9-D are legally valid under international law is not for the AG to assess within the context of a request for an Opinion pursuant to Art. 218, para. 11, TFEU. After all, the allocation of competences between the EU and its Member States is a matter of EU law. Her reasoning, however, acknowledges the fact that the EU does not exist in isolation but ultimately within the context of international law. Particularly in the field of external relations, conformity with international law is pivotal. Not merely for the integrity of EU law, but for its effectiveness and efficiency. It is therefore that her reasoning on this point is so valuable. Notably, in her reasoning she walks a thin line between the consideration of international law and the justification of her conclusions on competence – a purely internal matter – by reference to international law.

Similar provisions have been included into other EU trade and investment agreements. CETA stipulates in Art. 30.8, para. 1, and corresponding Annex 30-A that all bilateral investment agreements between Member States and Canada cease to apply upon conclusion of the agreement. Perhaps, considering that CETA will ultimately be concluded as a mixed agreement, this issue becomes a moot point. On the other hand, unlike large parts of the investment chapter, Art. 30.8 CETA is not excluded from provisional application, and therefore bound to take effect already after ratification of the agreement by the European Parliament, in line with Art. 30.7, para. 3, CETA. In fact, the European Parliament already casted a positive vote on CETA on February 15, 2017. In her analysis, the AG has put her finger where it matters, but she hasn't resolved the issue. And it is not an entirely unrelated concern for the EUSFTA either, which might still end up in a similar situation – signed but not ratified by all Member States. What then is the effect of Art. 9.10, para. 1, of the EUSFTA? As long as the agreement is not ratified by the relevant national parliaments, it is difficult to establish the requisite consent for the termination of existing bilateral investment agreements. Unless Member States address the issue independently of the process of ratification – and whilst they are on it address the potential issue of sunset clauses, too – we are likely to see parallel investment regimes being applied between Canada and the EU for a few years to come.[117]

[117] Thus far Canada has not been the respondent state of an investment dispute initiated by an EU investor, and was home state of the investor in only five cases: ICSID, case no. ARB/15/31, *Gabriel Resources v. Romania*; *Arbitration Tribunal*, *Lumina Copper v. Poland*, pending; ICSID, case no. ARB/14/14, *EuroGas v. Slovakia*; Permanent Court of Arbitration, UNCITRAL, final award of 12 November 2010, *Frontier v. Czech Republic*; *Ad hoc* arbitration, UNCITRAL, award of 25 May 2008, *Ulemek v. Croatia*. More Information on these cases are available at investmentpolicyhub.unctad.org.

V. Conclusions

The Commission's request in Opinion 2/15 provides the CJEU with a valuable opportunity to assess the scope of the post-Lisbon common commercial policy. Some aspects (e.g. services, and commercial aspects of intellectual property) have in this context already been addressed by the CJEU elsewhere, while others present entirely novel territory (e.g. foreign direct investment). Never since Opinion 1/94, however, was the CJEU asked to comprehensively examine the breadth of EU foreign trade and investment policy in light of Art. 207, para. 1, TFEU. Not least for those reasons, is Opinion 2/15 likely to have a broad and significant impact on future EU trade and investment agreements. AG Sharpston's Opinion in this matter is illustrative of the complexity that deep and comprehensive free trade agreements pose for an efficient common commercial policy from an institutional perspective. One thing is certain, mixity in EU foreign trade and investment policy is here to stay. Mrs Sharpston concludes her Opinion acknowledging that:

> "A ratification process involving all the Member States alongside the European Union is of necessity likely to be both cumbersome and complex. It may also involve the risk that the outcome of lengthy negotiations may be blocked by a few Member States or even by a single Member State. That might undermine the efficiency of EU external action and have negative consequences for the European Union's relations with the third State(s) concerned.
> However, the need for unity and rapidity of EU external action and the difficulties which might arise if the European Union and the Member States have to participate jointly in the conclusion and implementation of an international agreement cannot affect the question who has competence to conclude it. That question is to be resolved exclusively on the basis of the Treaties. [...] In other words, the fact that there is not a complete overlap between what is to be regarded as 'trade policy' or 'investment policy' in international relations (and is therefore covered by an agreement such as the EUSFTA) and what constitutes the common commercial policy as a matter of EU law is not relevant when determining whether the European Union has exclusive competence to conclude such an agreement".[118]

A number of aspects are striking in the AG's reasoning and are worth briefly mentioning here. First, her approach to the questions posed attempts to inextricably combine two important strands of reasoning, on the on hand, determining the nature of competence and, on the other, determining the correct legal basis. This is a laudable effort indeed. However, it leaves many questions unanswered and adds incoherence and a lack of clarity to an already high level of complexity. It is clear from her approach, however, that the multilateral trading system still constitutes an important baseline when assessing the boundaries of Art. 207, para. 1, TFEU. Throughout her reasoning she coherently examines the impact of individual components of the EUSFTA on trade in goods and services. Second, Mrs Sharpston is wary not to extend the Union's exclu-

[118] Opinion of AG Sharpston, in Opinion procedure 2/15, cit., paras 565 and 566.

sive competence in trade and investment by means of Art. 3, para. 2, TFEU. Only in two instances (i.e. rail and road transport services), is she convinced that the conditions of implied exclusivity are fulfilled. Acknowledging that the common commercial policy must be interpreted and applied in a manner that allows an efficient foreign trade and investment policy, the AG is careful to not overstretch its boundaries. Third, in her assessment of the Unions competence to terminate existing international agreements between Member States and third countries the AG is engaging in complex questions on the interaction of EU institutional law with public international law. It remains to be seen whether the CJEU is equally prepared to look beyond the rim of the EU Treaties to determine this vital questions. After all, conclusions of these points will directly impact on relevant provisions in other EU agreements such as the recently conclude CETA between the EU and Canada.

Fourth, her examination of the EUSFTA investment chapter corresponds in breadth and scope to developments of the other parts of the common commercial policy. This is particularly obvious in regards to the inclusion of investment protection (i.e. post-admission treatment) as falling broadly into the scope of Art. 207, para. 1, TFEU. Paradoxically, having applied consistently a standard that assesses the impact of commitments on trade, in her appraisal of ch. 9 the AG rather assesses, whether a commitment has a direct and immediate impact on foreign direct investment. In some sense, it appears, Mrs Sharpston considers investment protection in separation of the remaining parts of the common commercial policy. This reading is furthermore supported by the fact that general transport services exception (Art. 207, para. 5, TFEU) does not appear to be applicable to foreign direct investment. Consequently, the AG does not explicitly exclude direct investments in the transport sector from the scope of the common commercial policy. In other words, the common commercial policy covers trade *and* investment, rather than investment in as far as it specifically affects trade.

Last but not least, the Court's position on the possible use of provisions in primary law as "common rules" within the meaning of Art. 3, para. 2, TFEU will be of particular importance.