EUROPEAN COMMISSION

TO THE PRESIDENT AND THE MEMBERS OF

THE COURT OF JUSTICE OF THE EUROPEAN UNION

REQUEST FOR AN OPINION

lodged by the **EUROPEAN COMMISSION**, represented by Ulrich WÖLKER, principal legal advisor of the European Commission, and by Bart DE MEESTER, Martina KOCJAN and Ramón VIDAL-PUIG, members of its Legal Service, with an address for service at the office of Merete CLAUSEN, member of its Legal Service, located at Bâtiment BECH, 5 rue A. Weicker, 2721 Luxembourg

pursuant to Article 218(11) of the Treaty on the Functioning of the European Union on the following question:

> *Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically,*
>
> > *- which provisions of the agreement fall within the Union's exclusive competence?;*
> >
> > *- which provisions of the agreement fall within the Union's shared competence?; and*
> >
> > *- is there any provision of the agreement that falls within the exclusive competence of the Member States?*

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TABLE OF ABBREVIATIONS

Agreement on Agriculture	Agreement on Agriculture, included in Annex 1 A of the WTO Agreement
Agreement on Preshipment Inspection	Agreement on Preshipment Inspection, included in Annex 1 A of the WTO Agreement
Agreement on Rules of Origin	Agreement on Rules of Origin, included in Annex 1 A of the WTO Agreement
Agreement on Safeguards	Agreement on Safeguards, included in Annex 1 A of the WTO Agreement
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, included in Annex 1 A of the WTO Agreement
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works (of September 9, 1886, as last revised at Paris on July 24, 1971)
BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CFR	Charter of Fundamental Rights of the European Union
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, included in Annex 1 A of the WTO Agreement
DSU	Dispute Settlement Understanding, included in the WTO Agreement as Annex 2
EUSFTA	Free Trade Agreement between the European Union and the Republic of Singapore
FET	Fair and Equitable Treatment
FAO	Food and Agriculture Organisation
GATT 1994	General Agreement on Tariffs and Trade 1994, included in Annex 1 A of the WTO Agreement
GATS	General Agreement on Trade in Services, included in Annex 1 B of the WTO Agreement
GSP	Generalised System of Preferences

ICSID Convention	Convention on the Settlement of Investment Disputes between States and National of other States (adopted on 18 March 1965 in Washington)
ILO	International Labour Organization
ILP Agreement	Agreement on Import Licensing Procedures, included in Annex 1 A of the WTO Agreement
IMF	International Monetary Fund
ISDS	Investor-to-State dispute settlement
IUU	Illegal, Unreported and Unregulated
Nomenclature	Nomenclature annexed to Council Directive 88/36/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L 178, 8.7.1988
OECD	Organisation for Economic Co-operation and Development
Paris Convention	Paris Convention for the Protection of Industrial Property the Patent Cooperation Treaty
Patent Cooperation Treaty	Patent Cooperation Treaty (done at Washington on 19 June 1970, amended on 8September 1979, modified on 3 February 1984)
Plant Varieties Convention	International Convention for the Protection of New Varieties of Plants (adopted in Paris on December 2, 1961, as last revised in Geneva on March 19, 1991)
SCM Agreement	Agreement on Subsidies and Countervailing measures, included in Annex 1 A of the WTO Agreement
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures, included in Annex 1 A of the WTO Agreement
TBT Agreement	Agreement on Technical Barriers to Trade, included in Annex 1 A of the WTO Agreement
Singapore Treaty	Singapore Treaty on the Law of Trademarks
TRIPs Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, included in Annex 1 C of the WTO Agreement
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTAD	United Nations Conference on Trade and Development
WIPO	World Intellectual Property Organisation

WIPO Copyright Treaty, WCT	WIPO Copyright Treaty (adopted in Geneva on December 20, 1996)
WIPO Performances and Phonograms Treaty, WPPT	WIPO Performances and Phonograms Treaty (adopted in Geneva on December 20, 1996)
WIPO Trademark Law Treaty (TLT)	Trademark Law Treaty (1994)
WTO	World Trade Organization
WTO Agreement	Agreement establishing the World Trade Organization (adopted in Marrakesh on 15 April 1994)

LIST OF ANNEXES

ANNEX 1	Text of the Free Trade Agreement between the European Union and the Republic of Singapore, as initialled by the negotiators (cited for the first time in para. 1.)
ANNEX 2	Note submitted by France to the Council's Trade Policy Committee, dated 12 September 2014, on the competence to conclude the Free Trade Agreement between the European Union and Canada (cited in section 3.10.6.4).
ANNEX 3	Document of the Trade Policy Committee 490/13, dated 17 December 2013, submitted by France and Germany on the competence to conclude EUSFTA (cited in section 3.15).

1. INTRODUCTION

1. The Commission has recently completed the negotiations on a Free Trade Agreement with the Republic of Singapore. (A copy of the negotiated text is attached to this submission as Annex 1).

2. The text negotiated by the Commission envisages the signature and conclusion of an 'EU-only' agreement, i.e. an agreement between the European Union and the Republic of Singapore, without the participation of the Member States.

3. Doubts have been raised as to whether the Union has the necessary competence (exclusive and/or shared) to conclude alone the envisaged Free Trade Agreement with the Republic of Singapore or whether the participation of the Member States is necessary in respect of certain matters.

4. In particular, doubts have been expressed with regard to the extent and the nature of the Union's competence in respect of certain provisions on the protection of foreign investment, transport services, intellectual property, transparency and sustainable development.

5. In view of the above, the Commission has decided, before submitting a proposal to the Council for the signature and conclusion of the envisaged Free Trade Agreement with Singapore, to seek from the Court an opinion under Article 218(11) TFEU on whether the Union has the necessary competence to sign and conclude alone that agreement.

6. Specifically, the Commission is requesting the Court's opinion on the following question:

> *Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically,*
>
> *- which provisions of the agreement fall within the Union's exclusive competence?;*
>
> *- which provisions of the agreement fall within the Union's shared competence?; and*
>
> *- is there any provision of the agreement that falls within the exclusive competence of the Member States?*

7. For the reasons set out in this submission, the Commission is of the view that the Union has the necessary competence to conclude alone the Free Trade Agreement with Singapore. More precisely, the Commission considers that:

(1) no provision of the envisaged agreement falls within the exclusive competence of the Member States;

(2) all the provisions of the envisaged agreement, with the sole exception of those concerning cross-border transport services and portfolio investment, fall within the scope of the Union's Common Commercial Policy, as defined in Article 207(1) TFEU and, therefore, within the Union's exclusive competence pursuant to Article 3(1) TFEU;

(3) the provisions on portfolio investment are covered by the common rules on free movement of capital contained in Article 63(1) TFEU. The Union is, therefore, exclusively competent in respect of those provisions pursuant to Article 3(2) TFEU. In the alternative, the Commission considers that the Union would have shared competence in respect of those provisions;

(4) the provisions on transport services are within the exclusive competence of the Union because: (i) as regards establishment of third country transport service suppliers, they fall within the scope of the Union's Common Commercial Policy; and (ii) as regards cross-border supply and the presence of natural persons, the Union has adopted common rules that cover largely the area concerned, or those provisions are ancillary to commitments for which the Union has exclusive competence. In the alternative, the Commission considers that the Union would have shared competence in respect of those provisions.

2. BACKGROUND

2.1. Summary description of the purpose and content of EUSFTA

8. EUSFTA seeks to liberalise and facilitate trade and investment between the Parties in a comprehensive manner. To that effect, EUSFTA provides for the establishment of a free trade area for goods and for services, consistent with Article XXIV of the GATT 1994 and Article V of the GATS, respectively. In addition, EUSFTA includes provisions on investment protection, government

procurement and trade related aspects of intellectual property, as well as horizontal chapters on competition, trade and sustainable development, transparency, dispute settlement and general, final and institutional provisions.

9. More precisely, EUSFTA consists of 17 Chapters, each with its respective annexes, and one protocol on rules of origin for goods:

- Chapter 1 sets forth the general objectives of EUSFTA.

- Chapter 2 provides for the elimination or reduction of customs duties, as well as for the prohibition of quantitative restrictions on imports and exports of goods and an obligation to provide national treatment.

- Chapter 3 lays down disciplines with regard to the imposition of trade remedies in respect of trade in goods (anti-dumping, countervailing and safeguard measures).

- Chapters 4 and 5 address non-tariff barriers to trade in goods resulting, respectively, from technical regulations and standards and from sanitary and phytosanitary measures.

- Chapter 6 contains provisions in order to promote the facilitation of trade in goods, while ensuring effective customs control.

- Chapter 7 deals with non-tariff barriers to trade and investment in the field of renewable energy generation.

- Chapter 8 provides for the liberalization of the cross-border supply of services and of the right of establishment in both services and non-services sectors. In addition, it contains specific provisions on electronic commerce.

- Chapter 9 lays down certain standards of protection for foreign investors, as well as an investor-to-State dispute settlement mechanism to enforce such standards.

- Chapter 10 provides for the opening of the government procurement markets of the Parties in respect of both goods and services.

- Chapter 11 stipulates provisions on intellectual property with a view to facilitating trade and investment between the Parties and increasing their benefits.

- Chapter 12 contains provisions on competition and related matters.

- Chapter 13 is concerned with trade and sustainable development. It includes provisions on both the labour and environmental aspects of sustainable development, as well as a monitoring mechanism.

- Chapter 14 is a horizontal chapter laying down rules on transparency in respect of matters covered by other chapters.

- Chapters 15 and 16 provide, respectively, for a State-to-State dispute settlement mechanism and a mediation mechanism.

- Chapter 17 establishes a Trade Committee and several specialised committees and stipulates various general provisions (including horizontal exceptions) and final provisions (including on entry into force, territorial application and lack of direct effect).

10. EUSFTA will be one of the first trade and investment agreements concluded after the entry into force of the Treaty of Lisbon. As recalled below, the Treaty of Lisbon has enlarged the scope of the CCP with a view to enabling the Union to pursue, in a comprehensive and coherent manner, a trade policy which is adapted to the complexities of the current global economy and the modern trends of trade and investment. International production, trade and investments are increasingly organised within so-called global 'value chains' where the different stages of the production process are located across different countries. Around half of the world trade today takes place between affiliates of multinational enterprises, which trade intermediate goods and services. The same EU companies are often both investors and traders in third countries. By addressing trade as well as the entire lifecycle of an investment (liberalization and protection), the EU's agreements are able to cover globally the economic activity of the EU companies. Furthermore, by integrating trade and investment into comprehensive agreements that include related issues such as competition, the protection of intellectual property rights, public procurement and sustainable development, it becomes possible to capitalise on the

synergies between the different constituent elements of the CCP and other Union policies.

11. Unlike other agreements of the Union dealing with trade and investment matters, EUSFTA does not include any provision falling within the scope of the Common Foreign and Security Policy or providing for cooperation on non-trade related matters. Those matters have been addressed in a separate Partnership and Cooperation Agreement between the Union and its Member States and the Republic of Singapore, which has been negotiated in parallel with EUSFTA.[1]

2.2. The negotiation of EUSFTA

12. On 8 December 2006 the Commission submitted to the Council a recommendation for the opening of negotiations in view of the conclusion of a free trade agreement between the European Community and the countries of Association of South East Asian Nations (ASEAN). In April 2007 the Council authorised the Commission to negotiate the envisaged free trade agreement. The authorisation provided that in the event that it was not possible to reach an agreement jointly with all the countries of ASEAN, the Council could authorise the Commission "to launch negotiations with countries of South East Asia in another plurilateral or bilateral format".

13. On 22 December 2009 the Council authorised the Commission to pursue negotiations with individual countries belonging to ASEAN, starting with Singapore[2]. Negotiations with Singapore began in March 2010.

14. On 14 February 2011 the Commission submitted a recommendation to the Council for the modification of the existing directives with respect to Singapore in order to include investment protection. In September 2011 the Council agreed to supplement the directives as recommended by the Commission.

15. After eleven rounds of negotiations an agreement was reached between the negotiators (on all but the investment protection chapter) in December 2012[3]. The

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[1] The text of the Partnership and Cooperation Agreement between the European Union and its Member States and the Republic of Singapore was initialled by the negotiators on 14 October 2013. *See* joint press release by the European Union and Singapore at http://eeas.europa.eu/statements/docs/2013/131014_02_en.pdf.

[2] Press Release, 2988th Council meeting, 17764/2/09 REV 2 (Presse 392).

agreement, apart from the investment protection chapter, was initialled in September 2013[4]. The negotiations on the investment protection chapter were concluded on 17 October 2014[5].

2.3. Relevant provisions of Union law

2.3.1. The Treaty on European Union

16. Article 3(5) TEU sets out the values and interests of the Union to be upheld in its relations with the wider world. It provides that:

> *In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.*

17. Article 21(2) TEU, under the heading "General Provisions on the Union's External Action", specifies in relevant part that:

> *The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:*
>
> […]
> *(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;*
>
> *(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;*
>
> *(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;*
>
> […]
>
> *(h) promote an international system based on stronger multilateral cooperation and good global governance.*

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[3] European Commission Press Release "EU and Singapore present text of comprehensive free trade agreement" IP/13/849, Brussels, 20 September 2013.

[4] European Commission Press Release "EU and Singapore present text of comprehensive free trade agreement", Brussels, 20 September 2013, IP/13/849.

[5] European Commission Press Release "EU and Singapore conclude investment talks", Brussels, 17 October 2014, IP/14/1172.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of different areas of the Union's external action covered by this Title and Part Five of the Treaty on the Functioning of the European Union, and the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

2.3.2. The Treaty on the Functioning of the European Union

18. Article 216(2) TFEU defines the scope of the Union's competence to conclude international agreements. It provides that:

The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

19. Whereas Article 216(2) TFEU defines the *scope* of the Union's competence to conclude international agreements, the *nature* of such competence is to be determined in each case in accordance with the relevant provisions contained in Articles 2 to 6 of the TFEU.

20. The Union's competence to conclude international agreements may be 'exclusive' of the Member States' competence, 'shared' with the Member States[6] or 'supportive' of the Member States' competence.

21. Article 2(1) TFEU provides that, where the Union's competence is 'exclusive', the Member States cannot conclude international agreements in the same area, unless they are empowered to do so by the Union.

22. The Union's exclusive competence may be 'express' or 'implied'.

23. The Union has express exclusive competence in the areas mentioned in Article 3(1) TFEU, i.e.:

(a) customs union;

[6] 'Shared' competence also includes the areas of so-called 'parallel' competence mentioned in Article 4(3) and 4(4) TFEU.

(b) the establishing of competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.

24. In addition, pursuant to Article 3(2) TFEU the Union has exclusive competence in the following situations:

[…] when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

25. The Union has 'shared' competence in the areas mentioned in Article 4(2) TFEU and, more generally, whenever the Treaties confer on it competence which does not relate to the areas referred to in Article 3 ('exclusive') or Article 6 ('supportive').[7]

26. Here below, the Commission will set out briefly the content and interpretation of those provisions on the scope and nature of the Union's external competence which are most relevant in view of the issues raised in this request.

2.3.2.1. Articles 3(1)(e) and 207 TFEU

27. As provided expressly in Article 3(1)(e) TFEU, the Union has exclusive competence to conclude international agreements in the area of the CCP.

28. Article 206 TFEU sets forth the objectives of the CCP:

By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.

29. The scope of CCP is defined in Article 207(1) TFEU, which provides that:

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

[7] Article 4(1) TFEU.

uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

30. The Treaty of Lisbon enlarged the scope of the CCP in two different ways:

- it included "foreign direct investment" within the scope of the CCP; and

- it added "trade in services" and the "commercial aspects of intellectual property" to the definition of the CCP in Article 207(1) TFEU. As a consequence, the Union is now competent not only to conclude agreements in those two fields (as was already the case under Article 133(5) EC), but also to enact autonomous measures.

31. Moreover, following the entry into force of the Treaty of Lisbon, the competence in respect of both "trade in services" and the "commercial aspects of intellectual property" is always exclusive.[8]

32. By way of exception, Article 207(5) TFEU continues to exclude from the scope of the CCP the conclusion of international agreements "in the field of transport."

33. The scope of CCP is not confined to measures aimed at liberalizing trade. Rather, according to settled-case law, an act falls within the scope of the CCP "if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade."[9]

34. According also to well-established case law, the scope of the CCP must be interpreted in a "non-restrictive"[10] and dynamic manner which takes into account

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8 The following two exceptions to the exclusivity of the Community's competence provided in the EC Treaty are not maintained under the TFEU: 1) the fourth subparagraph of Article 133(5) EC, which preserved the right of the Member States to maintain and conclude agreements in the fields of trade in services and commercial aspects of intellectual property in so far as such agreements complied with Community law and other relevant agreements; and 2) the second subparagraph of Article 133(6) EC, which provided that agreements "relating to trade in cultural and audiovisual services, educational services, and social and human services" had to be concluded jointly by the Community and the Member States. In place of this, Article 207(4) TFEU now provides that in certain cases the Council shall act unanimously for the negotiation and conclusion of agreements in those fields.

9 *See* e.g. Case C-137/12, *Commission v Council*, EU:C:2013:675, para. 57, and the case law cited.

10 *See* e.g. C-70/94, *Werner*, EU:C:1995:328, para. 9 and C-83/94, *Leifer*, EU:C:1995:329, para. 9, where the Court noted that:

the evolving nature of international trade policies and instruments. Already in Opinion 1/78 the Court noted that "the question of external trade must be governed from a wide point of view"[11] and stressed the need to interpret dynamically the scope of the CCP:

> *It is therefore not possible to lay down, for Article 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 mechanisms 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.*[12]

35. Similarly, in the GSP case the Court held that:

> *In defining the characteristics and the instruments of the common commercial policy in Article 110 et seq., the Treaty took possible changes into account. Accordingly, Article 110 lists among the objectives of commercial policy 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.*[13]

36. In Opinion 1/94 the Court noted again the "open nature of the common commercial policy".[14]

37. The last sentence of Article 207(1) TFEU provides that the CCP "shall be conducted in the context of the principles and objectives of the Union's external action". Those principles and objectives are set out in Article 21(2) TEU transcribed above.

38. In addition, in defining and implementing the CCP the Union must take into account the "provisions having general application" contained in Title II of Part One of the TFEU. Such provisions include Article 9 of the TFEU, which provides that:

> *The implementation of the CCP requires a non-restrictive interpretation of that concept, so as to avoid disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries*.

11 Opinion 1/78, EU:C:1979:224, para 45.

12 Opinion 1/78, EU:C:1979:224, para. 45.

13 Case 45/86, *Commission v Council*, EU:C:1987:63, para. 19.

14 Opinion 1/94, EU:C:1994:384, para. 41.

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

39. Also relevant for these proceedings is Article 11 of the TFEU, which provides that:

Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.

2.3.2.2. Article 3(2) TFEU

40. In addition to the list of subject areas that are explicitly labelled as "exclusive competences" of the Union in Article 3(1) TFEU, Article 3(2) provides an additional area of exclusive competences. Article 3(2) does not define this on the basis of an explicit subject matter, but is specific to one legal instrument: international agreements. Article 3(2) TFEU specifies that the conclusion of an international agreement belongs to the Union's exclusive competences in three situations:

(a) when its conclusion is provided for in a legislative act of the Union; or

(b) is necessary to enable the Union to exercise its internal competence; or

(c) in so far as its conclusion may affect common rules or alter their scope.

41. The first possible situation of exclusive competence was already described by the Court in its Opinion 1/94, where it found that:

[w]henever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts.[15]

42. If individual Member States were still be able to undertake international commitments in a situation where the Union has, in an internal legislative act, already provided for the Union to negotiate with third countries in a certain area, the Union's envisaged international agreements would be compromised. In fact,

[15] Opinion 1/94, EU:C:1994:384, para. 95.

this constitutes a specific application of the third situation of exclusive competence for the Union to conclude international agreements, discussed hereafter.

43. The second situation demonstrates that the Union may have exclusive competence to conclude an international agreement even if the internal competence has not yet been exercised. In such cases, in order to exercise internal competence, it would be necessary to exercise this competence externally at the same time.[16] In such a situation, the Union has exclusive competence.[17]

44. With respect to the third situation, the Court has recently confirmed that this corresponds to the words by which the Court in its judgement in *ERTA* defined the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions, where common EU rules have been promulgated for the attainment of the objectives of the Treaty.[18] The Court stressed that:

> *[t]hose words must therefore be interpreted in the light of the Court's explanation with regard to them in the judgement in ERTA (EU:C:1971:32) and in the case-law developed as from that judgement*.[19]

45. The Court's case-law clarifies that the Union has an exclusive competence to conclude an international agreement if there is a risk that common EU rules might be adversely affected by international commitments by the individual Member States, or that the scope of those rules might be altered where those commitment fall within the scope of those common rules.[20]

46. However, the Court stressed that:

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16 *See* Opinion 1/76, EU:C:1976:76, para. 4; Opinion 1/94, EU:C:1994:384, para. 85.

17 Opinion 1/03, EU:C:2006:81, para. 115.

18 Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, para. 66.

19 Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, para. 67.

20 Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, para. 68; Opinion, 1/13, EU:C:2014:2303, para. 71; Case C-66/13, *Green Network SpA v Autorità per l'energia elettrica e il gas*, EU:C:2014:2399, para. 29.

[a] finding that there is such risk does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully.[21]

47. Rather, it is sufficient that the international commitments are concerned within an area which is already covered to a large extent by such rules.[22] Hence, there must thus not necessarily be a perfect overlap between the common rules and the content of the international commitments. The analysis whether the international commitments concern an area already largely covered by common rules must take into account:[23]

- the areas covered by EU rules and by the provisions of the envisaged agreement;
- their foreseeable future development; and
- the nature and content of those rules and those provisions.

48. On the basis of an analysis of these elements, it must be determined whether the international agreement is capable of affecting the common EU rules or of altering their scope.[24]

49. The Court confirmed that "this analysis is not affected by the … entry into force of the Lisbon Treaty"[25] and "remains relevant, in the context of Article 3(2) TFEU".[26]

50. In addition, Member States may not enter into such commitments outside the framework of the EU institutions, even if there is no possible contradiction between those commitments and the common EU rules.[27]

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21 Opinion 1/03, EU:C:2006:81, para. 126; Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, para. 69; Opinion, 1/13, EU:C:2014:2303, para. 72; Case C-66/13, *Green Network SpA v Autorità per l'energia elettrica e il gas*, EU:C:2014:2399, para. 30.

22 Opinion 2/91, EU:C:1993:106, paras. 25 and 26 and Opinion 1/03, EU:C:2006:81, para. 126.

23 Opinion 1/03, EU:C:2006:81, paras. 126, 128 and 133; Opinion 1/13, EU:C:2014:2303, para. 74; Case C-66/13, *Green Network SpA v Autorità per l'energia elettrica e il gas*, EU:C:2014:2399, para. 33.

24 Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, para. 74; Opinion 1/13, EU:C:2014:2303, para. 74.

25 Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, para. 72 and *see* para. 73.

26 Opinion 1/13, EU:C:2014:2303, para. 73.

27 Opinion 2/91, EU:C:1993:106, paras. 25 and 26; and Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, para. 71.

2.3.2.3. Article 216(1) and Article 4 TFEU

51. Article 216(1) TFEU states that the Union may conclude international agreements with third countries *inter alia:*

> *[…] where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties […].*

52. This situation encompasses, but is not limited to the second situation described in Article 3(2) TFEU as conferring exclusive competence, i.e. when the conclusion of an agreement is "necessary to enable the Union to exercise its internal competence". In other words, the conclusion of an agreement may be necessary to achieve an objective of the Treaties in the sense of Article 216(1) TFEU even where such an agreement is not necessary to enable the Union to exercise its internal competences.

53. In accordance with Article 4(1) TFEU, to the extent that the competence conferred by Article 216(1) TFEU does not fall within the areas referred to in Articles 3 or 6 TFEU, such competence must be deemed 'shared'.

3. LEGAL ANALYSIS

3.1. Admissibility

54. Article 218(11) TFEU provides that:

> *[…] the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties.*

55. Article 196(2) of the Rules of Procedure of the Court of Justice specifies that:

> *A request for an Opinion may relate both to whether the envisaged agreement is compatible with the provisions of the Treaties and to whether the European Union or any institution of the European Union has the power to enter into that agreement.*

56. The Commission has completed the negotiations on a Free Trade Agreement with Singapore. The agreement has not been signed or concluded yet and, therefore, remains "envisaged" within the meaning of Article 218(11) TFEU.

57. The questions raised by the Commission in this request relate to whether the Union has the power to enter into the agreement envisaged, as provided expressly in Article 196(2) of the Rules of Procedure.

58. For the above reasons, the Commission is of the view that the present request for an Opinion under Article 218(11) TFEU is manifestly admissible.

3.2. Objective of the Agreement (Chapter 1)

59. The overall objectives of EUSFTA are expressly set out in its Articles 1.1 and 1.2.

60. Article 1.1 EUSFTA (entitled "Establishment of a Free Trade Area") states that:

> *The Parties to this Agreement hereby establish a free trade area, consistent with Article XXIV of GATT 1994 and Article V of GATS.*

61. Article 1.2 EUSFTA (entitled "Objectives") provides that:

> *The objectives of this agreement are to liberalise and facilitate trade and investment between the Parties in accordance with the provisions of this Agreement.*

62. The overall objectives mentioned in both Article 1.1 and 1.2 are, to a very large extent, within the scope of the objectives of the Union's Common Commercial Policy, as described in Article 206 TFEU.

63. The objectives of EUSFTA are marginally broader than those of the CCP in that Article 1.2 EUSFTA alludes to "investment" in general, instead of "direct investment", as in Article 206 TFEU. Moreover, the language of both Articles 1.1 and 1.2 EUSFTA encompasses cross-border transport services, which are expressly excluded from the scope of the CCP by Article 207(5) TFEU. The liberalization and facilitation of non-direct investment and cross-border transport services are nonetheless within the scope of the TFEU's objectives set out, respectively, in Article 63(1) TFEU and in Articles 91 and 100 TFEU.

3.3. National Treatment and Market Access for Goods (Chapter 2)

64. Chapter 2 of EUSFTA deals with "National treatment and market access for goods". The objective of Chapter 2 is described as follows in Article 2.1 EUSFTA:

> *The Parties shall progressively and reciprocally liberalise trade in goods over a transitional period starting from the entry into force of this Agreement in accordance with this Agreement and in conformity with Article XXIV of GATT.*

65. In order to achieve this objective, Chapter 2 of EUSFTA provides for the following:

- the progressive reduction and/or elimination of customs duties on imports (Articles 2.6 and 2.8 EUSFTA and related annexes and protocol);
- the elimination of customs duties and taxes on exports (Article 2.7 EUSFTA);
- the prohibition of both import and export restrictions (Article 2.9 EUSFTA);
- national treatment in respect of internal regulations and taxes (Article 2.3 EUSFTA);
- disciplines on fees and formalities connected with importation and exportation (Article 2.10 EUSFTA);
- rules on imports and export licensing procedures (Article 2.11 EUSFTA);
- provisions on state trading enterprises (Article 2.12 EUSFTA);
- elimination of certain sectoral non-tariff measures on goods (Article 2.13 EUSFTA and related annexes);
- exceptions to the above provisions based on legitimate policy objectives (Article 2.14 EUSFTA).

66. All the provisions included in Chapter 2 of EUSFTA "relate specifically" to international trade in goods in that they seek to liberalise trade in goods between the Parties and have a direct and immediate effect on such trade.

67. The provisions on the elimination or reduction or customs duties fall squarely within the express terms of Article 207(1) TFEU, which refer *inter alia* to "the conclusion of *tariff* and trade agreements relating to trade in goods."

68. As regards the non-tariff provisions, it should be noted that most of them reproduce, incorporate by reference and/or elaborate upon existing provisions of the GATT 1994 or of other multilateral agreements on trade in goods included in Annex 1A of the WTO Agreement.[28]

[28] Specifically, Article 2.3 EUSFTA ("National treatment") incorporates by reference Article III of the GATT 1994; Article 2.9 EUSFTA ("Import and export restrictions") incorporates by reference Article

69. In its Opinion 1/94 the Court held that the GATT 1994 and all the other multilateral agreements on trade in goods included in Annex 1 A of the WTO Agreement, including the ILP Agreement, fall within the scope of the Common Commercial Policy and, therefore, within the Union's exclusive competence.[29] The Commission considers that the same reasons should lead the Court to conclude that Chapter 2 of EUSFTA falls within the scope of the Union's exclusive competence pursuant to Article 207 TFEU.

3.4. Trade Remedies (Chapter 3)

70. Chapter 3 of EUSFTA provides for "Trade Remedies" in respect of imports of goods. It consists of three sections: Section A concerning "anti-dumping and countervailing measures"[30]; Section B dealing with the application of "global safeguard measures"[31]; and Section C on the application of "bilateral safeguard measures"[32].

71. All the provisions included in Chapter 3 of EUSFTA fall clearly within the scope of the CCP, as defined in Article 207(1) TFEU, which covers *inter alia* "measures to protect trade such as those to be taken in the event of dumping and subsidies".

XI of the GATT 1994; Article 2.10 EUSFTA ("Fees and formalities connected with importation and exportation") restates the obligations provided in Article VIII of the GATT 1994; Article 2.11 EUSFTA ("Import and export licensing procedures") reaffirms expressly the Parties' obligations under the ILP Agreement, incorporates by reference and makes applicable to both import and export licensing procedures certain provisions of the ILP Agreement and adds certain provisions which build upon the provisions of the WTO ILP Agreement; Article 2.12 EUSFTA ("State trading enterprises") incorporates by reference Article XVII of the GATT 1994; and Article 2.14 EUSFTA ("General exceptions") incorporates by reference Article XX of the GATT 1994 and adds some procedural provisions for the application of the exceptions stipulated in paragraphs (i) and (j) of Article XX of the GATT 1994

29 Opinion 1/94, EU:C:1994:384, para. 34.

30 More precisely, Section A reaffirms the Parties' rights and obligations under Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement (Article 3.1 EUSFTA); provides for further transparency and exchanges of information (Article 3.2 EUSFTA); and requires the application of the "lesser duty rule" and the consideration of the "public interest" before imposing anti-dumping or countervailing duties (Articles 3.3 and 3.4 EUSFTA).

31 Specifically, Section B reaffirms the Parties' rights and obligations under the Agreement on Safeguards and Article 5 of the Agreement on Agriculture (Article 3.6 EUSFTA); and provides for further transparency (Article 3.7 EUSFTA).

32 Section C provides for a bilateral safeguard clause allowing each Party to increase the applicable customs duties on imports of a certain category of goods when, as a result of the reduction or elimination of customs duties in accordance with the provisions of EUSFTA, the goods concerned are being imported in such increased quantities as to cause injury to that Party's domestic industry.

72. Moreover, Sections A and B reaffirm and build upon the provisions of Article VI of the GATT 1994, the Anti-Dumping Agreement, the SCM Agreement, the Agreement on Safeguards and Article 5 of the Agreement on Agriculture, all of which are included in Annex 1A of the WTO Agreement and were found by the Court to fall within the scope of the Union's Common Commercial Policy in its Opinion 1/94[33].

3.5. Technical Barriers to Trade (Chapter 4)

73. Article 4.1 EUSFTA sets out the objectives of Chapter 4 on technical barriers to trade (hereinafter "TBT"). It provides that the objective is:

> *[…] to facilitate and increase trade in goods between the Parties, by providing a framework to prevent, identify and eliminate unnecessary barriers to trade within the scope of the TBT Agreement*.

74. Chapter 4 EUSFTA reaffirms and builds upon the provision of the WTO's TBT Agreement. In Opinion 1/94, the Court described the WTO's TBT Agreement, consisting of:

> *[…] provisions of which are designed merely to ensure that technical regulations and standards and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade (see the preamble and Articles 2.2 and 5.1.2 of the Agreement).*[34]

75. According to the Court, this objective "falls within the ambit of the common commercial policy", which is an "exclusive competence".[35]

76. Given that the objective of the TBT Chapter in the FTA is "to facilitate trade in goods between the Parties, by providing a framework to prevent, identify and eliminate unnecessary barriers to trade within the scope of the TBT Agreement", there cannot be any doubt that the chapter falls within the scope of Article 207 TFEU, which is, as provided for in Article 3(1)(e) TFEU, an exclusive competence of the Union.

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33 Opinion 1/94, EU:C:1994:384, para. 34.

34 Ibid., para. 33.

35 Ibid., paras. 33-34.

3.6. Sanitary and Phytosanitary Measures (Chapter 5)

77. Article 5.1 EUSFTA sets out the objectives of Chapter 5 on sanitary and phytosanitary measures. It lists three objectives for this Chapter:

> *(a) to protect human, animal or plant life or health in the respective territories of the Parties while facilitating trade between the Parties in the area of sanitary and phytosanitary measures (hereinafter referred to as "SPS measures");*
>
> *(b) to collaborate on the further implementation of the SPS Agreement;*
>
> *(b) to provide a means to improve communication, cooperation and resolution of issues related to the implementation of SPS measures affecting trade between the Parties.*

78. The Court also examined the scope and content of the WTO's SPS Agreement in its Opinion 1/94. According to the Court, because the SPS Agreement

> *[…] is confined, as stated in its preamble, to the 'establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade'[, s]uch an agreement can be concluded on the basis of Article 113 [now Article 207 TFEU] alone*.[36]

79. Hence, the Court stressed the fact that the SPS Agreement contained rules and disciplines that sought to "minimize negative effects on trade" of SPS measures.

80. The same objective underlies Chapter 5 of EUSFTA. Article 5.1 (a) expresses the balance sought between the protection of human, animal or plant life or health, on the one hand, and the facilitation of trade, on the other hand. Article 5.1(b) next explicitly specifies that the aim is to further implement the SPS Agreement and Article 5.1(c) indicates that the Chapter further seeks to improve communication, cooperation and resolution of issues related to the implementation of SPS measures, precisely because they "affect trade between the Parties". Therefore, Chapter 5 falls within the scope of the Common Commercial Policy of the Union, as specified in Article 207 TFEU, which is an exclusive competence of the Union.

[36] Opinion 1/94, EU:C:1994:384, para. 31.

3.7. Customs and Trade Facilitation (Chapter 6)

81. Chapter 6 of EUSFTA on "Customs and Trade Facilitation" deals with various customs matters with a view to facilitating international trade in goods between the Parties.[37]

82. Article 6.1 EUSFTA makes it clear that the primary purpose of Chapter 6 is to facilitate international trade in goods between the Parties, while ensuring effective customs controls:

> *The Parties recognise the importance of customs and trade facilitation matters in the evolving global trading environment. The Parties agree to reinforce cooperation in this area with a view to ensuring that the relevant legislation and procedures, as well as the administrative capacity of the relevant administrations, fulfil the objectives of promoting trade facilitation while ensuring effective customs control.*

83. Given its objective and content, Chapter 6 of EUSFTA is "specifically related to international trade" and, therefore, falls within the Union's exclusive competence pursuant to Article 207 TFEU.

84. Moreover, most of the provisions of Chapter 6 of EUSFTA have their counterpart in the more detailed provisions on the same subject matter included in the Agreement on Trade Facilitation[38] adopted by the WTO on 27 November 2014[39], which, upon its entry into force, will become part of Annex 1A of the WTO Agreement. According to its preamble, the Agreement on Trade Facilitation seeks to:

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[37] More precisely, Chapter 6 consists of provisions on "principles" (Article 6.2 EUSFTA); "customs cooperation" (Article 6.3 EUSFTA); "transit and transhipments" (Article 6.4 EUSFTA); "advance rulings" (article 6.5 EUSFTA); "simplified customs procedures" (Article 6.6 EUSFTA); the "release of goods" (Article 6.7 EUSFTA); "fees and charges" (Article 6.8 EUSFTA); "customs brokers" (Article 6.9 EUSFTA); "pre-shipment inspections" (Article 6.10 EUSFTA); "customs valuation" (Article 6.11 EUSFTA); "risk management" (Article 6.12 EUSFTA); "single window" (Article 6.13 EUSFTA); "appeal procedures" (Article 6.14 EUSFTA); and "relations with the business communities" (Article 6.15 EUSFTA).

[38] More specifically, the Agreement on Trade Facilitation deals with "customs cooperation" in Article 12: with "transit and transhipment" in Article 11; with "advance rulings" in Article 3; with "simplified customs procedures" in Articles 7.5 and 7.7; with the "release of goods" in Articles 7.1 and 7.3; with "fees and charges" in Article 6; with "customs brokers" in Article 10.6; with "pre-shipment inspections" in Article 10.5; with "risk management" in Article 7.4; with "single window" in Article 10.4; with "appeal procedures" in Article 4; with "transparency" in Article 1; and with "relations with the business community" in Article 2.

[39] The text of the WTO Trade Facilitation Agreement is available at https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit. [40]

85. In February of 2015 the Commission submitted to the Council a proposal for a decision on the conclusion of the WTO Agreement on Trade Facilitation.[41] The proposal is based exclusively on Article 207 TFEU and does not envisage the participation of the Member States. On the basis of the ongoing discussions on this proposal, the Commission understands that neither the Member States nor the other institutions contest the Union's exclusive competence with regard to the Trade Facilitation Agreement and, therefore, with regard to Chapter 6 of EUSFTA.

3.8. Renewable energy (Chapter 7)

86. Chapter 7 of EUSFTA deals with non-tariff barriers to trade and investment in respect of renewable energy generation. Article 7.1 EUSFTA explains that the following objectives are pursued in this Chapter:

In line with global efforts to reduce greenhouse gas emissions, the Parties share the objective of promoting, developing and increasing the generation of energy from renewable and sustainable non-fossil sources, particularly through facilitating trade and investment. To this effect, the Parties shall cooperate towards removing or reducing tariffs as well as non-tariff barriers and fostering regulatory convergence with or towards regional and international standards.

87. While the ultimate objective of the Chapter is to promote the generation of renewable energy, its direct purpose (the *means* to achieve the ultimate objective) is to remove barriers to trade and investment that can hamper the generation of energy from renewable and sustainable non-fossil sources. Such barriers may consist of tariffs or non-trade barriers, which should be "remov[ed] or reduc[ed]". Import tariffs could, for instance, make the import of technological equipment for wind power generation more expensive. Where regulations must remain in place, regulatory convergence can further facilitate trade and investment. Article 7.3 EUSFTA therefore specifies that the scope of the Chapter is limited to "measures which may affect trade and investment between the Parties related to the generation of energy from renewable and sustainable non-fossil sources".

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40 Third recital of the preamble to the Agreement on Trade Facilitation.

41 COM(2015) 50 final.

88. Note that, also within the framework of the WTO, a "green goods initiative", launched on 24 January 2014, seeks to remove tariffs on a list of green goods. Plurilateral negotiations started on 8 July 2014.

89. Chapter 7 also covers foreign direct investment, as is demonstrated by the second principle in Article 7.4, which is an obligation for each Party to:

> *[…] refrain from adopting measures requiring the formation of partnerships with local companies, unless such partnerships are deemed necessary for technical reasons and the Party can demonstrate such technical reason upon request by the other Party.*

90. Such prohibited measures (requirements to form a partnership with local companies) are obvious restrictions on foreign direct investment.

91. Investment in the energy sector is covered by Article 207(1) TFEU, which refers explicitly to "foreign direct investment". Hence, the facilitation of investment in renewable energy by removing non-tariff barriers and fostering regulatory convergence falls within the scope of the exclusive competence of the Union.

3.9. Services, Establishment and Electronic Commerce (Chapter 8)

3.9.1. Summary description of the scope and content of the chapter

92. Chapter 8 of EUSFTA is titled "Services, establishment and electronic commerce". It contains seven sections.

93. Section A (General Provisions) sets out the objective and scope of the Chapter as well as applicable definitions. More specifically, Article 8.1 EUSFTA specifies that the Parties:

> *[…] hereby lay down the necessary arrangements for the progressive reciprocal liberalisation of trade in services, establishment and electronic commerce*

94. Section A also specifies what Chapter 8 does *not* cover. It does not:

> *(a) apply to subsidies granted or grants provided by a Party, including government-supported loans, guarantees, and insurance;*
>
> *(b) apply to services supplied in the exercise of governmental authority within the respective territories of the Parties. For the purposes of this Chapter, a service supplied in the exercise of governmental authority means any service, except a service which is supplied on a commercial basis or in competition with one or more service suppliers;*

(c) require the privatisation of public undertakings; and/or

(d) apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale[42]

95. Also, Chapter 8 does *not* apply to:

[…] measures affecting natural persons seeking access to the employment market of a Party, or to measures regarding citizenship, residence or employment on a permanent basis.[43]

96. Sections B, C and D provide for obligations with regard to, respectively, cross-border supply of services, establishment and temporary presence of natural persons for business purposes.

97. Section E is titled "Regulatory Framework" and contains provisions of general application and domestic regulation as well as sector-specific sub-sections.

98. Section F deals with electronic commerce, setting out the objectives of the section and containing provisions dealing with customs duties, electronic supply of services, electronic signatures and regulatory cooperation through a regulatory dialogue and exchange of information.

99. Finally, Section G provides for general exceptions.

100. Two annexes are attached to Chapter 8, containing the Union's (Annex 8-A) and Singapore's (Annex 8-B) Schedule of Specific Commitments. These Annexes specify, for each of the three forms of service supply addressed in Chapter 8 EUSFTA (cross-border supply of services, establishment and temporary movement of natural persons), the service sectors that are liberalised pursuant to Articles 8.7 and 8.12 EUSFTA. By means of reservations, the schedules indicate measures, which would otherwise violate the market access and national treatment obligations in Chapter 8, can still be applied by the Union and by Singapore.

101. The Commission explains hereafter, for each of these sections, why the Union is competent to conclude EUSFTA alone in respect of services, establishment and electronic commerce.

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42 Article 8.1.2 EUSFTA.

43 Article 8.1.4 EUSFTA.

3.9.2. Cross-border supply of services, establishment and temporary presence of natural persons

102. Section B provides obligations in respect of cross-border supply of services. It does not apply to: (a) audio-visual services; (b) national maritime cabotage; and (c) domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to traffic rights. In respect of the latter, there are nevertheless three types of services covered: (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service; (ii) the selling and marketing of air transport services; and (iii) computer reservation systems.[44]

103. Article 8.4 EUSFTA defines "cross-border supply of services" as the supply of a service:

> *(a) from the territory of a Party into the territory of the other Party; and*
>
> *(b) in the territory of a Party to a service consumer of the other Party.*

104. This definition corresponds to "Mode 1" and "Mode 2" service supply as defined in the GATS.[45]

105. Section C provides obligations in respect of establishment. It does not apply to (a) mining, manufacturing and processing of nuclear materials; (b) production of, or trade in, arms, munitions and war material; (c) audio-visual services; (d) national maritime cabotage; and (e) domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to traffic rights. In respect of the latter, there are nevertheless three types of services covered: (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service; (ii) the selling and marketing of air transport services; and (iii) computer reservation systems.[46]

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[44] Article 8.3 EUSFTA.

[45] Article I:2 GATS provides that:

trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member; […]

[46] Article 8.9 EUSFTA.

106. Article 8.8 (d) defines "establishment" as:

> *(i) the constitution, acquisition or maintenance of a juridical person;*
>
> *(ii) the creation or maintenance of a branch or representative office,*
>
> *within the territory of a Party for the purpose of performing an economic activity including, but not limited to, supplying a service.*

107. This definition is drawn from the definition of "Mode 3" service supply in the GATS, which is the supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member".[47] In turn, the GATS defines "commercial presence" as:

> *(i) the constitution, acquisition or maintenance of a juridical person, or*
>
> *(ii) the creation or maintenance of a branch or a representative office,*
>
> *within the territory of a Member for the purpose of supplying a service*.[48]

108. Note that the European Union makes a horizontal reservation to the application of the obligations of market access and national treatment to the establishment of Singapore's companies in the Union. It specifies that:[49]

> *Treatment accorded to subsidiaries (of Singapore's companies) formed in accordance with the law of Member States of the Union and having their registered office, central administration or principal place of business within the Union is not extended to branches or agencies established in the member States of the Union by Singapore's companies.*

109. A footnote further clarifies that:

> *In accordance with Article 54 of the Treaty on the Functioning of the European Union, these subsidiaries are considered as juridical persons of the Union. To the extent that they have a continuous and effective link with the economy of the European Union, they are beneficiaries of the Union's internal market, which includes, inter alia, the freedom to establish and to provide services in all Member States of the Union.*

110. The right to benefit from the Union's internal market is thus limited to subsidiaries with a continuous and effective link to the EU economy and does not extend to branches and agencies of Singapore's companies.

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47 Article I:2(c) GATS.

48 Article XXVIII(d) GATS.

49 *See* Appendix 8-A-2 EUSFTA, p. 7.

111. Section D deals with "temporary presence of natural persons for business purposes". It specifies the scope and definitions for the Section and contains obligations with respect to the temporary presence of key personnel and graduate trainees and business sellers. The scope of Section D corresponds to the definition of "Mode 4" service supply in the GATS. The GATS defines Mode 4 as the supply of a service "by a service supplier of one Member, through the presence of natural persons of a Member in the territory of another Member".[50] The presence of the natural person is only for the period during which the service is supplied and is thus temporary.[51] The scope of Section D of EUSFTA is in fact narrower than that of the GATS, since it is limited to "key personnel", "graduate trainees" and "business services suppliers", a specification that is not included in the GATS.

112. The scope of sections B to D of EUSFTA thus corresponds to Modes 1, 2, 3 and 4 of the GATS. These four modes of service supply are all caught within the scope of Article 207(1) TFEU, which provides that the Union's Common Commercial Policy includes "the conclusion of tariff and trade agreements relating to trade in goods and services". The Court of Justice has indeed confirmed that, since the Treaty of Nice, the CCP covers not only international agreements relating to services supplied under Mode 1, but also agreements relating to trade in service supplied under Modes 2 to 4.[52] Sections B to D of EUSFTA thus fall within this exclusive competence of the Union.

113. The Commission notes that, in respect of Section C, the definition of establishment in Article 8.8(d) specifies that it covers the creation of a juridical person or a branch or representative office "for the purpose of performing an economic activity *including, but not limited to, supplying a service*" [emphasis added].

114. Establishment thus covers more than creating a juridical person or branch or representative office for the purpose of supplying a service. However, even when it concerns establishment for the purpose of an economic activity that does not entail "supplying a service", this still falls within the scope of the CCP. This is because

50 Article I:2(d) GATS.

51 Note that paragraph 2 of the GATS Annex on Movement of Natural Persons Supplying Services under the Agreement provides that the GATS "shall not apply to measures affecting natural persons seeking access to the employment market of a member, nor shall it apply to measures regarding citizenship, residence or employment *on a permanent basis*" [emphasis added].

52 Opinion 1/08, EU:C:2009:739, paras. 118-119.

Article 207(1) provides that the Union's CCP also covers foreign direct investment.

115. Indeed, the Commission will explain in paragraphs 329-337, below, that foreign direct investment covers, *inter alia*, establishment and extension of new undertakings belonging solely to the investor; the *acquisition in full* of existing undertakings; and the *acquisition of a participation (e.g. a shareholding)* in new or existing undertakings which allows the investor, at least, to participate effectively in the management of that undertaking or its control, including, therefore, the acquisition of participations which allow the investor to "exert a definite influence on the company's decisions and to determine its activities". This corresponds to the definition of establishment in Article 8.8(d) EUSFTA, which refers to *constitution, acquisition or maintenance of a juridical person* as well as the *creation or maintenance of a branch or representative office.* In all these situations, there is at least participation of the investor in the management of the undertaking or its control.

116. Also with regard to the services that are explicitly included within the scope of Sections B and C ((i) aircraft repair and maintenance services during which an aircraft is withdrawn from service; (ii) selling and marketing of air transport services; and (iii) computer reservation systems), the Union has exclusive competence. As the Commission explains hereafter, some of these services fall within the scope of the Union's Common Commercial Policy and, with respect to others, the Union has adopted common rules in this area or a legislative act provides for the conclusion of an international agreement.

117. In respect of <u>maintenance and repair of aircraft</u>, the Union has exclusive competence. Paragraph 6(a) of the GATS *Annex on Air Transport Services* defines this service as:

> *… activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.*

118. The European Union has adopted Regulation No 216/2008 on common rules in the field of aviation.[53] Article 12 of Regulation No 216/2008 deals with certificates

[53] Regulation (EC) No 216/2008 of 20 February 2008 of the European Parliament and of the Council on common rules in the field of aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ 2008 L 79/1.

issued in third countries. This certification covers organisations responsible for the "maintenance of products, parts and appliances".[54] Article 12 of the Regulation envisages the conclusion of agreements by the Union and authorises the Member States to issue certificates on the basis of third country certification in application of an agreement between the Member State and the third country as long as no agreement is concluded by the Union.[55] The Commission may intervene when the agreement would not provide for a level of safety equivalent to that specified by this Regulation and its implementing rules or when it would discriminate among Member States.[56] As soon as the Union has concluded such agreement, the Member States must renounce to existing agreements.[57]

119. Hence, in accordance with Article 3(2) TFEU, the Union has exclusive competence to conclude international agreements in respect of maintenance and repair of aircraft since a Union legislative act provides for this.

120. In the view of the Commission, selling and marketing of air transport services falls within the scope of the Union's Common Commercial Policy. Paragraph 6(b) of the GATS *Annex on Air Transport Services* defines these activities as:

> *… opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.*

121. These services do not involve the transport of goods or passengers. Rather, they form an intermediate service to bring consumers of such transport services and air carriers into contact with each other. They do not entail the transport itself. Therefore, these services fall within the Common Commercial Policy of the Union.

122. Computer reservation system services are defined in Paragraph 6(c) of the *GATS Annex on Air Transport Services* as:

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54 Article 5(d) Regulation No 216/2008.

55 Article 12(2)(a) Regulation No 216/2008.

56 Article 12(2)(b) Regulation No 216/2008.

57 Article 12(2)(c) Regulation No 216/2008.

[…] services provided by computerized systems that contain information about carriers' schedules, availability, fare and fare rules, through which reservations can be made or tickets may be issued.

123. These services are extensively regulated by common rules of the Union, in particular by Regulation (EC) No 80/2009 on a code of conduct for computerised reservation systems.[58] The Court has already decided with respect to the predecessor of this Regulation that:

[…] it follows from Articles 1 and 7 of Regulation No 2299/89 [now repealed and replaced by Regulation No 80/2009] that, subject to reciprocity, that regulation also applies to nationals of non-member countries, where they offer for use or use a CRS [computer reservation system] in Community territory.

By the effect of that regulation, the Community thus acquired exclusive competence to contract with on-member countries the obligations relating to CRSs offered for use or used in its territory.[59]

124. Hence, computer reservation system services for air transport are largely covered by common rules and Member States' international commitments would risk affecting these common rules. Therefore, in accordance with Article 3(2) TFEU, the Union has exclusive competence to conclude an international agreement in this area.

125. In sum, Sections B to D of Chapter 8 of EUSFTA fall entirely within the exclusive competence of the Union.

3.9.3. Regulatory framework

126. Section E is titled "Regulatory Framework" and is subdivided into seven sub-sections, dealing with: (1) provisions of general application (mutual recognition of professional qualifications and transparency); (2) domestic regulation; (3) computer services; (4) postal services; (5) telecommunication services; (6) financial services; and (7) maritime services.

3.9.3.1. Mutual recognition of qualifications (Article 8.16)

127. Sub-Section 1 of Section E contains provisions of general application and first of all concerns mutual recognition of professional qualifications. Through recognition

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58 Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89, OJ 2009 L 35/47.

59 Case C-467/98, *Commission v Denmark (Open Skies)*, EU:C:2002:625, paras. 102-103.

of qualifications, access to each of the other Party's markets is facilitated for foreign service suppliers (natural persons) of the other Party. Such recognition arrangements fall within the Union's CCP.

128. The Court has stressed that:

> *[…] a European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade*.[60]

129. Provisions in EUSFTA that set out the framework for negotiating and concluding mutual recognition agreements of qualifications fall within the field of the Common Commercial Policy since such provisions seek to "promote and facilitate […] trade and ha[ve] direct and immediate effects on trade".[61]

131. The Commission notes that also the GATS contains provisions on recognition arrangements (autonomous recognition and as part of an agreement). Article VII GATS imposes requirements in order to avoid that such recognition arrangements constitute a means of discrimination among countries or a disguised restriction on trade in services.[62] Furthermore, in December 1998 the WTO's Council for Trade in Services adopted *Disciplines on Domestic Regulation in the Accountancy Sector*.[63] The WTO Members recognised, in paragraph 21 of the Disciplines,

> *[…] the role which mutual recognition agreements can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education.*

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60 Case C-137/12, *Commission v Council*, EU:C:2013:675 para. 57. *See* also Opinion 2/00, EU:C:2001:664, para. 40; C-347/03, *Regione Autonoma Friuli-Venezia Giulia and ERSA*, EU:C:2004:285, para. 75; C-411/06, *Commission v Parliament and Council*, EU:C:2009:518; para. 71; and C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para. 51.

61 C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para. 51. *See* also Case C-281/01, *Commission v Council* ('Energy Star'), EU:C:2002:761, paras. 40, 41, 43 and 48.

62 *See* Article VII:3 GATS ("A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of service suppliers, or a disguised restriction on trade in services".)

63 Disciplines on Domestic Regulation in the Accountancy Sector. Adopted by the Council for Trade in Services on 14 December 1998, S/L/64, 17 December 1998. These Disciplines have not yet entered into force, since the Council for Trade in Services decided that the Disciplines must be integrated into the GATS before the end of the Doha Round of trade negotiations and will then become legally binding. Since the Doha Round is not yet finished, the Disciplines have not yet entered into force.

132. The Council for Trade in Services has also adopted (non-binding) *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector*.[64] The Guidelines note that their objective is to make it easier for parties to negotiate recognition agreements and for third parties to negotiate their accession to such agreements or to negotiate comparable ones.

133. Mutual recognition is thus firmly embedded in the GATS given its direct and immediate effects on trade: it facilitates trade in professional services, e.g. accountancy services, when the qualifications of the service providers are recognised as equivalent. The Court has already confirmed that these obligations in the GATS – which are now reflected in EUSFTA – are within the Union's CCP.[65] Therefore, also the provisions on mutual recognition in EUSFTA fall within the scope of the Common Commercial Policy of the Union.

3.9.3.2. Transparency (Article 8.17)

134. Article 8.17 EUSFTA imposes the obligation on each Party to "respond promptly to all requests by the other Party for specific information on any of its measures of general application or international agreement which pertain to or affect this Chapter". Parties are also obliged to establish one or more enquiry points.

135. Such transparency obligation is common in international trade agreements.[66] Further, also the GATS contains a general transparency obligation. Article III:1 GATS requires WTO Members to publish promptly all relevant measures of general application which pertain to or affect the GATS. Like Article 8.17 EUSFTA, Article III:4 GATS requires each WTO Member to "respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of [Article III:1]". It also requires WTO Members to establish one or more enquiry points to provide specific information to other Members on all such matters. Article 8.17 EUSFTA essentially copies these existing obligations from the GATS.

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64 Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector. S/L/38, 28 May 1997.

65 Opinion 1/08, EU:C:2009:739, paras. 118-119.

66 *See*, for instance, Chapter Twelve of the EU-Korea Free Trade Agreement, done at Brussels on 6 October 2010.

138. Uncertainties on applicable measures that regulate commercial actions are an important concern for traders and may lead service suppliers to decide not to access foreign markets. Therefore, improving transparency "promote[s] and facilitate[s] […] trade and has direct and immediate effects on trade".[67] The Court has also confirmed that the transparency obligation included in the GATS – and now reflected in EUSFTA – falls within the Union's CCP.[68] Hence, the transparency obligation in Article 8.17 EUSFTA falls within the scope of the Union's CCP.

3.9.3.3. Domestic regulation (Articles 8.18-8.20)

140. Sub-Section 2 is entitled "Domestic Regulation" and applies to "measures of the Parties relating to licensing requirements and procedures or qualification requirements and procedures" affecting cross-border supply of services, establishment and temporary presence of natural persons.[69]

141. Sub-Section 2 does not seek to determine or harmonise the content of licensing requirements and procedures or qualification requirements and procedures. Rather, it imposes a number of conditions that aim to ensure that such requirements and procedures do not hamper international trade.

142. For instance, it requires Parties to ensure that requirements and procedures are based on criteria which are (a) clear; (b) objective and transparent; and (c) pre-established and accessible to the public and interested persons.[70] Further, Article 8.19.3 EUSFTA requires the Parties to maintain or institute a review of administrative decisions "affecting establishment, cross-border supply of services or temporary presence of natural persons for business purposes". Another example is the requirement to ensure that licensing and qualification procedures "are as simple as possible and do not unduly complicate or delay the supply of the service".[71]

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67 C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para. 51

68 Opinion 1/08, EU:C:2009:739, paras. 118-119.

69 Article 8.18.1 EUSFTA.

70 Article 8.19.1 EUSFTA.

71 Article 8.20.1 EUSFTA.

143. The Commission notes that the objective of ensuring that licensing requirements and procedures, as well as qualification standards and procedures, even if not discriminatory, "do not constitute unnecessary barriers to trade in services", is also contained in the GATS.[72]

144. Article VI:4 GATS contains a mandate for developing disciplines on domestic regulation (qualification requirements and procedures, technical standards and licensing requirements) in order to achieve this objective.

145. Sector-specific disciplines have been adopted by the WTO Council for Trade in Services in respect of the accountancy profession.[73] These Disciplines contain, similar to Article 8.19.1 EUSFTA, the requirement that the licensing requirements and procedures are "pre-established, publicly available and objective".[74]

146. The obligation in Article 8.19.3 EUSFTA to maintain review of decisions is also contained in Article VI:2(a) GATS, which requires Members to "maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services".

147. Within the WTO's Working Party on Domestic Regulation, Members have also been negotiating Horizontal (*i.e.* non sector-specific) Disciplines on the basis of the mandate in Article VI:4 GATS. In March 2009, the Chair of the Working Party issued, under its own responsibility, a draft of possible regulatory disciplines pursuant to Article VI:4 of the GATS.[75] Although the March 2009 text is only an informal document, it can be noticed that many of the provisions contained in the Section of EUSFTA on Domestic Regulation are also contained in this March 2009 text.[76] This demonstrates that disciplines on domestic regulation – seeking to

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72 *See* Article VI:4 GATS.

73 Disciplines on Domestic Regulation in the Accountancy Sector. Adopted by the Council for Trade in Services on 14 December 1998, S/L/64, 17 December 1998 (Accountancy Disciplines).

74 Accountancy Disciplines, paras. 8 and 14.

75 This March 2009 text is contained in the Report of 21 April 2011 by the Chairman of the Council for Trade in Services to the Trade Negotiations Committee, TN/S/36, p. 66.

76 In particular, Article 8.19.2 is similar to paragraph 30 of the March 2009 text; Article 8.20.1 is similar to paragraphs 17 and 31 of the March 2009 text; Article 8.20.2 is similar to paragraph 18 of the March

facilitate trade by ensuring that licensing requirements and procedures, as well as qualification requirements and procedures, do not constitute unnecessary barriers to trade in services – are an essential part of the efforts to achieve higher levels of liberalisation of trade in services pursued in the GATS.

148. Also in respect of EUSFTA, such requirements "promote and facilitate … trade and ha[ve] direct and immediate effects on trade"[77]. The Court has also confirmed that the provisions relating to domestic regulation included in the GATS – and now reflected in EUSFTA – fall within the Union's CCP.[78] Hence, the Sub-Section on domestic regulation falls within the scope of the Union's CCP.

3.9.3.4. Computer services

150. Sub-Section 3 of EUSFTA contains an "understanding" between the Parties on the meaning of "computer services" for the purpose of the obligations contained in Sections B, C and D of Chapter 8. Given that such specification relates to Sections that fall within the Union's Common Commercial Policy, also Sub-Section 3 falls within its scope.

3.9.3.5. Postal services

151. Sub-Section 4 on postal services contains two obligations. Article 8.22 EUSFTA requires each Party to:

> *[…] introduce or maintain appropriate measures for the purpose of preventing suppliers of postal services who, alone or together, are a major supplier in the relevant market for postal services from engaging in or continuing anti-competitive practices*

152. Business practices by major postal service suppliers may restrain competition and thereby restrict trade in services, for instance by concluding exclusive contracts that foreclose the market for foreign competition. Indeed, the WTO Members have recognised in the GATS that "certain business practices of service suppliers, other

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2009 text; Article 8.20.3 is similar to paragraph 20 of the March 2009 text; Article 8.20.4 is similar to paragraph 24 of the March 2009 text; Article 8.20.5 is similar to paragraph 21 of the March 2009 text; Article 8.20.6 is similar to paragraph 22 of the March 2009 text; Article 8.20.7 is similar to paragraph 23 of the March 2009 text and Article 8.20.8 is similar to paragraph 25 of the March 2009 text.

77 Case C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para. 51

78 Opinion 1/08, EU:C:2009:739, paras. 118-119.

than those [by monopolies and exclusive service suppliers] may restrain competition and thereby restrict trade in services".[79]

153. Further, Article 8.23 EUSFTA requires the Parties to ensure that the regulatory bodies in the postal sector are independent from the postal service suppliers. This is exactly to ensure that, in making decisions on the admittance and operation of postal services, certain market participants (in particular domestic suppliers) are not favoured over others (e.g. foreign suppliers).

154. Therefore, both obligations fall squarely within the Union's CCP.

3.9.3.6. Telecommunication services

155. Sub-Section 5 applies to "measures affecting trade in communication services" liberalised pursuant to the obligations in Sections B to D of EUSFTA.[80] The Commission notes that also the GATS contains an *Annex on Telecommunications*. This *Annex* provides supplementary provisions to the GATS because of "the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities".[81] In addition, the WTO Members can accept, in their GATS Schedules of Specific Commitments, adherence to the GATS *Reference Paper on Basic Communications*. These two WTO documents contain provisions with respect to access and use of public telecommunications transport networks,[82] confidentiality of information,[83] interconnection,[84] anti-competitive conduct by major suppliers,[85] independence of regulatory authorities,[86] and allocation and use of scarce resources.[87]

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79 *See* Article IX:1 GATS.

80 Article 8.24 EUSFTA.

81 Paragraph 1 GATS *Annex on Telecommunications.*

82 Paragraph 5 GATS *Annex on Telecommunications.*

83 Paragraph 5(d) GATS *Annex on Telecommunications.*

84 Paragraph 2 *Reference Paper on Basic Telecommunications.*

85 Paragraph 1 *Reference Paper on Basic Telecommunications.*

86 Paragraph 5 *Reference Paper on Basic Telecommunications.*

87 Paragraph 6 *Reference Paper on Basic Telecommunications.*

159. Sub-Section 5 reaffirms these obligations, and builds further upon them in light of technological developments.[88] Hence, this Sub-Section "has direct and immediate effects on trade [in services]"[89] and falls within the scope of the Common Commercial Policy of the Union.

3.9.3.7. Financial services

163. Sub-Section 6 EUSFTA applies to "financial services liberalised pursuant to Sections B (Cross-border Supply of Services), C (Establishment) and D (Temporary Presence of Natural Persons for Business Purposes)".[90] The definition of "financial service", which determines the scope of the Sub-Section – is identical to the definition used in the GATS *Annex on Financial Services*.[91] The different substantive obligations in Sub-Section 6 also correspond to, and build upon, obligations in respect of financial services that the European Union has undertaken in the framework of the GATS.[92] The Court has confirmed that the provisions relating to financial services included in the GATS – and now reflected in EUSFTA – fall within the Union's CCP.[93] Trade in financial services in Sub-Section 6 EUSFTA thus falls squarely within the scope of the Union's CCP.

3.9.3.8. Transport, including international maritime transport services

164. In EUSFTA, the European Union and Singapore commit to certain obligations relating to transport. The European Union's market access and national treatment commitments with respect to maritime transport services, inland waterway

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88 *Compare* Article 8.26 EUSFTA and Paragraph 5 GATS *Annex*; Article 8.27 EUSFTA and Paragraph 5(d) GATS *Annex*; Articles 8.28 and 8.29 EUSFTA and Paragraph 2 *Reference Paper*; Articles 8.30 and 8.31 EUSFTA and Paragraph 1 *Reference Paper*; Article 8.39 EUSFTA and Paragraph 5 *Reference Paper*; Article 8.42 EUSFTA and Paragraph 6 *Reference Paper*.

89 Case C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para. 51

90 Article 8.49.1 EUSFTA.

91 *See* Paragraph 5 GATS *Annex on Financial Services*.

92 *Compare* Article 8.50 EUSFTA and Paragraph 2 GATS *Annex on Financial Services*; Article 8.55 EUSFTA and Paragraph 1(b) GATS *Annex on Financial Services* juncto Article I(b) GATS; Article 8.51 EUSFTA and Paragraph C.2 GATS *Understanding on Commitments in Financial Services*; Article 8.52 EUSFTA and Paragraph C.1 GATS *Understanding on Commitments in Financial Services*; Article 8.53 EUSFTA and Paragraph 7 GATS *Understanding on Commitments in Financial Services*; Article 8.54 EUSFTA and Paragraph 8 GATS *Understanding on Commitments in Financial Services*.

93 Opinion 1/08, EU:C:2009:739, paras. 118-119.

transport services, rail transport services and road transport services (together "transport services") and with regard to "services auxiliary to transport" are contained in the Union's Schedule of Specific Commitments in Annex 8-A to Chapter 8. This schedule indicates the services sectors that are liberalised and, by means of reservations, the market access and national treatment limitations (*i.e.* the specific exceptions to the commitments) that apply to services and service suppliers of Singapore in those sectors. The schedule is sub-divided into cross-border supply of services (Appendix 8-A-1), establishment (Appendix 8-A-2) and temporary presence of natural persons (Appendix 8-A-3).

165. EUSFTA also contains a specific Sub-Section 7 that "sets out the principles regarding the liberalisation of international maritime transport services".[94] Hence, Sub-Section 7 EUSFTA only relates to international maritime transport.

166. In what follows, the Commission will show that the transport-related commitments in the Union's Schedule of Specific Commitments, as well as the content of Sub-Section 7 on international maritime transport, do not prevent the Union to conclude EUSFTA alone.

167. As explained below, in Section 3.9.3.8(b), the Commission considers that the transport services covered by EUSFTA are within the exclusive competence of the Union because, (i) as far as it concerns establishment, transport services are not excluded from the scope of the Common Commercial Policy of the European Union, as defined in Article 207 TFEU; and, (ii) as far is it concerns cross-border supply of services and temporary presence of natural persons, these transport services concern an area that is already largely covered by common rules, or the commitments are ancillary to commitments for which the Union has exclusive competence.

168. The Commission stresses that this analysis with respect to transport services – and the conclusion that exclusive competence exists – is specific for the commitments contained in EUSFTA and takes into account the particular geographical situation of Singapore and the European Union. In respect other free trade agreements that the Union would conclude in the future, the detailed analysis of the content of the

94 Article 8.56.1 EUSFTA.

commitments made in each agreement would need to be re-done, taking into account the geographical situation of the parties to the agreement.

169. Next, as explained below in Section 3.9.3.8(c), the Commission considers that even if the Court would decide that certain provisions on transport services covered by EUSFTA are not within the exclusive competence of the Union, those provisions fall within the Union's shared competence.

170. However, before setting out its arguments, the Commission clarifies, in Section 3.9.3.8(a) below, the precise content of its transport-related commitments in EUSFTA.

(a) The content of the Union's transport-related commitments in EUSFTA

171. The Commission notes from the outset that the Union's transport-related commitments in EUSFTA are limited, notably in comparison to other services sectors where the European Union takes almost full commitments, such as telecommunications and financial services. The provisions and commitments are categorized according to five sectors: (1) maritime transport; (2) inland waterways transport; (3) rail transport; (4) road transport; and (5) services auxiliary to transport. Nonetheless, a closer examination of the EU's actual commitments for each mode of supply in these sectors, and their practical implication, shows that the Union's commitments in EUSFTA are narrow and specific.

(i) Mode 3 (establishment)

172. Trade between Singapore and the European Union in the five mentioned sectors takes to a very significant extent place through Mode 3 (establishment): transport companies from Singapore seek to establish themselves in the Union to provide services, and vice-versa. The European Union's commitments with respect to the five mentioned sectors for Mode 3 are contained in Appendix 8-A-2. These Mode 3 commitments are subject to sector-specific reservations:

a. For international maritime transport, there is a reservation with respect to all but three Member States (Croatia, Latvia and Malta), indicating that the commitment is unbound for the establishment of a registered company for the purpose of operating a fleet under the national flag of the State of establishment. National cabotage is excluded from the commitment.

b. For inland waterways transport services, the commitment is subject to significant limitations. The EU's commitment is subject to the reservation for

establishment and nationality requirements.[95] The EU thus reserves the right to restrict the right of establishment and provide services in the EU to companies owned by EU nationals. Companies in the EU owned by Singapore nationals are not able to claim the right to provide inland waterways transport services between EU Member States. Note that the commitment also does not extend to national cabotage transport. Hence, an established company in a Member State has no right to provide services within the Member State of establishment. In addition, there are a number of reservations with regard to specific Member States.[96] Therefore, because of the nationality requirements and the exclusion of cabotage, the European Union makes, in practice, essentially no commitment for Mode 3 for inland waterways.

c. For rail transport, there is no commitment for Bulgaria and Slovakia as far as it concerns establishment through direct branching (incorporation is required) and no commitment at all in respect of Croatia ("unbound"). There are no limitations to the commitment in respect of all the remaining Member States.

d. For road transport, there is an EU-wide reservation indicating that foreign investors cannot provide transport services within a Member State (cabotage), except for rental of non-scheduled services of buses with operator and an EU-wide reservation for economic needs tests for taxi services. There are reservations in respect of Austria and Bulgaria for nationality requirements and for economic needs tests in Spain, Italy, Portugal, Slovakia and Ireland. For Finland and Latvia, authorisation is required, not extended to foreign vehicles. With respect to France, there is no commitment ("unbound") for intercity bussing services and with respect to Latvia and Sweden, there is a reservation for a requirement to use vehicles with national registration.

e. For services auxiliary to transport, there EU made extensive reservations that are both EU-wide and with respect to specific Member States.[97]

173. The Commission recalls that these Mode 3 commitments are also qualified by the Union's horizontal reservation in respect of types of establishment.[98] The Union has specified that the right to benefit from the Union's internal market is limited to subsidiaries of Singapore's companies with a continuous and effective link to the

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[95] This EU-wide reservation reads: "Measures based upon existing or future agreements on access to inland waterways (incl. agreements following the Rhine-Main-Danube link) reserve some traffic rights to operators based in the countries concerned and meeting nationality criteria regarding ownership. Subject to regulations implementing the Mannheim Convention on Rhine Shipping."

[96] For all Member States, except for Croatia and Latvia, there is no commitment ("unbound") for the establishment of a registered company for the purpose of operating a fleet under the national flag of the State of establishment. With respect to Croatia, there is no Mode 3 commitment ("unbound"). With respect to Slovakia and Bulgaria, there is no commitment for establishment through direct branching (incorporation is required). With respect to Austria, there is a reservation with respect to nationality conditions. With respect to Hungary, there is a reservation for requirements that the State participates in an establishment. With respect to Finland, there is a reservation that services can only be provided by ships operating under the Finnish Flag.

[97] *See* Appendix 8-A-2 EUSFTA, pp. 48-52.

[98] *See* paragraphs 108-110, above.

EU economy and does not extend to branches and agencies.[99] Hence, only subsidiaries of Singapore's companies with a continuous and effective link to the EU economy can benefit from the EU's internal market acquis relating to transport.

(ii) Modes 1, 2 and 4 (cross-border supply and temporary presence of natural persons)

174. In contrast, the geographical situation of Union and Singapore implies that the practical relevance cross-border supply of transport services (Modes 1 and 2) and temporary presence of natural persons for supplying these services (Mode 4) is much more limited, except for maritime transport. Notably, since there are no inland waterways directly connecting Singapore and the European Union, cross-border trade in this transport sector is only of hypothetical nature. The same is also true for rail and road transport, given the distance between the Union and Singapore. The transport sector for which cross-border trade between the European Union and Singapore is most important is international maritime transport.

175. The commitments by the European Union with respect to cross-border supply (Modes 1 and 2) (in Appendix 8-A-1) and temporary presence of natural persons (Mode 4) (in Appendix 8-A-3) reflect this reality: the Union has a full commitment with respect to supply of international maritime transport services through Modes 1 and 2.[100] The Union makes a commitment for Mode 4, but limits this commitment for Mode 4 in respect of international passenger transportation by reserving the right to impose a nationality condition for ships' crew, and for the majority of managing directors in Austria. Temporary presence of natural persons (Mode 4) will generally take place in connection with the establishment of a Singapore service supplier in the Union (Mode 3), who sends its "key personnel" to the establishment.[101]

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99 *See* Appendix 8-A-2 EUSFTA, p. 7.

100 The EU Schedule indicates "none" for Modes 1 and 2 in maritime transport, meaning that there are no reservations to the commitment. On the meaning of the different commitments and limitations, *see* Guidelines for the scheduling of specific commitments under the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 23 March 2001, paras. 41-49.

101 *See* Article 8.13.2(a) EUSFTA, which defines "key personnel" as "natural persons employed within a juridical person of one Party than a non-profit organisation and who are responsible for the setting up or the proper control, administration and operation of an establishment".

176. In contrast, the commitments for Modes 1, 2 and 4 are very limited for the other modes of transport. The limitations to the commitments for inland waterways transport services show that, even if it were practically possible to provide inland waterways services cross-border from Singapore to the European Union, this would be legally impossible due to establishment and nationality requirements that the Union is permitted to impose. Indeed, with respect to Modes 1 and 2, the EU commitment is subject to the reservation for establishment and nationality requirements.[102] Hence, the EU makes in practice essentially no commitment for Modes 1 and 2. There are also no Mode 4 commitments at all.

177. Furthermore, the Union has no commitments for supply of rail transport services through Modes 1 or 4,[103] but only for cross-border trade through Mode 2. In respect of road transport, the Union has no commitments for the supply of road transport services through Mode 1 either.[104] The Union made a commitment for road transport through Mode 2, and through Mode 4 subject to reservations for nationality conditions in certain Member States. While there are commitments for Mode 2 in rail and road transport, the practical relevance of these commitments is again very limited, since it is unlikely that the Union or its Member States would ever want to restrict the consumption of transport services by their nationals in a third country.

178. For services auxiliary to transport, the Union has made a number of specific commitments, but subject to several reservations. The Union's schedule of commitments provides the following for services auxiliary to transport:

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[102] The EU-wide reservation reads: "Measures based upon existing or future agreements on access to inland waterways (incl. agreements following the Rhine-Main-Danube link) reserve some traffic rights to operators based in the countries concerned and meeting nationality criteria regarding ownership. Subject to regulations implementing the Mannheim Convention on Rhine Shipping." There is also a reservation for nationality conditions in Austria. Furthermore, with respect to 13 Member States (Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, Croatia, Hungary, Lithuania, Malta, Romania, Sweden, Slovenia and Slovakia) there is no commitment ("unbound").

[103] The EU Schedule indicates "unbound" for Mode 1 in rail transport, meaning that the EU reserves the right to maintain or adopt measures that would violate its Market Access or National Treatment obligations for this mode of supply in this sector. The EU Schedule does not mention Mode 4 for rail transport.

[104] The EU Schedule indicates "unbound" for Mode 1 in road transport, meaning that the EU reserves the right to maintain or adopt measures that would violate its Market Access or National Treatment obligations for this mode of supply in this sector.

a. The Union made a commitment for Mode 1 in respect of services auxiliary to international maritime transport, but not for pushing and towing.[105] With respect to several Member States,[106] there is also no commitment for rental of vessels with crew, while for Hungary, the commitment only extends to freight transport agency services. There is a full commitment for Mode 2. There is a commitment for Mode 4 subject to reservations in respect of several Member States for nationality and residency requirements.[107]

b. For services auxiliary to rail transport, the EU has made a commitment for Mode 1, but not for pushing and towing, and Hungary again only extends its commitment to freight transport agency services. There is a full commitment for Mode 2, but no Mode 4 commitment.

c. For services auxiliary to inland waterways transport, the Commission again recalls that cross-border supply between the Union and Singapore has no practical relevance. Furthermore, the EU commitment for Modes 1 and 2 is again subject to the reservation for establishment and nationality requirements.[108] The Union makes no commitment for pushing and towing services and a number of reservations with respect to specific Member States.[109]

d. For services auxiliary to road transport, the EU Schedule specifies that, for several Member States,[110] the Mode 1 commitment does not extend to rental of commercial road vehicles with operators, and for Hungary, the commitment only extends to freight transport agency series and supporting services for road transport that are subject to a permit. There is a full Mode 2 commitment. There is also a Mode 4 commitment for auxiliary services to road transport, but there are reservations for three Member States.[111]

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105 The EU Schedule indicates "unbound" for Mode 1 for pushing and towing services.

106 Namely Austria, Bulgaria, Cyprus, the Czech Republic, Germany, Estonia, Hungary, Latvia, Malta, Poland, Romania, Slovenia and Slovakia.

107 Namely Austria, Bulgaria, Malta and Greece (nationality condition) as well as Denmark and Italia (residency requirement).

108 The EU-wide reservation reads: "Measures based upon existing or future agreements on access to inland waterways (incl. agreements following the Rhine-Main-Danube link) reserve some traffic rights to operators based in the countries concerned and meeting nationality criteria regarding ownership. Subject to regulations implementing the Mannheim Convention on Rhine Shipping."

109 There is no commitment for Croatia ("unbound") and in respect of 14 Member States (Austria, Bulgaria, Cyprus, the Czech Republic, Germany, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, Romania, Slovakia and Slovenia), no Mode 1 commitment is made ("unbound") for rental of vessels with crew. In respect of Sweden, the Mode 1 commitment for pushing/towing and rental of vessels with crew is limited in respect of cabotage and flag.

110 Namely Austria, Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia and Sweden.

111 Austria (nationality condition for persons and shareholders entitled to represent a juridical person or partnership) and Bulgaria and Malta (nationality condition).

179. The Commission notes that such auxiliary services will, given the geographical distance between the European Union and Singapore, mostly be provided through an establishment of a Singapore company in a Member State to the consumers in a port of that Member State. For instance, it is practically very difficult to provide auxiliary services, such as pushing and towing, or storage and warehousing through cross-border supply (Mode 1). Furthermore, it seems also unlikely that the Union or its Member States would ever want to restrict consumption of such auxiliary services by their nationals in Singapore (Mode 2). Temporary presence of natural persons (Mode 4) will also generally take place in connection with the establishment of a Singapore service supplier in the Union (Mode 3), who sends its "key personnel" to the establishment.[112]

180. In sum, the most important commitments with respect to transport services concern Mode 3 in all five mentioned sectors and Mode 1 in international maritime transport services. Mode 4 commitments, if they exist, are closely linked to Mode 3 commitments. There are piecemeal commitments for services auxiliary to transport.

(b) The commitments in EUSFTA with regard to transport services are within the exclusive competence of the Union

(i) Establishment in respect of transport services does not fall within the scope of Title VI of Part Three TFEU, and thus not within Article 207(5) TFEU, but within the scope of the Union's CCP

181. Article 207(5) TFEU indicates that the negotiation and conclusion of international agreements in the field of transport is not covered by Article 207 TFEU, but is subject to Title VI of Part Three TFEU and Article 218 TFEU.

182. The Court has found in this regard that:

> *[…] the 'transport' aspect of the agreements at issue [agreements modifying the GATS Schedules of Specific Commitments of the Union and its Member States] falls, in accordance with the third subparagraph of Article 133(6) EC [Article 207(5) TFEU[113]], within the sphere of transport policy and not that of the common commercial policy*.[114]

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[112] *See* Article 8.13.2(a) EUSFTA, which defines "key personnel" as "natural persons employed within a juridical person of one Party than a non-profit organisation and who are responsible for the setting up or the proper control, administration and operation of an establishment".

[113] Note that the wording of the third subparagraph of Article 133(6) EC and 207(5) TFEU differs slightly. Article 133(6) EC read:

183. Nonetheless, the Court has, until now, never examined whether the "international agreements in the field of transport" that are mentioned in Article 207(5) TFEU (or the preceding versions) cover all four modes of supply, or only some of them. The Court has stressed, however, that this provision "seeks to maintain, with regard to international trade in transport services, a *fundamental parallelism* between internal competence whereby [Union] rules are unilaterally adopted and external competence which operates through the conclusion of international agreements, each competence remaining […] anchored in the title of the Treaty specifically relating to common transport policy".[115]

184. To understand the scope of the terms "international agreements in the field of transport", it is indeed necessary to consider the scope of "transport services" as specified in the provisions of the TFEU that deal with internal competence with regard to transport. Such an analysis shows that the term "transport" mentioned in Article 207(5) TFEU does not cover the establishment (Mode 3) of transport service providers from third countries.

185. Title VI TFEU is titled "Transport". The first provision of this Title, Article 90 TFEU sets out the general objective of the Transport Title, namely that "[t]he objectives of the Treaties shall, in matters governed by this Title, be pursued within the framework of a common transport policy". Article 91(1) TFEU next provides a legal basis for certain EU measures relating to transport. This article specifies certain areas in which common rules must be adopted and reads as follows:

> *For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:*

The negotiation and conclusion of international agreements in the field of transport ***shall continue to be governed by*** *the provisions of Title V and Article 300.* [emphasis added]

Article 207(5) TFEU reads:

The negotiation and conclusion of international agreements in the field of transport ***shall be subject to*** *Title VI of Part Three and to Article 218.* [emphasis added]

114 Opinion 1/08, EU:C:2009:739, para. 173.

115 Opinion 1/08, EU:C:2009:739, para. 164 (emphasis added).

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

(c) measures to improve transport safety;

(d) any other appropriate provisions.

186. It can be noted that also Article 58(1) TFEU makes a cross-reference to the Transport Title. Article 58(1) is contained in Chapter 3 (Services) of Title IV (Free Movement of Persons, Services and Capital) in Part Three TFEU and specifies:

Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.

187. Pursuant to Article 58(1), cross-border supply of services in the field of transport is not governed by the provisions in the Services Chapter, but by the Transport Title. The Services Chapter includes Article 56 TFEU, prohibiting restrictions on the freedom to provide services within the Union and providing a possibility for the Parliament and the Council to extend the provisions of the services chapter to third country nationals that are already established within the Union.[116]

188. In stark contrast, Chapter 2 of Title IV of Part Three, dealing with establishment, does not contain any provision equivalent to Article 58(1) TFEU. The Court has indeed found that:

[…] there is no article in the Treaty which precludes its provisions on freedom of establishment from applying to transport.[117]

189. There is thus an asymmetry in the internal competence of the Union: establishment is a directly applicable fundamental freedom which extends also to transport services providers, while provision of cross-border transport services must be liberalised for each particular situation, under the Transport Title. Therefore, respecting *the* "*fundamental parallelism* between internal competence […] and

[116] Recall that the European Union has specified in respect of its commitments for Mode 3 (establishment) that subsidiaries of Singapore's companies that have a continuous and effective link with the EU economy are considered as "juridical persons of the Union", and thus are treated in the same way as natural persons who are nationals of Member States, in line with Article 54 TFEU. Such subsidiaries thus automatically benefit from the freedom to provide services. The mandate in the second paragraph of Article 56 TFEU does not apply to that situation. That is not the case for branches and agencies of Singapore's companies established in the Member States of the Union. *See* paragraphs 108-110, above.

[117] Case C-467/98, *Commission v Denmark (Open Skies)*, EU:C:2002:625, para. 123.

external competence"[118] in transport matters, international agreements relating to the establishment of third country transport suppliers, including the conditions for creating such establishment, are not governed by the Transport Title, but rather by Article 207 TFEU on the Union's CCP. Indeed, as just explained, the carve-out for transport in Article 207(5) TFEU does not extend to establishment of transport service providers.

190. The fact that the Transport Title in the TFEU is limited to cross-border supply of transport services (Modes 1 and 2) and movement of natural persons providing transport services (Mode 4) and does not extend to establishment (Mode 3) is further supported by the text of Article 91(1) TFEU. The common rules that are described in paragraphs (a) and (b) of that provision do not concern the establishment of third country suppliers in the Union. Paragraph (a) refers to "international transport to or from the territory of a Member State or passing across the territory of one or more Member States", a notion which includes transport services between a Member State and a third country.[119] It does not concern the conditions for third country nationals to establish oneself as a transport service supplier in a Member State of the European Union. Next, paragraph (b) refers to "conditions under which non-resident carriers may operate transport services within a Member State". The sentence makes clear that it involves conditions of the transport operations of "non-resident carriers". It does not concern the conditions for establishment.

191. The relationship between Article 207(5) TFEU and the Transport Title, on the one hand, and Article 207(1) TFEU, on the other hand, corresponds to the relationship, within the EU, between freedom to provide transport services under secondary law adopted in accordance with Title VI of Part III of the TFEU, on the one hand, and freedom of establishment under Articles 49 *et seq.* TFEU on the other.[120]

192. Given the cross-reference in Article 207(5) TFEU to Title VI of Part Three TFEU, the meaning of "transport" covered by the Title must also determine the meaning of "international agreements in the field of transport" in Article 207(5) TFEU. As a

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[118] Opinion 1/08, EU:C:2009:739, para. 164 (emphasis added).

[119] Case 22/70, *ERTA*, EU:C:1971:32, paras. 25 and 26.

[120] *See* Case C-338/09, *Yellow Cab Verkehrsbetriebs GmbH v Landeshauptmann von Wien*, EU:C:2010:814, paras. 28 *et seq*.

consequence, the "agreements in the field of transport" that are excluded from the Union's CCP are limited to agreements relating to cross-border supply of services (Modes 1 and 2) and temporary presence of natural persons (Mode 4) and not establishment. Establishment (Mode 3) is covered by Article 207(1) TFEU, also in respect of transport. This maintains the "*fundamental parallelism* between internal competence whereby [Union] rules are unilaterally adopted and external competence which operates through the conclusion of international agreements, each competence remaining … anchored in the title of the Treaty specifically relating to common transport policy".[121]

193. Therefore, the provisions in EUSFTA relating to establishment of transport service providers, in particular Article 8.56.5 EUSFTA (right of establishment for international maritime transport suppliers) and the commitments with regard to establishment in transport services contained in Appendix 8-A-2 EUSFTA, fall within the scope of the Union's CCP, and thus within the Union's exclusive competence.

194. The Commission notes that Mode 3 commitments also cover the right to provide transport services from Member States to other Member States, once established in a Member State (as a subsidiary of a Singapore companies with a continuous and effective link to the EU economy). To the extent that this part of the commitment would fall under the Transport Title, the Commission considers that there is still exclusive competence pursuant to Article 3(2) TFEU, because this transport by EU-established companies is governed by the common rules that exist in this area. These rules do not provide for nationality requirements regarding ownership of the company. As a result, the commitments relevant here in EUSFTA fall within the scope of those rules.

(ii) Cross-border supply of transport services as well as temporary presence of natural persons to supply such services constitutes an area that is already largely covered by common rules, or concern commitments ancillary to commitments for which the Union has exclusive competence

195. The Commission would argue that the Union also has exclusive competence with respect to the provisions and commitments on cross-border supply of transport services as well as temporary presence of natural persons to supply such services,

[121] Opinion 1/08, EU:C:2009:739, para. 164 (emphasis added).

covered by EUSFTA. This argument is based on a detailed analysis of the commitments in EUSFTA and taking into account the particular geographical situation of the European Union and Singapore.

196. The Commission has explained, in paragraphs 40-50, above, that Article 3(2) TFEU provides an additional area of exclusive competences, specific to one legal instrument: international agreements. Article 3(2) TFEU specifies that the conclusion of an international agreement belongs to the Union's exclusive competences in three situations:

(a) when its conclusion is provided for in a legislative act of the Union; or

(b) is necessary to enable the Union to exercise its internal competence; or

(c) in so far as its conclusion may affect common rules or alter their scope.

197. The areas covered by the commitments in EUSFTA do not concern cases where, in order to exercise internal competence, the Union must exercise this competence externally at the same time.[122] Therefore, the situations that could be relevant for the present analysis are the first and the third situations. Article 3(2) TFEU refers to these situations with a view to avoid that Union internal legislation or agreements be compromised by Member State external action. The Court has confirmed that its jurisprudence relating to the analysis of whether such a risk exists – which in fact dates from before the entry into force of the Lisbon Treaty – is still relevant.[123]

198. The Commission will set out below its arguments pleading in favour of exclusive competence of the Union with respect to Sub-Section 7 (International Maritime Transport) and the transport-related commitments for Modes 1, 2 and 4 in EUSFTA. International commitments by individual Member States in these areas risk affecting EU common rules, in their current state and foreseeable future development (the third situation in Article 3(2) TFEU).

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122 *See* Opinion 1/76, EU:C:1976:76, para. 4; Opinion 1/94, EU:C:1994:384, para. 85.

123 Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, paras. 72 and 73; and Opinion 1/13, EU:C:2014:2303, para. 73.

199. Indeed, the provisions and commitments on cross-border supply (Modes 1 and 2) and temporary presence of natural persons (Mode 4) with respect to transport services in EUSFTA cover five sectors: (1) maritime transport; (2) inland waterways transport; (3) rail transport; (4) road transport and (5) services auxiliary to transport. The Commission has explained in paragraphs 172-180, above, that, in practice, the most important commitments are those for Mode 1 in international maritime transport and that no commitments exist for Modes 1 and 4 in rail transport and for Mode 1 in road transport. Commitments exist in Mode 2 for road and rail transport, but are of limited practical relevance. Some commitments exist for Mode 4 in maritime and road transport, which are again of limited practical relevance, except for those that facilitate Mode 3 establishment. Some piecemeal commitments exist for all modes of supply of services auxiliary to transport.

200. These specific transport-related commitments, as well as Sub-Section 7 of EUSFTA, together form the "transport area" in EUSFTA in respect of which it must be assessed whether the Union has exclusive competence. Even if there may be some aspects of this area that are not yet covered by common rules, the Commission considers, on the basis of an analysis of the EU acquis in respect of this "transport area", that this area is largely covered by common rules and that Member States' external action risks to affect the common rules in this area, or to alter their scope. In this regard, the Commission recalls that the Court has stressed that such risk does not presuppose that the areas covered by the international commitments and those covered by the Union rules coincide fully.[124] Rather, it is sufficient that the international commitments are concerned with an area which is already covered to a large extent by such rules.[125] The Court also stressed the importance of taking into account the foreseeable future development of the rules.[126]

201. In case the Court would disagree with the Commission's description of the "transport area" covered by EUSFTA, and would require an analysis to be made of

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[124] Opinion 1/03, EU:C:2006:81, para. 126; Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, para. 69; Opinion, 1/13, EU:C:2014:2303, para. 72; Case C-66/13, *Green Network SpA v Autorità per l'energia elettrica e il gas*, EU:C:2014:2399, para. 30.

[125] Opinion 2/91, EU:C:1993:106, paras. 25 and 26 and Opinion 1/03, EU:C:2006:81, para. 126.

[126] Opinion 1/03, EU:C:2006:81, paras. 126, 128 and 133; Opinion 1/13, EU:C:2014:2303, para. 74; Case C-66/13, *Green Network SpA v Autorità per l'energia elettrica e il gas*, EU:C:2014:2399, para. 33.

the commitments for each individual transport sector in isolation, the Commission considers that at least for the commitments in EUSFTA with respect to international maritime transport, rail transport and road transport, as well as certain specific auxiliary services, exclusive Union competence exists, on the basis of Article 3(2) TFEU.

202. Following the directions set by the Court in its previous decisions, the Commission subsequently considers the EU acquis for maritime transport, inland waterway transport, rail transport, road transport and services auxiliary to transport.

1. Maritime transport

203. As indicated, EUSFTA contains a specific Sub-Section 7 on International Maritime Transport Services, which "sets out the principles regarding the liberalisation of international maritime transport services".[127] Article 8.56.2 EUSFTA provides that international maritime transport:

> *… includes door-to-door and multi-modal transport operations, which is the carriage of goods using more than one mode of transport, involving a sea-leg, under a single transport document, and to this effect the right to directly contract with providers of other modes of transport*.

204. Article 8.56 of Sub-Section 7 EUSFTA on International Maritime Transport Services sets out the scope of this Sub-Section. Article 8.56.1 EUSFTA specifies:

> *This Sub-Section sets out the principles regarding the liberalisation of international transport services pursuant to Sections B (Cross-border Supply of Services), C (Establishment) and D (Temporary Presence of Natural Persons for Business Purposes).*

205. Sub-Section 7 first of all contains a number of obligations relating to cross-border supply of services and movement of natural persons. These obligations are further supplemented by the specific commitments in Appendix 8-A-1 (cross-border supply) and Appendix 8-A-3 (temporary presence of natural persons) to Chapter 8 EUSFTA. With respect to maritime transport, the European Union's Schedules indicate that they cover (a) international passenger transportation (CPC 7211) and (b) international freight transportation (CPS 7212). In both cases, EUSFTA excludes national cabotage transport, which covers "transportation of passengers or goods between a port or point located in a Member State of the Union and

[127] Article 8.56.1 EUSFTA.

another port or point located in the same Member State, including its continental shelf as provided in the UN Convention on the Law of the Sea, and traffic originating and terminating in the same port or point located in a Member State of the Union".[128]

206. EUSFTA indicates that the Parties agree to ensure effective application of three principles: (1) unrestricted access to cargoes on a commercial basis; (2) freedom to supply international maritime transport services; and (3) national treatment in the framework of supply of such services.[129]

207. The Parties commit to:

> *(a) […] effectively apply the principle of unrestricted access to the international maritime transport markets and trades on a commercial and non-discriminatory basis; and*
>
> *(b) […] grant to ships flying the flag of the other Party or operated by service suppliers of the other Party treatment no less favourable than that accorded to its own ships or those of any third country, whichever are the better, with regard to,* inter alia*, access to ports the use of infrastructure and auxiliary maritime services of the ports, as well as related fees and charges, customs facilities and access to berths and facilities for loading and unloading*.[130]

208. Article 8.56.4 EUSFTA sets out two specific manifestations of the application of these principles: *first*, the prohibition to introduce cargo-sharing arrangements in future agreements with third countries and to terminate existing ones;[131] and, *second*, to abolish and abstain from introducing unilateral measures and obstacles which could constitute a disguised restriction or have discriminatory effects on the free supply of services in international maritime transport.[132]

209. In respect of the supply of international maritime transport services covered by these obligations, as well as the commitments in its schedules, the Union has already adopted common rules that largely cover this area. Indeed, for both international passenger transportation and international freight transportation, the

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[128] *See* footnotes 31, 32, 33, 34 in Appendix 8-A-1.

[129] Article 8.56.3, first paragraph, EUSFTA.

[130] Article 8.56.3 EUSFTA.

[131] Article 8.56.4(a) EUSFTA.

[132] Article 8.56.4(b) EUSFTA.

Union has adopted Council Regulation No 4055/86 on applying the principles of freedom to provide services to maritime transport between Member States and between Member States and third countries.[133] The title of this Regulation already indicates that it applies to international maritime transport between Member States and third countries.

210. Regulation No 4055/86 was adopted because it was anticipated that Member States would, in traffic rights negotiations with third countries, be exposed to pressure by third countries to accept regimes incompatible with the freedom of operators from other Member States to provide services from the ports of the first mentioned Member State.[134] The Regulation refers to this anticipated risk in the ninth recital of the Regulation:

> *Whereas Community shipowners are increasingly faced with new restrictions, imposed by third countries, on the freedom to provide maritime transport services for shippers established in their own country, in other Member States or in the third countries concerned, which may have harmful effects on Community trades as a whole.*

211. Regulation No 4055/86 indeed provides common rules in respect of cross-border trade in maritime transport services between the Union and Member States. Trade agreements concluded between an individual Member State and Singapore may affect these common rules by accepting certain market access and national treatment rights and obligations for the shipping companies from that Member State and from Singapore.

212. Article 1(1) of Council Regulation No 4055/86 reads as follows:

> *Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.*

213. Thus, Article 1(1) of Regulation No 4055/86 is not limited to intra-EU transport, but imposes an obligation not to restrict cross-border supply of transport services

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[133] Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ 1986 L 378/1.

[134] *See* Progress towards a common transport policy. Maritime transport. Commission Communication and proposals to the Council transmitted on 19 March 1985, COM(85)90 final, 14 March 1985, para. 35.

in respect to transport services that are provided from a Member State to third countries.

214. Article 1(1) of the Regulation thus provides a common rule with respect to cross-border trade in maritime transport services between Member States and third countries. If an individual Member State were able to conclude an international agreement that regulates such cross-border trade in maritime transport services from its territory to a third country (Singapore) the common rule in Article 1(1) could be affected.

215. Furthermore, Article 1(2) of Regulation No 4055/86 specifies that the provisions of this Regulation also apply to:

> *[…] nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State if their vessels are registered in that Member State in accordance with its legislation.*

216. Hence, the Regulation also covers shipping companies established outside the Union and providing passenger and freight transport services to consumers from the Member States, if two conditions are fulfilled. First, it is necessary that these shipping companies outside the Union are controlled by nationals of a Member State of the Union. Second, it is required that the vessels of these companies are registered in that Member State. The establishment of shipping companies outside the Union, while the company is controlled by nationals of a Member State and the vessels are registered in that Member State is a frequently used practice for shipping companies involved in international transportation.[135]

[135] In this respect, the Commission recalls that in *Fonnship*, the Court of Justice noted that "it is apparent from the seventh to ninth and twelfth recitals of Regulation No 4055/86 and from the *travaux préparatoires* thereof, as set out in the observations submitted to the Court, that, by including in that scope *ratione personae* the nationals of a Member State established in a third country or controlling a shipping company there, the EU legislature **wished to ensure that a significant part of the commercial fleets owned by nationals of a Member State come under the liberalisation of the shipping industry established by that regulation, so that Member States' shipowners could better face, inter alia, the restrictions imposed by third countries".** Case C-83/13, *Fonnship*, EU:C:2014:2053, para. 33 (emphasis added). In *Fonnship*, the Advocate General noted in its Opinion that, "[a]ccording to one writer, this situation covers 85% of the fleet of Greek-flagged vessels." (AG Opinion in Case C-83/13, *Fonnship*, EU:C:2014:201, footnote 27.) The Advocate General referred to the study by Martinez Lage, S., 'El régimen comunitario del transporte marítimo y el Real Decreto 990/1986 sobre ordenación del transporte marítimo en España', Gaceta Jurídica de la CEE, No 10, 1988, p. 408.

217. The Commission adds that, specifically with respect to cargo-sharing arrangements (with regard to which Article 8.56.4(a) EUSFTA imposes a prohibition), Article 3 of Regulation No 4055/86 has already imposed an obligation for Member States to phase out such arrangements contained in existing bilateral agreements concluded by Member States with third countries. Article 4 provides that, exceptionally, existing cargo-sharing arrangements may still be maintained, but on the condition that they are adjusted in accordance with Union legislation.[136]

218. Moreover, Article 5 of the Regulation also prohibits new cargo-sharing arrangements in any future agreements with third countries. Only in the exceptional circumstances where the Union liner shipping companies would not otherwise have an effective opportunity to ply for trade to and from the third country concerned, cargo-sharing agreements would be permitted under the Regulation.[137] However, the Member State concerned is obliged to inform the Commission and the other Member States of these difficulties. The Council, on the proposal of the Commission then decides on necessary action, which may include the authorisation for a Member State to negotiate and conclude such cargo-sharing arrangements, or the conclusion of such agreement by the Union.[138] In case the Council would not act within six months, there is an implicit authorisation for the Member States to act.[139]

219. The area of cargo-sharing agreements is thus already largely covered by common Union rules, explicitly prohibiting Member States to conclude or maintain such arrangements, except in exceptional circumstances regulated by Union rules. What is more, in those exceptional circumstances the Regulation establishes that it is in principle the Union who either decides about the authorisation of the Member State, or itself concludes such agreements.

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136 Article 4.1 Council Regulation (EEC) No 4055/86.

137 Article 5.1 Council Regulation (EEC) No 4055/86.

138 Article 6.2 Council Regulation (EEC) No 4055/86.

139 It is only when the Council has not taken necessary action within six months of a Member State informing the Council the problem to ply for trade that the Member State may take the action necessary to preserve an effective opportunity to ply for trade. (Article 6.3 Council Regulation (EEC) No 4055/86.)

220. On the basis of Articles 1(1) and 1(2), as well as Articles 3-6 of Regulation No 4055/86, the Commission considers that the Regulation covers at least a significant part of supply of maritime transport services between Member States and third countries; and also covers the treatment of third country nationals (namely certain shipping companies that are established in third countries).[140] The international commitments in EUSFTA in respect of cross-border supply of maritime transport services (Modes 1 and 2) are concerned with an area which is already covered to a large extent by common rules.[141]

221. The Commission stresses that the situation of international maritime transport services is different from the one prevailing in international air transport, addressed by the Court in its "Open Skies" decisions. In those cases, the Court examined the Commission's argument that the "Open Skies" agreements contracted by Member States would affect Regulations No 2407/92 and No 2408/92, since it would allow US carriers to use intra-Community routes without complying with the conditions in those Regulations. The Court rejected that argument, stressing that Regulation No 2408/92 did not govern the granting of traffic rights on intra-Community routes to non-Community carriers and Regulation No 2407/92 did not govern operating licences of non-Community air carriers within the Community.[142]

222. Regulation No 4055/86 is different because it does apply to certain third country shipping companies.[143] Moreover, the Regulation is not limited to intra-Union shipping routes, but it concerns also the provision of international maritime transport services between the Member States and third countries.[144]

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[140] *See* Case C-467/98, *Commission v Denmark (Open Skies)*, EU:C:2002:625, paras. 102-103 (finding that "Regulation No 2299/89 … also applies to nationals of non-member countries", and therefore, the Union "acquired exclusive competence to contract with non-member countries the obligations relating to CRSs [computer reservation systems] for use or used in its territory") and Opinion 1/94, EU:C:1994:384, para. 95 ("Whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries … it acquires exclusive external competence in the spheres covered by those acts").

[141] Opinion 2/91, EU:C:1993:106, paras. 25 and 26 and Opinion 1/03, EU:C:2006:81, para. 126.

[142] Case C-467/98, *Commission v Denmark (Open Skies)*, EU:C:2002:625, paras. 90-91.

[143] *See* Article 1(2) Council Regulation (EEC) No 4055/86.

[144] Article 1(1) Council Regulation (EEC) No 4055/86.

223. A bilateral agreement between a Member State and Singapore is capable of distorting the freedom to provide maritime transport services between the Member States and Singapore. A Member State might indeed, as part of such agreement, agree to create a monopoly for a shipping company to provide services between the Member State and Singapore; agree to an unconditional access for its own shipping companies (and only its own) to Singapore; or add conditions for allowing cross-border supply of international maritime transport services between its territory and third countries by shipping companies established in Singapore. Such individual Member State commitments would affect the common EU rules in this area. The Union's common approach would be undermined. Individual Member State external action is thus capable of affecting the common EU rules or of altering their scope.[145] For this reason, pursuant to Article 3(2) TFEU, the Union has exclusive competence for concluding these parts of EUSFTA.

224. Sub-Section 7 EUSFTA also contains an obligation in Article 8.56.6 for the Parties to:

> *… make available to international maritime transport suppliers of the other Party on reasonable and non-discriminatory terms and conditions the use of the following services at the port:*
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> *(a) pilotage;*
>
> *(b) towing and tug assistance;*
>
> *(c) provisioning;*
>
> *(d) fuelling and watering;*
>
> *(e) garbage collecting and ballast waste disposal;*
>
> *(f) port captain's services;*
>
> *(g) navigation aids; and*
>
> *(h) shore-based operational services essential to ship operations, including communications, water and electrical supplies, emergency repair facilities, anchorage, berth and berthing services.*

225. The Commission notes that these port services are not committed in the Union's schedule of commitments and are thus not liberalised for foreign suppliers of such port services. Rather, Article 8.57.6 EUSFTA is a further elaboration of the

[145] Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, para. 74; Opinion 1/13, EU:C:2014:2303, para. 74.

national treatment obligation in respect of international maritime transport, as far as it is liberalised, and for which the exclusive competence has just been demonstrated. Indeed, the only obligation that the Union and Singapore undertake is to ensure that suppliers of international maritime transport services from either Party have access to port services on reasonable and non-discriminatory terms.

226. Further, with respect to the supply of maritime transport services by subsidiaries of Singapore's companies established in a Member State from that Member State to another Member State, the Commission notes that these fall plainly within the scope of Regulation No 4055/86, in the absence, in particular, of national requirements with regard to the owners of the subsidiary. Hence, this cross-border service supply is governed by the EU rules.

227. Finally, with regard to Mode 4 (mainly for freight transport), the Commission recalls that, in practice, a maritime transport company from Singapore will make use of this commitment to send key personnel – most likely intra-corporate transferees (executives, manages or specialists)[146] – to the establishment it has created (on the basis of the Union's Mode 3 commitment) in a Member State of the European Union.

228. In this regard, the Commission notes that the Union adopted Directive 2014/66 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.[147] Article 2.1 of Directive 2014/66 provides that the Directive:

> *… shall apply to third-country nationals who reside outside the territory of the Member States at the time of application and apply to be admitted or who have been admitted to the territory of a Member State under the terms of this Directive, in the framework of an intra-corporate transfer as managers, specialists or trainee employees.*

[146] *See* Article 8.13.2(a) EUSFTA, which defines "key personnel" as "natural persons employed within a juridical person of one Party than a non-profit organisation and who are responsible for the setting up or the proper control, administration and operation of an establishment".

[147] 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, OJ 2014 L 157/1.

229. Chapter II of Directive 2014/66 specifies conditions of admission for such third-country nationals in the framework of intra-corporate transfers.[148]

230. Directive 2014/66 thus provides for common rules. Individual Member State external action, e.g. the conclusion of a bilateral agreement by a Member State and a third country regarding intra-corporate transferees, is capable of affecting this common EU rule or of altering its scope.[149] For this reason, pursuant to Article 3(2) TFEU, the Union has also exclusive competence for concluding the commitment in respect of international maritime transport services supplied through Mode 4.

231. In any event, because the Mode 4 commitment is so closely linked to establishment (Mode 3), this commitment is a "necessary adjunct to"[150] the Union's Mode 3 commitment, for which the Union has exclusive competence, as the Commission has demonstrated.

232. In sum, with respect to cross-border trade in maritime transport services in EUSFTA through Modes 1, 2 and 4, as well as the aspect of Mode 3 that concerns the right to provide transport services from Member States to other Member States, once established, the Union has adopted common rules. Member State external action "may affect [these] common rules or alter their scope". As a consequence, pursuant to Article 3(2) TFEU, the Union has exclusive competence to conclude these areas in EUSFTA. The Commission recalls that supply of international maritime transport services through Mode 3 is covered by the Union's CCP. Hence, also for this part of EUSFTA, the Union is exclusively competent.

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148 Article 3(b) Directive 2014/66/EU defines "intra-corporate transfer" as "the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third- country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States".

149 Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, para. 74; Opinion 1/13, EU:C:2014:2303, para. 74.

150 *See* Opinion 1/94, EU:C:1994:384, para. 51 and Opinion 1/08, EU:C:2009:739, para. 166.

2. Internal waterways transport

233. The Commission recalls that the practical relevance of inland waterways services provided cross-border between Singapore and the European Union is essentially *nihil*. Moreover, as explained in paragraphs 172 and 176, above, because of the specific limitations the Union has inscribed to its Mode 1, 2 and 3 commitments, and the fact that the Appendix on Mode 4 does not mention inland waterways transport, the Union makes essentially no commitments for trade in internal waterways transport at all. Therefore, there is, in practice, no exercise of competence through EUSFTA.

3. Rail transport

234. The EUSFTA contains narrow commitments by the Union in respect of rail transport services. The Union's Schedules of Specific Commitments cover both (a) passenger transportation (CPC 7111) and (b) freight transportation (CPC 7111). The Commission has explained in paragraph 177 above that the EU makes no commitments for Modes 1 or 4. It is only for Mode 2 that there is a full commitment without reservations.

235. This Mode 2 commitment is of limited practical concern to Member States and the Union since it is unlikely that they would ever consider it necessary to restrict or regulate in any manner the use by their nationals of rail transport services within Singapore. Given that this commitment is "extremely limited in scope"[151] the Commission considers that this specific commitment would, in any event, be ancillary to the commitments in EUSFTA in the transport area and in the area of the Union's CCP for which the Union has exclusive competence.

236. Finally, with respect to the supply of rail transport services by a subsidiary of a Singapore company established in a Member State to another Member State, the Commission notes that Directive 2012/34 establishing the Single European Railway Area[152] authorises free provision of intra-Union services by operators established in a Member State, without stipulating nationality requirements

[151] *See* Opinion 1/94, EU:C:1994:384, para. 67 and Case C-268/94, *Portugal v Council*, EU:C:1996:461, para. 75.

[152] Directive 2012/34 of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast), OJ 2012 L 343/32.

regarding owners of the subsidiary. Article 3(1) of Directive 2012/34 defines "railway undertaking" as:

> *... any public or private undertaking licensed according to this Directive, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertaking which provide traction only.*

237. The free provision of services is governed by Article 17 *et seq.* of Directive 2012/34, in combination with Article 10 *et seq.* of the Directive.

238. Also undertakings in the Union that are owned by a third country natural or legal person are thus entitled to operate services within the Union. Hence, the cross-border supply of rail transport services from a subsidiary of a Singapore company established in a Member State to another Member State is governed by the EU rules. Therefore, the Union has, pursuant to Article 3(2) TFEU, exclusive competence in respect of this service supply by companies established in the Union.

4. Road transport

239. EUSFTA contains limited commitments by the Union in respect of road transport services. The European Union's Schedules of Specific Commitments cover both (a) passenger transportation (CPC 7121 and CPC 7122) and (b) freight transportation (CPC 7123, excluding transportation of postal and courier items on own account). The Commission has explained in paragraphs 177 above that the EU makes no commitments for road transport services supplied through Mode 1. The EU makes a full commitment without reservations for Mode 2 and a commitment for Mode 4, subject to reservations for nationality and residency conditions in a number of Member States. The Commission considers that the Union has exclusive competence to conclude the limited commitments in this area.

240. Like for rail transport, the commitment with respect to Mode 2 in road transport services is of limited practical concern to Member States and the Union since it is unlikely that they would ever consider it necessary restrict their nationals to make use of road transport services within Singapore. Given that this commitment is "extremely limited in scope"[153] the Commission considers that this specific

[153] *See* Opinion 1/94, EU:C:1994:384, para. 67 and Case C-268/94, *Portugal v Council*, EU:C:1996:461, para. 75.

commitment is, in any event, ancillary to the commitments in EUSFTA in the transport area and in the area of the Union's Common Commercial Policy for which the Union has exclusive competence.

241. Further, with respect to the supply of road transport services from a subsidiary of a Singapore company established in a Member State to another Member State, the Commission notes that Regulations 1072/2009[154] and 1073/2009,[155] in combination with Regulation 1071/2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator,[156] apply irrespective of the nationality of the owners of the subsidiary.

242. Article 1(2) of Regulation 1071/2009 specifies that it applies

> *… to all undertakings established in the Community which are engaged in the occupation of road transport operator. It shall also apply to undertakings which intend to engage in the occupation of road transport operator. …*

243. Furthermore, also Regulations 1072/2009 and 1073/2009 do not stipulate any nationality requirement.

244. Also private undertakings in the Union that are owned by a third country natural or legal person are covered by this definition. Hence, the cross-border supply of road transport services from a subsidiary of a Singapore company established in a Member State to another Member State is governed by the EU rules. Therefore, the Union has, pursuant to Article 3(2) TFEU, exclusive competence in respect of this service supply by companies established in the Union.

245. Finally, with respect to Mode 4, the Commission recalls that, in practice, a road transport company from Singapore will make use of this commitment to send key personnel – most likely intra-corporate transferees (executives, manages or specialists) – to the establishment it has created (on the basis of the Union's Mode 3 commitment) in a Member State of the European Union.

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154 Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (recast), OJ 2013 L 300/72.

155 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 (recast), OJ 2009 L 300/88.

156 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, OJ 2009 L 300/51.

246. The Commission has already explained that the Union has adopted Directive 2014/66 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. This is a common rule that may be affected by individual Member State action. Therefore, pursuant to Article 3(2) TFEU, the Union has exclusive competence also with respect to Mode 4 service supply for road transport.

247. In any event, the Commission considers that these commitments are ancillary to the Union's commitment in respect of provision of road transport services through Mode 3. The Mode 4 commitment for road transport is thus a "necessary adjunct to"[157] the Union's Mode 3 commitment, for which the Union has exclusive competence.

5. Services auxiliary to transport

248. EUSFTA further contains commitments in respect of services auxiliary to maritime transport, internal waterways transport, rail transport and road transport. These commitments cover cross-border supply of services (Appendix 8-A-1), establishment (Appendix 8-A-2) and temporary presence of natural persons (except in case of services auxiliary to inland waterways transport and services auxiliary to rail transport) (Appendix 8-A-3). These commitments are subject to several reservations, as described in paragraphs 172 and 178, above.

249. In respect of maritime transport, Article 8.56.6 EUSFTA requires the Parties to make available to international maritime transport suppliers some additional auxiliary services at the port on reasonable and non-discriminatory terms and conditions. The Commission has explained, in paragraph 225, above, that the Union does not commit to liberalise these port services.

250. The following table lists the auxiliary services that are covered by EUSFTA.

Services auxiliary to maritime transport	**Services auxiliary to inland waterways transport**

[157] *See* Opinion 1/94, EU:C:1994:384, para. 51 and Opinion 1/08, EU:C:2009:739, para. 166.

a) Storage and warehousing services (Part of CPC 742) b) Customs Clearance Services c) Container Station and Depot Services d) Maritime Agency Services e) Maritime freight forwarding Services f) Rental of Vessels with Crew (CPC 7213) g)Pushing and towing services (CPC 7214) h)Supporting services for maritime transport (part of CPC 745) i) Other supporting and auxiliary services	a) Cargo-handling services (part of CPC 741) b) Storage and warehouse services (part of CPC 742) c) Freight transport agency services (part of CPC 748) d) Rental of Vessels with Crew (CPC 7223) e) Pushing and towing services (CPC 7224) f) Supporting services for internal waterways transport (part of CPC 745) g) Other supporting and auxiliary services (part of CPC 749)
Services auxiliary to rail transport	**Services auxiliary to road transport**
a) Cargo-handling services (part of CPC 741) b) Storage and warehouse services (part of CPC 742) c) Freight transport agency services (part of CPC 748) d) Pushing and towing services (CPC 7113) e) Supporting services for rail transport services (CPC 743) f) Other supporting and auxiliary services (part of CPC 749)	a) Cargo-handling services (part of CPC 741) b) Storage and warehouse services (part of CPC 742) c) Freight transport agency services (part of CPC 748) d) Rental of Commercial Road Vehicles with Operators (CPC 7124) e) Supporting services for road transport (CPC 744) f) Other supporting and auxiliary services (part of CPC 749)

251. The Commission considers that some of the services that are auxiliary to transport concern services that are not transport services but are more properly situated within the Union's CCP. The conclusion of international agreements with respect to such services is thus an exclusive competence of the Union. This is, more specifically, the case for customs clearance services. These are activities consisting in carrying out on behalf of other party customs formalities concerning import, export or through transport of cargoes, whether this service is the main activity of the service provider or a usual complement of its main activity.[158] The Union has regulated these services in Article 179 of the Union Customs Code,[159] in particular

[158] Footnote 37 of Appendix 8-A-1; Footnote 72 of Appendix 8-A-2; Footnote 14 of Appendix 8-A-3.

[159] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ 2013 L 269/1 and *see* Article 106 of the preceding Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code), OJ 2008 L 145/1.

the authorisation for providing centralised customs clearance services (to lodge at a customs office responsible for the place where such the clearance agent is established, a customs declaration for goods which are presented to customs at another customs office). This squarely falls within the scope of the Union's CCP, which is an exclusive competence. These authorisation conditions also apply to third country nationals that would want to provide customs clearance services in the Union. Hence, even if the Court would decide that these services are not within the Common Commercial Policy of the Union, they are within the Union's exclusive competence because individual Member State action could affect these common rules or alter their scope.

252. The Commission further notes that maintenance and repair of equipment for maritime transport, for inland waterways transport, for rail transport and for road transport is not covered by the commitments in EUSFTA relating to services auxiliary to transport services. Rather, it is covered by the EU's commitments on business services.[160] These services concern equipment, while being insufficiently connected to transport as such. Hence, they fall within the Union's CCP, which is an exclusive competence. Therefore, the Union has an exclusive competence to conclude these aspects of EUSFTA.

253. In any event, the Commission recalls, as explained in paragraph 179, above, that all auxiliary services covered by EUSFTA will, given the geographical distance between the EU and Singapore, mostly be provided through an establishment of a Singapore company in a Member State to the consumers in a port of that Member State. Since establishment falls within the Union's CCP, it is within the Union's exclusive competence.

254. Moreover, the Commission stresses that all these services are *auxiliary to* transport services. Therefore, the commitments relating to these services are "extremely limited in scope"[161] and are a "necessary adjunct to"[162] the Union's commitments relating to transport services in EUSFTA, for which the Union has exclusive competence.

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[160] *See* Footnote 37 of Appendix 8-A-1; Footnote 72 of Appendix 8-A-2.

[161] *See* Opinion 1/94, EU:C:1994:384, para. 67 and Case C-268/94, *Portugal v Council*, EU:C:1996:461, para. 75.

[162] *See* Opinion 1/94, EU:C:1994:384, para. 51 and Opinion 1/08, EU:C:2009:739, para. 166.

(c) In the alternative, the Union has shared competence with regard to transport services

255. Even if the Court would find that certain provisions in EUSFTA relating to transport services do not fall within the scope of the exclusive competences of the Union, the Union is still competent to conclude international agreements in this field. This is because Article 216 TFEU provides that the Union:

> *... may conclude an agreement with one or more third countries ... where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties...*

256. For the avoidance of doubt, the Commission does not argue, in this subsidiary instance, that the Union has exclusive competence with regard to the commitments for transport services in EUSFTA because its provisions are "necessary to enable the Union to exercise its internal competence" within the meaning of Article 3(2) TFEU. The conclusion of an agreement, nevertheless, may be necessary to achieve an objective of the Treaties in the sense of Article 216(1) TFEU even where such an agreement is not necessary to enable the Union to exercise its internal competences.

257. The objective of establishing common rules for transport services between the Union and third countries is reflected in Title VI TFEU, more in particular in Article 91(1) TFEU. As discussed in paragraph 185 above, this provision specifies certain areas in which common transport rules must be adopted and reads as follows:

> *For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:*
>
> *(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;*
>
> *(b) the conditions under which non-resident carriers may operate transport services within a Member State;*
>
> *(c) measures to improve transport safety;*
>
> *(d) any other appropriate provisions.*

258. The provision refers specifically to transport services between the Union and third countries. Subparagraph (a) refers to "international transport to or from the

territory of a Member State or passing across the territory of one or more Member States". This covers a situation where transport starts in a third country and ends in a Member State; where transport starts in a Member State and ends in a third country; and where transport starts and ends in third countries, but passes across the territory of at least one Member State. Subparagraph (b) refers to services supplied by non-resident carriers (possibly residing in a third country) within a Member State.

259. Article 100 TFEU clarifies that the modal-scope of the Transport Title covers transport by rail, road, inland waterway, sea and air transport. Article 110(1) provides a further legal basis for adopting "appropriate provisions" for sea and air transport.

260. In the framework of the Union's common transport policy, one of the objectives is thus to regulate transport services between the Union and third countries. This may involve the conclusion of international agreements with those countries.

261. The Commission submits, therefore, that the conclusion of international agreements within the content of Chapter 8 EUSFTA in respect of transport is "necessary" within the meaning of Article 216(1) TFEU within the framework of the Union's common transport policy. Accordingly, the Union must be recognised, at least, to have shared competence to conclude such agreements.

3.9.4. Electronic Commerce

262. Section F of EUSFTA deals with electronic commerce. This Section mainly concerns declarations of intent to promote electronic commerce. In Article 8.57.1 EUSFTA, the Parties:

> *… recognis[e] hat electronic commerce increases trade opportunities in many sectors [and] agree on the importance of facilitating its use and development and the applicability of WTO rules on electronic commerce.*

263. The statement of objectives already demonstrates the direct connection between electronic commerce and trade opportunities, and thus with the Union’s CCP.

264. The majority of the provisions in Section F involve declarations of intent. Most general, the Parties:

… agree to promote the development of electronic commerce between them, in particular by cooperating on the issues raised by electronic commerce under the provisions of this Chapter. Within this context both Parties should avoid imposing unnecessary regulations or restrictions on electronic commerce.[163]

265. Furthermore, the Parties recognise the importance of the free flow of information on the internet, as well as that this should not impair the rights of intellectual property owners.[164] They also agree that "development of electronic commerce must be fully compatible with international standards of data protection".[165]

266. The only substantive obligation in this Section F is contained in Article 8.58 EUSFTA, where it is agreed that:

[t]he Parties shall not impose customs duties on electronic transmissions.

267. A prohibition to impose customs duties falls squarely within the scope of the Union's CCP, which covers tariff and trade agreements with regard to goods and services.

268. In Article 8.59 EUSFTA, the Parties affirm "for greater certainty" that measures relating to the supply of a service using an electronic means falls within the scope of the obligations contained in Chapter 8. This is in fact a confirmation of the GATS principle of "technological neutrality" (i.e. when an obligation is written without distinguishing between technologies, that obligation applies to any sort of technology used to supply the service) explicitly recognised by WTO Panels and the Appellate Body.[166] This reaffirmation of an established GATS principle falls thus squarely within the Union's CCP.

269. The Parties announce in Article 8.60.1 EUSFTA to "take steps to facilitate the better understanding of each other's electronic signatures framework and, subject to relevant domestic conditions and legislation, to examine the feasibility of having in the future a mutual recognition agreement on electronic signatures". Examples of such steps are listed in Article 8.60.2 EUSFTA and involve facilitation of representation in international fora dealing with electronic signatures, exchange of

163 Article 8.57.2 EUSFTA.

164 Article 8.57.3 EUSFTA.

165 Article 8.57.4 EUSFTA.

166 *See* Panel Report, *US – Gambling*, para. 6.285; Appellate Body Report, *US – Gambling*, para. 265; Panel Report, *China – Publications and Audiovisual Products*, paras. 7.1256-7.1258.

views on this issue and contribution to each other's study efforts. None of these provisions in Article 8.60 EUSFTA involve substantive obligations but merely intentions to cooperate. In any event, promoting the use of electronic signatures is a trade-related objective since it facilitates trade transactions.

270. Further cooperation is announced in Article 8.61 EUSFTA. The Parties shall maintain a dialogue on regulatory issues raised by electronic commerce.[167] Cooperation may take the form of exchange of information between the Parties. Such dialogue and information exchange serves the objective of promoting electronic commerce and thus falls within the scope of the Union's CCP.

3.10. Investment protection (Chapter 9)

3.10.1. Summary description of the chapter

271. Chapter 9 of EUSFTA deals with "Investment protection". It consists of two sections: Section A contains substantive provisions on investment protection; Section B provides for investor-to-State Dispute Settlement in respect of the substantive provisions included in Section A.

272. The provisions of Chapter 9 are broadly similar to those usually included in the Bilateral Investment Treaties concluded by the Member States with third countries[168] and will replace the existing BITs between the Member States and Singapore.[169]

273. Article 9.1 EUSFTA defines some of the terms used in Chapter 9. Of particular relevance for these proceedings are the definitions of "covered investment" and "investment":

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[167] Article 8.61.1 EUSFTA.

[168] The existing BITs of the Member States with third countries impinge on the exclusive competence of the Union with regard to foreign investment, except where they were conclude before 1 January 1958 or their date of accession to the Union (cf. Article 351 TFEU). Regulation (EC) No 1219/2012 of the European Parliament and the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between the Member States and third countries (OJ L 351, 20.12.2012, p.40) has empowered the Members States, in accordance with Article 2(1) TFEU, to maintain their existing BITs with third countries, as well as, subject to certain requirements, to amend them or conclude new ones, pending the conclusion of agreements by the Union.

[169] Article 9.10 EUSFTA.

'covered investment' means an investment which is owned, directly or indirectly, or controlled, directly or indirectly, by a covered investor of one Party in the territory of the other Party.[170]

'investment' means every kind of asset that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, or a certain duration.

274. Article 9.2 EUSFTA defines the scope of application of Chapter 9. In essence, it provides that Chapter 9 applies to 'covered investments' (as defined in Article 9.1) made in accordance with the applicable laws of that Party whether before or after the entry into force of EUSFTA[171], including therefore those investments made pursuant to the market access commitments contained in Chapter 8 of EUSFTA.

275. Articles 9.3, 9.4 and 9.6 EUSFTA are the core substantive provisions of Chapter 9. They provide for three different standards of protection: 'National Treatment' (Article 9.3 EUSFTA); 'Fair and Equitable Treatment' (Article 9.4.2 EUSFTA); and protection in case of expropriation (Article 9.6 EUSFTA), respectively. While these three standards of protection are found in most BITs of the Member States with third countries, EUSFTA introduces important innovations in order to better protect each Party's right to regulate for legitimate purposes.

276. Article 9.3.1 EUSFTA defines the National Treatment standard as follows:

Each Party shall accord to covered investors of the other Party and to their covered investments, treatment in its territory no less favourable than the treatment it accords, in like situations, to its own investors and their investments with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of their investments.

277. Article 9.3.3 EUSFTA makes the National Treatment standard subject to an express exception modelled on Article XX of the GATT 1994 and Article XIV of the GATS, which allows each Party to take such measures as necessary to pursue a broad catalogue of legitimate objectives.

278. Fair and Equitable Treatment is narrowly defined in Article 9.4.2 EUSFTA by setting down a closed list of the types of behaviour that constitute a breach of that standard:

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[170] Footnote omitted.

[171] Article 9.2 EUSFTA together with the definition of covered investment in Article 9.

(a) denial of justice in criminal, civil and administrative proceedings;

(b) a fundamental breach of due process;

(c) manifestly arbitrary conduct;

(d) harassment, coercion, abuse of power or similar bad faith conduct; or

(e) a breach of the legitimate expectations of an investor arising from specific or unambiguous representations from a Party so as to induce the investment and which are reasonably relied upon by the covered investor[172].

279. Article 9.6.1 EUSFTA provides the following with regard to the expropriation of investments:

Neither Party shall directly or indirectly nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') the investments of investors of the other Party except:

(a) for a public purpose;

(b) in accordance with due process of law;

(c) on a non-discriminatory basis; and

(d) against payment of prompt, adequate and effective compensation in accordance with paragraph 2.

280. Article 9.6 EUSFTA must be read together with Annex 9-A, which lays down detailed criteria for interpreting the notion of 'indirect expropriation'. In particular, it clarifies that:

For greater certainty, except in the rare circumstance where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measure or series of measures by a Party that are designed and applied to protect legitimate public policy objectives such as public health, safety and the environment, do not constitute indirect expropriation.

281. In addition to the three core standards of protection discussed above, Section A of Chapter 9 of EUSFTA also includes the following other provisions:

- Article 9.4.1 EUSFTA requires the Parties to provide "full protection and security". Article 9.4.4 EUSFTA clarifies, for greater certainty, that this standard "only refers to a Party's obligation relating to physical security of covered investors and investments."

[172] Footnotes omitted.

- Article 9.4.5 EUSFTA provides for a narrow version of the so-called 'umbrella clause', whereby each Party agrees not to "frustrate or undermine" the commitments given to an investor in a contractual written obligation "through the exercise of its governmental authority", either "deliberately" or in a way which "substantially alters the balance of rights and obligations" unless that Party provides adequate compensation.

- Article 9.5 EUSFTA provides for the obligation, under certain conditions, to compensate losses resulting from war or similar extraordinary events.

- Article 9.7 EUSFTA provides for the free transfer of funds relating to an investment.

- Articles 9.8 EUSFTA allows, under certain conditions, the 'subrogation' of a Party in the rights of an investor.

- Articles 9.9 and 9.10 EUSFTA deal, respectively, with the consequences of the termination of EUSFTA and the relationship of EUSFTA to the pre-existing BITs of the Member States with Singapore.

282. Section B of Chapter 9 provides for investor-to-State dispute settlement in respect of the substantive provisions contained in Section A. ISDS allows an investor of a Party who considers that the other Party has breached a provision of Section A to bring a claim against the latter Party before an arbitration tribunal. If the tribunal upholds the claim it will award monetary damages and/or restitution of property. Nevertheless, the defending Party may choose to pay monetary damages *in lieu* of restitution

283. Section B lays down detailed provisions with regard to each step of the ISDS procedures, including on matters such as: prior consultations (Article 9.13 EUSFTA); mediation and alternative dispute resolution (Article 9.14 EUSFTA); notice of initiation and determination of the respondent (Article 9.15 EUSFTA); choice of the settlement mechanism to which a claim is submitted (Article 9.16 EUSFTA); conditions for submitting a claim (Article 9.17 EUSFTA); constitution of the tribunal (Article 9.18 EUSFTA); applicable law and rules of interpretation (Article 9.19 EUSFTA); frivolous claims (Article 9.20 EUSFTA); transparency (Article 9.22 EUSFTA); rights of the non-disputing Party (Article 9.23 EUSFTA);

final awards (Article 9.24 EUSFTA); costs (Article 9.26 EUSFTA); role of the Parties to EUSFTA (Article 9.28 EUSFTA); enforcement of the awards (Article 9.27 EUSFTA); and consolidation of claims (Article 9.29 EUSFTA).

3.10.2. Summary of the Commission's position with regard to the scope and nature of the Union's competence

284. The Commission considers that the Union has exclusive competence with regard to all the provisions included in Chapter 9 of EUSFTA.

285. To the extent that Chapter 9 of EUSFTA applies to "foreign direct investment" the Union's exclusive competence is expressly provided for in Article 207 TFEU, which, since the Treaty of Lisbon, includes that type of investment within the scope of the Common Commercial Policy.

286. Article 207 TFEU does not cover 'portfolio investment'. Nevertheless, in the Commission's view, this does not imply that the Union lacks exclusive competence with regard to that type of investment. Portfolio investment is a "capital movement" within the meaning of Article 63 TFEU. Furthermore, the standards of treatment provided for in Chapter 9 of EUFSTA are at least largely covered by the "common rules" laid down in Article 63 TFEU in respect of portfolio investment. The Commission, therefore, considers that the Union has implied exclusive competence with regard to portfolio investment pursuant to Article 3(2) TFEU. In the alternative, the Commission submits that the Union has at least shared competence with regard to portfolio investment pursuant to the second situation included in Article 216(1) TFEU.

287. The Commission's position does not appear to be shared by the Council. The supplementary negotiating directives for EUSFTA issued by the Council in July of 2011 state that:

> *The aim is to include into the investment protection chapter of the agreement areas of mixed competence, such as portfolio investment, dispute settlement, property and expropriation aspects.*[173]

[173] Similar statements are made in the negotiating directives issued by the Council with regard to other trade agreements now being negotiated by the Commission. *See* e.g. the negotiating directives issued by the Council for the Transatlantic Trade and Investment Agreement with the United States, at para. 22 (available at http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf).

288. In addition, some authors have argued that the Union's exclusive competence with regard to foreign direct investment pursuant to Article 207 TFEU does not extend beyond the initial admission of the investment.

289. For the reasons set out below, the Commission considers that the Union has exclusive competence with regard to each of the three areas of alleged "mixed competence" identified by the Council (i.e. expropriation, investor-to-State dispute settlement and portfolio investment), as well as with regard to the 'post-admission' treatment of the investments.

3.10.3. Matters covered by the Union's exclusive competence in respect of "foreign direct investment" pursuant to Article 207 TFEU

290. In previous cases concerning "trade in goods", "trade in services" or the "commercial aspects of intellectual property", the Court has repeatedly held that an act falls within the scope of the CCP

> *[…]if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade.*[174]

291. The Commission considers that the same test applies, *mutatis mutandis*, in order to assess whether a matters falls within the terms "foreign direct investment", as used in Article 207 TFEU. In other words, the Commission submits that an agreement falls within the scope of Article 207 TFEU if it relates specifically to international investment in that it is essentially intended to promote, facilitate or govern international investments and has direct and immediate effects on those investments.

292. Chapter 9 of EUSFTA applies exclusively to investments made by the investors of one Party into the territory of the other Party.[175] It does not apply to investments made by investors of a Member State in another Member State or within their own

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[174] Case C-137/12, *Commission v Council*, EU:C:2013:675 para. 57. *See* also Opinion 2/00, EU:C:2001:664, para. 40; C-347/03, *Regione Autonoma Friuli-Venezia Giulia and ERSA*, EU:C:2004:285, para. 75; C-411/06, *Commission v Parliament and Council*, EU:C:2009:518; para. 71; and C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para. 51.

[175] Article 9.2 EUSFTA in conjunction with the definition of "covered investment" in Article 9.1 EUSFTA.

Member State of origin. It is therefore beyond dispute that Chapter 9 "relates specifically" to international investment.

293. Moreover, the provisions included in Chapter 9 of EUSFTA are similar to those usually included in existing Bilateral Investment Treaties. BITs are at the core of the investment policies of most countries and are generally considered an effective tool to promote and facilitate foreign investment. As of 2013 there were 3.240 BITs in force and almost all countries were parties to one or several BITs.[176] The Member States are among the first and most frequent users of BITs.[177] It is estimated that currently the Member States are parties to 1.382 BITs with 149 third countries.[178]

294. BITs often stress in their preamble that the parties' objective is to facilitate and promote investments between them.[179] UNCTAD has observed that "improving the standards of treatment of foreign investors" and "protecting foreign investors" are among the "main ways in which countries seek to attract foreign investment".[180] According to UNCTAD, "investors appear to regard BITs as part

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[176] UNCTAD, *World Investment Report 2013*, pp. 114-128 (available at http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf).

[177] The first BIT was concluded in 1959 between Germany and Pakistan. Ireland is the only Member State which is not a party to a BIT. Nonetheless, Ireland, like the other member States is a party to the Energy Charter Treaty.

[178] *See* in OJ 2014 C 169/01 the latest publication of BITs notified by the Member States under Regulation (EC) No 1219/2012 of the European Parliament and the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between the Member States and third countries (OJ 2012, L 351/40).

[179] For example, the preamble of the BIT between France and Saud Arabia signed on 26 February 2002 (available at http://investmentpolicyhub.unctad.org/IIA/country/72/treaty/1606) states the following.

[…]Désireux de renforcer la coopération économique entre les deux Parties contractantes et de créer des conditions favorables pour les investissements français en Arabie saoudite et les investissements saoudiens en France,

Persuadés que l'encouragement et la protection de ces investissements sont propres à stimuler les transferts de capitaux et de technologie entre les deux Parties contractantes, dans l'intérêt de leur développement économique.[…]

Similar language is used in many of the BITs concluded by other Member States. *See* e.g. the BIT between Bahrain and Germany signed on 27 May 2010 (available at http://investmentpolicyhub.unctad.org/IIA/country/15/treaty/343) or the preamble to the BIT between the United Kingdom and Mexico signed on 25 July 2007 (available at http://investmentpolicyhub.unctad.org/IIA/country/136/treaty/25450.

[180] UNCTAD, *World Investment Report 2003*, pp. 86-97 (available at http://unctad.org/en/docs/wir2003light_en.pdf), at p. 86.

of a good investment framework".[181] In UNCTAD's view, while it is not possible to measure precisely the specific impact of BITs on investment flows, BITs do play an important enabling role:

> *[International Investment Agreements] tend to make the regulatory framework more transparent, stable, predictable and secure --that is, they allow the economic determinants to assert themselves. And when IIAs reduce obstacles to FDI and the economic determinants are right, they can lead to more FDI. […]*[182]

295. Like the existing BITs of the Member States with third countries, Chapter 9 of EUSFTA has as its primary objective to "facilitate" and "promote" investment between the Parties by affording investors of the other Party adequate guarantees against certain types of treatment by the authorities of the host country, including in particular discrimination, unfair and unequitable treatment and expropriation without compensation. Such conduct may considerably impair the operation and enjoyment of the investments. In some cases it may entail, *de iure* or *de facto*, the undoing of the investment concerned. Moreover, the lack of adequate protection against such type of treatment is liable to deter other potential investors of one Party from investing in the other Party. The protection afforded by Chapter 9 against those types of conduct has, therefore, sufficiently "direct" and "immediate" effects on international investment.

3.10.4. Post-admission protection

296. Some authors have argued that the Union's exclusive competence pursuant to Article 207 TFEU is restricted to what they variously describe as issues of 'market access', 'investment liberalization' or the 'initial admission' of the investments, to the exclusion of issues pertaining to the subsequent protection of investments already admitted to the host country.[183] The majority view in the literature,

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[181] Ibid, p. 91.

[182] Ibid., p. 91.

[183] *See* e.g. M. Krajewski, 'The reform of the Common Commercial Policy' in A. Biondi et al. (Eds.), *EU Law after Lisbon* (OUP 2012), who argues that the extension of the Common Commercial Policy to foreign direct investment "could and should be read more narrowly only referring to those aspects of foreign direct investment which concern investment liberalization and those which have a close link to trade" (at p. 303). This author relies to a large extent on the negotiating history of the Lisbon Treaty which, he argues, would show that the drafters were concerned primarily with allowing the participation of the Union in ongoing investment negotiations in the WTO. However, by the time that the inclusion of foreign direct investment was finally decided, investment had already been definitively dropped from the WTO's Doha agenda. See in this sense M. Bungenberg, 'The division of competences between the EU and its Member States in the area of investment politics' in Bungenberg et al. (Eds.) *International Investment Law and EU Law* (Springer, 2011), pp. 30-32. Moreover, there is

however, correctly holds that Article 207 TFEU covers not only issues of investment admission but also of investment protection[184].

297. The narrow view according to which the Union's competence would be confined to the initial admission of the investments has no basis in the wording of the relevant TFEU provisions. Both Articles 206 and 207(1) TFEU allude to "foreign direct investment", without any further specification. No distinction is made between the initial admission of the investments and its subsequent protection.

298. Furthermore, a narrow reading of the terms "foreign direct investment" would go against the objectives of the CCP set out in Article 206 TFEU, which include "the progressive abolition of the restrictions on […] foreign direct investment". Those "restrictions" may result not only from barriers to the initial admission of an investment, but also from obstacles to its subsequent operation and enjoyment, such as discriminatory, unfair or unequitable treatment or expropriation without compensation. Moreover, lack of adequate protection against those types of treatment is liable to discourage potential investors, thereby limiting the flow of foreign investment.

299. As recalled above[185], the Court has stressed that the scope of the CCP must be interpreted in a "non-restrictive" and dynamic manner which takes into account the evolving nature of international trade and investment policies and instruments. As explained above, BITs have become one of the essential legal tools for facilitating and promoting foreign direct investment. Reading the terms "foreign direct investment" in Article 207 TFEU as covering only the initial admission of the investments would effectively exclude from the scope of the CCP most of the provisions usually contained in the BITs, thereby eviscerating the new competence conferred upon the Union by the Treaty of Lisbon.

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no reason to assume that the WTO negotiations on investment would have been confined to admission issues. As discussed above, WTO negotiations on services do address also post-admission issues.

184 *See* e.g. F. Ortino and P. Eeckhout, 'Towards an EU Policy on Foreign Direct Investment' in A. Biondi et al. (Eds.), *EU Law after Lisbon* (OUP 2012), pp. 318-319; M. Bungenberg, 'The division of competences between the EU and its Member States in the area of investment politics' in Bungenberg et al. (Eds.) *International Investment Law and EU Law* (Springer, 2011), p. 37; and M. Burgstaller, 'The future of bilateral investment treaties of EU Member States' in Bungenberg et al. (Eds.) *International Investment Law and EU Law* (Springer, 2011).

185 Section 2.3.2.1 of this submission.

300. Confining the scope of the terms "foreign direct investment" to issues relating to the initial admission of the investment is all the more unwarranted in view of the broad interpretation given by the Court to the other items mentioned in Article 207(1) TFEU[186].

301. Thus, the Union's exclusive competence in the field of "trade in goods" is by no means limited to border measures, such as tariffs or import quotas. It is well-established that such competence extends also to 'post-admission' matters, such as the granting of national treatment and most favoured nation treatment in respect of taxes and other internal laws and regulations[187], or the elimination of unnecessary obstacles to trade arising from technical regulations and standards affecting the marketing or use of both imported and domestic products.[188]

302. Likewise, the Union's exclusive competence with regard to "trade in services" is not confined to issues of 'market access'.[189] It includes also matters such as national treatment[190] and most-favoured nation treatment[191] in respect of internal laws and regulations, as well as certain obligations with regard to the administration and the content of 'domestic regulation'.[192] It is beyond dispute that the GATS provisions laying down those standards apply also to the 'post-admission' treatment of a "commercial presence" established for the purposes of supplying services in the host country (the so-called 'Mode 3' of supply of services). [193] Similar standards of treatment are stipulated in Chapter 8 of EUSFTA

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186 *See* in the same sense F. Ortino and P. Eeckhout, ´Towards an EU Policy on Foreign Direct Investment' in A. Biondi et al. (Eds.), *EU Law after Lisbon* (OUP 2012), pp.318-319.

187 Cf. Article I:1 and Article III of the GATT 1994, respectively. The Court confirmed in its Opinion 1/94 that the Community had exclusive competence to conclude all the WTO multilateral agreements concerning trade in goods, including the GATT 1994, on the basis of Article 133 EC. Opinion 1/94, EU:C:1994:384, para. 34.

188 Cf. Article 2.2 of the TBT Agreement. Again, the Court confirmed in Opinion 1/94 that the Community had exclusive competence with regard to the TBT Agreement on the basis of Article 133 EC. Opinion 1/94, EU:C:1994:384, paras. 31-33.

189 Cf. Article XVI GATS.

190 Cf. Article XVII GATS.

191 Cf. Article II GATS.

192 Cf. Article VI GATS.

193 In its Opinion 1/2008 the Court rejected Spain's contention that the Community's competence with regard to trade in services pursuant to Article 133 EC was limited to services supplied according to mode 1 (i.e. cross-border services). According to the Court, following the Treaty of Nice, Article 133

in respect of "establishment" in both the services and the non-services sectors.[194] In turn, those provisions overlap with the standards of treatment provided for in Chapter 9 of EUSFTA. It would be illogical to conclude that the Union lacks exclusive competence in respect of those standards in the context of Chapter 9 of EUSFTA because they apply to 'post-admission' treatment, but not in respect of analogous standards of treatment included in Chapter 8 of EUSFTA or in the GATS.

303. As regards the "commercial aspects of intellectual property", the Court has recently confirmed that the Union's competence pursuant to Article 207 TFEU is not confined to those provisions of the TRIPs Agreement concerning the border enforcement of intellectual property rights, but extends to all provisions of that agreement.[195] To mention but one example, Article 31 TRIPs regulates the use of the subject matter of a patent without authorization of the right holder. Some of the requirements imposed by Article 31 TRIPs are analogous to those provided in respect of expropriation in investment agreements. Yet this did not prevent the Court from concluding that the Union has exclusive competence with respect to the entirety of the TRIPs Agreement.

304. Further contextual support is provided by the TFEU's chapter on capital movements and payments.[196] As discussed below, the Court has interpreted Article 63(1) TFEU as prohibiting not only the restrictions on the initial admission of the investments but also the restrictions affecting their 'post-admission' treatment.

EC also covered the other three modes of supply provided in the GATS, including the supply of services through the establishment of a 'commercial presence' (mode 3). *See* Opinion 1/2008, EU:C:2009:739, paras. 120-123. Furthermore, while the Court ruled that the EC lacked exclusive competence to conclude the Article XXI GATS agreements at issue in respect of certain service sectors falling within the scope of Article 133(6) EC, there is no indication in Opinion 1/2008 that, as regards the sectors where the Community was exclusively competent, such competence did not extend to the national treatment commitments pursuant to GATS Article XVII contained in the agreements at issue on the grounds that those commitments applied also in respect of 'post-admission' treatment.

194 *See* e.g. Article 8.11 EUSFTA (national treatment) and Articles 8.18-8.20 EUSFTA (domestic regulation).

195 Case C-414/11, EU:C:2013:520, *Daiichi Sankyo and Sanofi-Aventis Deutschland.*

196 Part III, Title IV, Chapter 4, Articles 63 to 66 TFEU.

3.10.5. Expropriation

305. The negotiating directives issued by the Council for EUSFTA in July of 2011 cite "property and expropriation aspects" as one of the "areas" of "mixed competence". The Council, however, has nowhere explained the grounds for this view.

306. Some authors[197] have argued that the provisions on expropriation typically included in the BITs fall within the exclusive competence of the Member States by virtue of Article 345 TFEU, which provides that:

> *The Treaties shall in no way prejudice the rules in the member States governing the system of property ownership.*

307. It has also been argued that the provisions on expropriation are excluded from the scope of the Union's Common Commercial Policy by virtue of Article 207(6) TFEU[198], which states that:

> *The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the member States, and shall not lead to harmonisation of legislative or regulatory provisions of the member States in so far as the Treaties exclude such harmonisation*.

308. For the reasons set out below, the Commission considers that neither Article 345 TFEU nor Article 207(6) TFEU limit the Union's exclusive competence with

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[197] *See* e.g. C. Tietje *Die Aussenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon* (Halle 2009), p. 14; and J.A. Bischoff, 'Just a little bit of "mixity"? The EU's role in the field of international investment protection law, *Common Market Law Review 48*, 2011, pp. 1543-1545.

The majority view in the literature, however, holds that Article 345 TFEU does not exclude the Union's exclusive competence with respect to expropriation clauses. *See* e.g. F. Ortino and P. Eeckhout, ´Towards an EU Policy on Foreign Direct Investment' in A. Biondi et al. (Eds.), *EU Law after Lisbon* (OUP 2012), pp. 319-320; M. Bungenberg, 'The division of competences between the EU and its Member States in the area of investment politics' in Bungenberg et al. (Eds.) *International Investment Law and EU Law* (Springer, 2011), pp. 36-37; M. Burgstaller, 'The future of bilateral investment treaties of EU Member States' in Bungenberg et al. (Eds.) *International Investment Law and EU Law* (Springer, 2011), pp. 64-65; and P. Strik, *Shaping the Single European Market in the field of Foreign Direct Investment* (Hart, 2014), pp.86-87.

[198] *See* J. Ceyssens, 'Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution', *Legal Issues of European Integration*, 32(3), 2005, who admits in principle that the wording of Article 207(1) TFEU is broad enough to encompass post-admission matters (at pp. 276-278), but goes on to conclude that expropriation and post-admission treatment standards may be excluded from the Union´s competence under that provision through the operation of Article 207(6) TFEU (at pp. 278-281). This view is contested by the majority of authors. *See* e.g. M. Krajewski, The Reform of the Common Commercial Policy A. Biondi et al. (Eds.), *EU Law after Lisbon* (OUP 2012), pp. 304-306; and P. Strik, *Shaping the Single European Market in the field of Foreign Direct Investment* (Hart, 2014), pp.80-81.

regard to the expropriation clauses usually contained in the BITs and, more specifically, with regard to Article 9.6 EUSFTA.

3.10.5.1. Article 345 TFEU

309. As clarified by the Court, Article 345 TFEU is an expression of the 'principle of neutrality' of the Treaties in relation to the rules of the Member States governing the system of property ownership.[199]

310. More precisely, the Court has declared that:

> *[…] the Treaties do not preclude as a general rule either the nationalisation of undertakings […] or their privatisation […]. It follows that Member States may legitimately pursue an objective of establishing or maintaining a body of rules relating to the public ownership of certain undertakings.*[200]

311. At the same time, the Court has repeatedly stressed that Article 345 TFEU does not exclude the application of the fundamental rules of the TFEU, including in particular the right of establishment and the free movement of capital. In the Court's own words:

> *However, Article 345 TFEU does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty, which rules include, inter alia, the prohibition of discrimination, freedom of establishment and the free movement of capital […]201.*

312. Consistent with the above mentioned 'principle of neutrality', Article 9.6 EUSFTA neither prohibits nor requires that Member States expropriate any assets owned by investors of Singapore. Article 9.6 EUSFTA merely subjects the exercise of the Member States' right to expropriate those assets to certain conditions. To recall, Article 9.6 EUSFTA states that expropriation must be

> *(a) for a public purpose;*
>
> *(b) in accordance with due process of law;*
>
> *(c) on a non-discriminatory basis; and*

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199 *See* e.g. Joined cases C-105/12 to 107/12, *Essent et al.*, EU:C:2013:677, para. 29.

200 *See* Joined cases C-105/12 to 107/12, *Essent et al.*, EU:C:2013:677, paras. 30-31 and the case law cited.

201 Joined cases *Essent et al.*, C-105/12 to 107/12, para. 36, and the case-law cited.

(d) against payment of prompt, adequate and effective compensation […]

313. The above conditions are not such as to "prejudice" the rules governing the system of property ownership in each Member State. As discussed below, similar conditions are implicit in fundamental rules of the TFEU, including the right of establishment and the free movement of capital.

314. Thus, in the *Fearon* case the Court ruled that Member States' laws on expropriation "remain subject to the fundamental rule of non-discrimination which underlies the Chapter of the Treaty relating to the right of establishment".[202]

315. More recently, in *Essent*[203], the Court examined, *inter alia,* the measures applied by the Netherlands in order to prohibit the privatization of the distribution systems for gas and electricity. The Court confirmed that, while such prohibition fell within the scope of Article 345 TFEU[204], it remained subject to the fundamental rules of the TFEU[205]. The Court went on to find that the prohibition on privatization restricted the free movement of capital within the meaning of Article 63 TFEU[206] and, therefore, required justification by one of the reasons mentioned in Article 65(2) TFEU or by 'overriding reasons of public interest'.[207] The Court then recalled that, whereas grounds of purely economic nature cannot constitute overriding reasons of public interests, national legislation may be justified "when it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest".[208] The Court concluded that:

> *Consequently, the reasons underlying the choice of the rules of property ownership adopted by the national legislation within the scope of Article 345 TFEU constitute factors which may be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital. Accordingly, in*

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202 Case 182/83, *Fearon*, EU:C:1984:335, para.7.

203 Joined cases C-105/12 to 107/12, *Essent et al.* EU:C:2013:677.

204 Joined cases C-105/12 to 107/12, EU:C:2013:677, *Essent et al.*, EU:C:2013:677, para. 34.

205 Joined cases C-105/12 to 107/12, EU:C:2013:677 *Essent et al.*, EU:C:2013:677, paras. 36-37.

206 Joined cases C-105/12 to 107/12, *Essent et al.*, EU:C:2013:677, paras. 41-47.

207 Joined cases C-105/12 to 107/12, *Essent et al.*, EU:C:2013:677, para. 50.

208 Joined cases C-105/12 to 107/12, *Essent et al.*, EU:C:2013:677, para. 52.

the main proceedings, it is for the referring court to conduct such an examination.[209]

316. While the *Essent* judgement concerns a prohibition on the privatization of assets, the Court's reasoning is equally pertinent in relation to the expropriation of private assets. *Essent* stands for the proposition that such measures, albeit falling within Article 345 TFEU, restrict in principle the right of establishment and/or the free movement of capital (depending on the assets concerned). In order to be compatible with the TFEU, such restriction must be sufficiently justified by a 'public purpose' (whether one of the reasons mentioned in Article 65(2) TFEU or an overriding reason of public interest). In turn, this means that the restriction must be proportionate (i.e. adequate and necessary) to achieve that purpose.

317. Expropriation measures which fail to accord compensation, or which do not comply with basic due process requirements such as those prescribed in Article 9.6 EUSFTA, would normally be disproportionate even if they purse a legitimate objective and, therefore, could not be justified under Articles 49 or 63 TFEU.

318. In this regard, it should be recalled that, where a Member State seeks to derogate from a fundamental freedom by relying on an exception provided for by Union law, it must comply with the general principles of Union law, including the fundamental rights enforced by the Court.[210] Accordingly, in order to justify an expropriation under Articles 49 or 63 TFEU, a Member State is required to comply *inter alia* with Article 17 of the Charter, which provides that:

[…] No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss.[…]

319. In addition, the Member State concerned would have to ensure compliance with other relevant fundamental rights, such as the principles of equality and non-discrimination (Articles 20 and 21 of the Charter) or the right to an effective remedy and a fair trial (Article 47 of the Charter).

320. The above analysis shows that Article 9.6 EUSFA subjects the exercise of the Member States' right to expropriate to similar conditions as those imposed by

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209 Joined cases C-105/12 to 107/12, *Essent et al.*, EU:C:2013:677, para. 55.

210 *See* e.g. C-390/12, *Pfleger et al.*, EU:C:2014:281, paras. 35-36; *Alands Vindkraft*, C-573/12, EU:C:2014;2037, para. 125; C-98/14, *Berlington Hungary*, para. 74.

Articles 49 and 63 TFEU. As confirmed in many occasions by the Court, measures falling within the scope of Article 345 TFEU remain subject to Articles 49 and 63 TFEU. Given that Article 345 TFEU does not exclude the application of Articles 49 and 63 TFEU to expropriation measures, there is no reason why Article 345 TFEU should exclude the Union's competence to conclude agreements that, in essence, seek to extend on a reciprocal basis to the investments between the Union and third countries a standard of treatment which is similar to that implicit in Articles 49 and 63 TFEU in respect of the expropriation of investments covered by those two provisions.

3.10.5.2. Article 207(6) TFEU

321. It has been argued that the first half-sentence of Article 207(6) TFEU excludes from the scope of the Union's exclusive competence the clauses on expropriation usually included in the BITs, such as Article 9.6 EUSFTA, because "no comparable Union policy exists within the internal market".[211] According to this view, the first half-sentence of Article 207(6) TFEU would seek "to ensure that external trade policy measures do not trespass in any other way on what internally would be member States' competences" and would thus reflect an implicit 'principle of parallelism' between external and internal competences.[212]

322. The Commission believes that this argument is misconceived because it fails to recognise the distinction drawn by the TFEU between express and implied exclusive competence to conclude international agreements. The scope of the Union's express external exclusive competences, such as that conferred on the Union by Article 3(1) TFEU in respect of the CCP, is not subject to a 'principle of parallelism' and may well go beyond the Union's internal competence. The first half-sentence of Article 207(6) TFEU does not seek to limit the scope of the Union's external competence with regard to the CCP as defined in Article 207(1) TFEU. Its sole purpose is to clarify that the exercise of that external competence does not have the effect of rendering exclusive the internal competence over the

[211] *See* J. Ceyssens, 'Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution', *Legal Issues of European Integration*, 32(3), 2005, at p.280.

[212] Ibid.

same subject matter. In other words, the first sentence of Article 207(6) TFEU confirms the absence of a 'reverse ERTA' effect. [213]

323. Moreover, as a matter of fact, it is incorrect to say, in respect of the expropriation clauses usually included in the BITs, that "no comparable Union policy exists within the internal market".[214] As shown above, the standard of protection accorded in those clauses is analogous to that implicit in Articles 49 and 63 TFEU in respect of the investments covered by those two provisions.

324. As regards the second half-sentence of Article 207(6) TFEU, it must be recalled that, as confirmed by the Court, Article 345 TFEU does not exclude harmonisation of property rights, as long as it does not "prejudice" the rules of the Member States "governing the system of property ownership".[215]

325. In any event, Article 9.6 EUSFTA does not provide for the "harmonisation" of legislative or regulatory provisions of the Member States within the meaning of Article 207(6) TFEU[216]. Rather, Article 9.6 EUSFTA seeks to extend to the investments between the Union and third countries, on a reciprocal basis, a

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213 *See* in this sense M. Cremona, 'The Union's external action: constitutional perspectives', in *Genesis and destiny of the European Constitution*, edited by G. Amato, H, Bribosia and B. De Witte, 1st edition, 2007, p. 1206, para. 56. *See* also J. Wouters, D. Coppens and B. De Meester, 'The European Union's External Relations after the Lisbon Treaty', in S. Griller and J. Ziller (eds), *The Lisbon Treaty – EU constitutionalism without a Constitutional Treaty?* (Austria: Springer, 2008) pp. 172-173.

214 *See* J. Ceyssens, 'Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution', *Legal Issues of European Integration*, 32(3), 2005, at p.280.

215 *See* e.g. Case 350/92, *Spain v Council*, EU:C:1995:237.

216 Examples of provisions of the TFEU which, unlike Article 345 TFEU, exclude harmonisation by the Union include Article 149 (employment); Article 153(2)(a) (social policy); Article 165(4) (education); 166(4) (vocational training); 167(5) (culture); 168(5) (public health); 173(3) (industry); 189(2) (space policy); 195(2) (tourism); 196(2) (civil protection); and 197(2) (administrative cooperation). It should be noted, however, that not all common rules concerning those fields can be regarded as amounting to 'harmonisation' in the sense of Article 207(6) TFEU. This is confirmed indirectly by Article 207(4) TFEU, which stipulates that unanimity shall be required, in certain cases, for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services or in the field of social, education and health services. This provision presupposes that Article 207(6) TFEU does not exclude the conclusion of agreements regulating trade or investment in those fields, even if the TFEU excludes harmonisation in those areas. While in practice the distinction between 'harmonisation' and other forms of regulation can be difficult to make in some cases, it is submitted that, at a minimum, agreements which stipulate provisions that are the functional equivalent of the rules contained in the TFEU's chapters on the right of establishment or capital movements cannot be regarded as providing for harmonisation within the meaning of Article 207(6) TFEU. More specifically, the exception contained in Article 207(6) TFEU cannot be read as excluding the possibility for the Union to conclude agreements providing for standards of treatment typically included in BITs, such as national treatment, fair and equitable treatment or protection against expropriation.

standard of treatment which, to repeat, is analogous to that prescribed by Articles 49 and 63 TFEU in respect of the investments covered by those two provisions.

3.10.6. Portfolio investment

326. The Council's negotiating directives for EUSFTA describe "portfolio investment" as an area of "mixed competence". The Commission understands the Council's position to be that portfolio investment is not covered by the terms "direct investment" used in Article 207(1) TFEU. Therefore, in the Council's view, portfolio investment would not be covered by the Union's exclusive competence with regard to the Common Commercial Policy. On the other hand, it remains unclear to the Commission whether the Council takes the view that the Union has shared (albeit unexercised) competence with regard to portfolio investment or, rather, that portfolio investment is an exclusive competence of the Member States.

327. As discussed below, the Commission agrees that portfolio investment is not within the scope of Article 207 TFEU. Nevertheless, in the Commission's view, this does not imply that the Union lacks exclusive competence with regard to that type of investment. Portfolio investment is a "capital movement" within the scope of Article 63 TFEU. Furthermore, the standards of treatment stipulated in the investment chapter of EUFSTA are at least largely covered by the "common rules" laid down in Article 63 TFEU in respect of portfolio investment. The Commission, therefore, considers that the Union has implied exclusive competence with regard to portfolio investment pursuant to Article 3(2) TFEU. [217] In the alternative, the Commission submits that the Union has at least shared competence with regard to portfolio investment.

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[217] The Commission has consistently maintained this view. *See* e.g. Commission's communication of 7 July 2010, 'Towards a comprehensive European international investment policy', COM(2010)343final, p. 3.

The Commission's view was echoed by the co-legislators in the second recital of Regulation (EC) No 1219/2012 of the European Parliament and the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between the Member States and third countries (OJ L 351, 20.12.2012, p.40), where the Parliament and the Council noted that:

> *In addition, Chapter 4 of Title IV of Part Three TFEU lays down common rules on the movement of capital between Member States and third countries, including in respect of capital movements involving investments. Those rules can be affected by international agreements relating to foreign investment concluded by Member States.*

328. Here below, the Commission will examine successively: 1) the types of investment covered by Article 207 TFEU; 2) the scope of Chapter 9 of EUSFTA on investment protection; 3) whether the Union has implied exclusive competence with regard to portfolio investment on the basis of the common rules contained in Article 63(1) TFEU; and 4) in the alternative, whether the Union has shared competence with regard to portfolio investment on a different basis.

3.10.6.1. Types of investment covered by Article 207 TFEU

329. The scope of the Common Commercial Policy is defined in 207(1) TFEU. That provision refers to "foreign direct investment", rather than to "foreign investment" in general. It is necessary, therefore, to examine the meaning of the terms 'direct investment'.

330. The terms 'direct investment' originate in economic literature, where they are commonly used in contradistinction to 'portfolio investment'. Thus, it has been observed that:

> *Economic debate often assumes that a direct investment involves the following elements: 1) transfer of funds; 2) a long term project; 3) the purpose of regular income; 4) the participation of the person transferring the funds, at least to some extent, in the management of the project; 5) business risk. These elements distinguish foreign direct investment from a portfolio investment (no element of personal management), from an ordinary transaction for purposes of a sale or service (no management, no continuous flow of income), and from a short-term financial transaction.*[218]

331. The terms 'foreign direct investment' have been defined in various international instruments, including in particular the IMF's Balance of Payments and International Investment Position Manual[219], the OECD's Benchmark Definition of Foreign Direct Investment[220] and the OECD's Code of Liberalization of Capital Movements[221]. These definitions differ in some respects, reflecting the fact that

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218 R. Dolzer & C. Schreuer, *Principles of International Investment Law*, Oxford University Press, p. 60.

219 IMF, *Balance of Payments and International Investment Position Manual*, Sixth Edition, 2009, pp. 99-111, available at https://www.imf.org/external/pubs/ft/bop/2007/bopman6.htm.

220 OECD, *Benchmark Definition of Foreign Direct Investment*, 4th Edition, 2008, available at http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf.

221 OECD, *Code of Liberalization of Capital Movements*, 2013, available at http://www.oecd.org/investment/investment-policy/codes.htm. *See* also *OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: User's Guide*, Edition 2008, available at

each of them has been adopted for a different purpose. But all of them single out, as distinguishing features of direct investment, its lasting character and the fact that direct investment allows the investor to participate in the management of the invested assets.

332. The terms 'direct investment' also appear in the TFEU's chapter on capital and payments.[222] In that context, they have been interpreted by the Court in the light of the Nomenclature annexed to Directive 88/361/EEC,[223] which is in turn largely based on the OECD's Code of Liberalization of Capital Movements.[224]

333. According to a formula consistently used by the Court, 'direct investments' are:

> *[…] 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 undertakings to which that capital is made available in order to carry out an economic activity.*[225]

334. The Court has further specified that, when investments take the form of a shareholding in new or existing undertakings,

> *[t]he objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him, either pursuant to the provisions of the national laws or in some other way, to participate effectively in the management of that company or in its control.* [226]

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http://www.oecd.org/daf/inv/investment-policy/oecdcodesofliberalisationofcapitalmovementsandcurrentinvisibleoperationsusersguide htm.

222 Part III, Title IV, Chapter 4, Articles 63 to 66 TFEU.

223 Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L 178, 8.7.1988, p. 5-18.

224 *See* OECD, *Code of Liberalisation of Capital Movements*, 2013; OECD, *Benchmark Definition of Foreign Direct Investment*, 4th Edition, 2008; and *OECD Codes of Liberalisation: User's Guide*, Edition 2008.

225 Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 181. *See* also e.g. cases C-157/05, *Holböck*, EU:C:2007:297, para. 34; C-112/05, *Commission v Germany*, EU:C:2007:623, para. 18; C-101/05, *Skatterverket v A*, EU:C:2007:804, para. 46; C-194/06, *Orange European Smallcap Fund*, EU:C:2008:289, para. 100; C-274/06, *Commission v Spain*, EU:C:2008:86, para. 18; and C-326/07,*Commission v Italy*, EU:C:2009:193, para. 35.

226 Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 182. *See* also e.g. cases C-157/05, *Holböck*, EU:C:2007:297, para. 35; C-112/05, *Commission v Germany*, EU:C:2007:623, para. 18; *Orange European Smallcap Fund*, EU:C:2008:289, para. 101; *Commission v Spain*, EU:C:2008:86, para. 19; and C-326/07, *Commission v Italy*, EU:C:2009:193, para. 35.

335. The Court has distinguished the notion of 'direct investment' from that of 'portfolio investment', which it has described as:

> *the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking*.[227]

336. The Court has also distinguished the notion of 'direct investment' from that of 'establishment' within the meaning of Article 49 TFEU. According to the Court, 'establishment' involves the ability "to exert a definite influence on the company's decisions and to determine its activities"'.[228] Therefore, according to this case law, the notion of 'direct investment' is broader than that of 'establishment' in that it encompasses, in addition to investments involving 'establishment', non-controlling participations which, nonetheless, allow the investor to "participate effectively in the management or control of the participated company." [229]

337. In the Commission's view, the above interpretation of the terms 'direct investment' can be transposed to Article 207(1) TFEU. On that premise, Article 207(1) TFEU would cover *inter alia* the following types of investment:

- the establishment and extension of new undertakings or branches belonging solely to the investor;[230]
- the acquisition in full of existing undertakings;[231]
- participations in new or existing undertakings which allow the investor, at least, "to participate effectively in the management of that undertaking or its control"[232], including, therefore, participations which allow the investor to

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[227] Joined Cases C-282/4 and C-283/04, *Commission v Netherlands*, EU:C:2006:608, para. 19.

[228] Case C-326/07*Commission v Italy*, EU:C:2009:193, para. 34 and the case law cited.

[229] *See* e.g. Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 182.

[230] *See* the Nomenclature at I-1.

[231] *See* the Nomenclature at I-1.

[232] *See* e.g. Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 182.

"exert a definite influence on the company's decisions and to determine its activities"[233];

- real estate and other material or immaterial assets "associated with a participation in, or creation or extension of, an enterprise" or "used for the business activity of the investor in the country of the investment;"[234]

- long term loans and other debt instruments with a view to establishing lasting links;[235]

338. On the other hand, the terms "foreign direct investment" in Article 207 TFEU would not cover *inter alia* the following types of investment:

- short-term or minority participations, which do not allow the investor "to participate effectively in the management of the undertaking or in its control" (*i.e.* 'portfolio investments' *stricto sensu*)[236];

- securities and other financial assets of a non-participatory nature;[237]

- short-term loans and debt instruments; [238]

- real estate or other material or immaterial assets owned by private persons for personal use.[239]

3.10.6.2. The scope of Chapter 9 of EUSFTA

339. The definition of investment included in EUSFTA is not based on the functional distinction between direct and portfolio investment which is reflected in Article

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233 *See* e.g. Case C-326/07*Commission v Italy*, EU:C:2009:193, para. 34 and the case law cited.

234 These criteria are used by the OECD in order to distinguish direct investment in real state from other investments in real state. *See OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: User's Guide*, Ed. 2008, at p. 62.

235 *See* the Nomenclature at I-3.

236 *See* e.g. Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 182.

237 *See* the Nomenclature at I-5.

238 *See* the Nomenclature at I-3 *a contrario*.

239 Cf. Explanatory Notes to the Nomenclature under the heading 'Investments in real state'.

207 TFEU. Instead, like most BITs, Chapter 9 of EUSFTA defines its scope of application by following a so-called 'asset-based approach'.

340. Specifically, Article 9.1 EUSFTA defines the investments covered by Chapter 9 of EUSFTA as follows:

> *'**investment**' means every kind of asset which has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, or a certain duration.*

341. The "characteristics of an investment" mentioned in the above definition have been drawn from the case-law established by arbitration tribunals set up under the ICSID Convention[240] when interpreting Article 25 of that convention. The list of "characteristics of an investment" included in Article 9.1 EUSFTA does not purport to be exhaustive. Nor is the presence or absence of any of those characteristics necessarily dispositive. Rather, the existence of an investment should be determined on the basis of an overall assessment of all the relevant characteristics of the assets concerned.

342. The definition of investment in Article 9.1 EUSFTA is followed by an illustrative list of assets:

> *Forms that an investment may take include:*
>
> *a) tangible or intangible, movable or immovable property, as well as any other property rights, such as leases, mortgages, liens, and pledges;*
> *b) an enterprise including, a branch, shares, stocks and other forms of equity participation in an enterprise, including rights derived therefrom;*
> *c) bonds, debentures, and loans and other debt instruments, including rights derived therefrom;*
> *d) other financial assets including derivatives, futures and options;*
> *e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;*
> *f) claims to money or to other assets, or to any contractual performance having an economic value;*
>
> *g) intellectual property rights, as defined in Article 11.2 (Scope and definitions, and goodwill;*

[240] Convention on the Settlement of Investment Disputes between States and National of other States, adopted on 18 March 1965 in Washington. Text available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm.

h) licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law, including any concessions to search for, cultivate, extract or exploit natural resources.[241]

343. The illustrative list must be read together with the "characteristics of an investment" mentioned in the definition of 'investment'. Thus, for example, although letter a) read in isolation might suggest otherwise, real estate owned by private persons for personal use (e.g. secondary residences) is not a covered investment because it lacks some of the fundamental characteristics of a covered investment, such as "the expectation of gain or profit" or the "assumption of risk". To mention but another example, the contractual claims resulting from ordinary sale or services contracts are not covered investments because those types of contract do not involve either the "commitment of capital or other resources" or a "certain duration".

344. The definition of investment contained in Article 9.1 EUSFTA may cover both direct investment and portfolio investment. For example,

- enterprises and branches (mentioned in letter b) are *per se* direct investments[242];

- similarly, the assets mentioned in letters a), e) f) g) and h), when they have the "characteristics of an investment" referred to in the definition of investment, will usually be part of the assets of an enterprise or a branch established by the investor in the host country, or be otherwise used in connection with the business activity of such enterprise or branch and, as such, qualify as direct investments;

- the shares, stocks and other forms of equity participation mentioned in letter b) may constitute either a direct investment or a portfolio investment, depending on whether they allow the investor "to participate effectively in the management of that undertaking or its control"[243];

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241 Footnotes omitted.

242 Nomenclature at I-1.

243 *See* e.g. Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 182.

- the financial assets mentioned in letter d) will often be passive investments which do not qualify as direct investments[244];

- the loans and other debt instruments referred to in letter c) will qualify as direct investment when they are made for a long period, with a view to establishing lasting links.[245]

345. Since the scope of Chapter 9 of EUSFTA includes investments other than direct investments within the meaning of Article 207 TFEU, it is necessary to examine whether the Union has competence on a different basis in respect of such other investments, including in particular portfolio investments.

3.10.6.3. The Union has implied exclusive competence with regard to portfolio investment on the basis of the common rules contained in Article 63(1) TFEU

346. The Commission considers that, in so far as the provisions of Chapter 9 of EUSFTA apply to portfolio investment (or other non-direct of investments), they are at least largely covered by the common rules contained in Article 63(1) TFEU. Therefore, the Union is exclusively competent pursuant to Article 3(2) TFEU.

347. Here below, the Commission will 1) describe the common rules laid down in Article 63(1) TFEU and related provisions of the same chapter; and 2) show that, to the extent that they apply to portfolio investment (or other non-direct investments), the provisions of Chapter 9 of EUSFTA are at least largely covered by such common rules.

A) Description of the common rules laid down in Article 63(1) TFEU

348. Article 63(1) TFEU gives effect to the liberalisation of capital between Member States and between Member States and third countries. To that end, it provides that "all restrictions" on the movement of capital between Member States and between Member States and third countries are to be prohibited:

> *Within the framework of the provision set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.*

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[244] Nomenclature at I-5.

[245] Nomenclature at I-3.

349. As confirmed by the Court, "capital movements" within the meaning of Article 63 TFEU include *inter alia* portfolio investments[246]. Those terms also include most, if not all, other types of investment which are covered by Chapter 9 of EUSFTA but are excluded from the notion of "direct investment" within the meaning of Article 207 TFEU, such as, for example, securities and other financial instruments of a non-participatory nature.[247]

350. Article 63(1) TFEU prohibits, in principle, "all restrictions" on capital movement. The term "restriction" has been widely interpreted by the Court. Article 63(1) TFEU does prohibit discrimination based on nationality[248], place of establishment[249] or residence.[250] But, as clarified by the Court, the scope of the prohibition contained in Article 63(1) TFEU is not limited to discriminatory restrictions. According to settled case law, Article 63(1) TFEU prohibits any measure which is liable to prevent or limit investments between the Union and a third country, or which is liable to dissuade or discourage third country investors from investing in the Union or vice-versa.[251]

351. Article 63(1) TFEU prohibits restrictions on the initial admission of an investment, such as, for example, bans on the acquisition of certain assets[252] or prior authorization requirements[253]. But it does prohibit as well restrictions concerning the post-admission treatment of the investments. For example, the types of measures which the Court has found to be incompatible in principle with Article 63(1) TFEU include:

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246 *See* e.g. Joined cases C-282/04 and 283/04, *Commission v Netherlands*, EU:C:2006:608, para. 19.

247 *See* the Nomenclature at I-5.

248 *See* e.g. C-302/97, *Konle*, EU:C:1999:271, paras. 23-24.

249 *See* e.g. C-484/93, *P. Svensson and L. Gustavsson*, EU:C:1995:379, para. 10; C-375/12, *Bouanich*, EU:C:2014/138, paras. 32-56.

250 *See* e.g. C-194/06, *Orange European Smallcap Fund*, EU:C:2008:289, paras. 103-108; C-387/11, *Commission v Belgium*, EU:C:2012:670; C-342/10, *Commission v Finland*, EU:C:2012:688; C-190/12, *Emerging Markets Series of DFA Investments Trust Company*, EU:2014:249, paras. 41-43.

251 *See* e.g. C-367/98, *Commission v Portugal*, EU:C:2002:326, paras. 44-45; *Skatteveret v A*, EU:C:2007:804, para. 40; C-171/08, *Commission v Portugal*, EU:C:2010:412, paras. 50 and 67 and the case law cited.

252 *See* e.g. C-367/98, *Commission v Portugal*, EU:C:2002:36, para. 42.

253 *See* e.g. C-302/97, *Konle*, EU:C:1999:271; *Commission v Portugal*, EU:C:2002:326, paras. 44-46.

- discriminatory taxes on dividends[254], on interests[255], on the proceeds from the transfer of shares[256] or on the value of financial assets[257];

- restrictions on the voting rights of shareholders[258];

- 'golden shares' conferring privileged rights to certain shareholders[259];

- other measures granting special powers to the State in respect of management decisions of privatised undertakings[260];

- measures making the granting of building permits conditional upon certain 'social' obligations.'[261]; or

- the imposition of fines on minority shareholders for business activities of the invested company that breach deontological rules on journalism[262].

352. In addition to prohibiting restrictions on the capital movements themselves, Article 63(1) TFEU also prohibits restrictions on the transfers of funds related to the capital movements.[263]

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[254] *See* e.g. C-194/06, *Orange European Smallcap Fund*, EU:C:2008:289, paras. 103-108; C-436/08, *Haribo*, EU:C:2011:61, paras. 46-53; C-284/09, Commission v Germany, EU:C:2011:670, paras. 44-73; C-387/11, *Commission v Belgium*, EU:C:2012:670; C-342/10, *Commission v Finland*, EU:C:2012:688; C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paras. 36-65; C-375/12, *Bouanich*, EU:C:2014:138, paras. 32-56; C-190/12, *Emerging Markets Series of DFA Investments Trust Company*, EU:2014:249, paras. 41-43.

[255] *See* e.g. C-233/09, *Dijkman*, EU:C:2010:6649, paras. 20-48.

[256] *See* e.g. C-265/04, *Bouanich*, EU:C:2006:51, para. 235.

[257] *See* e.g. C-20/09, *Commission v Portugal*, EU:C:2010:412, paras. 54-57.

[258] *See* e.g. C-112/05, *Commission v Germany*, EU:C:2007:623, paras. 38-56; C-174/04, *Commission v Italy*, EU:C:2005:350, para. 31.

[259] *See* e.g. C-83/99, *Commission v France*, EU:C:2002:327; Case C-503/99, *Commission v Belgium*, EU:C:2002:328; Joined cases C-282/04 and 283/04, *Commission v Netherlands*, EU:C:2006:608; C-463/04, *Federconsumatori*, EU:C:2007:752; C-171/08, *Commission v Portugal*, EU:C:2011:214; C-543/08, *Commission v Portugal*, EU:C:2010:669; C-212/09, *Commission v Portugal*, EU:C:2011:717, paras. 55-69.

[260] *See* e.g. C-463/00, *Commission v Spain*, EU:C:2007:752; C-326/07, *Commission v Italy*, EU:C:2009:193.

[261] Joined cases C-197/11 and C-203/11, *Libert*, EU:C:2013:11, paras. 64-69.

[262] C-81/09, *Idryma Typou*, EU:C:2010:622, paras. 55-60

[263] Annex I to Directive 88/831/EEC provides expressly in relevant part that:

353. Article 63(1) TFEU is subject to the exception provided in Article 64(1) TFEU, which authorizes the Union and the Member States to maintain certain restrictions on capital movements applied by them prior to 31 December 1993.[264] However, the restrictions 'grandfathered' by Article 64(1) TFEU do not include restrictions on portfolio investment.

354. Other measures of the Member States restricting capital movements may be justified only by one of the reasons mentioned in Article 65(1) TFEU or, provided that the measures are indistinctly applicable, by overriding reasons of public interest. [265] [266]

355. Article 65(2) TFEU further states that the provisions of the Chapter on capital movements and payments "shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties". Since the Treaties do not accord the right establishment of third country nationals[267], it follows that Article 63(1) TFEU does not prevent the Member States from restricting the establishment of third country nationals in their territory.

356. Moreover, the Court has stressed that where a measure of a Member State can apply only to investments involving establishment, Article 63(1) TFEU cannot be

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The capital movements listed in this Nomenclature are taken to cover:

[…]

- all the operations necessary for the purposes of capital movements: conclusion and performance of the transaction an related transfers […]

- operations to liquidate or assign assets built up, repatriation of the proceeds of liquidation thereof or immediate use of such proceeds within the limits of Community obligations.

[…]

[264] In the case of Bulgaria, Estonia and Hungary the relevant date is 31 December 1999, and in the case of Croatia 31 December 2002.

[265] *See* e.g. Joined cases C-105/12 to 107/12, *Essent et al.*, EU:C:2013:677, para. 50.

[266] In addition to the exceptions contained in Article 64(2) TFEU and Article 65 TFEU, Article 66 TFEU provides that the Union may take safeguard measures in exceptional circumstances where movements of capital cause or threaten to cause serious difficulties for the operation of economic and monetary union.

[267] Cf. Article 49 TFEU.

relied upon by investors from a third country against such measure. According to the Court:

> *Since the Treaty does not extend freedom of establishment to third countries, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with third countries does not enable economic operators who do not fall within the limits of the territorial scope of freedom of establishment to profit from that freedom […].*[268]

B) The provisions of Chapter 9 EUSFTA on portfolio investment are, at least to a large extent, covered by the rules of Article 63(1) TFEU

357. In so far as the provisions of Chapter 9 of EUSFTA apply to portfolio investment and other investments not covered by the notion of "direct investment", they are, at least to a large extent, covered by the "common rules" stipulated in Article 63(1) TFEU and may thus "affect" or "alter the scope" of such "common rules", within the meaning of Article 3(2) TFEU.

358. In this regard, it should be recalled at the outset that, in order to establish that an agreement may "affect" or "alter the scope" of "common rules" it is not necessary to establish that "the areas covered by the international commitments and those covered by the EU rules coincide fully".[269] Rather, it is sufficient if the international commitments are concerned with an area which is already covered to a large extent by such "common rules".[270]

359. The core provisions of Chapter 9 of EUSFTA are the standards of treatment provided for in Articles 9.3 ("National Treatment"), 9.4.2 ("Fair and Equitable Treatment") and 9.6 (protection against "Expropriation"). As discussed below, all these three standards of treatment are covered by the prohibition on "all restrictions" on capital movements laid down in Article 63(1) TFEU, as interpreted by the Court.

360. Article 9.3.1 ("National Treatment") provides that:

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[268] Case C-35/11,*Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraph 100; C-47/12, *Kronos*, EU:C:2014:220, para. 53.

[269] Opinion 1/03, EU:C:2006:81, para. 126; Case C-114/12, *Commission v Council (Broadcasters)*, EU:C:2014:2151, para. 69; Opinion, 1/13, para. 72; Case C-66/13, *Green Network SpA v Autorità per l'energia elettrica e il gas*, EU:C:2014:2399, para. 30.

[270] Opinion 2/91, EU:C:1993:106, paras. 25 and 26 and Opinion 1/03, EU:C:2006;81, para. 126.

Each Party shall accord to covered investors of the other Party and to their covered investments, treatment in its territory no less favourable than the treatment it accords, in like situations, to its own investors and their investments with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of their investments.

361. In essence, Article 9.3 EUSFTA amounts to a prohibition on discrimination based on the nationality of the investor. As discussed above, Article 63(1) TFEU does prohibit that type of discrimination. [271]

362. In Article 9.4.2 EUSFA the standard of Fair and Equitable Treatment is clearly and narrowly defined by establishing a closed list of the types of conduct that may constitute a breach of that standard. To recall, Article 9.4.2 EUSFTA prohibits:

(a) denial of justice in criminal, civil and administrative proceedings;

(b) a fundamental breach of due process;

(c) manifestly arbitrary conduct;

(d) harassment, coercion, abuse of power or similar bad faith conduct; or

(e) a breach of the legitimate expectations of a covered investor arising from specific or unambiguous representations from a Party so as to induce the investment and which are reasonably relied upon by the covered investor.[272]

363. The above types of conduct are manifestly unfair and inequitable and would, if performed by the Union or by a Member State applying Union law, breach general principles of Union law, including fundamental rights. In the specific instances where the authorities of the host State resort to any of those types of behaviour with regard to a foreign investor, they are likely to prevent, limit or even force the liquidation of the investment concerned. Moreover, lack of adequate protection against those forms of conduct is liable to discourage other potential foreign investors from investing in the territory of the State responsible for such conducts. For those reasons, the types of conduct prohibited by Article 9.4.2 EUSFA amount to "restrictions" on the free movement of capitals that would be prohibited by Article 63(1) TFEU if applied by a Member State to the investors from another Member State or from a third country.

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[271] *See* e.g. C-302/97, *Konle*, EU:C:1999:271, paras. 23-24.

[272] Footnote omitted.

364. As discussed in detail in section 3.10.5 above, the standard of protection against expropriation laid down in Article 9.6 EUSFTA is similar to that implicit in Article 63(1) TFEU.

365. As regards the remaining provisions of Section A of Chapter 9 of EUSFTA, the following should be noted:

- the standard of "Full Protection and Security" in Article 9.4.1 EUSFTA only refers to a Party's obligation to provide protection against physical violence by either state organs or private individuals.[273] Moreover, the host Party is not under an obligation of strict liability to prevent such violent acts. Rather, the host Party is required to exercise 'due diligence' and to take such measures protecting the foreign investment as are reasonable under the circumstances.[274] This obligation has its counterpart in the Member States' obligation to take all necessary and proportionate measures to prevent that private individuals obstruct the exercise of the fundamental freedoms, in particular through violent actions. According to settled-case law, this obligation flows from those fundamental freedoms (including, therefore, from Article 63(1) TFEU), in conjunction with the Member States' duties pursuant to Article 4(3) TFEU.[275]

- the standard of protection stipulated in Article 9.5 EUSFTA ("Compensation for Losses") has a very limited scope of application. It applies only in case of war and other extraordinary events of social strife and disorder. In principle, customary international law excludes the responsibility of the host State for those events. [276] This principle, nevertheless, is subject to certain qualifications under customary international law. [277] Article 9.5 EUSFTA reflects those qualifications. The first paragraph of Article 9.5 EUSFTA combines the

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[273] Article 9.4.4 EUSFTA.

[274] R. Dolzer & C. Schreuer, *Principles of International Investment Law*, Oxford University Press, pp. 149-150.

[275] Cases C-265/95, *Commission v France*, EU:C:1997:595; and C-112/00, *Schmidberger*, EU:C:2003:333. *See* also Case C-438/05, *Viking*, EU:C:2007:772, paras. 68-74, where the Court found that collective action by a trade union constituted in principle a restriction of the right of establishment.

[276] R. Dolzer & C. Schreuer, *Principles of International Investment Law*, Oxford University Press, pp. 166-167. This principle is reflected in Article 17.10. EUSFTA.

[277] R. Dolzer & C. Schreuer, *Principles of International Investment Law*, Oxford University Press, pp. 166-167.

National Treatment standard of Article 9.5 EUSFTA with an obligation to provide Most Favoured Nation treatment. Both standards are covered by the prohibition of discrimination based on nationality which is at the core of Article 63(1) TFEU. [278] In turn, the second paragraph of Article 9.5 EUSFTA is a specification of the obligations imposed by the standards of protection against expropriation and full protection and security in the extraordinary situations addressed by that provision.

- the standard of protection provided for in Article 9.4.5 EUSFTA (a narrow version of the 'umbrella clause') is essentially an elaboration of the obligation not to breach the legitimate expectations of the investor included in the FET standard (Article 9.4.2(d) EUSFTA), which applies when such expectations result from contractual written obligations assumed by the host State.

- as explained above, just like Article 9.7 EUSFTA, Article 63(1) TFEU also prohibits the restrictions on the transfers of funds related to capital movements.[279]

- Articles 9.8 ("Subrogation"), 9.9 ("Termination") and 9.10 ("Relationship with other Agreements") are clearly dependant on, and hence ancillary to, the other provisions included in Section A of Chapter 9.

366. As discussed below in section 3.10.6, the competence with regard to the provisions on ISDS contained in Section B of Chapter 9 of EUSFTA follows necessarily the competence with regard to the substantive provisions in Section A.

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[278] *See* e.g. C-302/97, *Konle*, EU:C:1999:271, paras. 23-24.

[279] In the cases C-205/06, *Commission v Austria*, EU:C2009:118; C-249/06 *Commission v Sweden, EU:C:2009:119;* and C-118/07, *Commission v Finland*, EU:C2009:715, the Court held that the transfer clauses included in the BITs concluded by the Member States concerned with certain third countries infringed Article 307 CE (351 TFEU) because they did not allow those Member States to apply the measures restricting the free movement of capitals and payments stipulated in Article 56 CE (63 TFEU) which the Council was liable to adopt under Articles 57(2) EC, 59 EC and 60(1) EC. The BITs at issue had been concluded before the respective date of accession of the Member States concerned to the Union. Therefore, those Member States were authorized to maintain those BITs in accordance with Article 307 CE, notwithstanding the Union's exclusive competence resulting from the common rules contained in Article 56 CE. Nonetheless, these three cases illustrate that the transfer clauses usually contained in the BITs overlap with the common rules on free movement of capitals and payments laid down in Article 63 TFEU. Otherwise, the transfer clauses could not have been an obstacle to the implementation of Articles 57(2) CE, 59 CE and 60(1) CE, which were in the nature of exceptions to Article 56 CE.

367. Last, Chapter 9 of EUSFTA is subject to various exclusions and exceptions which reproduce or encompass those provided in the TFEU in respect of Article 63(1) TFEU, thereby preserving the 'policy space' of the Member States. Those exceptions include the following:

- Article 17.6 EUSFTA, which provides for a broad exception with regard to tax measures;

- Article 17.9 EUSFTA, which permits the imposition of restrictive measures in order to safeguard the balance of payments;

- Article 17.20 EUSFTA, which allows the Parties to take the measures that they consider necessary in order to protect their security interests;

- Article 9.3.3 EUSFTA, which allows the Parties to derogate from the National Treatment standard where necessary in order to achieve one of the legitimate policy objectives listed therein;

- Article 9.7.2 EUSFTA, which authorizes the Parties to restrict the free transfer of funds related to investments for the reasons mentioned in that provision;

- Annex 9-A to Chapter 9 of EUSFTA, which clarifies that non-discriminatory regulatory measures that are designed and applied to protect legitimate public objectives do not constitute indirect expropriation except in the rare cases where they are manifestly excessive.

C) Article 63(1) TFEU provides for common rules within the meaning of Article 3(2) TFEU

368. It has been suggested by some authors[280] that the terms "common rules" used in Article 3(2) TFEU allude exclusively to rules of secondary law. Accordingly, the rules contained in the Treaties, such as the rule stipulated in Article 63(1) TFEU, could never be the source of implied exclusive competence.

369. In the Commission's view, that interpretation of the terms "common rules" is unduly restrictive. Indeed, that reading is by no means required by the ordinary meaning of the terms concerned and disregards the rationale behind the ERTA

[280] *See* F. Ortino and P. Eeckhout, ´Towards an EU Policy on Foreign Direct Investment' in A. Biondi et al. (Eds.), *EU Law after Lisbon* (OUP 2012), p. 318-319.

case-law codified in Article 3(2) TFEU. That rationale can be discerned from paragraph 31 of the ERTA judgement, where the Court stressed that the implied powers of the Union:

> *[…] exclude the possibility of concurring powers on the part of the Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the common market and the uniform application of Community law.*[281]

370. Similarly, in Opinion 1/03 the Court recalled that:

> *Ruling in much more general terms, the Court has found there to be exclusive Community competence in particular where the conclusion of an agreement by the Member States is incompatible with the unity of the common market and the uniform application of Community law […]*[282].

371. The Court went on to conclude in Opinion 1/03 that:

> *It follows from all the foregoing that a comprehensive and detailed analysis must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area covered by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish.*[283]

372. In the ERTA case, like in most of the cases concerning the application of the ERTA principle[284], the common rules at issue were contained in secondary legislation. This reflects the fact that often, but not always, the Treaties limit themselves to set out policy objectives and confer upon the institutions the powers

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281 Case 22/70, *ERTA*, EU:C:1971:32, para. 31. Underlining added.

282 Opinion 1/03, EU:C:2006:81, para 122. Underlining added.

283 Opinion 1/03, EU:C:2006:81, para. 133. Underlining added.

284 But *see* Case C-370/12, *Pringle*, EU:C:2012:756, paras. 103-106, where, in considering a claim of violation of the Union's exclusive competence pursuant to Article 3(2) TFEU, the Court examined whether the treaty establishing the European Stability Mechanism "affected" the rules contained in Article 122(2) TFEU.

See also Opinion 1/92, EU:C:1992:189, at paras. 39-40, where the Court held that the Community's competence to conclude international agreements in the field of competition arose from "the competition rules in the EEC Treaty and measures implementing those rules" (underlining added). The Court did not specify whether the competence was exclusive or shared. But Article 3(1)(b) TFEU confirms that the competence in this field is exclusive to the extent that the competition rules are "necessary for the functioning of the internal market".

to achieve those objectives. But it would be mistaken to infer from this fact the existence of a legal principle whereby ERTA competence can arise only from common rules contained in secondary legislation. In Opinion 1/03 the Court cautioned against restricting the scope of the ERTA principle to situations which are "only examples, formulated in the light of the particular contexts with which the Court was concerned"[285].

373. The need to ensure the "unity of the internal market" and the "uniform application of Union law", invoked by the Court in the ERTA judgement and in Opinion 1/03 as the rationale behind the ERTA principle, arises with equal, if not greater force where the Union rules that can be "affected" are contained in the TFEU itself, rather than in secondary legislation.

374. The Treaty rules on the free movement of capitals are unique in that, unlike the rules on the other three fundamental freedoms, they have an external dimension. Article 63(1) TFEU applies both to intra-EU capital movements and to capital movements between the Union and third countries. For that reason, there is no need to enact secondary legislation in order to extend the free movement of capitals to the capital movements between the Member States and third countries, unlike in the case of the right of establishment or the freedom to provide services.

375. Moreover, Article 63(1) TFEU achieves by itself the full liberalisation of capital movements between the Union and third countries, with the sole exception of the movements mentioned in Article 64(1) TFEU. This renders unnecessary the adoption of secondary legislation in order to achieve the full liberalization of portfolio investment. [286] For that reason, the chapter on capital movements and

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[285] Opinion 1/03, EU:C:2006:81, para. 121.

[286] Prior to the Treaty of Maastricht, the provisions on capital movements in the original EEC Treaty were much more limited in scope and nature than the corresponding provisions now contained in the TFEU. Essentially, they provided that the Member States should abolish progressively between themselves the restrictions on capital movements, to the extent necessary for the proper functioning of the common market (Article 68 EEC), and coordinate progressively their exchange policies in respect of capital movements between the Member States and third countries (Article 70 EEC). Articles 69(1) and 70 EEC conferred upon the Council the power to issue directives in order to achieve those objectives. Pursuant to those legal bases, the Council adopted three directives, the last being Council Directive 88/361/EEC. The rules contained in the TFEU go beyond the liberalization achieved by Directive 88/361/EEC, in particular with regard to the capital movements between the Union and third countries. In the Commission's view, it would be an odd result if the decision of the drafters of the Treaty of Maastricht to enshrine in the EC Treaty itself the full achievement of the free movement of capital, in both its internal and external dimension (subject only to the residual restrictions grandfathered by Article 64(1) TFEU), had deprived the Union of the exclusive ERTA competence

payments includes no legal base for adopting secondary legislation liberalizing portfolio investments. Article 64(2) TFEU only provides for a legal base in respect of the residual restrictions on certain other types of capital movements maintained by the Union or the Member States pursuant to Article 64(1) TFEU.[287]

376. Whereas Article 63(1) TFEU prohibits all restrictions on capital movements, it is obvious that the liberalization of capital movements between the Union and third countries, unlike the liberalization of intra-EU capital movements, cannot be effective unless the third countries remove their own restrictions to the capital movements between the Union and their territories. Usually this will require the conclusion of international agreements with those countries based on reciprocity. Yet, unless the Union has exclusive competence to conclude such agreements, it will not be possible to ensure that the common rules contained in Article 63(1) TFEU are applied uniformly and consistently. Third countries may not be willing to conclude separate agreements with each and every Member State or, even if they do so, to exchange the same concessions in all the agreements. As a result, portfolio investments between the Union and third countries would benefit from a different degree of liberalization and protection, depending on the Member State of origin or destination of the investment. This lack of uniformity, and the ensuing risks of distortion of the investment flows between the Union and third countries, would manifestly "affect" and "alter the scope" of the "common rules" set out in Article 63(1) TFEU within the meaning of Article 3(2) TFEU.

C) The proposed interpretation does not render superfluous the inclusion of direct investment in Article 207 TFEU

377. It has been suggested that the Commission's view that the Union draws exclusive competence from the common rules in Article 63(1) TFEU would have rendered

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that it would have acquired, should the liberalization of capital movements had been pursued through the adoption of directives, as originally envisaged in the EC Treaty.

[287] The same is true of Article 64(3) TFEU, which allows the Council to adopt, by unanimity, "measures that constitute a step backwards in Union Law as regards the liberalisation of capital movements to or from third countries". *See* Case C-101/05, EU:C:2007:804, *Skatteverket v. A*, para 34, where the Court noted that Article 57(2) EC "must be read in conjunction with Article 57(1) EC and simply permits the Council to adopt measures on those categories of capital movements and the national or Community restrictions for which paragraph 1 expressly provides cannot be relied on against the Council".

superfluous the inclusion of foreign direct investment within the scope of the CCP effected by the Treaty of Lisbon.[288]

378. However, this view disregards that, as explained above[289], the TFEU's chapter on capital movements leaves the Member States free to restrict foreign investment involving establishment, which constitutes the core component of foreign direct investment. [290] The inclusion of foreign direct investment within the scope of Article 207 TFEU has filled that gap by conferring upon the Union exclusive competence also in respect of that type of investment.

3.10.6.4. In the alternative, the Union has shared competence with regard to portfolio investment

379. For the above reasons, the Commission is firmly of the view that the Union has exclusive competence also with regard to portfolio investment. Nevertheless, for the sake of completeness, and given that the Council and the Member States have not taken a clear position yet on this issue, the Commission submits subsidiarily that, in the event that the Court were to conclude that the Union lacks exclusive competence, it should find that the Union has shared competence with regard to portfolio investment.

380. Article 216(1) TFEU states that the Union may conclude international agreements with third countries *inter alia:*

> *[…] where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties […].*

381. The objective to achieve the free movement of capitals, including portfolio investment, between the Union and third countries, is expressly contemplated in Article 63 TFEU.

382. As explained above, unlike the liberalization of intra-EU capital movements, the liberalization of extra-EU capital movements cannot be effective unless third

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288 M. Krajewski, 'The reform of the Common Commercial Policy' in A. Biondi et al. (Eds.), *EU Law after Lisbon* (OUP 2012), p. 302.

289 *See* Section 3.10.6.3 A *in fine*.

290 *See* e.g. C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraph 100; C-47/12, *Kronos*, EU:C:2014:2200, para. 53.

countries remove their own restrictions to the capital movements between the Union and their territories. Usually this will require the conclusion of international agreements with those countries based on reciprocity.

383. The Commission submits, therefore, that the conclusion of international agreements with the content of Chapter 9 of EUSFTA in respect of portfolio investment is "necessary" within the meaning of Article 216(1) TFEU in order to achieve the Union's objective set out in Article 63(1) TFEU within the framework of the Union's policy on free movement of capitals. Accordingly, the Union must be recognised, at least, shared competence to conclude such agreements.

384. For the avoidance of doubt, the Commission does not argue that the Union has exclusive competence with regard to Chapter 9 of EUSFTA because its provisions are "necessary to enable the Union to exercise its internal competence". As explained above, however, the conclusion of an agreement may be necessary to achieve an objective of the Treaties in the sense of Article 216(1) TFEU even where such an agreement is not necessary to enable the Union to exercise its internal competences. In accordance with Article 4(1) TFEU, to the extent that the competence conferred by Article 216(1) TFEU does not fall within the areas referred to in Articles 3 or 6 TFEU, such competence must be deemed 'shared'

3.10.7. Investor-to-State dispute settlement

385. The supplementing negotiating directives for EUSFTA issued by the Council in July of 2011 cite "dispute settlement" as one of the areas of "mixed competence". The Council has not explained the reasons for this view. The Commission understands that the Council considers that the Member States are exclusively competent with regard to the provisions on ISDS included in Section B of Chapter 9 of EUSFTA to the extent that the Member States may be required to act as respondents in some disputes.[291]

[291] See, for example, a note submitted by France to the Council's Trade Policy Committee dated 12 September 2014 (attached as **Annex 2**), which argues that the Member States are competent with regard to the investor-to-State dispute settlement provisions included in the Free Trade Agreement between the European Union and Canada (CETA) negotiated by the Commission, due to the "presence of the Member States as respondents" ("présence des Etats membres en tant que défendeur").

386. For the reasons set out below, the Commission considers that the Union has exclusive competence also with regard to all the ISDS provisions contained in Section B of Chapter 9.

387. The Union's competence to conclude agreements providing for a mechanism of dispute settlement has been underlined by the Court in several occasions. In Opinion 1/91 the Court held that:

> *The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.*[292]

388. The Court reiterated this view in Opinion 1/09[293] and most recently in Opinion 2/13.[294]

389. In practice, the Union is already party to many agreements providing for a dispute settlement mechanism, including one providing for ISDS (the Energy Charter Treaty)[295].

390. As confirmed by the above case-law and practice, the competence with regard to dispute settlement follows necessarily the competence with regard to the substantive provisions of the agreement to be interpreted and applied through dispute settlement in each case. In the Commission's view, the Union is exclusively competent to agree on all the substantive provisions on investment protection included in Chapter 9, Section A, of EUSFTA. Therefore, the Commission is likewise exclusively competent with regard to the ISDS mechanism provided for in Section B of Chapter 9 in order to enforce the substantive provisions of Section A.

391. In turn, the fact that the Union is exclusively competent to agree with Singapore both the substantive provisions of Section A and the ISDS provisions of Section B

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[292] Opinion 1/91, EU:C:1991:490, para. 40.

[293] Opinion 1/09, EU:C:2011:123, para.74.

[294] Opinion 2/13, EU:C:2014:2454, para. 182.

[295] Energy Charter Treaty agreed within the Energy Charter Conference/International Conference on 24 April 1998, approved on behalf of the European Community by Council Decision 98/537/EC, of 13 July 1998, OJ of 12.9.98, L 252/21. ISDS is provided for in Article 26 of the Energy Charter Treaty.

entails that, in principle, the Union is solely responsible, as a matter of international law, for any breach of such provisions. [296]

392. As explained below, Section B of Chapter 9 envisages that a Member State may act as respondent in a dispute. But, contrary to what appears to be the Council's view, this does not imply that Member States are competent to negotiate and conclude the provisions on ISDS of Section B. Without prejudice to its international responsibility, the Union may decide, as an internal matter, to apportion the financial responsibility linked to ISDS among the Union and the Member States, so as to ensure a more equitable distribution of the financial burdens. The Union may likewise decide to empower the Member States to act as respondents in certain disputes where they have been apportioned financial responsibility. As explained below, this is precisely what the Union's co-legislators have chosen to do by adopting Regulation 912/2014.[297] If Section B of Chapter 9 envisages the participation of the Member States as respondents in some disputes it is not because the Member States are exclusively competent with regard to ISDS, but rather because such participation is necessary in order to give effect to the internal rules previously enacted by the Union as part of Regulation 912/2014.

393. Regulation 912/2014 applies in respect of all agreements providing for ISDS to which the Union is a party, including therefore EUSFTA. It deals with two different but related issues. In the first place, Regulation 912/2014 lays down criteria for apportioning the financial responsibility resulting from ISDS among the Union and the Member States. In addition, Regulation 912/2014 stipulates rules for determining who shall act as respondent in each dispute.

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296 *See* Opinion 1/91 (EU:C:1991:490, at para. 33), where the Court indicated that international responsibility follows competence:

> *The expression "Contracting Parties" is defined in Article 2 c) of the agreement. As far as the Community and its Member States are concerned, it covers the Community and the member States, or the Community, or the member States, depending on the case. Which of the three possibilities is to be chosen is to be deduced in each case from the relevant provisions of the agreement and from the respective competences of the Community and the member States as they follow from the EEC Treaty and the ECSC Treaty*.

297 Regulation (EU) No 912/2014 of the European Parliament and of the Council, of 23 July 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 a party, OJ of 25.8.2014, L 257/121.

394. The basic criteria for the apportionment of responsibility are set out in Article 3(1) of Regulation 912/2014. In essence, Article 3(1) provides that the Union shall bear the financial responsibility arising from treatment afforded by the Union's institutions, bodies offices or agencies, whereas each Member State shall bear the responsibility arising from treatment afforded by that Member State, unless such treatment was required by Union law.

395. Articles 4 and 9 of Regulation 912/2014 lay down the rules for determining who will act as a respondent. Those rules are based on who (the Union or the Member State) is the author of the act, rather than on who has the external competence in respect of the allegedly breached obligation under the investment agreement concerned. More precisely, they provide that the Union shall act as respondent when the dispute concerns exclusively treatment afforded by the Union[298], whereas the Member State concerned shall act as respondent when the dispute concerns, fully or partially, treatment afforded by that Member State.[299] By way of exception, the Commission may decide in certain circumstances that the Union shall act as respondent, even if the dispute concerns, fully or partially, treatment afforded by a Member State.[300] In addition, the Union will act as respondent in a dispute concerning exclusively treatment afforded by that Member State, if that Member State notifies the Commission that it does not intend to act as respondent.[301] The latter provision is fully coherent with the view that the Union is internationally responsible and, therefore, must be the default respondent when a Member State does not wish to act as respondent.

396. The rationale for apportioning the financial responsibility between the Union and the Member States was explained as follows by the co-legislators in recitals 3 and 5 of Regulation 912/2014:

> *International responsibility for treatment subject to dispute settlement follows the division of competences between the Union and the Member States. As a consequence, the Union will in principle be responsible for defending any claims alleging a violation of rules included in an agreement which fall within the*

298 Article 4(1) of Regulation 912/2014.

299 Article 9(1) of Regulation 912/2014.

300 Articles 9(1)(a), 9(2) and 9(3) of Regulation 912/2014.

301 Article 9 (1)(b) of Regulation 912/2014.

Union's exclusive competence, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State.

[…]

Where the Union, as an entity having legal personality, has international responsibility for the treatment afforded, it will be expected, as a matter of international law, to pay any adverse award and bear the costs of any dispute. However, an adverse award may potentially flow either from treatment afforded by the Union itself or from treatment afforded by a Member State. It would as a consequence be inequitable if awards and the costs of arbitration were to be paid from the budget of the Union where the treatment was afforded by a Member State, unless the treatment in question is required by Union law. It is therefore necessary that financial responsibility be allocated, as a matter of Union law, between the Union itself and the Member State responsible for the treatment afforded on the basis of criteria established by this Regulation.

397. In turn, as recorded by the Parliament and the Council in recital 9 of Regulation 912/2014, the fact that the financial responsibility is apportioned in some cases to the Member States justifies that the Member States act as respondents in such cases:

Where a Member State would bear the potential financial responsibility arising from a dispute, it is equitable and appropriate that such Member State acts as a respondent in order to defend the treatment which it has afforded to the investor.[…].

398. In order to permit the effective implementation of the internal arrangements laid down in Regulation 912/2014, Article 9.15 of EUSFTA provides the following in relevant part:

[…]

2. Where a notice of intent to arbitrate has been sent to the Union, the Union shall make a determination of the respondent within two months from the date of receipt of the notice. The Union shall inform the claimant of this determination immediately, on the basis of which the claimant may submit a notice of arbitration pursuant to Article 9.19 (Submission of Claim to Arbitration).

3. Where no determination of the respondent has been made pursuant to paragraph 2, the following shall apply:

(a) in the event that the notice of intent to arbitrate exclusively identifies treatment by a Member State of the Union, that Member State shall act as respondent;

(b) in the event that the notice of intent to arbitrate identifies any treatment by an institution, body or agency of the Union, the Union shall act as respondent.

399. Therefore, the obligation for a Member State to act as respondent in some disputes does not result from the agreement itself, but instead from a subsequent determination to be made unilaterally by the Union in accordance with its own internal rules, as provided for in Regulation 912/2014. The fact that such determination is to be made by the Union alone confirms that the Union alone, and not the Member States, are competent with regard to ISDS. [302]

3.11. Government Procurement (Chapter 10)

400. The Government Procurement Chapter is composed of two parts: (i) the non-market-access provisions; and (ii) Parties' market access schedules of commitments, which are contained in the annexes.

401. The objective of the Government Procurement Chapter is to mutually open government procurement markets between the Union and Singapore within the limits set out in the Parties' market access schedules of commitments. To this end, the text of the Chapter sets out certain rules, requiring that open, fair and transparent conditions of competition be ensured in government procurement (Articles 10.1 through 10.17). These rules do not automatically apply to all procurement activities of each Party. Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values are covered by the disciplines set out under this Chapter. These schedules are annexed to the Chapter (Annex 10-A through Annex 10-I) and thus form an integral part of the Agreement.

402. According to Article 207(1) TFEU, the common commercial policy is "based on uniform principles, particularly with regard to [...] the conclusion of [...] trade agreements relating to trade in goods and services, [...], the achievement of

[302] Upon the insistence of Singapore, paragraph 3 of Article 9.15 EUSFTA provides for a default rule where no determination of respondent is notified by the Union within the prescribed deadline. In practice, however, compliance with the provisions of Regulation 912/2014 will render inapplicable that default rule. Indeed, the two month deadline prescribed by Article 9.15 EUSFTA takes into account the deadlines set down in Regulation 912/2014. According to Article 9(1) of Regulation 912/2014, the decision by the Commission to act as respondent in cases concerning fully or partially treatment afforded by a Member State must be taken within 45 days of the notification of the notice of intention to initiate proceedings. Similarly, Article 9(1) of Regulation 912/2014 provides that, if a Member State does not intend to act as respondent, it must notify the Commission within 45 days of the notice of intent to initiate proceedings. Thus, in either case the Union will be able to notify the determination of the respondent within the prescribed two month deadline. Article 9(5) of Regulation 912/2014 provides expressly that "the Commission and the Member State concerned shall ensure that any deadlines set down in the agreement are respected."

uniformity in measures of liberalisation, export policy and measures to protect trade [...]." It is already established that the common commercial policy legal basis covers, in principle, the conclusion of agreements on the reciprocal opening of public procurement markets for goods and for trans-frontier services.[303] After the inclusion of the other modes of trade in services in the scope of the common commercial policy (by the Treaties of Nice and Lisbon)[304] it must be concluded that the reciprocal opening of public procurement markets for other modes of the supply of services is also covered by the Common Commercial Policy legal basis.

403. More generally, the Court of Justice ruled that an Union act falls within the scope of the common commercial policy "if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned"[305] International agreements on access to the Union's public procurement markets for third country goods and services and on access to third country public procurement markets for goods and services originating in the Union, such as the Government Procurement Chapter in this Agreement, relate specifically to international trade and have direct and immediate effects on international trade in this sense.

404. Moreover, the Government Procurement Chapter reaffirms and builds upon the provisions of the WTO Agreement on Government Procurement. The Protocol amending the Agreement on Government Procurement, which was recently agreed by the Parties to the Government Procurement Agreement, was concluded by the Union in exercise of its exclusive competence with respect to the common commercial policy.[306] The Commission believes, therefore, that the Member States and the other institutions do not contest the Union's exclusive competence with regard to Chapter 10 of EUSFTA.

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303 Case C-360/93, *European Parliament v. Council*, EU:C:1996:84. The Court annulled the decision on the conclusion of the agreement because the agreement covered reciprocal access to procurement markets not only for goods and for services supplied across frontiers, but also for other modes of supply of services, which were at that time not covered by the legal basis for the common commercial policy.

304 *See* also above para. 112 *et seq*.

305 *See* Case C-347/03, *ERSA*, EU:C:2005:285, para. 75; Case C-411/06, *Commission v. European Parliament and Council*, EU:C:2009:518, para. 71.

306 2014/115/EU: *Council Decision of 2 December 2013 on the conclusion of the Protocol Amending the Agreement on Government Procurement*, OJ L 68, 7.3.2014, p. 1.

3.12. Intellectual Property (Chapter 11)

3.12.1. Summary description of the chapter

405. The Intellectual Property Chapter is composed of five sections.

406. Section A sets out the scope of the commitments and the relevant definitions by reference to the TRIPs Agreement. It also explicitly confirms that the exhaustion regime remains subject to the relevant provisions of the TRIPs Agreement (Article 11.3).

407. Section B addresses each intellectual property right in succession. It contains provisions concerning copyright, trademarks, geographical indications, designs, patents, protection of test data and plant varieties.

408. On copyright the Chapter confirms standards of protection for intellectual property rights such as the protection of authors' work for a duration of 70 years after the death of the author (Article 11.5) and the right to a single equitable remuneration for performers and producers of phonograms (Articles 11.6, 11.11). Parties are required to provide adequate legal protection and effective legal remedies against the circumvention of any effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights (Article 11.9). Equally, Parties commit to protect electronic rights management information (Article 11.10).

409. EUSFTA ensures that procedures for registering trade marks in the Union and Singapore follow certain rules, such as the possibility of opposition by interested parties and the availability of a public electronic database of applications and registrations. A publicly available electronic database of trade mark applications and trade mark registrations must be established (Article 11.13). Well-known trademarks are to be protected in accordance with the TRIPs Agreement (Article 11.14). In addition, the Chapter lays down the conditions under which a Party can provide for exceptions to the rights conferred by a trademark (Article 11.15).

410. The Intellectual Property Chapter applies to the recognition and protection of geographical indications for wines, spirits, agricultural products and foodstuffs which are originating in the territories of the Parties (Article 11.16). All geographical indications to be protected are listed in Annex 11-B (see Article 11.18, Article 11.23). Parties are required to establish systems for the registration

and protection of geographical indications in their territories (Article 11.17). Parties must provide means to prevent the use of any indication which misleads the consumer as to the origin of goods, and any use which would constitute an act of unfair competition (Article 11.19). The Chapter also lays down the rules on the relationship between geographical indications and conflicting trademarks (Article 11.21), as well with respect to geographical indication that have been in prior use, customary and common names (Article 11.22).

411. Designs are protected under the Intellectual Property Chapter for a period of at least 10 years from the date of application (Articles 11.24, 11.26). Owners of protected designs would be able to prevent from at least making, offering for sale, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes (Article 11.25). The Parties commit to offer the possibility that a registered design is not completely precluded from enjoying protection under the domestic law of copyright (Article 11.28).

412. As regards patents, the Parties recall the obligations under the Patent Cooperation Treaty (done at Washington on June 19, 1970, amended on September 28, 1979, modified on February 3, 1984). They commit, where appropriate, to make all reasonable efforts to comply with Articles 1 to 16 of the Patent Law Treaty (adopted in Geneva on June 1, 2000) in a manner consistent with their domestic law and procedures (Article 11.29). The Parties recognise the importance of the Declaration on the TRIPs Agreement and Public Health and commit to ensure consistency with this Declaration, as well as to respect the Decision of the WTO General Council of 30 August 2003 on Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health, and the Decision of the WTO General Council of 6 December 2005 on Amendment of the TRIPs Agreement, adopting the Protocol Amending the TRIPs Agreement (Article 11.31). The Parties agree to cooperate on initiatives to facilitate the granting of patents on the basis of applications filed by applicants of a Party in the other Party; and the qualification and recognition of patent agent professionals of a Party in the territory of the other Party (Article 11.32).

413. The Intellectual Property Chapter provides protection with regard to the test data or studies concerning the safety and efficacy of a pharmaceutical product prior to

granting approval for the marketing of such product and test data submitted to obtain an administrative marketing approval to put an agricultural chemical product on the market (Articles 11.33 and 11.34).

414. With respect to plant varieties, the Parties reaffirm their obligations under the International Convention for the Protection of New Varieties of Plants (adopted in Paris on December 2, 1961, as last revised in Geneva on March 19, 1991) (Article 11.35).

415. Section C of the Chapter sets out the obligations by the Parties to provide procedures and remedies under their domestic law to ensure that intellectual property rights can be effectively enforced (Articles 11.36 - 11.47).

416. Section D provisions relate to measures to be taken at the border for the suspension by customs authorities of release, into domestic circulation, of counterfeit trademark goods, pirated copyright goods, counterfeit geographical indication goods, and pirated design goods (Articles 11.49 - 11.51).

417. Section E of the Agreement sets out an indicative list of areas of cooperation and the modalities agreed by the Parties to cooperate with a view to supporting the implementation of the commitments and obligations undertaken under the Intellectual Property Chapter.

418. Commission's position with regard to the scope and nature of the Union's competence

419. In the view of the Commission, the provisions of the Intellectual Property Chapter of EUSFTA fall in their totality within the scope of the common commercial policy competence.

420. The Union has exclusive competence for all items falling within the scope of the common commercial policy, on the basis of Article 3(1) TFEU. All the items listed in Article 207(1) TFEU fall within the scope of the common commercial policy. Article 207(1) explicitly includes the "commercial aspects of intellectual property". Consequently, the commercial aspects of intellectual property fall within the scope of the common commercial policy and the Union has exclusive competence over them. Furthermore, Article 207 TFEU does not contain any language

corresponding to the last sub-paragraph of Article 133(5) of the Treaty of Nice307. The non-inclusion of that old provision in the text of the Lisbon Treaty, in combination with the express reference to the commercial aspects of intellectual property in Article 207(1) TFEU further supports the conclusion that, following the entry into force of the Lisbon Treaty, the commercial aspects of intellectual property fall within the exclusive competence of the European Union. This position was confirmed by the Court of Justice in Daiichi Sanyko and Sanofi-Aventis Deutschland.308

421. The Commission submits that the notion of "commercial aspects of intellectual property" covers the totality of the Intellectual Property Chapter of EUSFTA. As the Court of Justice explained in Daiichi Sanyko and Sanofi-Aventis Deutschland,309 it follows from Article 207(1) TFEU – and, in particular, from its second sentence – that the common commercial policy relates to trade with non-member countries, not to trade in the internal market. A Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade.310 The Court also clarified that only those rules adopted by the Union in the field of intellectual property "with a specific link to international trade are capable of falling within the concept of "commercial aspects of intellectual property" in Article 207(1) TFEU and hence in the field of common commercial policy".311

422. The Court of Justice agreed with the Commission in Daiichi Sanyko and Sanofi-Aventis Deutschland, that following the entry into force of the Lisbon Treaty the TRIPs Agreement in its entirety is covered by the notion of "commercial aspects of

307 The last sub-paragraph of Article 133(5) of the Treaty of Nice provided as follows: "This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements."

308 *See* Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para. 49.

309 *See* Ibid, para. 50. *See* also Case C-137/12: *European Commission v Council*, EU:C:2013:675, para. 56.

310 Opinion 2/00, EU:C:2001:664, para. 40; Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA*, EU:C:2005:285, para. 71-83; and Case C-411/06 *Commission v Parliament and Council*, EU:C:2009:518, para. 71

311 *See* Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para. 52.

intellectual property" and clarified that "although [its] rules do not relate to the details, as regards customs or otherwise, of operations of international trade as such, they have a specific link with international trade".312 The same is true with respect to international agreements on intellectual property with a specific link to international trade that are concluded outside the WTO context, as confirmed by the Court in Regione Autonoma Friuli-Venezia Giulia and ERSA.313

423. The Commission notes that most of the provisions contained in the Intellectual Property Chapter of EUSFTA are based upon the TRIPs Agreement and, as expressly stated in the second sentence of Article 11.2(1), aim to "complement the rights and obligations of the Parties under the TRIPs Agreement and other international treaties in the field of intellectual property to which they both are Parties". Specifically:

- Article 11.1 (Objectives) and Section A (Principles) of EUSFTA is based upon Part I (General Provisions and Basic Principles) of TRIPs;
- Sub-Section A (Copyright and Related Rights) of Section B (Standards Concerning Intellectual Property Rights) of EUSFTA complements Section 1 (Copyright and Related Rights), Part II of TRIPs;
- Sub-Section B (Trademarks) of Section B of EUSFTA is based upon and complements Section 2 (Trademarks), Part II of TRIPs;
- Sub-Section C (Geographical Indications) of Section B of EUSFTA is based upon and complements Section 3 (Geographical Indications), Part II of TRIPs;
- Sub-Section D (Designs) of Section B of EUSFTA is based upon and complements Section 4 (Industrial Designs), Part II of TRIPs;
- Sub-Section E (Patents) of Section B of EUSFTA is based upon and complements Section 5 (Patents), Part II of TRIPs;

312 *See* Ibid., para. 53.

313 C-347/03, *Regione Autonoma Friuli-Venezia Giulia and ERSA*, cited above, para. 71-83.

- Sub-Section F (Protection of Test Data) of Section B of EUSFTA is based upon and complements Section 7 (Protection of Undisclosed Information), Part II of TRIPs;

- Sub-Section G (Plant Varieties) of Section B of EUSFTA reaffirms the obligations under the *International Convention for the Protection of New Varieties of Plants*[314];

- Section C (Civil Enforcement of Intellectual Property Rights) of EUSFTA complements Sections 1 (General Obligations) and 2 (Civil and Administrative Procedures and Remedies), Part III (Enforcement of Intellectual Property Rights) of TRIPs;

- Section D (Border Measures) of EUSFTA is based upon and complements Section 4 (Special Requirements Related to Border Measures), Part III (Enforcement of Intellectual Property Rights) of TRIPs.

424. In Daiichi Sanyko and Sanofi-Aventis Deutschland the Court also emphasised the importance of considering TRIPs as an integral part of the WTO system for establishing the existence of a specific link to international trade between the intellectual property provisions contained in TRIPs. The Court observed that:

> *[…] Although those rules do not relate to the details, as regards customs or otherwise, of operations of international trade as such, they have a specific link with international trade. The TRIPs Agreement is an integral part of the WTO system and is one of the principal multilateral agreements on which that system is based.*
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> *The specific character of the link with international trade is illustrated in particular by the fact that the Understanding on Rules and Procedures governing the settlement of disputes, which forms Annex 2 to the WTO Agreement and applies to the TRIPs Agreement, authorises under Article 22(3) the cross-suspension of concessions between that agreement and the other principal multilateral agreements of which the WTO Agreement consists.*[315]

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[314] 2005/523/EC: *Council Decision of 30 May 2005 approving the accession of the European Community to the International Convention for the Protection of New Varieties of Plants, as revised at Geneva on 19 March 1991*, OJ L 192, 22.7.2005, p. 63–77.

[315] *See* Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, paras. 53 and 54.

425. Just like the TRIPs Agreement is an integral part of the WTO system, the EUSFTA Intellectual Property Chapter should also not be read in isolation, but should instead be considered as a part of the broader trade pact. EUSFTA in general and its Intellectual Property Chapter in particular relate to international trade, more specifically to trade between the European Union and Singapore.

426. The specific link of the Intellectual Property Chapter to trade is reflected, inter alia, in its objectives, as set out in Article 11.1(1), which are to "facilitate the production and commercialization of innovative and creative products and the provision of services between the Parties"; and "increase the benefits from trade and investment through the adequate and effective level of protection of intellectual property rights and the provision of measures for the effective enforcement of such rights".

427. The Commission submits that these objectives reflect the underlying premise that setting common standards for intellectual property protection is not the goal in itself in the context of EUSFTA, but the means to achieving the reduction in trade distortions and an increased level of market opening for products protected by intellectual property rights.316 Adherence to certain common standards and the assurance of effective enforcement thereof are the preconditions for the promotion and facilitation of international trade, which is at the heart of the common commercial policy, as interpreted by the Court of Justice.317

428. Furthermore, as the Court of Justice observed in relation to the TRIPs Agreement in the context of Daiichi Sanyko and Sanofi-Aventis Deutschland,318 the specific character of the link with international trade is also illustrated by the fact that the Intellectual Property Chapter is subject to the dispute settlement mechanism under EUSFTA (Chapters 15 and 16). As a result, breaches of obligations under the Intellectual Property Chapter can be the object of trade sanctions under EUSFTA.

3.12.1.1. References to international treaties in the field of intellectual property

429. The Commission notes that a number of provisions under the EUSFTA Intellectual Property Chapter refer to existing international treaties in the field of intellectual

316 *See* Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland,* EU:C:2013:520, paras. 58-59.

317 *See* above section 2.3.2 and footnote 310.

318 Ibid., para. 54.

property and in some cases incorporate319 specific provisions of those treaties into EUSFTA. EUSFTA Parties also recall or reaffirm their respective obligations under the TRIPs Agreement and the Paris Convention for the Protection of Industrial Property (Article 11.2(1)), the Patent Cooperation Treaty (Article 11.29), and the International Convention for the Protection of New Varieties of Plants (Article 11.35); and agree to make all reasonable efforts to comply with the WIPO Trademark Law Treaty and the Singapore Treaty on the Law of Trademarks (Article 11.12). In the context of the provisions on copyright and related rights the Parties committed to comply with the rights and obligations set out in the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and the TRIPs Agreement (Article 11.4).

430. References to existing international treaties in the field of intellectual property are not uncommon as a drafting technique. They are also a common feature in the context of intellectual property provisions of broader trade pacts. Examples can be found in prior free trade and cooperation agreements,320 as well as the TRIPs Agreement.321

431. Such an approach is reasonable and justified in view of the overall objective of progressively abolishing obstacles to international trade and investment, which trade agreements pursue. Indeed, a different approach, which would disregard existing international treaties in the field of intellectual property and start anew on every occasion, would be counterproductive with respect to the objectives of any trade agreement. It would increase the complexity and fragmentation of

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319 This is the case for certain provisions of the TRIPs Agreement (*see* Articles 11.1(2), 11.2(2), 11.38(2)(b)) and Article 10bis of the Paris Convention (*see* Article 11.19(1)(b)).

320 E.g. *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part,* OJ L 127, 14.5.2011, p. 1–1426; *Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part,* OJ L 354, 21.12.2012, p. 3–2607; *Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part,* OJ L 276, 28.10.2000, p. 45–80.

321 E.g. several references are made in the TRIPs Agreement to provisions of the *Paris Convention for the Protection of Industrial Property* (Article 1.3, Article 2, Article 3.1, Article 15.2, Article 16.2, Article 16.3, Article 22.2(b), Article 39(1), Article 62.3 and Article 63.2) and the *Berne Convention for the Protection of Literary and Artistic Works* (Article 1.3, Article 2, Article 3.1, Article 4, Article 9.1, Article 10.1, Article 14.3, Article 14.6, Article 70.2).

international law in the area of intellectual property and thus create new obstacles to international trade and investment rather than removing them.

432. Moreover, in most instances where a reference is made to existing international treaties in EUSFTA, this is only declaratory or in the form of a best-endeavours commitment.322 The Commission submits that such commitments do not produce any legal effects which could call into question the Union's competence under Article 207 TFEU with respect to the Intellectual Property Chapter.

433. With respect to Article 11.4 EUSFTA, where a binding commitment was made, with respect to the Berne Convention for the Protection of Literary and Artistic Works (of September 9, 1886, as last revised at Paris on July 24, 1971), the WIPO Copyright Treaty (adopted in Geneva on December 20, 1996), the WIPO Performances and Phonograms Treaty (adopted in Geneva on December 20, 1996)323, and the TRIPs Agreement, the Commission submits that in view of the substance of the treaties referred to and the new context that EUSFTA provides,324 these commitments fall within the Union's competence under Article 207 TFEU.325

434. The Berne Convention deals with the protection of works and the rights of their authors. It contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them. The minimum standards of protection relate to the works and rights to be protected, and to the duration of protection.

435. The WIPO Copyright Treaty incorporates326 and builds upon the Berne Convention for the protection of literary and artistic works, notably by adapting the regime under the Berne Convention to the digital environment. Under the

322 *See* Article 11.2(1), Article 11.12, Article 11.35, Article 11.29, Article 11.35 EUSFTA.

323 The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty were implemented in Union law with *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, OJ L 167, 22.6.2001, p. 10–19.

324 See above para. 424 et seq.

325 Moreover, as the Court of Justice confirmed (*see* Case C-510/10: *DR and TV2 Danmark A/S v NCB - Nordisk Copyright Bureau*, EU:C:2012:244, para. 31), these commitments would be in any event considered covered by Union competence by virtue of Article 3(2) TFEU.

326 *See* Article 1(4) of the *WIPO Copyright Treaty*.

Convention authors are able to benefit from legal protection for the distribution, rental, communication to the public, and making available to the public of their works. Explicit protection is provided for computer programs and databases. In addition this Treaty contains provisions on technological measures (such as on the contravention of anti-copy devices) and on rights management information, as well as provisions on the enforcement of rights.

436. Under the WIPO Performances and Phonograms Treaty performers and phonogram producers will be able to benefit from an exclusive right of reproduction, distribution, rental, and making available to the public of their performances and phonograms. Moreover they will benefit from a right of remuneration for broadcasting and all other forms of communication to the public of phonograms published for commercial purposes. Just as in the Copyright Treaty, this Treaty sets out provisions on technological measures, on rights management systems and on the enforcement of rights.

437. As noted above, the Court of Justice already had an opportunity to clarify,327 that following the entry into force of the Lisbon Treaty the TRIPs Agreement is covered by the notion of "commercial aspects of intellectual property" and thus falling within the common commercial policy of the Union. Any reference within EUSFTA to rights and obligations under TRIPs would thus not be capable of affecting the nature of the competence for the conclusion of EUSFTA.

438. Both WIPO Treaties have been concluded by the then European Community and its Member States.328 The European Union is not itself a party to the Berne Convention. However, the latter has been incorporated in large part in the TRIPs Agreement and subsequently into the WIPO Copyright Treaty.329 As a result, by

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327 *See* Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland,* EU:C:2013:520, para. 53.

328 2000/278/EC: *Council Decision of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty - WIPO Copyright Treaty (WCT) - WIPO Performances and Phonograms Treaty (WPPT)* .OJ L 89, 11.4.2000, p. 6–23.

329 As confirmed by the Court "[w]ith regard to the Berne Convention, the European Union, although not a party to it, is nevertheless obliged, under Article 1(4) of the WIPO Copyright Treaty, to which it is a party, which forms part of its legal order and which Directive 2001/29 is intended to implement, to comply with Articles 1 to 21 of the Berne Convention (see, to that effect, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 189 and the case-law cited)." (*See* Case C-510/10: *DR and TV2 Danmark A/S v NCB - Nordisk Copyright Bureau*, cited above, para. 29.)

committing to respect any of the provisions under the afore mentioned conventions in the context of EUSFTA the Union is not entering into any new obligations; it is simply incorporating pre-existing obligations into its trade regime.

439. It is this very incorporation into EUSFTA that is decisive in terms of choice of legal basis.330 The Commission submits that – like in the context of the TRIPs Agreement – the incorporation of parts or the totality of existing intellectual property agreements in the trade agreement obviously changes their immediate context, but also changes their object and purpose, and in so doing can establish a link to international trade that could not necessarily be claimed to exist, when international agreements are concluded with the sole objective of harmonization of intellectual property law.

440. As already noted above, the objective of the Intellectual Property Chapter under EUSFTA is not harmonization of intellectual property law per se. While establishing certain common minimal standards of substantive protection and enforcement of intellectual property rights remains the means, the objective is promoting and facilitating international trade and investment. This objective is reflected in Article 11.1 EUSFTA. As the text shows, by agreeing on common minimal standards and measures or principles which ensure their effective enforcement, the Parties aim to reduce uncertainty and create the necessary confidence on the side of right holders that will "facilitate the production and commercialization" of protected products and services, and at the same time "increase the benefits from trade and investment". EUSFTA, unlike the WIPO Copyright Treaty or WIPO Performances and Phonograms Treaty, is capable of achieving these objectives, because it does not limit itself to incorporating existing standards, but instead builds upon them, while at the same time extending to the pre-existing and to the new substantive commitments its dispute settlement mechanism and the possibility of trade sanctions, neither of which exists under the international intellectual property treaties at issue.

441. In light of the objective of the EUSFTA Intellectual Property Chapter, there cannot be any doubt that the Chapter falls within the scope of Article 207 TFEU, which is, as provided for in Article 3(1)(e) TFEU, an exclusive competence of the Union.

330 *See* above paras. 424- 425.

3.13. Competition (Chapter 12)

3.13.1. Summary description of the chapter

442. The Competition and Related Maters Chapter is composed of four sections. In this Chapter, the Parties agreed to prohibit and sanction certain practices and transactions involving goods or services which distort competition and trade between them.

443. Section A, Antitrust and Mergers, sets out the guiding principles (Article 12.1), followed by commitments on the implementation of those principles (Article 12.2). The Parties agree to (i) maintain comprehensive legislation effectively addressing certain restrictions of competition by enterprises within their jurisdiction, and (ii) maintain in place institutions with the competence to effectively apply this legislation in a transparent and non-discriminatory manner and in accordance with the principle of due process.

444. Section B (Article 12.3), provides that competition law should also apply to state-controlled enterprises and that there is no discrimination by monopolies. This ensures that companies of both Parties have equal access to each other's markets. These obligations are without prejudice to the Parties' rights to establish or maintain public undertakings, undertakings with special or exclusive rights and state monopolies.

445. Section C, Subsidies, builds upon the regime under the WTO *SCM Agreement*, which already applies to trade between EUSFTA Parties. It provides that the Parties agree to remedy or remove distortions of competition caused by subsidies in so far as they affect international trade (Articles 12.5 and 12.6). This section is particularly significant in so far as it contains provisions that prohibit certain types of subsidies, which are considered to be particularly distortive. These are: i) subsidies covering debts or liabilities of an enterprise without any limitation, in law or in fact, as to the amount or duration; ii) subsidies to ailing enterprises, without a credible restructuring plan based on realistic assumptions that would allow the recipient to return to long term viability without further reliance on State support (Articles 12.7 and 12.8). The section also contains transparency provisions according to which Parties have to report annually the total amount, types and the sectoral distribution of subsidies (Article 12.9). The Parties also committed to

review progress in implementing of the subsidies section every two years (Article 12.10).

446. Section D, General Matters, contains a general provision on cooperation and coordination in law enforcement (Article 12.11), rules about confidentiality (Article 12.12), a procedure for consultations (Article 12.13) and an exclusion of the Chapter on Competition and Related Matters, except Article 12.7, from the dispute settlement and mediation procedures under the agreement (Article 12.14). This Chapter also has an annex, entitled Principles Applicable to Other Subsidies, which provides a list of subsidies which "may be granted by a Party when they are necessary to achieve an objective of public interest, and when the amounts of subsidies involved are limited to the minimum needed to achieve this objective and their effect on trade of the other Party is limited" (Annex 12-A).

3.13.2. Commission's position with regard to the scope and nature of the Union's competence

447. The Commission submits that the object and purpose, as well as the text and the context of the Competition Chapter demonstrate, that its provisions relate specifically to international trade in that it is essentially intended to promote and facilitate trade and has direct and immediate effects on it. As a consequence, the Competition Chapter in its totality falls under the Union exclusive competence for the common commercial policy and Article 207 TFEU constitutes the correct legal basis for its conclusion.[331]

448. Closer integration between markets means that the likelihood of anti-competitive measures in one country causing adverse effects on another country's interests is much higher. The EUSFTA Competition Chapter thus addresses anti-competitive practices with transnational dimensions, which could otherwise impede market access and undermine the intended benefits of trade liberalization achieved through EUSFTA.

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[331] Practice in the context of prior bilateral trade agreements confirms this position. *See Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part*, OJ L311, 04/12/1999, p. 3; *Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part*, OJ L276, 28/10/2000, p. 45; *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*; OJ L 127, 14/5/2011, p. 1.

449. The EUSFTA Chapter on Competition and Related Matters not only covers competition rules in the narrow sense, which typically address anti-competitive practices by private actors (anti-trust and mergers), but extends also to intrusions by the public sector into competitive markets (state controlled enterprises, state monopolies, subsidies).

450. The objective of the EUSFTA Competition Chapter, as stated in Article 12.11, is to attain "free and undistorted competition in the trade relations" between the Union and Singapore. In Article 12.1 "[t]he Parties recognise the importance of free and undistorted competition in their trade relations [and] acknowledge that anti-competitive business conduct or anti-competitive transactions have the potential to distort the proper functioning of their markets and undermine the benefits of trade liberalisation."

451. While certain common standards are agreed upon between the Parties (notably, in the area of subsidies), Parties do not harmonise their rules to attain their objectives. On the contrary, they explicitly agree to maintain their autonomy in developing and enforcing their respective laws, but commit to maintain legislation effectively addressing certain anti-competitive behaviours (Article 12.1(2), Article 12.3, Article 12.4), as well as authorities responsible and appropriately equipped for the effective enforcement of said legislation (Article 12.2).

452. The Commission notes that the specific link of the anti-competitive behaviours addressed by the Competition Chapter to international trade is also made explicit in the text of several provisions. Article 12.1(2) requires Parties to maintain in their respective territories comprehensive legislation which effectively address certain anti-competitive behaviours, where said anti-competitive behaviours "affect trade between them". Article 12.3(3) requires Parties to ensure that undertakings entrusted with special or exclusive rights do not use their special or exclusive rights to engage in anticompetitive practices "that adversely affect investments, trade in goods or services of the other Party". Article 12.4 requires that each Party adjust state monopolies of a commercial character to ensure that "no discrimination is exercised by such monopolies regarding the conditions under which goods and services are procured from and marketed to natural or legal persons of the other Party". Pursuant to Article 12.7, certain particularly trade-distortive types of subsidies related to trade in goods and services are prohibited,

"unless the subsidising Party upon request of the other Party has demonstrated that the subsidy in question does not affect trade of the other Party nor will be likely to do so". Similarly, under Article 12.8(1), the "Parties agree to use their best endeavours to remedy or remove through the application of their competition laws or otherwise, distortions of competition caused by other specific subsidies related to trade in goods and services which are not covered by Article 12.7 (Prohibited Subsidies), insofar as they affect or are likely to affect trade of either Party, and to prevent the occurrence of such situations."

453. Furthermore, the Commission notes that several WTO agreements, which indisputably fall under the Common Commercial Policy of the Union, already incorporate important elements of competition policy. For example, Article II.4 of the GATT requires that if a monopoly is retained by a WTO member, such a monopoly shall not "operate so as to afford protection in excess of that provided for in the schedules." Article III (national treatment) is fundamentally about the maintenance of competitive conditions for imported products compared to domestically produced goods. There is also a possible application of Articles XI (quantitative restrictions) and XVII (state trading enterprises) against anti-competitive practices, focusing on government actions or the application of non-commercial criteria by state owned companies or companies that benefit from exclusive or special rights granted by the government.[332] In addition to the general principles of most favoured nation treatment in Article II and transparency in Article III, the GATS contains competition provisions regarding the behaviour of monopolistic suppliers in Article VIII, as well as provisions regarding other business practices of service suppliers which "may restrain competition and thereby trade and services" in Article IX.[333] The *WTO Agreement on Subsidies and Countervailing Measures*, which Section C of the Competition Chapter builds upon, disciplines the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies.[334]

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[332] *Opinion 1/94*, EU:C:1994:384, para. 34.

[333] The Court of Justice' *Opinions 1/94* and *1/08*, both cited above, support the position that this provisions are covered by the Union's competence for the common commercial policy.

[334] *Opinion* 1/94, EU:C:1994:384, para. 34.

3.14. Sustainable development (Chapter 13)

3.14.1. Summary description of the chapter

454. The Trade and Sustainable Development Chapter is composed of four sections. Section A (Introductory Provisions) lays down the context and objectives of the Chapter (Article 13.1) and confirms the right of each Party to establish its own level of environmental and labour protection, and adopt and modify accordingly its laws and policies (Article 13.2).

455. Section B (Trade and Sustainable Development: Labour Aspects) develops on the labour aspects of trade and sustainable development. First, it sets out the Parties' responsibilities in relation to existing multilateral labour standards and agreements (Article 13.3). Second, it provides an illustrative list of areas on which the Parties may initiate cooperative activities on trade-related aspects of labour policies (Article 13.4). Last, Parties commit to take account of relevant scientific and technical information and related international standards, guidelines or recommendations, if they exist, including the precautionary principle as enshrined in such international standards, guidelines or recommendations, when preparing and implementing measures aimed at health and safety at work which may affect trade or investment between the Parties (Article 13.5).

456. Following the same approach as the section on labour aspects, Section C (Trade and Sustainable Development: Environmental Aspects) develops on environmental aspects. It begins by setting out the Parties' commitments in relation to existing multilateral environmental standards and agreements (Article 13.6). It then lays down undertakings concerning trade in timber and timber products (Article 13.7) and trade in fish products (Article 13.8). Parties also agree to take account of scientific evidence and relevant international standards, guidelines or recommendations, if they exist, and of the precautionary principle, when preparing and implementing measures aimed at environmental protection which may affect trade or investment between them (Article 13.10). The Parties establish an illustrative list of areas on which they may initiate cooperative activities on trade-related aspects of environmental policies (Article 13.10).

457. Finally, Section D (General Provisions) contains general commitments aimed at promoting sustainable development through trade and investment (Article 13.11), a commitment to uphold levels of environmental and labour protection (Article

13.12), rules on transparency (Article 13.13), a commitment on the monitoring, assessment and review of the impact of EUSFTA on sustainable development (Article 13.14), and the provisions laying down the institutional set up and monitoring mechanism (Article 13.15). The dispute settlement and mediation procedures under EUSFTA (Chapters 15 and 16 respectively) do not apply to this Chapter, which provides instead for Government Consultations (Article 13.16) and, where these fail to resolve the disagreement, the possibility of a recourse to a Panel of Experts (Article13.17).

3.14.2. Commission's position with regard to the scope and nature of the Union's competence

458. In the view of the Commission, the provisions of the EUSFTA Trade and Sustainable Development Chapter fall in their totality within the scope of the Union's common commercial policy competence.

459. According to the settled case-law of the Court, the choice of the legal basis for a Union measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure.[335]

460. As already noted above, a Union act falls within the common commercial policy if it relates specifically to international trade[336] in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade.[337] The direct and immediate effects on trade need not necessarily consist in *promoting* or *facilitating* trade. For a Union act to be capable of falling within the scope of Article 207 TFEU, it suffices rather that such an act is an instrument intended *essentially* to promote, facilitate *or govern* trade.[338]

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335 See, *inter alia*, Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 30, C-155/91 *Commission v Council*, EU:C:1993:98, para 7, C-295/90 *Parliament v Council*, EU:C:1992:294, para 13, and C-440/05 *Commission v Council*, EU:C:2007:625, para 29.

336 The same test should be applied, *mutatis mutandis*, in order to assess whether a matters falls within the terms "foreign direct investment", as used in Article 207 TFEU.

337 Case C-137/12, *Commission v Council*, cited above, para. 57. *See* also Opinion 2/00, EU:C:2001:664, para 40; Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA*, cited above, para 75; Case C-411/06 *Commission v Parliament and Council*, cited above, para.71 and C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, para. 51. *See* also *Case C-281/01 Commission v Council* ('Energy Star'), EU:C:2002:761, paras. 40, 41, 43 and 48, and Opinion 2/00, cited above, paras. 40 and 42 to 44.

338 To that effect, Opinion 2/00, cited above, para 37; emphasis added: "Instruments of commercial policy by no means always have the sole object of *promoting* or *facilitating* trade; rather, Article 133 EC also

461. The Court recognized in *Opinion 1/78,* when it stated that Article [207] of the Treaty must not be interpreted in such a way as to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade. According to the Court, "commercial policy" understood in that sense would be destined to become nugatory in the course of time. The Court thereby confirmed that the concept of trade policy may evolve and can be interpreted in the light of international trade practice.

462. Both autonomous commercial-policy measures and trade agreements are consistently used to serve the ends of other policies.[339] For example, the Union has for many years now integrated a social dimension in its commercial policy through its system of generalised preferences (GSP)[340], which allows the granting of further tariff preferences to the countries that effectively apply all standards referred to in the ILO Declaration on Fundamental Principles and Rights at Work. In considering, in *Case 45/86 Commission v Council,* what was the appropriate legal basis for certain measures implementing the GSP scheme, the Court reasoned as follows:

> *The link between trade and development has become progressively stronger in modern international relations. It has been recognized in the context of the United Nations, notably by the United Nations Conference on Trade and Development (UNCTAD), and in the context of the GATT, in particular through the incorporation in the GATT of Part IV, entitled "Trade and Development".*
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> *It was against that background that the model was evolved on which the [Union] system of generalized preferences, partially implemented by the regulations at issue, was based. That system reflects a new concept of international trade relations in which development aims play a major role.*
>
> *In defining the characteristics and the instruments of the common commercial policy in Article [206] et seq., the Treaty took possible changes into account. […]*

463. The Court thus agreed with the Commission that such measures can and should be based on the common commercial policy legal base alone and confirmed that "the

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permits classic (protective) measures of commercial policy that may amount to restricting or even prohibiting the import or export of certain products, for instance if anti-dumping duties or a trade embargo is imposed (on the latter, see, for example, *Centro-Com*, cited in note 21)."

339 E.g. Commercial-policy measures such as trade agreements or even trade embargoes are frequently determined by the interests of the common external policy, including also security interests.

340 *Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008,* OJ L303, 31.10.2012, p. 1.

existence of a link with other policy goals does not cause a measure to be excluded from the sphere of the common commercial policy as defined by the Treaty.

464. According to the Court, a Union act such as the international agreement at issue may thus be based on the common commercial policy, even if in addition to its main commercial aspect it also pursues other aims, such as aims of development policy,[341] labour protection and/or protection of the environment.[342]

465. With respect to Chapter 13 EUSFTA, it is clear from its title that it concerns both trade and sustainable development. It is also apparent that this Chapter is not self-standing and should not be read in isolation. It is but one part of the broader trade pact. The Commission submits that EUSFTA in general and its Trade and Sustainable Development Chapter in particular relate to international trade, more specifically to trade between the European Union and Singapore.

3.14.2.1. The text shows that the objective of EUSFTA Chapter 13 is to promote, facilitate or govern trade and investment, and that the provisions at issue have direct and immediate effects on trade and investment

466. It is widely accepted that considerable discrepancies in the levels of environmental and labour protection between states can have direct and immediate adverse effects on international trade and investment.[343]

467. As the text of EUSFTA explicitly recognises in Article 13.1(3)[344], trade and/or investment can be enhanced "by weakening or reducing the protections afforded in

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341 Case 45/86 *Commission* v *Council*, EU:C:1987:163, paras. 17 to 21. *See* also the Opinion of Advocate General Lenz in that case, especially point 62.

342 Case C-62/88 *Greece* v *Council ('Chernobyl')*, EU:C:1990:153, paras. 15 to 19, and Case C-281/01 *Commission* v *Council ('Energy Star')*, cited above, paras. 39 to 43.

343 For an exhaustive overview of the debate on the social dimension of international trade, *see* R. Howse and M. Mutua, 'Protecting human rights in a global economy. Challenges for the World Trade Organization' (2000), accessible at http://lic.law.ufl.edu/~hernandez/Trade/Howse.pdf; V. A. Leary, 'The WTO and the social clause: Post-Singapore', (1997) 8 *European Journal of International Law* 118; F. Maupain, 'La protection internationale des travailleurs et la libéralisation du commerce mondial: un lien ou un frein?' (1996) *Revue Générale de Droit international Publique* 45; Y. Moorman, 'Integration of ILO core rights labor standards into WTO' (2001) 39 *Columbia Journal of Transnational Law* 555; E.-U. Petersmann, R. Howse and P. Aston, 'Trade and human rights: An Exchange', *Jean Monnet Working Papers* WP 12/2002; S. Sanna, 'Diritti fondamentali dei lavoratori: ruolo dell'OIL e dell'OMC' (2004) 78 *Diritto del lavoro* 147; J.-M. Siroën, 'Organisation mondiale du commerce, clause sociale et développement' (1997) 98 *Mondes en Developpement* 29.

344 *See* also Article 13.3(5).

domestic labour and environment laws", and conversely environmental and labour standards can become disguised trade barriers motivated by protectionism:

> *The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour and environment laws. At the same time, the Parties stress that environmental and labour standards should not be used for protectionist trade purposes.*

468. To avoid these undesirable effects, EUSFTA Parties acknowledge the existence of an interconnection between trade and sustainable development and agree (i) to a series of provisions by means of which they reaffirm existing international commitments in the sustainable development domain (including its labour and environmental aspects), and (ii) on a framework for consulting and cooperating on trade-related labour[345] and environmental issues[346].

469. First, starting with the text of the preamble to EUSFTA, in the fourth recital there is an acknowledgement by the Parties of the existence of an interconnection between trade and sustainable development and a statement of a common objective to further liberalize trade in a manner which is mindful of sustainable development:

> *DETERMINED to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote trade and investment in a manner mindful of high levels of environmental and labour protection and relevant internationally-recognised standards and agreements to which they are Parties;*

470. Second, it is also apparent from the text of Article 13.1(1) that the objective of the Parties is to develop and promote international trade and their bilateral trade and economic relationship in such a way as to contribute to sustainable development.

> *1. The Parties recall the Agenda 21 of the United Nations Conference on Environment and Development of 1992, the Preamble to the WTO Agreement, the Singapore Ministerial Declaration of the WTO of 1996, the Johannesburg Plan of Implementation on Sustainable Development of 2002, the Ministerial Declaration of the UN Economic and Social Council on Generating Full and Productive Employment and Decent Work for All of 2006, and the International Labour Organization (hereinafter referred to as "ILO") Declaration on Social Justice for*

[345] *See* Articles 13.3(1) and 13.4.

[346] *See* Articles 13.6(1) and 13.7(a), 13.7(c) and 13.10.

a Fair Globalization of 2008. In view of these instruments, the Parties reaffirm their commitment to developing and promoting international trade and their bilateral trade and economic relationship in such a way as to contribute to sustainable development.

471. Third, this objective is also clear from the text of the last sentence of Article 13.3(2) and Articles 13.4, 13.6(4), 13.7, 13.10, and 13.11.

472. Fourth, the Parties further recognise in Article 13.1(2) that there are three interdependent and mutually reinforcing components to sustainable development; namely, economic development, social development and environmental protection:

2. The Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development. They underline the benefit of cooperation on trade-related social and environmental issues as part of a global approach to trade and sustainable development.

473. Fifth, Article 13.1(4) confirms that the intention of EUSFTA is not to create new substantive obligations in the area of labour and environmental protection or otherwise to harmonise the labour or environmental standards between the Union and Singapore:

The Parties recognise that it is their aim to strengthen their trade relations and cooperation in ways that promote sustainable development in the context of paragraphs 1 and 2. In light of the specific circumstances of each Party, it is not their intention to harmonise the labour or environment standards of the Parties.

474. Article 13.2(1) further confirms that the Parties retain a right to regulate and establish their own levels of environmental and labour protection, but commit to do so in in a manner consistent with internationally recognised standards and agreements to which they are already parties:

The Parties recognise the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies, consistent with the principles of internationally recognised standards or agreements, to which it is a party, referred to in Articles 13.3 (Multilateral Labour Standards and Agreements) and 13.6 (Multilateral Environmental Standards and Agreements).

475. Thus, while commitments under certain pre-existing agreements concerning labour and environmental protection are reaffirmed in the context of EUSFTA[347], they are relevant and contribute to the pursuit of the trade and investment liberalization objectives of EUSFTA. This particular approach is appropriate and justified, because it ensures that Parties respect key international labour and environmental treaties, while at the same time ensuring that the conditions for trade and investment are not adversely affected through different levels of ambition by the Parties.

476. The link between trade and sustainable development in EUSFTA is also apparent from the obligation to uphold existing standards of protection in Article 13.12, which provides:

> *A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental and labour laws, in a manner affecting trade or investment between the Parties.*
>
> *A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.*

477. While Parties retain regulatory freedom with respect to their environmental and labour laws and their application, they commit not to exercise it in a manner which would affect trade or investment between them.

3.14.2.2. Union law requires the integration of certain non-trade concerns in the common commercial policy

478. It would be erroneous to conclude that provisions of a trade agreement, which are related to international trade and investment and specifically directed toward promoting them, fall outside the common commercial policy field solely because they take account of the need to ensure adequate levels of environmental and labour protection.[348] Quite to the contrary, it is undisputed that Union law not only enables, but purposely requires the integration of certain non-trade concerns in its relations with the wider world and in this context the Union's commercial policy.

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[347] *See* Articles 13.3(2), 13.3(3), 13.6(3).

[348] *See* C-281/01 *Commission v Council, cited above*.

479. The Commission is thus bound by the text of the Treaties to ensure a harmonious and balanced development of the Union's commercial policy with the objective of sustainable development. In accordance with Article 3(5) TEU the Union must contribute, inter alia, to "sustainable development of the Earth" and "free and fair trade".

480. Furthermore, the TFEU contains in its Article 9 a "horizontal social clause, which promotes social mainstreaming by strengthening the axiological orientation of the Union set out in Articles 2 and 3 TEU. Its environmental counterpart is contained in Article 11 TFEU. Although the expression "take into account" under Article 9 TFEU is not as strong as "must be integrated" under Article 11 TFEU, the value of the horizontal social clause is prescriptive, due to its position under Title II (Provisions having general application), as well as the requirement to implement the social market economy model, which would otherwise be devoid of all purpose. As these clauses are horizontal, they must be used to promote social and environmental goals in all Union policies and activities, including the common commercial policy.

481. As from the Lisbon Treaty the commercial policy is also subject to the set of objectives for Union external action found in Article 21(2) TEU, which includes several sustainable development related objectives: "foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty"; "encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade"; "help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development"; "promote an international system based on stronger multilateral cooperation and good global governance". Article 21 TEU thus reinforces the function played by the Articles 9 and 11 TFEU, by requiring Union institutions to take account of sustainable development considerations when defining and implementing the common commercial policy.

3.14.2.3. Sustainable development is recognised as an objective of global and regional trade law and policy

482. The approach to trade and sustainable development adopted in EUSFTA is also in line with the general policy objectives of the Union. In the context of the "*Global Europe – Competing in the World*" policy strategy, which was adopted by the Commission and endorsed by the Council in 2006,[349] the Council gave a mandate to integrate social and environmental concerns in bilateral trade agreements. Whilst the Global Europe strategy did not elaborate on the precise content of provisions concerning sustainable development, it is clear that their inclusion is mandated in a context of using the commercial policy more actively in order to enhance the Union's competitiveness in a globalised world. In other words, the Union's interest, as defined by the policy makers, is avoiding a race to the bottom in the regulation of labour and environmental protection and ensuring a level playing field with international partners.

483. Sustainable development is also recognised as an objective of global and regional trade law and policy. Notably in the context of the WTO[350], the WTO Appellate Body clarified that the preamble of the *WTO Agreement* sets sustainable development as an objective of the WTO.[351] Building on the GATT 1947, the preamble of the *WTO Agreement* recognises that WTO Members' "relations in the field of trade and economic endeavour should be conducted with a view to […] allowing for the optimal use of the world's resources in accordance with the objective of sustainable development […]."[352] Through several Ministerial

[349] Commission, "Communication on Global Europe – Competing in the World. A contribution to the EU's Growth and Jobs Strategy" COM (2006) 567 final, 4.10.2006. "Conclusions on Global Europe – Competing in the World" (14779/06), 2760th Council Meeting, General Affairs and External Relations, 13.11.2006.

[350] The contribution which the WTO can make to sustainable development was recognized at the United Nations Conference on Environment and Development (UNCED) in 1992, which noted that an open, non-discriminatory trading system is a prerequisite for effective action to protect the environment and to generate sustainable development.

[351] WTO Appellate Body Report, *EC – Tariff Preferences*, WT/DS246/AB/R, adopted 20 April 2004, para. 94; *US- Shrimp*, WT/DS588/AB/R, adopted 6 November 1998, para 129.

[352] *See* also M. Gehring and M.C. Cordonier Sagger (eds), *Sustainable Development in World Trade Law* (The Hague: Kluwer, 2005), p. 1-24.

Declarations the WTO Membership reaffirmed that sustainable development is one of the objectives of the WTO.[353]

484. The then European Community's position on sustainable development in the WTO context was outlined in the Council Conclusions of October 1999.[354] In these conclusions, the Council agreed that the then Community should strongly support the protection of core labour standards. Other fundamental elements of these Council conclusions are the support for the work of the ILO, as well as its co-operation with the WTO, including through a regular dialogue; support for positive measures to encourage respect of core labour standards; and a clear rejection of any sanctions-based approach. This line with respect to sanctions-based approaches is reflected in EUSFTA.[355] Chapter 13 is thus not subject to the dispute settlement mechanism under Chapter 15, but contains its own dispute resolution mechanism which does not provide for the possibility of imposing trade sanctions.

485. Finally, as will be discussed in greater detail below, none of the specific obligations undertaken under EUSFTA Chapter 13 renders necessary the participation of the Member States in the conclusion of EUSFTA.

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353 In the *Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment* the WTO Membership considered, "that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other […]" (*See* Preamble of the Ministerial Decision on Trade and Environment, MTN/TNC/45(MIN), adopted 15 April 1994.). This was echoed in the 1996 *Singapore Ministerial Declaration*, which stated that "[f]ull implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development" (Singapore Ministerial Declaration, WT/MIN(96)/DEC, adopted 13 December 1996.). In this context sustainable development objectives are clearly linked to the implementation of trade agreements. Further, the 1998 *Geneva Ministerial Declaration* states: "We shall also continue to improve our efforts towards the objectives of sustainable economic growth and sustainable development" (Geneva Ministerial Declaration, WT/MIN(98)/DEC, adopted 20 may 1998.). The interface between trade and social issues was also discussed in the third WTO Ministerial Conference in Seattle in November 1999, when some industrialised countries called for inclusion of trade and labour in the WTO agenda.

354 WTO: Preparation of the Third Ministerial Conference - Council Conclusions (12121/99), 2209th Council meeting, Luxembourg, 26.10.1999.

355 As well as in other bilateral agreements containing a chapter on trade and sustainable development, and in the Union's generalised system of preferences scheme.

3.14.2.4. Commitments on fundamental rights at work under Article 13.3(3)

486. Article 13.3(3) contains a commitment by the Parties to respect, promote and effectively implement certain principles concerning the fundamental rights at work in accordance with the obligations assumed under the ILO. It provides:

> *In accordance with the obligations assumed under the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted by the International Labour Conference at its 86th Session in 1998, the Parties commit to respecting, promoting and effectively implementing the principles concerning the fundamental rights at work, namely:*
>
> *(a) freedom of association and the effective recognition of the right to collective bargaining;*
>
> *(b) the elimination of all forms of forced or compulsory labour;*
>
> *(c) the effective abolition of child labour; and*
>
> *(d) the elimination of discrimination in respect of employment and occupation.*
>
> *The Parties reaffirm the commitments to effectively implementing the ILO Conventions that Singapore and the Member States of the Union have ratified respectively.*

487. The Commission firstly notes that these obligations do not prescribe in concrete terms the manner in which the effective implementation of the ILO Conventions that Singapore and the Member States of the Union have ratified is to take place.[356] It can thus be concluded that the obligation assumed in the FTA with regards to effective implementation is in any event not prescriptive enough so as to necessitate the participation of the Member States in concluding EUSFTA.[357]

488. Second, the four principles that the Parties commit to respecting, promoting and effectively implementing pursuant to the first paragraph of Article 13.3(3) are generally recognised as universal core labour standards.[358] Thus, this provision

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356 Case C-377/12 *Commission v Council*, EU:C:2014:1903, paras. 39-40.

357 Case C-377/12 *Commission v Council*, EU:C:2014:1903, paras. 39-40.

358 The 1995 World Summit for Social Development addressed the social dimension of globalisation for the first time at the highest political level and thus gave full recognition to the social component of sustainable development. In the Copenhagen Declaration on Social Development, participants recognised that globalisation creates opportunities for sustained economic growth and development of the world economy. At the same time, they recognised that poverty, unemployment and social disintegration have too often accompanied the changes and adjustment processes. The Copenhagen Declaration identified the challenge of managing the process of globalisation so as to increase its benefits and mitigate its potential negative effects upon people. In the Programme of Action to the Copenhagen Declaration, governments committed themselves to "safeguarding and promoting respect

amounts to a codification of principles already in force under customary international law.[359] They are currently covered by eight ILO conventions[360] and also contained in Article 2 of the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*. The key objective of the Declaration was to ensure universal recognition and application of the core labour standards as articulated in the Declaration itself. All ILO Members, including those that have not ratified relevant conventions, are required, by their membership of the ILO, to promote and realise the principles concerning the fundamental rights of the ILO Conventions. The 1998 Declaration also introduced a follow up mechanism to promote the universal application of core labour standards which applies to all ILO members, including those which have not ratified the corresponding ILO conventions.

489. Third, the *Charter of Fundamental Rights of the European Union* (CFR), proclaimed in Nice in December 2000 confirms the Union's objective to promote and fully integrate fundamental rights – including core labour standards – in all its

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for basic workers' rights, including the prohibition of forced labour and child labour, freedom of association and the right to organise and bargain collectively, equal remuneration for men and women for work of equal value, and non-discrimination in employment, fully implementing the conventions of the International Labour Organisation (ILO) in the case of States parties to those conventions, and taking into account the principles embodied in those conventions in the case of those countries that are not States parties to thus achieve truly sustained economic growth and sustainable development." Thus, the Summit identified core labour standards for the first time, and agreed on their universality by making them the responsibility of all governments, not just those that have ratified the relevant conventions. The Copenhagen summit, inspired the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at Work. This Declaration constituted an important step forward in the universal recognition of core labour standards.

[359] Marleau, Véronique "Réflexion sur l'idée d'un droit international coutumier du travail", in Jean-Claude Javillier et Bernard Gernigon, (ed.) "Les normes internationales du travail: un patrimoine pour l'avenir: Mélanges en l'honneur de Nicolas Valticos", (Genève: BIT, 2004) 363-435; *See* also Madeleine Bullard, "Child labour prohibitions are universal, binding, and obligatory law: The evolving state of customary international law concerning the unempowered child labourer", Houston Journal of International Law, vol. 24, 2001, p. 124; Leslie Deak, "Customary international labour laws and their application in Hungary, Poland, and the Czech Republic", Tulsa Journal of Comparative and International Law, vol. 2, 1994, p. 1; Yasmine Rassam, "Contemporary forms of slavery and the evolution of slavery and the slave trade under international customary law, Virginia Journal of International Law, vol. 39, 1999, p. 303. J. Wouters and B. De Meester, "The Role of International Law in Protecting Public Goods. Regional and Global Challenges", Lirgiad Working Paper No 1, www.lirgiad.be (2003), p. 21. Bruno Simma and Philip Alston,,'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles', 12 Australian Year Book of Int'l L (1988–1989): 104-105.

[360] Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention No. 87); Right to Organise and Collective Bargaining Convention, 1949 (Convention No. 98); Forced Labour Convention, 1930 (Convention No. 29); Abolition of Forced Labour Convention, 1957 (Convention No. 105); Minimum Age Convention, 1973 (Convention No. 138); Worst Forms of Child Labour Convention, 1999 (Convention No. 182); Equal Remuneration Convention, 1951 (Convention No. 100); Discrimination (Employment and Occupation) Convention, 1958 (Convention No. 111.

policies and actions. The Charter contains a number of provisions which translate into the European legal order the social rights protected by core international conventions:

a. Freedom of association and the effective recognition of the right to collective bargaining: Article 12 CFR recognises the freedom of assembly and association. Article 28 CFR deals with the right of collective bargaining and action. Workers and employers have the right to negotiate and conclude collective agreements and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

b. The elimination of all forms of forced or compulsory labour: Articles 5 and 31 CFR contain provisions prohibiting forced labour. Article 5 foresees that no one shall be held in slavery or servitude (paragraph 1), or shall be required to perform any form of forced or compulsory labour (paragraph 2). Article 31 CFR recognises the right to fair and just working conditions, which are meant to respect the health, safety and dignity of every worker. This provision also sets out the right to limitation of maximum working hours, to daily and weekly rest periods as well as to an annual period of paid leave.

c. Abolition of child labour: the eradication of any form of exploitation of child labour is foreseen by Article 32 CFR, which prohibits the employment of children altogether and prescribes appropriate levels of protection for young people at work.

d. Elimination of discrimination in respect of employment and occupation: Article 21 CFR protects individuals against discrimination based on any ground, including sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Article 23 CFR reinforces the prohibition of sexual discrimination in the workplace by stating that equality between men and women must be ensured in all areas, including employment, work and pay. Article 33(2) shields parents from discrimination by stating that, in order to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

490. The new Article 6(1) TEU confers upon the Charter the same legal value as the founding Treaties. With the entry into force of the Lisbon Treaty, the rights codified in the Charter acquire constitutional value within the Union legal order. This implies the obligation for European institutions to respect the rights, freedoms and prohibitions contained therein.

491. Therefore, the Charter acts as a parameter of legality also in relation to international agreements concluded by the Union in the context of the common commercial policy. The choice for EUSFTA Chapter 13 of those particular fundamental social rights, is thus not only justified by the general horizontal social clause (Article 9 TFEU) and Articles 2 and 3 TEU[361], but also by the *Charter of Fundamental Rights of the European Union.*

492. In addition, the preamble of the TEU highlights the importance of fundamental social rights by *"CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers".*

493. Finally, as already noted above, the Union has for a long time integrated a social dimension in its commercial policy through its system of generalised preferences (GSP),[362] which allows the granting of further tariff preferences to the countries that effectively apply all standards referred to in the *ILO Declaration on Fundamental Principles and Rights at Work*. It is thus well established,[363] as a matter of principle, as well as a matter of substance, that the integration of an obligation to respect core social rights in a Union act can be essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade. For the reasons already discussed above,[364] these labour commitments provide a more levelled playing field for trade and investment between Singapore and the Union and aim to avoid a race to the bottom in labour protection when this would

361 *See* above section 3.14.2.2.

362 *Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008*, OJ L303, 31.10.2012, p. 1.

363 *See* above para. 461 *et seq.*

364 *See* para. 466 et seq.

affect trade or investment between the Parties.[365] Their incorporation into EUSFTA therefore contributes to the objectives of the Union's commercial policy as defined by the Treaties.

3.14.2.5. Obligation on effective implementation of multilateral environmental agreements under Article 13.6.2

494. Similarly to the second paragraph of Article 13.3(3) in the context of labour agreements, Article 13.6.2 requires the Parties to effectively implement in their respective laws, regulations or other measures and practices in their territories, the multilateral environmental agreements to which they are parties:

> *The Parties shall effectively implement in their respective laws, regulations or other measures and practices in their territories, the multilateral environmental agreements to which they are party.**
>
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>
> ** The multilateral environmental agreements referred to shall encompass those protocols, amendments, annexes and adjustments binding on the Parties.*

495. This obligation does not prescribe in concrete terms the manner in which the effective implementation of multilateral environmental agreements at issue is to take place, thus, the obligation is in any event not prescriptive enough so as to necessitate the participation of the Member States in concluding EUSFTA.[366]

496. Furthermore, this provision is in fact a restatement of the principle of good faith performance of binding treaties contained in Article 26 of the *Vienna Convention on the Law of the Treaties*. In committing to effectively implement the multilateral environmental agreements to which it is party, the Union does not enter into new obligations: it merely reaffirms the commitments already assumed.

497. Most importantly, for the reasons discussed above,[367] these environmental commitments provide a more levelled playing field for trade and investment between Singapore and the Union and aim to avoid a race to the bottom in environmental protection when this would affect trade or investment between the

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365 *See* in particular Articles 13.2 and 13.12 EUSFTA and paras. 473 to 477 above.

366 Ibid.

367 *See* para. 466 et seq.

Parties.[368] They are thus inextricably linked with trade and investment liberalization and their incorporation into EUSFTA contributes to the objectives of the Union's commercial policy as it is also in the Union's trade interest that its trading partners commit to uphold a certain level of environmental protection.

3.14.2.6. Obligations on the introduction and implementation of effective measures to combat illegal, unreported and unregulated fishing under Article 13.8

498. Similarly to the second paragraph of Article 13.3(3) in the context of labour agreements, and Article 13.6.2 with respect to environmental agreements, Article 13.8(a) contains an obligation to comply with obligations already undertaken. More specifically, it refers to long-term conservation measures and sustainable exploitation of fish stocks as defined in the international instruments ratified by the Parties and the principles of the Food and Agriculture Organization of the UN (hereinafter referred to as "FAO") and relevant UN instruments relating to these issues:

> *(a) comply with long-term conservation measures and sustainable exploitation of fish stocks as defined in the international instruments ratified by the respective Parties and uphold the principles of the Food and Agriculture Organization of the UN (hereinafter referred to as "FAO") and relevant UN instruments relating to these issues;*

499. Article 13.8(b) contains an obligation to introduce and implement effective measures to combat illegal, unreported and unregulated (hereinafter referred to as "IUU") fishing and an obligation to facilitate the prevention of products from such fishing from entering the trade flows and facilitate the exchange of information in that regard. Parties also undertake, pursuant to Article 13.8(c) to adopt effective monitoring and control measures to ensure compliance with conservation measures, such as appropriate Port State Measures. In addition, Parties commit, pursuant to Article 13.8(d) to uphold the principles of the FAO *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* and respect the relevant provisions of the FAO *Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing:*

[368] *See* in particular Articles 13.2 and 13.12 EUFTA and paras. 473 to 477 above.

(b) introduce and implement effective measures to combat illegal, unreported and unregulated (hereinafter referred to as "IUU") fishing, including cooperating with Regional Fisheries Managements Organisations and implementing their Catch Documentation or Certification Schemes for the export of fish and fish products when required. The Parties shall also facilitate the prevention of IUU products from trade flows and the exchange of information on IUU activities;

(c) adopt effective monitoring and control measures to ensure compliance with conservation measures, such as appropriate Port State Measures; and

(d) uphold the principles of the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas and respect the relevant provisions of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing.

500. As already noted, in committing to effectively implement the agreements to which it is party, the Union does not enter into new obligations, it merely reaffirms the commitments already assumed[369] in the context of a trade agreement. This different context in turn informs the choice of legal basis.

501. It is undisputed that trade-measures can constitute an adequate instrument to achieve non-trade conservation objectives without being for that reason excluded from the sphere of the common commercial policy.[370] Inadequate fisheries management, illegal unreported and unregulated (IUU) fishing can have distorting and diverting impacts on international trade. Similarly, inadequate global trade regimes that fail to provide disincentives to, and even support, the international trade in overfished species may render national and regional[371] conservation

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[369] In accordance with Article 3(1)(d) TFEU, the European Union is exclusively competent to adopt measures for the conservation of fishery resources under the common fisheries policy. It is also competent to enter into agreements with third countries and within the framework of international organisations. (E.g. both FAO agreements explicitly referred to in Article 13.8(d) were concluded by the Union in exercise of its exclusive competence for the common fisheries policy (*see* 96/428/EC: *Council Decision of 25 June 1996 on acceptance by the Community of the Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas*; OJ L 177 of 16/07/1996, p.24; 2011/443/EU: *Council Decision of 20 June 2011 on the approval, on behalf of the European Union, of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*; OJ L191 of 22/07/2011, p.1).)

[370] For instance, trade bans prevent the problem of illicit wildlife trade from being disguised as legal trade (*Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards,* OJ L 308, 09.11.1991, p. 1; *Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur*, OJ L 343, 27.12.2007, p. 1–4)

[371] It should be noted that measures have already been taken at Union level to combat IUU fishing (*see Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to*

measures wholly ineffective. In the medium to long run such inadequate trade regimes that fail to discourage or even support trade in overfished species can end up in eliminating all trade in such species. The Commission therefore submits that these commitments are inextricably linked with international trade, because they are intended to promote, facilitate and govern trade. Their incorporation into EUSFTA contributes to the objectives of the Union's commercial policy as defined by the Treaties and interpreted by the Court of Justice.

3.14.2.7. Commitment not to waive from environmental and labour laws under Article 13.12

502. Article 13.12 EUSFTA contains a prohibition, which flows from the recognition contained in Article 13.1(3) that it is inappropriate to attract trade or investment by weakening or reducing the levels of protection embodied in domestic environmental or labour laws. Article 13.12(1) on upholding the levels of protection deals with the regulatory framework, whereas Article 13.12(2) addresses implementation, more specifically it prohibits the failure to effectively enforce the Party's environmental and labour laws through sustained action or inaction in a manner affecting trade or investment.

503. Article 13.12 provides that:

> *1. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental and labour laws, in a manner affecting trade or investment between the Parties.*
>
> *2. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.*

504. This provision falls under the heading "Upholding Levels of Protection" and seeks to maintain the current levels of protection in the field of environment or labour law. The primary purpose of this prohibition is to prevent deregulatory pressures that would lead to a race to the bottom in environmental and labour regulation. Its inclusion in the Chapter supports the premise that the main objective of the

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prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU Regulation), OJ L 286, 29.10.2008, p.1; and *Commission Regulation (EC) No 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008*, OJ L 280, 27.10.2009, p. 5).

EUSFTA Sustainable Development Chapter is trade and not sustainable development, environment or labour protection.

505. As drafted, this commitment would apply to all environmental and labour laws adopted by the Union and Singapore. Existing levels of protection could be waived or otherwise derogated from only when this does not affect trade or investment between the Parties. This provision also has to be read in conjunction with Article 13.2 entitled "Right to Regulate and Levels of Protection", which recognises that each Party has the right to establish its own levels of environmental and labour protection as well as to adopt or modify accordingly its relevant laws and policies in consistence with principles of internationally defined standards or agreements to which it is a party and which are referred to elsewhere in EUSFTA (notably, Articles 13.3 and 13.6).

3.15. Transparency (Chapter 14)

506. Chapter 14 of EUSFTA is a horizontal chapter laying down rules on transparency in respect of measures relating to the matters covered by the other chapters of EUSFTA. Chapter 14 is residual in nature, in the sense that it applies subject to any other, more specific, provisions on transparency that may be contained in other chapters of EUSFTA.[372]

507. The "objectives and scope" of Chapter 14 of EUSFTA are described as follows in Article 14.2 EUSFTA:

> *Recognising the impact which their respective regulatory environments may have on trade and investment between them, the Parties shall pursue a transparent and predictable regulatory environment for economic operators, including small and medium-sized enterprises, doing business in their territories.*
>
> *The Parties, reaffirming their respective commitments under the WTO Agreement, hereby lay down clarifications and improved arrangements for transparency, consultation and better administration of measures of general application.*

508. Chapter 14 of EUSFTA consists of provisions on "publication regarding measures of general application" (Article 14.3 EUSFTA); "enquiries and contact points" (Article 14.4 EUSFTA); "administrative proceedings" (Article 14.5 EUSFTA);

[372] Article 14.8 EUSFTA.

"review of administrative actions" (Article 14.6 EUSFTA); and "regulatory quality and performance and good administrative behaviour" (Article 14.8 EUSFTA).

509. The Commission considers that Chapter 14 of EUSFTA falls within the scope of the Union's exclusive competence. First, the objective of Chapter 14 of EUSFTA is to facilitate trade and investment between the Parties by allowing operators to get better acquainted with each Party's laws and regulations on trade and investment and by ensuring that operators are afforded adequate opportunities to submit their views and enforce their rights under those laws and regulations in accordance with each Party's own internal procedures. Moreover, the provisions of Chapter 14 of EUSFTA apply only with respect to measures relating to matters that are covered by other chapters of EUSFTA, which themselves fall within the Union's exclusive competence. Last, as confirmed by Article 14.2 EUSFTA, the provisions included in Chapter 14 of EUSFTA seek to clarify and improve already existing provisions on transparency of the WTO Agreement.

510. Despite the above, some Member States have expressed the view that Articles 14.5 EUSFTA ("Administrative proceedings") and 14.6 EUSFTA ("Review of administrative actions") would fall "within Member State competence".[373] The Member States concerned have not explained the grounds for this view so far. For the reasons explained below, the Commission disagrees with that view.

3.15.1. Article 14.5 EUSFTA

511. Article 14.5 EUSFTA provides that:

> *With a view to administering in a consistent, impartial and reasonable manner all measures of general application, each Party, in applying such measures to particular persons, goods or services of the other Party in specific cases, shall:*
>
> *a) endeavour to provide interested persons of the other Party, who are directly affected by a proceeding, with reasonable notice, in accordance with its procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy;*
>
> *b) afford such interested persons a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, insofar as time, the nature of the proceeding and the public interest permit; and*
>
> *c) ensure that its procedures are based on and in accordance with its law.*

[373] Document of the Trade Policy Committee 490/13, dated 17.12.2013 submitted by France and Germany **(Annex 3)**.

512. As made clear by its *chapeau*, Article 14.5 EUSFTA is a mere elaboration of the obligation to administer measures of general application in a consistent, impartial and reasonable manner, which is provided for, *inter alia*, in Article X:3 (a) of the GATT 1994.[374]

513. Furthermore, the provisions of Article 14.5 EUSFTA are strongly qualified:

- the obligation in letter (a) to provide reasonable notice when an administrative proceeding is initiated is just a 'best endeavours' obligation, which moreover must be implemented in accordance with each Party's own procedures;

- the obligation in letter (b) to afford interested persons a reasonable opportunity to present facts and arguments prior to final administrative action applies "only in so far as time, the nature of the proceeding and the public interests permit";

- the obligation in letter (c) to "ensure that its procedures are based on and in accordance with its law" imposes no additional obligation in addition to those which result from each Party's own domestic law.

514. The requirements imposed by Article 14.5 EUSFTA are analogous to those provided for in some WTO agreements, including several agreements of Annex 1A, which the Court found in Opinion 1/94 to be covered in their entirety by the Common Commercial Policy[375]. For example, similar procedural requirements are found in Articles 6 and 12 of the Anti-Dumping Agreement, Articles 12 and 22 of the SCM Agreement, Article 3 of the Agreement on Safeguards or Article 42 of the TRIPs Agreement.

515. Furthermore, the requirements imposed by Article 14.5 EUSFTA reflect basic due process considerations that are part of the general principles of Union law which the Member States would, in any event, have to observe when implementing other chapters of EUSFTA falling within the scope of the Union's exclusive competence.

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[374] Similar provisions are contained in Article VI:1 of the GATS and Article 41.2 of the TRIPs Agreement. *See* also e.g. Article 1.3 of the ILP Agreement and Articles 2 e), 3 d) and 3 e) of the Agreement on Rules of Origin.

[375] Opinion 1/94, EU:C:1994:384, para. 34.

3.15.2. Article 14.6 of EUSFTA

516. Article 14.6 of EUSFTA provides that:

> *1. Each Party shall, subject to its domestic law, establish or maintain judicial, quasi-judicial or administrative tribunals or procedures for the purposes of the prompt review and, where warranted, correction of administrative actions relating to matters covered by this Agreement. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.*
>
> *2. Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:*
>
> *(a) a reasonable opportunity to support or defend their respective positions; and*
>
> *(b) a decision based on the evidence and submissions of record or, where required by its law, the record compiled by the administrative authority.*
>
> *3. Each Party shall ensure, subject to appeal or further review as provided for in its law, that such decision shall be implemented by, and shall govern the practice of, the office or authority with respect to the administrative action at issue.*[376]

517. Article 14.6 EUSFTA reproduces, to a large extent, the requirements already imposed by Article X:3(b) of the GATT 1994 in respect of the trade regulations covered by that provision.[377]

518. Several other agreements of Annex 1A to the WTO Agreement contain specific provisions on the review of administrative decisions. For example, Article 13 of the Anti-dumping Agreement, Article 11 of the Customs Valuation Agreement, Article 2.2.1 of the Agreement on Pre-shipment Inspection, Article 23 of the SCM Agreement and Articles 2 j) and 3 h) of the Agreement on Rules of Origin. Similar provisions are found also in Article VI:2 (a) of the GATS and in Article 41.1 of the TRIPs Agreement.

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[376] Footnote omitted.

[377] ArticleX:3(b) of the GATT states that:

> *Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.*

519. Moreover, like Article 14.5 EUSFTA, Article 14.6 EUSFTA reflects basic due process considerations that are part of the general principles of Union law which the Member States would, in any event, have to observe when implementing other chapters of EUSFTA within the scope of the Union's exclusive competence.

3.16. Dispute Settlement and Mediation (Chapters 15 and 16)

3.16.1. Summary description of the chapter

520. Chapters 15 and 16 are horizontal Chapters laying down rules on dispute settlement and mediation for EUSFTA. Chapter 15 is largely based on the WTO Dispute Settlement Understanding, but adapts the rules contained therein to the bilateral context of EUSFTA. The provisions included in Chapter 16 EUSFTA elaborate and improve on existing provisions on mediation under the DSU (Article 5 DSU).

521. The Dispute Settlement Chapter is divided in four sections. Section A, specifies the objective of the Chapter, which is "to avoid and settle any difference between the Parties concerning the interpretation and application of this Agreement with a view to arrive at, where possible, a mutually acceptable solution" (Article 15.1). It also designates the scope of application of the Chapter, namely "with respect to any difference concerning the interpretation and application of the provisions of this Agreement, except as otherwise expressly provided" (Article 15.2).

522. The first step of the dispute settlement procedure is addressed in Section B (Consultations) (Article 15.3). Through consultations, the Parties attempt to amicably resolve any difference regarding the interpretation and application of the covered provisions of EUSFTA. If the Parties do not find an agreement in the context of consultations, the dispute is referred to an arbitration panel.

523. The provisions relevant to the initiation of an arbitration procedure (Article 15.4), establishment of an arbitration panel (Article 15.5) and the decision of the panel (Articles 15.6 through 15.8) are contained in Section C (Dispute Settlement). This section also contains provisions on compliance obligations (Articles 15.9 and 15.10), the procedure for a possible review of measures taken to comply with the arbitration panel ruling (Article 15.11), and provisions on temporary remedies in case on non-compliance (Article 15.12, Article 15.13).

524. Section D (General Provisions) contains the rules concerning the establishment and updating of the List of Arbitrators, who serve on arbitration panels established under EUSFTA (Article 15.20). It also lays down rules for the choice of forum when the same measure can (or has been) challenged under EUSFTA procedures and the *WTO Agreement* (Article 15.21), rules on time limits (Article 15.22) and a simplified procedure for review of the Dispute Settlement Chapter or its Annexes (Article 15.23).

525. The Dispute Settlement Chapter has two annexes: Annex 15-A, containing the Rules of Procedure for Arbitration, and Annex 15-B, which also applies to Chapter 16 on Mediation, containing the Code of Conduct for Arbitrators and Mediators.

526. Chapter 16 of EUSFTA contains a mediation mechanism. This Chapter is composed of three sections. Section A, lays out the procedure under the mediation mechanism. Under the mediation mechanism, the Parties will be assisted by a mediator that they have jointly agreed, or that has been selected by lot from a list agreed in advance (Article 16.4). The mediator meets with Parties, delivers an advisory opinion and proposes a solution (Article 16.5). The opinion and the proposal of the mediator are not binding: the Parties are free to accept them, or use them as a basis for a solution (Article 16.5(3)). The aim of this mechanism is not to review the legality of a measure, but rather to find a quick and effective solution to a market access problem. The mediation mechanism does not exclude the possibility to have recourse to dispute settlement under EUSFTA, during or after the mediation procedure. Section B contains a provision on the implementation of a mutually agreed solution (Article 16.6). Section C (General Provisions) sets out: the relationship of the mediation procedure with the dispute settlement procedure under EUSFTA (Article 16.7) and rules on time limits (Article 16.8) and costs (Article 16.9). It also provides that the Parties will consult five years after the entry into force to assess the need to modify the mediation mechanism in light of experience gained and the development of the corresponding mechanism in the WTO context (Article 16.10).

3.16.2. Commission's position with regard to the scope and nature of the Union's competence

527. The Commission considers that Chapters 15 and 16 fall within the scope of Article 207 TFEU.

528. First, the rules of procedure for the settling of disputes or disagreements between the Parties regarding the interpretation and/or application of the covered provisions of EUSFTA, as set out in Chapters 15 and 16, are part of the provisions necessary for the effective exercise of rights and obligations under EUSFTA. Without a means of settling disagreements on the interpretation or application of the agreed rules, the rules-based system would be ineffective, because the rights and obligations could not be enforced.

529. Multilateral treaties normally contain detailed dispute resolution provisions. If a dispute, controversy or claim arises out of a treaty (for example, due to breach, error, fraud, performance issues, etc.) these provisions become extremely important. Usually the first resort is to non-formal means of dispute resolution with judicial settlement being the final resort.

530. The Union's competence to conclude agreements providing for a mechanism of dispute settlement has been underlined by the Court in several occasions. Thus, in Opinion 1/91 the Court held that:

> *The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.*[378]

531. The Court reiterated this view in Opinion 1/09[379] and most recently in Opinion 2/13.[380]

532. In practice, the Union is a party to many agreements providing for a dispute settlement mechanism. The Commission negotiates this type of provisions in the context of bilateral and multilateral trade negotiations, and also negotiated them in the context of EUSFTA.

533. As confirmed by the above case-law and practice, the competence with regard to dispute settlement follows necessarily the competence with regard to the substantive provisions of the agreement to be interpreted and applied through dispute settlement in each case. The provisions of Chapters 15 and 16 apply only

[378] Opinion 1/91, EU:C:1991:490, para. 40.

[379] Opinion 1/09, EU:C:2011:123, para.74.

[380] Opinion 2/13, EU:C:2014:2454, para. 182.

with respect to measures relating to matters that are covered by other Chapters of EUSFTA, which themselves fall within the Union's exclusive competence. The dispute settlement and mediation mechanisms thus serve an ancillary role to the substantive rules under the Agreement. In other words, while the substantive rules would be ineffective in the absence of a dispute settlement and mediation mechanism, the latter would serve no purpose at all in the absence of the former. Therefore, the Commission considers that the Union is likewise exclusively competent with regard to Chapters 15 and 16 EUSFTA.

3.17. Institutional, General and Final Provisions (Chapter 17)

534. The Institutional provisions foresee that the agreement will be managed by a Trade Committee which will meet yearly and will set its agenda (Article 17.1). Four specialised committees are also established: (a) the Committee on Trade in Goods, (b) the Committee on Sanitary and Phytosanitary Measures, (c) the Committee on Customs, and (d) the Committee on Trade in Services, Investment and Government Procurement (Article 17.2).

535. Chapter 17 also includes several provisions of horizontal application, usually in the form of exceptions: a so-called taxation 'carve out' (Article 17.6); provisions on current account and capital movements (Article 17.7) and on sovereign wealth funds (Article 17.8); an exception allowing the adoption of measures to safeguard the balance-of-payments (Article 17.9); and a provision setting out the security exceptions (Article 17.10), which is largely based on Articles XXI GATT 1994 and XIV *bis* GATS, and a provision regulating the disclosure of information (Article 17.10).

536. Furthermore, the Parties agree on the procedures to be followed, if any provision of the WTO Agreement that the Parties have incorporated into EUSFTA is amended (Article 17.3); and the method of treaty amendment (Article 17.5). Standard final provisions on entry into force (Article 17.12); duration (Article 17.13); fulfilment of obligations (Article 17.4); confirming absence of direct effect (Article 17.15); on relations with other agreements (Article 17.17); future accessions to the Union (17.18); territorial application (17.19); and listing the languages in which the text is authentic, are also included.

537. The Commission notes that the institutional, general and final clauses of a treaty relate to procedural aspects or horizontally applicable exceptions rather than to substantive aspects of the treaty. The purpose of these clauses is to allow for the easy operation of the treaty and facilitate implementation by the parties.

538. The provisions of Chapter 17 thus serve an ancillary role to the other substantive rules under EUSFTA. They establish an institutional and procedural framework, which ensures the operability and effectiveness of the rights and obligations undertaken under the other Chapters of EUSFTA, which themselves fall within the Union's exclusive competence. Therefore, the Commission considers that Chapter 17 falls within the scope of Union's exclusive competence.

4. CONCLUSION

539. For the reasons set out in this request, the Commission respectfully proposes the Court to answer the question referred to it under Article 218(11) TFEU as follows:

The Union has the necessary competence to conclude alone the Free Trade Agreement with Singapore. Specifically,

(1) *no provision of the envisaged agreement falls within the exclusive competence of the Member States;*

(2) *all the provisions of the envisaged agreement, with the sole exception of those concerning cross-border transport services and portfolio investment, fall within the scope of the Union's Common Commercial Policy, as defined in Article 207(1) TFEU and, therefore, within the Union's exclusive competence pursuant to Article 3(1) TFEU;*

(3) *the provisions on portfolio investment are at least largely covered by the common rules on free movement of capitals contained in Article 63(1) TFEU. The Union is, therefore, exclusively competent in respect of those provisions pursuant to Article 3(2) TFEU.*

(4) *the provisions on transport services are within the exclusive competence of the Union because: (i) as regards establishment of third country transport service suppliers, they fall within the scope of the Union's Common*

Commercial Policy; and (ii) as regards cross-border supply and the presence of natural persons, the Union has adopted common rules that cover largely the area concerned, or those provisions are ancillary to commitments for which the Union has exclusive competence.

Ulrich WÖLKER

Agent for the Commission

Bart DE MEESTER

Agent for the Commission

Martina KOCJAN

Agent for the Commission

Ramón VIDAL-PUIG

Agent for the Commission