The Common Commercial Policy, Parliamentary Participation and the Singapore Opinion of the CJEU

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A. Introduction

The future design of the Common Commercial Policy (CCP), as well as the current and future participation of the EU Member States – and their (national) parliaments in particular – determined the debates on CETA[1] and TTIP[2] in the last few years. The actual legal background of this discussion is about the interpretation and enforcement of Article 207 TFEU and Articles 2 to 4 TFEU, which establish the powers of the Union in the field of external trade and – therefore – contain at the same time the limits of the possible participation of the national parliaments in the external economic relations of the EU. The interpretation of these provisions was and is done by the Court of Justice of the European Union (CJEU), and in the past it was mainly the WTO

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1 Comprehensive Economic and Trade Agreement (CETA) between Canada on the one hand, and the European Union on the other hand, OJ L 11 of 14/1/2017, p. 23 (signed in Brussels on 30/10/2016; entered into force provisionally on 21/9/2017).

2 Transatlantic Trade and Investment Partnership; current information on this agreement can be found on the website of the Commission under http://ec.europa.eu/trade/policy/in-focus/ttip/index_de.htm (15/9/2017).

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opinion of 1994, which was of utmost importance.[3] This opinion induced many Treaty changes, which did not attract the attention of the general public – at least not in Germany. Hence, it is still open how the Commission will react to the most recent developments – in particular the Singapore opinion of the CJEU[4] on the ratification of the EU-Singapore FTA (EUSFTA).[5] Therefore, in conclusion, a proposal is made.

B. Development of the Common Commercial Policy under consideration of the European Parliament

At the latest with the Treaty of Lisbon, the Common Commercial Policy (CCP) in its entirety is part of the exclusive EU competences.[6] This was codified expressly in Article 3(1)(e) TFEU and consequently means that national ratification processes of the Member States are not allowed. Thus, when it comes to agreements that the EU concludes alone, there is no voting in the national parliaments on any possible act of consent. Regardless of this, a free parliamentary participation "in a different way" remains possible.[7] However, at the same time as the decrease of national participation rights, the participation powers of the European Parliament (EP) have been extended.

Therefore, questions arise as to the exact scope of the CCP and the vertical division of competences between the EU and its Member States – which also determines the role of the national parliaments in the final procedure – as well as the horizontal division of competences between the EU institutions, and the related role of the European Parliament.

I. The Development of Competences in Common Commercial Policy

Whether an agreement in the field of the treaty-based CCP falls entirely within the CCP competences is to be decided based on a detailed analysis of the Treaties. The CJEU carries out this analysis: in as far as an international agreement contains different purposes, of which some do not have the nature of common commercial policy, the legal classification has to be assessed "having regard to its essential objective rather than in terms of individual clauses of an altogether subsidiary or ancillary nature."[8] This classification will then determine whether the agreement should be concluded by the EU alone ("EU only"), or as a mixed agreement – that is together with the Member

3 CJEU, opinion 1/94, *WTO*, EU:C:1994:384.
4 CJEU, opinion 2/15, *Singapore Free Trade Agreement*, EU:C:2017:376.
5 EU-Singapore FTA, http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (15/9/2017).
6 On this, in detail, *Bungenberg*, Going Global? The EU Common Commercial Policy After Lisbon, in: Herrmann/Terhechte (eds.), European Yearbook of International Economic Law 2010, p. 123 et seq.
7 On this, in detail, *Mayer*, Die Mitwirkung deutscher Gesetzgebungsorgane an der EU-Handelspolitik: europarechtliche und verfassungsrechtliche Erfordernisse, ZEuS 2016, p. 391 et seq.
8 CJEU, opinion 1/78, *International Natural Rubber Agreement*, EU:C:1979:224, para. 56.

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States.[9] In those fields, where there is no exclusive Union competence to conclude the agreement, another differentiation must be made between the exclusive Member States competences and the shared competences between the EU and its Member States.

The CCP being an exclusive Union power is of particular relevance, when the definition of the scope of the Union's CCP powers in Article 207 TFEU is compared with its predecessor Article 133 TEC. Already for Article 113 TEEC (which then became Article 133 TEC), the CJEU decided that "the Treaty took possible changes [of international trade relations] into account,"[10] which means, "the aim of contributing to the harmonious development of world trade, which presupposes that *commercial policy* will be adjusted in order to take account of any changes of outlook in international relations."[11] This dynamic-evolutionary point of view was abandoned by the CJEU at the latest with its WTO opinion 1/94,[12] where the CJEU decided that the European Commission did not have the exclusive competence to conclude the GATS as well as the TRIPS under the then applicable legal situation. The EC therefore joined the WTO in 1995 by means of a "mixed agreement" – the EC Member States as well as the EC itself became founding members and contracting parties with all other WTO members.[13]

In order to preserve the EU capacity to act, amendments to the primary legal requirements were unavoidable. The Treaty of Amsterdam added a paragraph 5 to the first four paragraphs of Article 133 TEC,[14] to install an express legal basis for mixed participation of the EU and the Member States in Article 133(6)(2) TEC. The Treaty of Nice stated, in a new version of paragraph 5, that the rules of paragraphs 1 to 4 are in principle also applicable to the negotiation and conclusion of agreements concerning trade in services and trade-related aspects of intellectual property.[15] The Lisbon Treaty has then once again substantially broadened the scope of the CCP. Firstly, trade in services, trade-related aspects of intellectual property and foreign direct investment are explicitly listed in the first paragraph of the provision on the EU Common Commercial Policy. International agreements on services and the protection of intellectual property are therefore no longer – as they were since the WTO opin-

9 On this, in detail, *Weiß,* in: Grabitz/Hilf/Nettesheim (eds.), Das Recht der EU, 2016, Article 207, para. 91 et seq.

10 CJEU, case 45/86, *APS I*, EU:C:1987:163, para. 19.

11 Ibid.

12 See case report in CJEU, opinion 1/94, *WTO*, EU:C:1994:384; see also, *Bail*, Was bringt die Uruguay-Runde? Teil 1, EuZW 1990, p. 470 et seq.; *von Bogdandy*, Der rechtliche Rahmen der Zugangsregeln, in: Grabitz/von Bogdandy/Nettesheim (eds.), Europäisches Außenwirtschaftsrecht, Der Zugang zum Binnenmarkt: Primärrecht, Handelsschutzrecht und Außenaspekte der Binnenmarktharmonisierung, 1994, p. 29 et seq.

13 See also Article XII WTO Agreement.

14 Article 133(5) TEC (Amsterdam): "The Council may, acting unanimously and after consulting the European Parliament, extend the application of paragraphs 1 to 4 to international negotiations and agreements on the provision of services and intellectual property rights, insofar they are not covered by these paragraphs."

15 Critical in this respect, *Herrmann*, Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job, CMLR 2002, p. 26.

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ion – exceptional cases, which break through the normal division of competences, but are reintroduced into the former dogmatics from before opinion 1/94.[16]

The procedure for the conclusion of international agreements and the respective points of view to be taken into account are laid down in paragraphs 3 to 5 of Article 207 TFEU. Currently it is about the inclusion of new topics in Free Trade Agreements, as well as the correction of erroneous developments in some areas of international economic law in the past. With the "new" Free Trade Agreements of the fourth generation the EU strives, among other things, for a comprehensive liberalisation in services and in public procurement.[17] New areas, such as the protection of intellectual property, protection of labour and environment as well as fair competition also have to be regulated.[18] Until the Singapore opinion of the CJEU, it was not clear whether the EU had exclusive or shared competences in these above mentioned areas.

II. The Participation of the European Parliament

Article 218 TFEU applies to the conclusion of international agreements in the field of the CCP within the EU, without prejudice to the special provisions of paragraph 3 and 4 of Article 207 TFEU. Article 218 paragraph 1 to 10 TFEU contain provisions on the Union's internal horizontal division of competences between the European Parliament, the Council and the Commission, defining the respective rights of the different institutions involved in the negotiation and conclusion of international agreements. The Commission and the High Representative for Foreign Affairs and Security Policy respectively have the general right to propose initiation of negotiation, and the Council has the competence to conclude international agreements, after the European Parliament has consented to the conclusion in the "normal case".

With the various amendments of the Treaties, the role of the European Parliament in the negotiation and conclusion of international agreements has expanded continuously. The most fundamental changes to the procedure of conclusion have taken place with the Treaty of Lisbon.[19] According to the original legal situation prior to the entry into force of the Treaty of Lisbon, the European Parliament only had to be consulted. With regard to Association Agreements in the meaning of Article 218 TFEU, the Maastricht Treaty foresaw a right to consent for the EP (Article 228(3)(2) TEC). To-

16 *Krenzler/Pitschas*, Die Gemeinsame Handelspolitik im Verfassungsvertrag – ein Schritt in die richtige Richtung, in: Herrmann/Krenzler/Streinz (eds.), Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag, 2006, p. 21; *Cremona*, The Draft Constitutional Treaty: External relations and external action, CMLR 2003, p. 1363.

17 On this, *Bungenberg*, EU-Freihandelsabkommen in der Entwicklung, in: Müller-Graff (eds.), Europäische Union und USA – Europas nordatlantische Aufgaben, 2016, p. 91 et seq.

18 *Weiß*, Vertragliche Handelspolitik der EU, in: von Arnauld (ed.), Europäische Außenbeziehungen, EnzEuR Bd. 10, 2014, § 10, para. 2.

19 In detail on the changes, see inter alia, *Wedekind*, Die Mitbestimmungsbefugnisse des Europäischen Parlaments im Bereich der Gemeinsamen Handelspolitik, 2012, p. 135 et seq. and 191 et seq.; *Krajewski*, Die neue handelspolitische Bedeutung des Europäischen Parlaments, in: Bungenberg/Herrmann (eds.), Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon, 2011, p. 60 et seq.

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day the Lisbon Treaty provides for a fully comprehensive role for the European Parliament in all phases of the procedure of the conclusion; there has been a true "parliamentarisation" of the external action of the EU.[20] This parliamentarisation has taken place on the EU level parallel to the expansion of EU competences in external relations.

In addition to the general right to be informed, today the European Parliament is also involved in the conclusion procedure for international agreements. In the past, the European Parliament had already fought for and gained powers to participate in practice.[21] For a long time, the Commission committed itself to informing the European Parliament already at an early stage in the preparation of envisaged agreements (Luns procedure and Luns-Westerterp procedure).[22] Also the current cooperation between the Commission and the Parliament in concluding international agreements is laid down in a framework agreement.[23]

With the Treaty of Lisbon, the European Parliament is being informed "immediately and fully in all phases of the procedure" (Article 218(10) TFEU). However, when it comes to the signing of the agreement – not its ratification – the powers of the Parliament are limited, in comparison to the conclusion of the agreement.[24] The Union's ratification procedure for international agreements requires, however, the consent of the European Parliament in almost all cases (Article 218(6)(a) TFEU). The European Parliament has now also become an equal actor, together with the Council, in the conclusion of international agreements in the field of the CCP. A provisional entry into force of agreements is in practice subject to the prior approval of the European Parliament as well.

III. The Participation of the Member States, in particular the National Parliaments of the Member States

As clear as the role of the European Parliament is, so difficult is it to determine the powers of the national parliaments of the Member States. The phenomenon of mixed agreements is now more widespread than it was actually foreseen in the strict reading of the legal provisions. The Member States have an obvious interest, even in the area of trade policy, in not ceding as legal entities on the international scene. In any case, according to the jurisprudence of the CJEU with regard to the scope of CCP of Article 207 TFEU, a broad interpretation must be made,[25] which was lately confirmed in the Singapore opinion of the Court. A participation of the national parliaments in the sense of a voting procedure is clearly excluded when an agreement falls entirely

20 On this, in detail, ibid., p. 60 et seq.

21 In detail on the former procedure, see *MacLeod/Hendry/Hyett*, The External Relations of the European Communities, 1996, p. 98 et seq.

22 Framework Agreement on the relations between the European Parliament and the Commission, OJ C 121 of 24/4/2001, p. 122, Annex 2, pt. 2.

23 Framework Agreement on the relations between the European Parliament and the Commission, OJ L 304 of 20/11/2010, p. 47, para. 23 et seq.

24 *Lorenzmeier*, in: Grabitz/Hilf/Nettesheim, (fn. 9), Article 218, para. 42.

25 CJEU, opinion 1/78, *International Natural Rubber Agreement*, EU:C:1987:163, para. 20; CJEU, case C-124/95, *Centro-Com*, EU:C:1997:8, para. 26.

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within the exclusive competences of the EU. The situation is different for those agreements that fall under the shared competences, and agreements that fall within the exclusive competences of the Member States: The exclusive nature of CCP competence clearly excludes the Member States from taking measures, including parliamentary participation in the sense of approval of legislation in the field of CCP.[26] One exception exists where individual or all Member States are explicitly authorised by the EU to act (see Article 2(1) TFEU).

Then, as to the shared competences, it is repeatedly argued that they lead to mixed agreements. The CJEU has emphasised several times, that there is a duty of close cooperation between the Member States and the institutions of the Union when it comes to the conclusion of a mixed agreement.[27] The question is, however, whether shared competences necessarily lead to the participation of the Member States' parliaments, in the form of a parliamentary ratification.[28] In principle, shared competences offer the possibility to conclude an international agreement exclusively through the Union institutions, insofar as a political will within the Union institutions exists. Pursuant to Article 2(2) TFEU, in the case of shared competences, "the Union and the Member States may legislate and adopt legally binding acts in that area." Since it is subsequently provided that the Member States are competent, "to the extent that the Union has not exercised its competence", the EU can also, in accordance with the wording of the provision, exercise shared competence alone – without the participation of the Member States. At best, it is possible – and this aligns with the common practice – to conclude a facultative "mixed agreement", with participation of the Member States and their parliaments.

However, if an agreement that has been negotiated by the EU also contains areas that fall within the exclusive Member State competences, then the conclusion of a mixed agreement is inevitable. For the Member States, their constitutional requirements apply evidently. In the Federal Republic of Germany, the provisions of Article 59(2) of the Basic Law have to be adhered to. Also the approval of the Federal Council may be obtained pursuant to Article 84(2) of the Basic Law.

It must again be noted that a shared competence can also lead to action by the Union alone, in the sense of the conclusion of an international agreement. Then, even in the

26 *Reinisch*, in: Mayer/Stöger (eds.), EUV/AEUV, 2016, Article 207, para. 9; see also CJEU, case 174/84, *Bulk Oil*, EU:C:1986:60, para. 31; see now also Article 2(2) TFEU, where the power of the Member States is mentioned explicitly.

27 CJEU, opinion 1/78, *Physical Protection*, EU:C:1979:224, para. 34-36; CJEU, opinion 2/91, *ILO Agreement*, EU:C:1993:106, para. 36; CJEU, opinion 1/94, *WTO*, EU:C:1994:384, para. 108; CJEU, joined cases C-300/98 and C-392/98, *Dior and others*, EU:C:2000:688, para. 36; CJEU, case C-459/03, *Commission/Ireland*, EU:C:2006:345, para. 175 et seq.

28 In the same sense, *Holterhus*, Die Rolle des Deutschen Bundestags in der auswärtigen Handelspolitik der Europäischen Union – Insbesondere zu den parlamentarischen Einflussmöglichkeiten im völkerrechtlichen Vertragsschlussverfahren, EuR 2017, p. 236; *Jaag*, Demokratische Legitimation der EU-Außenpolitik nach Lissabon, EuR 2012, p. 320 et seq.; *Schiffbauer*, Mehrheitserfordernisse für Abstimmungen im Rat über TTIP, CETA & Co., EuZW 2016, p. 254.

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case of shared competences, there is no room for approval by the national parliaments. This is – for different reasons – often ignored.

C. The Ratification Process of the "new" Trade Agreements and the Singapore Opinion of the CJEU

The completion of the ratification process of the latest "post-Lisbon" Free Trade Agreements is, as is well known, extremely difficult with regard to several points, which became evident from the examples CETA and EUSFTA. With CETA, the EU was at first unable to reach an internal agreement on whether the agreement was to be concluded as a pure Union agreement or as a mixed agreement. Commission President Junker finally decided, after the internal debates, to launch the agreement as a mixed agreement, despite the fact that, according to his own statements, he was convinced that it was an EU only-agreement.[29] Hereby, the question arises as to whether Junker was not obliged to have the CJEU deal with this question, or at least await the result of the procedure before the CJEU for request for opinion in regard to the EU-Singapore Agreement.

Both in Belgium and Germany, big efforts were undertaken to prevent the signing of the CETA agreement. Furthermore in Romania and Bulgaria, the necessary parliamentary participation was used to pressure "Brussels" and Canada on visa issues. In Belgium, the regional parliaments have to give their consent, so that the Belgian Council representative can agree to trade agreements in the Council. The Walloon parliament had initially opposed the signing of the CETA agreement, thus blocking unanimity in the Council;[30] the planned signing date had to be cancelled.[31] A compromise between the Belgian federal government and the Walloon government was the turning point.[32] This compromise contained, inter alia, that the provisions on investment arbitration should be submitted to the CJEU for checking with respect to their compatibility with the Treaties.[33]

29 See *Mühlauer*, Ceta und Mordio, SZ of 6/7/2016; Zeit Online of 5/7/2016, Nationale Parlamente dürfen bei Ceta mitentscheiden.

30 See for example, *Kafsack*, Wie es jetzt mit CETA weitergeht, FAZ of 24/10/2016; *Mayer*, Wallonien, CETA und die Tyrannei der Minderheit, Verfassungsblog of 23/10/2016; FAZ of 14/10/2016, Wallonien verweigert Ceta die Zustimmung; Zeit Online of 28/10/2016, Wallonien und Brüssel sagen Ja zu Ceta.

31 See for instance, Handelsblatt of 27/10/2016, Ist das der Tod von Ceta?; Zeit Online of 28/10/2016, Wallonien und Brüssel sagen Ja zu Ceta.

32 See for instance, SZ of 28/10/2016, Parlament der belgischen Wallonie billigt Ceta-Abkommen; Zeit Online of 28/10/2016, Wallonien und Brüssel sagen Ja zu Ceta; Zeit Online of 27/10/2016, Belgische Regionen einigen sich im Streit um Ceta.

33 Belgium has already announced, with regard to the declarations in the Council minutes on the decision on the signing of the CETA Agreement, to request the Court of Justice to examine in an opinion procedure the compatibility of the Investment Court with the European Treaties, see also, Council, Comprehensive Economic and Trade Agreement (CETA) between Canada on the one hand and the European Union on the other hand – Declarations for the Council Protocol, 13463/1/16 REV 1 of 27/10/2016, Declaration No. 37, pt. B.

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In Germany, a record number of constitutional complaints were launched against the act consenting to CETA, as well as against the approval by the German Council representative to sign the CETA Agreement. In a ruling, the Federal Constitutional Court did not raise any objections to the German approval to the signing of CETA in the Council, but however made the German consent subject to various conditions.[34] The Federal Government had to ensure that a Council decision on the provisional application will apply to those provisions of CETA that lie undisputedly within the exclusive competences of the Union, that until the Federal Constitutional Court renders a decision on the principle proceedings, sufficient democratic legitimacy with regard to the decisions of the CETA Joint Committee is ensured, and that the interpretation of Article 30.7(3)(c) CETA allows Germany to terminate the provisional application unilaterally.[35] However, the necessity for these conditions was not made clear. The unilateral termination right concerns areas, which are applied provisionally only because they fall indisputably within the exclusive Union competences.[36]

Furthermore, there is also the question of how the permanent responsibility with respect to European integration (*Integrationsverantwortung*) can actually be affected by a free trade agreement,[37] and whether the approaches that have been developed by the Federal Constitutional Court in the past regarding the review of the transfer of sovereign rights to supranational organisations, can be applied as criteria for Free Trade Agreements. Furthermore the transfer of democratic control to the German Constitutional Court via initiating mass complaints, is to be viewed critically.[38] Appropriate decisions should be taken by the Parliament, in as far as they pertain to decisions that can still be made by the Member States. The Walloon claims, as well as the individual statements made by the Federal Constitutional Court regarding the participation of national entities or parliaments of the Member States in the conclusion of free trade agreements, disregard the distribution of competences as defined in the EU Treaties. Not only do they unnecessarily complicate and delay the law-making process, they furthermore also undermine the role of the European Parliament.

The EU-Singapore Free Trade Agreement (EUSFTA) was finally the occasion for the Commission to request that the CJEU renders an opinion on the distribution of competences between the EU and its Member States in the field of CCP. The EUSFTA provides that it is to be concluded as an agreement between the EU and Singapore without the participation of the Member States. Therefore, the Commission asked:

> "Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically,

34 BVerfG, (CETA-Eilanträge), 2 BvR 1368/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16, ECLI:DE:BVerfG:2016:rs20161013.2bvr136816.

35 BVerfG, (CETA Emergency Appeal), 2 BvR 1368/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16, ECLI:DE:BVerfG:2016:rs20161013.2bvr136816, para. 66 et seq.

36 Comparable, see *Fölsing*, Anmerkung zu BVerfG, (CETA Emergency Appeal, EWiR 2016, p. 661 et seq.

37 Critical on this point, see for instance, *Ruffert*, Völkerrecht, Europarecht und Verfassungsrecht: Zustimmung zur vorläufigen Anwendung von CETA, JuS 2016, p. 1144.

38 See also *Krajewski*, Spielstand nach dem CETA-Beschluss: 2:2, und Karlsruhe behält das letzte Wort, Verfassungsblog of 13/10/2016; *Ruffert*, (fn. 37), p. 1144.

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– Which provisions of the agreement fall within the Union's exclusive competence?
– Which provisions of the agreement fall within the Union's shared competence?
– Is there any provision of the agreement that falls within the exclusive competence of the Member States?"[39]

In any case, on the most general and most important question – whether the EU can sign the free trade agreement alone – the CJEU did not give a clear answer.

Advocate General *Sharpston* presented her opinion in this procedure on 21 December 2016,[40] whereas the CJEU gave itself some more time, and came to its own partially contradictory, or at least unclear, opinion on 16 May 2017. Interesting to note is that there are considerable differences between the opinions of the Advocate General and the opinion of the Court, and that in the official press release[41] either an independent interpretation of the CJEU opinion has already been made, or the press release at least seems to be simply imprecise. According to Advocate General *Sharpston*, the EU and its Member States can only conclude the EU-Singapore Free Trade Agreement jointly.[42] Decisive for this statement in her view is that there are fields that fall within the exclusive competences of the Member States.[43] Concerning the shared competences, the Advocate General poses, in a well-reasoned and justified manner – inter alia by making a connection with the opinion of Advocate General *Wahl* in the opinion procedure 3/15[44] –, that there is political will within the Council to decide whether the shared competences should be exercised as Union competences or as Member States competences.[45] However, the EU does not have the external competence to declare itself bound to the part of the EUSFTA, that the bilateral agreements between certain Member States and Singapore should be terminated; this is an exclusive competence of the Member States.[46]

In its opinion the CJEU also expressed that the EUSFTA cannot be concluded by the EU alone, in particular because of the chapter on investment protection. The provisions of the Agreement on "foreign investments other than direct investments", as well as dispute settlement between investors and states, would not fall in the exclusive competence of the EU, so that the agreement cannot be concluded without further

39 CJEU, opinion 2/15, *Singapore Free Trade Agreement*, EU:C:2017:376, para. 1.
40 Opinion of AG *Sharpston* to CJEU, opinion 2/15, *Singapore Free Trade Agreement*, EU:C:2016:992.
41 CJEU, The free trade agreement with Singapore cannot, in its current form, be concluded by the EU alone, Press Release No. 52/17 of 16/5/2017.
42 Opinion of AG *Sharpston* to CJEU, opinion 2/15, *Singapore Free Trade Agreement*, EU:C:2016:992, para. 564.
43 Ibid., para. 563.
44 Opinion of AG *Wahl* to CJEU, opinion 3/15, *Marrakesh Agreement*, EU:C:2016:657, para. 119 et seq.
45 Opinion of AG *Sharpston* to CJEU, opinion 2/15, *Singapore Free Trade Agreement*, EU:C:2016:992, para. 77 et seq.
46 Ibid., para. 363 et seq.

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cooperation of the Member States.[47] After all, the CJEU on the one hand permits the EU far more comprehensive exclusive competences than Advocate General *Sharpston* did before,[48] but on the other hand did not make clear at all in which way the Member States can and should participate in the case of shared competences. Finally, and contrary to Advocate General *Sharpston*, the CJEU does not assume that there are parts of the agreement that fall under the exclusive competences of the Member States.

The opinion was depicted as a "slap in the face" for the Commission in the first statements,[49] as it would amount to a veto right for the national parliaments.[50] When taking a more careful look at the statements of the Court though, a different conclusion should be drawn. Depending on the reading, the EU can conclude trade and investment protection agreements in the future without the consent of the Member States, in the case that there is a (unanimous?) Council decision on the signing and ratification. Or, at least, in a somehow more reserved reading, a comprehensive *trade* policy can be pursued by the EU alone; independent from that, a common policy of the Union and the Member States can be pursued for *investment* protection. It is also argued that the areas that fall within shared competences have the effect that the whole agreement should be ratified by the Member States according to the respective constitutional requirements.[51]

If one was to follow this last approach, the possibility of "facultative mixity" can at least be "thrown overboard".[52] Such a reading would misunderstand the competence structure laid down by the treaties; Advocate General *Sharpston* emphasised as well, that if the political will exists in the Council – in which all Member States are represented – the EU alone should conclude an agreement, even if there are shared competences, without ratification in the Member States.[53] Although there is a shared

47 CJEU, opinion 2/15, *Singapore Free Trade Agreement*, EU:C:2017:376, para. 243 et seq.: "243. It is apparent from paragraphs 80 to 109 and 226 to 242 of this opinion that the commitments contained in Section A of Chapter 9 of the envisaged agreement fall within the common commercial policy of the European Union and, therefore, within the latter's exclusive competence pursuant to Article 3(1)(e) TFEU in so far as they concern foreign direct investment of Singapore nationals in the European Union and vice versa. On the other hand, those commitments fall within a competence shared between the European Union and the Member States pursuant to Article 4(1) and (2)(a) TFEU in so far as they concern other types of investment. 244. It follows that Section A of Chapter 9 of the envisaged agreement cannot be approved by the European Union alone."

48 See insofar also *Kleimann/Kübek*, The Singapore Opinion or the End of Mixity as we know It, Verfassungsblog of 23/5/2017.

49 See e.g., Handelszeitung of 16/5/2017, EU-Gericht verpasst Kommission eine Ohrfeige.

50 See FAZ of 16/5/2017, Nationale Parlamente dürfen Veto gegen Freihandelsabkommen einlegen.

51 See also inter alia *Holterhus*, (fn. 28), p. 236.

52 See on the same point also, *Ankersmit*, Opinion 2/15 and the future of mixity and ISDS, European Law Blog of 18/5/2017.

53 Opinion of AG *Sharpston* to CJEU, opinion 2/15, *Singapore Free Trade Agreement*, EU:C: 2016:992, para. 72 et seq.

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competence in some areas, this cannot in principle lead to a mixed agreement.[54] The decision of EU only or mixed is a political decision to be taken by the Commission and the Council. This decision is also the factual decision whether or not to involve the national parliaments in a ratification process.[55] In practice, this constellation leads to the conclusion of mixed agreements in most cases, to allow participation of the national parliaments, but this is not mandatory.[56]

The CJEU has failed though, to make clear why and how the Member States should be involved – at least inaccuracies in the formulation of critical passages can be found, which once again lead to different interpretations of the opinion and of shared competences; this is all the more annoying, because this procedure to produce an opinion was initiated in the first place to bring light in the dark.[57] Or to put it even more clearly: the CJEU actually still owes an answer to the question whether or not the Union can, in principle, conclude the agreement alone when the agreement has parts that fall within shared competences.[58] Or did the CJEU deny facultative "mixity" for the future in an implicit way?

D. The Consequence of the Singapore Opinion for future Common Commercial Policy Agreements: Separation of Trade and Investment Agreements

If one is inclined to read that for the ratification process shared competences require the participation of the Member States, in accordance with their respective constitutional requirements, a separation of trade and investment (protection) policy may be the result. The same counts for cases where the Member States' participation is desired for political reasons.

The Singapore opinion confirms in any case that the future EU trade agreements can be concluded by the EU only. Parliamentary control would (only) be reserved for the European Parliament. The CJEU has given "green light" for this. All Singapore subject matters[59] – with the exception of investment protection – are categorised as exclusive competences of the EU, which is confirmed more than clearly.[60]

As has already taken place in the past, investment protection provisions can be separated from trade-related provisions without any problems, which may even be more appropriate if the EU investment protection policy is considered more closely.

54 See on this point, inter alia, *Giegerich*, in: Pechstein/Nowak/Häde (eds.), Frankfurter Kommentar, Vol 3, Article 216, para. 161 et seq.
55 Comparable also in *Giegerich*, What Kind of a Global Actor will the Member States Permit the EU to be?, ZEuS 2017, p. 402 et seqq.
56 Comparable in any case the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community on the one hand, and Kosovo on the other hand (signed on 27/10/2015 in Strasbourg; entered into force on 1/4/2016), OJ L 71 of 16/3/2016, p. 3.
57 See on the same point also *Ankersmit*, (fn. 52).
58 See also *Kleimann/Kübek*, (fn. 48).
59 See CJEU, opinion 2/15, *Singapore Free Trade Agreement*, EU:C:2017:376, para. 305.
60 *Tervooren*, Freihandelsabkommen – Vetorecht für nationale Parlamente?, PWC – Zollrecht aktuell – Ausgabe May 2017.

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Here it is of particular importance to note that the EU has been discussing the development of an independent investment protection policy since the entry into force of the Lisbon Treaty – however no EU agreement with investment protection has actually been put into force. Today the discussions about a Multilateral Investment Court (MIC) are more intense.[61] This would already make an ISDS chapter in EU free trade agreements superfluous if the EU, the Member States and the third country were members of such an MIC. For now, a network of approximately 1.400 Member States' investment protection agreements[62] remains in place. These agreements can be replaced or supplemented either by specific EU investment protection agreements with third states, or by mixed agreements – depending on the political will, since it pertains to a shared competence here. Or there will still be a substantive multilateral investment agreement, as has been the subject of discussion for a long time.[63]

Already immediately after the Wallonia-madness, a group was formed that profiled itself as advocates for an open and tradeable Europe,[64] after scientists previously made proposals to withdraw the EU from the current trade negotiations.[65] This group had proposed that agreements on areas covered only by exclusive EU competence should be clearly distinguished from the so-called mixed agreements. For every type of agreement, there should be a separate signing and ratification process. Agreements covering mainly areas that fall under the exclusive competences of the EU should not be made artificially into mixed agreements. It is expected that this orientation of the CCP agreements will be carried out in the future; this is already clear from singular expres-

61 In addition to the bilateral court systems as introduced in CETA as well as in the EU-Vietnam FTA, it was also stated – in the exact same wording – that the Contracting Parties are seeking to transfer the respective bilateral Investment Court Systems (ICS) into a multilateral system: "The Contracting Parties shall, together with other trading partners, endeavor to establish a multilateral investment court with the right to appeal." See on this point also, European Commission, Concept Paper, Investment in TTIP and beyond – the path for reform, May 2015, pp. 3 and 13; European Commission, A future multilateral investment court, Fact Sheet of 13/12/2016; European Commission, The Multilateral Investment Court project, News of 21/12/2016; *Ambrose/Naish*, An Investment Court system or an Appeals mechanism? The EU's 2017 consultation on multilateral reform of ISDS, Arbitration Blog of 15/2/2017; *Blair*, A global investment court for a changing era of trade, Financial Times of 24/1/2017; *Ghahremani/Prandzhev*, Multilateral Investment Court: A Realistic Approach to Achieve Coherence and Consistency in International Investment Law?, EFILA Blog of 14/3/2017.

62 See for example the establishment of the bilateral investment protection agreements pursuant to Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12/12/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ C 147 of 11/5/2017, p. 1.

63 See on this point for example *Karl*, The Negotiations on the OECD Multilateral Agreement on Investment, in: Bungenberg et al. (eds.), International Investment Law, 2015, p. 342, para. 46 et seq.); *Aslund*, The World Needs a Multilateral Investment Agreement, Peterson Institute for International Economics Policy Brief 13-01; with regard to the Union level, see, Council, Intra-EU Investment Treaties, Non-Paper from Austria, Finland, France, Germany and the Netherlands, www.bmwi.de/Redaktion/DE/Downloads/I/intra-eu-investment-treaties.pdf?__blob=publicationFile&v=4 (15/9/2017).

64 See www.trading-together-declaration.org/signatories (15/9/2017).

65 See Namur Declaration, http://declarationdenamur.eu/en/index.php/namur-declaration/ (15/9/2017).

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sions of potential partner countries,[66] and now also seems to have become the official policy of the Commission.[67]

E. Conclusion

The future EU treaties in the field of Common Commercial Policy can be EU only treaties – i.e. without participation of the Member States. This does not pertain to CETA and the Singapore FTA, nor the EU-Vietnam Agreement – but all future agreements. The big times of mixed agreements in the field of Common Commercial Policy might be over after the Singapore opinion of the CJEU – as may be the direct participation of the national parliaments in the ratification procedure. The Singapore opinion has made this very clear – contrary to the hasty conclusions drawn in the press. The only democratic – and sufficient – legitimacy future trade agreements will have, is that by the European Parliament – as is foreseen by the Treaty of Lisbon.

In the field of foreign investment, the situation is different. Investment treaties – like pre-existing ones in the relationship between the EU and China – might have to be negotiated as "stand-alone" agreements and fall within shared competences. Also in this area, the Singapore opinion of the CJEU raises several far-reaching questions: it is unclear in which way exactly the Member States will participate in cases of shared competences – through their representatives in the Council, or through a ratification process in accordance with the national constitutional requirements. This latter alternative would in any case be contrary to the meaning of shared competences, as described in Article 2 TFEU – but in EU law almost everything is possible!

66 See also *Lester*, Are Investment Protection and Trade Headed for a Divorce?, IELP Blog of 20/6/2017; see also *v. d. Burchard/Hanke*, EU, Japan launch big push to seal trade deal by July, Politico of 13/6/2017, with regards to the statements made by Japan.

67 See *Junker*, State of the Union Address 2017, Speech of 13/9/2017, http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm (15/9/2017); see also European Commission, Recommendation for a Council Decision authorising the opening of negotiation for a Free Trade Agreement with New Zealand, COM (2017) 469 final; and European Commission, Recommendation for a Council Decision authorising the opening of negotiation for a Free Trade Agreement with Australia, COM (2017) 472 final.

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