The Dynamic of the EU Objectives in the Analysis of the External Competence

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I. Introduction

The link between objectives and competences, inherent in the principle of conferral,[1] is expressed through the choice of legal basis for the conclusion of an international agreement. The legal basis determines the vertical allocation of competences between the European Union (EU) and its Member States. It is identified according to objective factors, amenable to judicial review, such as the aim and content of the international agreement and of the decision of the Council approving it.[2] In choosing the legal basis, ancillary objectives of the international agreement are absorbed by the dominant ones.[3]

However, the nature of the EU competence is not necessarily determined by the identified legal basis. Indeed, if the legal basis is an express external competence, the nature of the Union's competence stems from the Treaties. In contrast, if the legal basis is an internal competence, the nature of the EU external competence is dependent on the exclusivity criteria of

1 See Article 5, paragraph 1, of the Treaty on the European Union (TEU) : "Under the principle of conferral, the Union s hall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein".

2 Among the abundant literature: S. Adam, "The Legal Basis of International Agreements of the European Union in the Post-Lisbon Era", in I. Govaere and others (eds), *The European Union in the World; Essays in Honor of Marc Maresceau* (Leiden: Martinus Nijhoff, 2014), 78; M. Klamert, "Conflicts of Legal Basis: no Legality and no Basis but a Bright Future under the Lisbon Treaty", *European Law Review* 35, no. 4 (2010), 497; P. Koutrakos, "Legal Basis and Delimitation of Competence in EU External Relations", in M. Cremona, B. De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart Publishing, 2008), 171; K. Lenaerts, "EU Federalism in 3D", in E. Cloots, G. De Baere, S. Sottiaux (eds), *Federalism in the European Union* (Oxford: Hart Publishing, 2012), 23. See also, in this volume, the chapter by Mauro Gatti.

3 See also the chapter by Merijn Chamon in this volume.

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Article 3, paragraph 2, of the Treaty on the Functioning of the European Union (TFEU),[4] which are not necessarily relevant to the legal basis: the legal basis of the internal measures has no importance for the exclusivity of EU external competence according to the criterion of affecting the common rules or altering their scope or according to the condition of a provision in a legislative act.

Given that the determination of the nature of the EU external competence is decisive for the conclusion of an international agreement by the Union alone, or jointly by the Union and its Member States,[5] the choice of the legal basis according to objective criteria related to the provisions of an international agreement is not sufficient. While in the internal field the definition of the legal basis of the EU competence implies either its unconditional exercise (exclusive competence) or its exercise according to the principle of subsidiarity (non-exclusive competence), in the external field the definition of the legal basis does not answer the questions as to whether the exclusivity criteria of Article 3, paragraph 2, TFEU are met, or as to whether the conclusion of an agreement by the Union alone is possible in case of shared external competence, following Article 216, paragraph 1, TFEU.[6] From a vertical division of competences perspective and

4 "The Union shall also have exclusive competence for the conclusion of an international agreement 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".

5 Undoubtedly, an international agreement falling under the EU's exclusive competence is to be approved by the Union alone. However, an agreement falling under the Union's shared competence is not necessarily a mixed agreement. See: A. Dashwood, "Mixity in the Era of the Treaty of Lisbon", in C. Hillion, P. Koutrakos (eds), *Mixed Agreements Revisited* (Oxford: Hart Publishing, 2010), 356; E. Neframi, "Vertical Division of Competences and the Objectives of the European Union's External Action", in M. Cremona, A. Thies (eds), *The Court of Justice of the European Union and External Relations Law – Constitutional Challenges* (Oxford: Oxford University Press, 2014), 73; A. Rosas, "Exclusive, Shared and National Competence in the Context of EU External Relations: Do such Distinctions Matter?", in I. Govaere and others (eds), *The European Union in the World; Essays in Honor of Marc Maresceau* (Leiden: Martinus Nijhoff, 2014) 17. See also, in this volume, the chapter by M. Chamon.

6 "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".

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because of the requirement of effectiveness and the need to define whether the Union may conclude an international agreement alone or together with its Member States, the question "does the Union have exclusive competence to conclude an international agreement" prevails over the question "what is the legal basis for the conclusion of an international agreement".

Taking the nature of the EU competence as the decisive criterion for the vertical division of the external competences implies an EU-objectives-oriented analysis.

The external competence of the Union is exclusive if the international agreement falls under the common commercial policy (CCP).[7] Consequently, provided that the international agreement has a link to international trade, the starting point for the competence question analysis is the CCP's scope, which is defined according to the Union's objectives and which may lead to a broader conception of the trade objective when compared to a situation in which the starting point is an analysis of the objective of the international agreement (II).

If an agreement does not fall under the scope of the CCP, the next step is to assess the exclusive nature of the Union's implied external competence. The Court of Justice first examines the criteria of Article 3, paragraph 2, TFEU,[8] especially whether the conclusion of the agreement affects common rules or alters their scope according to the *ERTA* doctrine.[9] In this context, as is well known, the exclusive external competence of the Union stems not only from the objective comparison of EU internal rules with the provisions of the international agreement, but also from an analysis of the scope, nature and content thereof, "bearing in mind that account must be taken not only of (EU) law as it now stands in the area in question but also of its future development".[10] Besides, it is considered essential to "ensure a uniform, consistent application of the (EU) rules and the proper functioning of the system they establish in order for the full effectiveness of (EU) law to be preserved".[11] As a consequence, the EU-objectives ana-

7 Pursuant to Article 3, paragraph 1, TFEU, "(t)he Union shall have exclusive competence in the following areas: (…) (e) common commercial policy".

8 *Supra* note 4.

9 Judgment of 31 March 1971, *Commission* v *Council (European Agreement on Road Transport -ERTA),* 22/70, EU:C:1971:32.

10 Opinion of 7 February 2006, 1/03, *Competence of the Community to conclude the new Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,* EU:C:2006:81, para 126.

11 *Id.,* para 128.

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lysis prevails over a neutral comparison of the EU's and the international agreement's provisions. Moreover, the definition of the legal basis has no importance for the vertical division of competences, once the criterion of Article 3, paragraph 2, TFEU is met (III).

If a Union's external implied competence turns out not to be exclusive, the Court's next step is to answer the question as to whether the conclusion of a mixed agreement is mandatory.[12] The ability of the Union to exercise its competence directly in external fields depends, however, on the objective pursued. Article 216, paragraph 1, TFEU is also based on an EU-objectives approach, entailing a particular dynamic in the exercise of the EU external competence (IV).

However, the EU-objectives-oriented analysis of the question of the competence to conclude an international agreement is not without ambiguity. It may impact the classic distinction between substantive and ancillary provisions of the international agreement, which is not necessarily in line with effectiveness (V).

II. The Scope of the Common Commercial Policy

The definition of the scope of the CCP in order to establish the exclusivity of the Union's external competence follows a methodology close to that of the choice of legal basis, according to which certain objective factors, such as the content and the purpose of the international agreement, are evaluated.[13] However, as the Court of Justice's starting point, from an effectiveness-oriented EU approach, is to define the scope of any exclusive EU competence, the initial objective examination of the content and the purpose of the international agreement is highly influenced by the EU objectives expressed in Article 207, paragraph 1, TFEU,[14] which leads to a

12 *Supra,* note 5.

13 B. Van Vooren, R. Wessel, *EU External Relations Law* (Cambridge : Cambridge University Press, 2014), 158.

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

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global approach to the provisions of the international agreement (A) and to a global approach to the EU objectives (B).

A. *The Global Approach to the International Agreement*

In order to determine whether an international agreement falls under the scope of the CCP, the Court of Justice, following well-settled jurisprudence, examines the link between the agreement and international trade and its effects thereon.[15] The objective-factors-based approach is followed as far as the link between the agreement and international trade and its effects thereon are not evident. The Court of Justice applies, thus, the absorption doctrine, in order to distinguish between the main and the ancillary objectives of the international agreement. For instance, in Opinion 3/15, the Court of Justice held that the non-commercial objective of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled, prevailed and, without naming a legal basis for the conclusion of that agreement, excluded it from the scope of the CCP.[16] Following an objective examination of the purpose and the content of the Lisbon Agreement on Appellations of Origin and Geographical Indications, and after examining its specific link to international trade and its effects thereon, the Court of Justice held that its commercial purpose prevailed, such that the agreement fell under the scope of the CCP.[17]

The delimitation of the scope of the CCP is more complex where the commercial purpose of the agreement as a whole is not contested, but where some of its provisions are not classic CCP instruments. In other

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shall be conducted in the context of the principles and objectives of the Union's external action".

15 M. Cremona, "Balancing Union and Member State Interests: Opinion 1/2008, Choice of Legal Base and the Common Commercial Policy under the Treaty of Lisbon", *European Law Review* 35 (2010), 678; C. Kaddous, " The Transformation of the EU Common Commercial Policy ", in P. Eeckhout, M. Lopez Escudero (eds), *The European Union's External Action in Times of Crisis*, (Oxford: Hart Publishing, 2016), 429.

16 Opinion of 14 February 2017, 3/15, *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled,* EU:C:2017:114.

17 Judgment of 27 October 2017, *Commission* v *Council,* C-389/15, EU:C:2017:798.

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words, the question as to whether provisions of a trade agreement, which lead to the harmonisation of internal provisions, still fall under the scope of the CCP remains. In its recent case law, the Court of Justice, starting from the Treaty drafters' objective as expressed in Article 207 TFEU, adopted a global approach to international trade agreements, thereby abandoning a fragmented instrumental approach that distinguished the content of specific provisions from the content of the agreement as a whole.

More precisely, the Court's interpretation was based on the objective of reforming the CCP to reinforce the role of the Union as a global commercial actor, especially in the framework of the World Trade Organisation (WTO). As is well known, the scope of the CCP, in view of the conclusion of the WTO agreements, had been limited by the Court's instrumental approach, which led the Court of Justice to find that those provisions of the General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that had harmonizing effect and affected the internal market could not be considered as instruments of the CCP, despite the obvious link between the agreements and international trade.[18] The fragmented interpretation of the GATS and the TRIPS agreements has since been abandoned in subsequent case law following the entry into force of the Lisbon Treaty. As was already pointed out,[19] the Court of Justice interpreted the scope of the CCP with regard to the WTO agreements from the perspective of the objective expressed in Article 207 TFEU.

In *Daiichi Sankyo and Sanofi-Aventis Deutschland,*[20] the Court highlighted that only rules that have a specific link to international trade may be covered by the concept of "commercial aspects of intellectual property" as referred to in Article 207 TFEU.[21] However, instead of examining Article 27 of the TRIPS agreement – a provision setting out the framework for

18 Opinion of 15 November 1994, 1/94, *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property*, EU:C:1994:384.

19 See, in this volume, the chapter by Marise Cremona.

20 Judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland,* C-414/11, EU:C:2013:520.

21 For a comment, see L. Ankersmit, "The Scope of the Common Commercial Policy after Lisbon: The *Daiichi Sankyo* and *Conditional Access Services* Grand Chamber Judgments", *Legal Issues of Economic Integration,* 41 (2014), 193; A. Dimopoulos, P. Vantsiouri, "Of TRIPS and Traps: the Interpretative Jurisdiction of the Court of Justice of the EU over Patent Law", *European Law Review* 39, no. 2

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patent protection – for links to international trade in order to classify its "commercial aspect", the Court took the scope of the CCP as its starting point. It observed that the scope of Article 207 TFEU was intended to cover the TRIPS agreement, which makes the whole agreement a CCP instrument. In other words, the objective of the reform of Article 207 TFEU was to cover agreements having a specific link to international trade. As Advocate General Villalon pointed out, the connection between the wording of Article 207, paragraph 1, TFEU and the wording of the TRIPS agreement is very powerful as an idea. "That peculiar expression 'commercial aspects' would not have entered primary law had an international agreement entitled the 'TRIPs' Agreement not existed for over a decade".[22] Even if he does not arrive at the same conclusion as the Court of Justice, Advocate General Villalon observed that the effectiveness of Article 207 TFEU, which introduced a real reform to the scope of the CCP, is to be taken into consideration by excluding a strict interpretation of the term "commercial aspects". Contrary to the opinion held by Advocate General Villalon, who opined that the commercial aspects of intellectual property rights do not cover harmonization instruments, such as Article 27 of the TRIPS Agreement, the Court of Justice held that the harmonizing effect of Article 27 is absorbed by the connection between the TRIPS Agreement and international trade. To put it differently, starting from the EU objective to incorporate WTO agreements in the scope of the CCP, the scope of the Union's exclusive competence is now determined by the functionality of the agreement as a whole, which makes it a CCP instrument in its entirety, despite the harmonizing effect of some of its provisions.

The Court has taken the same position in other cases beyond WTO agreements: measures having a specific link to international trade, due to their objectives, fall under the scope of the CCP and not under the external aspect of the internal market competence, even though the adoption of those measures may lead to the harmonisation of internal provisions. The *Commission* v *Council* case related to the legal basis for the Council's decision to conclude the European Convention on the legal protection of ser-

(2014), 210; J. Larik, "No Mixed Feelings: The post-Lisbon Common Commercial Policy in *Daiichi Sankyo* and *Commission* v *Council (Conditionnal Access Convention)", Common Market Law Review* 52, no. 3 (2015), 779.

22 Opinion of AG Villalon of 31 January 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:49, para 64.

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vices based on, or consisting of, conditional access.[23] The Court found that the principal objective of the convention was to promote international trade and, thus, presented the obligatory specific link to international trade that made it a CCP instrument. Despite the existence of EU internal market rules covering the same subject and, thus, liable to support an implied external competence, the Court held that internal-market oriented measures, even stemming from the convention, were not incompatible with the CCP's scope. As Advocate General Kokott pointed out,[24] a CCP measure may lead to harmonisation of national legislation, while harmonisation of national legislation may no longer give rise to an external competence, as long as the international agreement is intended to promote trade.

With the enlargement of the scope of the CCP the Court abandons the strict parallelism between external and internal competence. The dynamic of the Union's external competence in the field of international trade is expressed through a functionalist approach that dissociates the CCP from the external aspect of the internal market: as far as a link between an agreement and international trade is established, the agreement is deemed to be a CCP instrument, despite the existence of provisions affecting the internal market, even if the concrete implementation thereof requires recourse to an internal-competence legal basis. While the WTO agreements are considered CCP instruments because of the objective underlying the reform of Article 207 TFEU, coherence implies that the effect of such an approach be generalized to all agreements with trade objective, which is thus globally assessed. The decisive element in the establishment of the link between the CCP and any potential agreement is, therefore, the identification of its international trade objective, which, beyond the WTO agreements, may stem from a classic balancing between its predominant and incidental purposes.

B. The Global Approach of the EU's Objectives

The so-called new generation of free trade agreements (NGFTAs) contain provisions falling under the CCP scope, as enlarged by the Lisbon Treaty and the Court of Justice's interpretation, such as foreign direct investment

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23 Judgment of 22 October 2013, *Commission* v *Council*, C-137/12, EU:C:2013:675.

24 Opinion of AG Kokott of 27 June 2013, *Commission* v *Council*, C-137/12, EU:C:2013:441, para 66.

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and intellectual property. However, the CCP scope does not cover the NGFTAs in their entirety. Because of their comprehensive approach, which incorporates various trade-related objectives, such as non-direct investment, public procurement, competition, and sustainable development, the NGFTAs need a detailed analysis as to the nature of the EU external competence, despite their undoubted trade objective.[25]

In Opinion 2/15, addressing the competence of the Union to conclude the free trade agreement with the Republic of Singapore (EUSFTA),[26] the Court of Justice was asked to clarify the link between the common commercial policy and the sustainable development provisions of the agreement. The EUSFTA contains, in its Chapter 13 entitled “Trade and Sustainable Development”, provisions related to labour and environmental protection. Those provisions impose obligations on the parties to promote their bilateral trade and economic relationship in such a way as to contribute to sustainable development, to establish environmental and labour protection, and to adopt or modify their relevant laws and policies in a manner consistent with the agreements to which they are a party. The inclusion of sustainable development provisions in the EUSFTA aims at balancing free trade with social and environmental protection, by avoiding a reduction in the second in favor of the first and by avoiding to apply the standards of protection in a protectionist manner. According to the horizontal dimension of the absorption doctrine, the question is which of the objectives – trade, social, and/or environmental protection – are ancillary and, consequently, absorbed by the main objective.

However, in Opinion 2/15, the Court of Justice did not apply the center of gravity test. Rather, it found that the sustainable development provisions did not express a proper objective and that the trade objective was

25 As AG Sharpston pointed out in her opinion concerning the conclusion of the EU-Singapore free trade agreement: “The EUSFTA is a very heterogeneous agreement. That means that, of necessity, the analysis to establish competence and its (exclusive or shared) nature will need (depending on the context) to focus on an individual chapter or groups of chapters of the EUSFTA, on a part or parts of that agreement or, occasionally, on an individual provision”. Opinion of AG Sharpston of 21 December 2016, Opinion 2/15, *Free Trade Agreement between the European Union and the Republic of Singapore*, EU:C:2016:992, para 82.

26 Opinion of 16 May 2017, 2/15, *Free Trade Agreement between the European Union and the Republic of Singapore*, EU:C:2017:376. See: M. Dony, “L’avis 2/15 de la Cour de justice: un 'jugement de Salomon?'”, *Revue trimestrielle de droit européen* 53, no. 3 (2017), 525.

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broad enough to cover social and environmental protection purposes. As a consequence, sustainable development provisions were found not to be ancillary objectives, but part of the CCP, instead.[27]

The reasoning of the Court of Justice was based on the global approach to the external action objectives pursuant to Article 21 TEU,[28] which finds a specific expression in Article 207, paragraph 1, TFEU: "(t)he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action". It, thus, held that the sustainable development provisions of the EUSFTA were an integral part of the CCP and were not to be examined as autonomous objectives, giving rise to a different competence than that of Article 207 TFEU.

The Court's perspective on the global approach of external action objectives differs from its usual center of gravity test in the examination of the different objectives of an international agreement and leads to a broad conception of the CCP objective. This was not the position of Advocate General Sharpston, who examined the sustainable development provisions of the EUSFTA as the expression of autonomous objectives giving rise to a proper competence question. Advocate General Sharpston did not apply the center of gravity test either, because the choice of the legal basis was not necessary, but instead directly considered the sustainable development objectives as distinctive and stand-alone objective, which led to the recognition, in her opinion, of a shared competence in environmental and social protection fields.[29]

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27 S. Schacherer, *The EU as a Global Actor in Reforming the International Investment Law Regime in Light of Sustainable Development,* (Geneva Jean Monnet Working Paper, 1/2017).

28 Article 21 TEU states especially in paras 2 and 3: "2. 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:(a) safeguard its values, fundamental interests, security, independence and integrity; (…) (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (…) (h) promote an international system based on stronger multilateral cooperation and good global governance. 3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies".

29 Opinion of 21 December 2016, *supra* note 25, paras 489-503.

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The position of the Court of Justice, which held that the CCP objective covers environmental and social protection, distinguished the CCP from implied external competences. Indeed, the Court of Justice could have reached the same result – that is, recognising the broad scope of the CCP and the exclusive competence of the Union – if it had found that sustainable development provisions did not occupy an important place in the agreement and were, thus, absorbed by the CCP provisions. Indeed, the Court of Justice, in the same Opinion 2/15, took that very position with regard to some of the transport policy provisions (see *infra)*. By recognizing the broad scope of the CCP, through its global approach to external action objectives, the Court of Justice gave a specific – broad – dimension to the trade objective. Such a broad conception of the CCP objective implies a broad conception of the CCP competence: the CCP competence, consequently, may cover sustainable development objectives, absorbed by the trade objective as conceived in the global approach of Articles 21 TEU and 207 TFEU, without passing the center of gravity test or an assessment of the importance of the provisions under question in the specific context. The Union's global approach to external action objectives may, in that sense, be considered as prevailing over a determination of the Union's competence according to objective factors in relation to any particular agreement.

However, the Court of Justice also justified its position with regard to objective factors by highlighting that the sustainable development provisions of the EUSFTA could be considered a basis for an EU competence because of their non-prescriptive nature. The Court specifically held that "it is not the Parties' intention to harmonise the labour or environment standards of the Parties" and that the provisions under question "are intended not to regulate the levels of social and environmental protection in the Parties' respective territory but to govern trade between the European Union and the Republic of Singapore by making liberalisation of that trade subject to the condition that the Parties comply with their international obligations concerning social protection of workers and environmental protection".[30] Sustainable development provisions were, thus, assimilated to ancillary provisions, which do not create new substantive obligations and, as a consequence, did not raise the question of the Union's competence with regard thereto.

30 Opinion of 16 May 2017, 2/15, *supra* note 26, paras 165, 166.

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It should nevertheless be noted that the reasoning of the Court of Justice is not without ambiguity. The Court justified the integration of the sustainable development provisions in the scope of the CCP also because of their effects on trade. The provisions of Chapter 13 of the EUSFTA do indeed affect trade in different ways: by balancing the standards of social and environmental protection against liberalization of trade; by eliminating disparities between the costs of producing goods and supplying services in the European Union and Singapore; and by suspending the liberalization of trade in case of breach of the provisions concerning social protection of workers and environmental protection.[31] The emphasis on the effects on trade of the sustainable development provisions is not justified if the latter are considered non-prescriptive – and thus as absorbed by the CCP objective. The effects on trade are usually examined in order to determine whether or not substantive provisions of an international agreement – which pursue their own objective – fall under the scope of the CCP. However, if the Court of Justice found the sustainable development provisions substantive, they could not fall under the scope of the CCP, because the first condition, especially intended to promote and regulate trade, would not have been met. The global approach perspective of the Union's external action objectives, instead of that of the qualification of the sustainable development provisions as CCP provisions because of their content, allowed the Court of Justice to accommodate the broad scope of the CCP with the principle of conferral: the CCP objective covers sustainable development as far as the corresponding provisions do not pursue an autonomous objective and are integral part of the CCP, which is justified through their effects on trade.

III. EU Objectives and the EU's Exclusive Implied External Competence

Despite the Court's broad conception of the CCP scope, some provisions of an international trade agreement, especially of the NGFTAs, may still not fall under Article 207 TFEU. The next step in the reasoning of the Court of Justice is to establish exclusivity according to the criteria of Article 3, paragraph 2, TFEU, concerning implied external competences.[32] In

31 *Id.,* paras 157-161.
32 F. Castillo de la Torre, "The Court of Justice and External Competences After Lisbon: Some Reflections on the Latest Case Law", in P. Eeckhout, M. Lopez Escud-

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that case too, the EU-objectives approach prevails over the objective-factors-based examination of the international agreement.

In examining Article 3, paragraph 2, TFEU's exclusivity criterion of affecting common rules or altering their scope, it is established case law that, insofar as the area addressed by an international agreement is not fully covered by internal rules and, thus, there is no *ERTA*-exclusivity based on field-preemption, and insofar as there is no conflict-preemption, in the sense of antinomy between the agreement and the common rules, exclusivity of the Union's competence may stem from the cross-examination of EU and international rules.[33] According to the Court of Justice, the exclusive implied competence of the Union "must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the EU law in force. That analysis must take into account the areas covered, respectively, by the rules of EU law and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish".[34]

It is inherent in the rationale of implied external competences that their dynamic is driven by the scope of the corresponding EU objectives, which may be broader than the scope of the internal rules that the exclusivity of the external competence aims to preserve. Indeed, exclusivity stems not only from conflict and overlap between EU and international rules, but

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ero (eds), *The European Union's External Action in Times of Crisis* (Oxford: Hart Publishing, 2016), 129.

33 A. Arena, "Exercise of EU Competences and Pre-emption of Member States' Powers in the Internal and the External Sphere: Towards 'Grand Unification'?", *Yearbook of European Law,* 35, no. 1 (2016), 28, at 64. M. Cremona, "EU External Relations: Unity and Conferral of Powers", in L. Azoulai (ed), *The Question of Competence in the European Union* (Oxford: Oxford University Press, 2014), 69; R. Schütze, "The *ERTA* Doctrine and Cooperative Federalism", in R. Schütze, *Foreign Affairs and the EU Constitution Selected Essays* (Cambridge: Cambridge University Press, 2014), 287.

34 Opinion of 14 October 2014, 1/13, *Convention on the Civil Aspects of International Child Abduction*, EU:C:2014:2303, para 71; Judgment of 26 November 2014, *Green Network*, C-66/13, EU:C:2014:2399, para 29; Opinion of 14 February 2017, 3/15, *supra* note 16, para 108. See I. Govaere, "Setting the International Scene: EU External Competence and Procedures Post-Lisbon Revisited in the Light of ECJ Opinion 1/13", *Common Market Law Review* 53, no. 5 (2015), 1277.

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also from the overlap between those objectives pursued by the EU internal rules and those pursued by the rules of the international agreement. The objectives-based-approach marks an expansion of the scope of the alteration criterion as a basis for *ERTA*-exclusivity,[35] even in case common rules are not properly affected by the provisions of an international agreement. If the provisions of the international agreement do not cover the same issues as the internal EU rules, but are an expression of the pursuit of the same objective, implied external competence of the Union is exclusive in order to ensure the proper functioning of the system and to preserve the future development of the EU internal rules. The expression "to a large extent covered by common rules" with regard to the field addressed by the exclusive implied external competence of the Union is to be understood in the light of the Union's objectives that determine the extent of the exercise of the corresponding competence. Such an approach justifies not only the proper meaning of the altering the scope of the common rules criterion, but also justifies the exclusive implied external competence of the Union with regard to the principle of conferral.

More precisely, the exercise of the internal shared competence of the Union implies a vertical balancing under the principle of subsidiarity, in order to assess the necessity of its exercise with regard to the Member States' action and with regard to their corresponding objective(s). The material scope of the adopted rules depends on the EU's choice in the exercise of the competence that the pursuit of the objective(s) justified. The material scope of the internal rules determines the scope of the internal, but not the scope of the external, preemption.[36] To the extent provisions of

35 A. Arena, *supra* note 33, at 82.

36 In *Commission* v *Council,* the *Neighbouring Rights of Broadcasting Organisations* case, the Court of Justice held that, Protocol (No 25) on the exercise of shared competence, the sole article of which states that, "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area", concerns, as is evident from its wording, only Article 2, paragraph 2, TFEU and not Article 3, paragraph 2, TFEU. It therefore seeks to define the scope of the exercise by the European Union of a shared competence with the Member States which was conferred on it by the Treaties, and not to limit the scope of the exclusive external competence of the European Union in the cases referred to in Article 3, paragraph 2, TFEU. Judgment of 4 September 2014, *Commission* v *Council,* C-114/12, EU:C:2014:2151, para 73. See, F. Castillo de la Torre, *supra* note 32, at 157.

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an international agreement deal with issues that could have been covered by the internal rules if the institutions had made a different choice, their conclusion does not need a new assessment of the need to exercise Union competence with regard to that of the Member States: the implied external competence of the Union is exclusive, despite the absence of internal field-preemption, because the international commitments pursue the same objective as the internal rules and, thus, they alter the scope of the common rules, by completing them. Consequently, the *ERTA*-exclusivity is to be assessed with regard to the scope of the Union's objective at the basis of the internal rules.

In the *Neighbouring Rights of Broadcasting Organisations* case, the Court of Justice acknowledged the exclusive nature of the implied external competence of the Union to conclude the Council of Europe's convention despite the fact that the scope of that convention and that of the relevant EU directives did not coincide completely.[37] Starting from the objective of protecting the broadcasting organisation's neighbouring rights, which were common to both the EU directives and the convention, the Court determined that the convention's extension of the protection to pre-broadcasting signals and to retransmission by wire, which issues were not covered by the EU rules, still fell under exclusive EU external competence. While Advocate General Sharspston adopted a different position, based on the absence of affectation of the common rules,[38] the position of the Court can be justified, in view of the principle of conferral, if one assumes that the international convention enlarged the scope of the common rules without requiring a new assessment of the necessity to exercise its competence.

The differentiation between the scope of the rules and the scope of the objectives is clearer when there is complete harmonisation, where Member States have discretion to derogate from the common rules. Indeed, in the case of complete harmonisation, the provisions of an international agreement on an issue falling within the Member States' discretion still fall under exclusive implied EU external competence, as any discretion to derogate from EU law is entirely controlled by the harmonising measures

37 *Supra* note 36.
38 Opinion of AG Sharpston of 3 April 2014, *Commission* v *Council,* C-114/12, EU:C:2014:224, paras 144-166.

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themselves.[39] In contrast, in the case of minimum harmonisation of the Member States' legislation, the Member States' competence to adopt stricter rules remains untouched, but exclusivity stems from exhaustive harmonisation.[40] An international rule entering in the Member States' sphere goes beyond the objective of the exercised competence of the Union and, as such, does not fall under exclusive EU competence, unless the international rule overlaps and is at odds with the EU rule (conflict preemption).

More problematic has been the establishment of the Article 3, paragraph 2, TFEU exclusivity in Opinion 3/15, concerning the competence of the Union to approve the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled.[41] At the moment of the request of the Opinion,[42] Directive 2001/29[43] did not harmonise the exceptions and limitations to the protected copyright and related rights, while the Marrakesh Treaty renders such exceptions and limitations mandatory, for the benefit of persons with disabilities. The Court of Justice found that the Member States' discretion in implementing their option to provide for an exception or limitation for the benefit of persons with disabilities "derives from the decision of the EU legislature to grant the Member States that option, within the harmonised legal framework which Directive 2001/29 establishes".[44] The Court held

39 The Court of Justice held that "the fact that [a] Directive provides for certain derogations or refers in certain cases to national law does not mean that in regard to the matters which it regulates harmonisation is not complete". Judgment of 25 April 2002, *Commission* v *France*, C-52/00, EU:C:2002:252, para 19.

40 Opinion of 19 March 1993, 2/91, *Convention no. 170 of the International Labour Organization concerning safety in the use of chemicals at work,* EU:C:1993:106. See R. Schütze, "Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption", *Common Market Law Review*, 43, no. 4 (2006), 1023.

41 Opinion of 14 February 2017, 3/15, *supra* note 16. See A. Arena, "The *ERTA* Pre-emption Effects of Minimum and Partial Harmonisation Directives: Insights from Opinion 3/15 on the Competence to Conclude the Marrakesh Treaty", *European Law Review* no. 5 (2018), forthcoming.

42 Since the delivery of Opinion 3/15, the EU legislature has carried out a full harmonisation of copyright exceptions and limitations for the benefit of persons with visual disabilities. See Regulation (EU) 2017/1563, OJ 2017 L242/1; Directive (EU) 2017/1564, OJ 2017 L242/6.

43 OJ 2001 L167/10.

44 Opinion of 14 February 2017, 3/15, *supra* note 16, para 119.

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that the Member States' discretion is not the expression of a shared power and, consequently, the Marrakesh Treaty falls under the exclusive implied EU external competence.

It is interesting to note that, in Opinion 3/15, exclusivity does not stem from complete harmonization. That would have been the case if the Union had harmonised limitations on copyright and related rights protection, as it did after the delivery of Opinion 3/15.[45] In that case, the Member States discretion would have been a derogation from harmonized rules. However, as the European Parliament pointed out,[46] a distinction must be drawn between exceptions relating to the scope of an EU act and exceptions relating to the rights laid down in such an act. Exceptions to the scope of an EU act, on the one hand, are the consequence of minimum harmonization, where Member States preserve their competence and the intensity of the exercise of the EU competence is limited. Exceptions to the rights laid down in an EU act, on the other hand, are the consequence of partial harmonization. It is the Union's choice not to harmonise them, because such exceptions are not related to the harmonisation's objective to preserve the functioning of the internal market. It is thus about a situation between complete harmonization, leading to an exclusive external competence, and minimum harmonization, leading to shared external competence. This intermediate state of preemption means that the Member States' discretion to introduce exceptions to protected intellectual property rights is irrelevant to the internal market objectives, which explains the absence of complete harmonization, but the Member States must still remain within the limits designed by the EU rules, which, in turn, defines the difference with regard to minimum harmonization.

The EU-perspective with regard to exclusivity of the Union's implied external competence is clearly illustrated by the Court's acknowledgment of exclusive EU competence with regard to the Marrakesh Treaty. What distinguishes that case from the *Neighbouring Rights of Broadcasting Organisations* case, while simultaneously confirming the EU-objectives perspective, is that the internal rules' objective, which is related to the internal market, does not coincide with the international agreement's objective, which concerns protection of disabled persons and non-discrimination. In the *Neighbouring Rights of Broadcasting Organisations* case, the objec-

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45 *Supra,* note 43.
46 Opinion of 14 February 2017, 3/15, *supra* note 16, para 58.

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tive of the international convention was protecting broadcasting rights, the same as the internal rules' objective and, as a consequence, the conclusion of the convention by the Union expanded the scope of the internal rules in a field where the EU competence had already been exercised. In the Marrakesh Treaty Opinion, the Union had exercised its internal competence to harmonise intellectual property rights protection, while leaving intact the Member States' discretion to introduce exceptions. However, in the internal field, the extent of the harmonization was to be enlarged if the Member States' exceptions affected the objectives of the internal rules. That should have been done through the conclusion of the Marrakesh Treaty by the Union, as the obligation stemming from that Treaty to introduce exceptions to the protected rights met the objective of the internal EU rules and fell not under a Member States' reserved competence, but under the Member States' discretion, the exercise of which fell under the common rules' scope. By concluding the Marrakesh Treaty, the Union would not need to reassess the necessity of the exercise of its competence. Its external competence was exclusive because the Marrakesh Treaty could affect the internal balance between EU objectives and the Member States' interests and, thus, could undermine the proper functioning of the common rules system.

It follows that, in the implied external competences field, preemption in the external field is broader than in the internal field. The criterion of external preemption is the previously described assessment of the necessity to exercise the Union's competence, regardless of the scope of the internal rules. In contrast, according to the *ERTA* criterion of affecting common rules or altering their scope, an assessment of the necessity to exercise the shared Union's competence is not to be done directly in the external field. Rather, where common rules do not cover a field with regard to which an assessment of the necessity to exercise a shared competence has not already been done and that field is covered by the provisions of an international agreement, then the conclusion of the agreement cannot be considered as altering the scope of the common rules. The conclusion of the agreement is an exercise of a shared competence that cannot be done directly in the external field on the basis of the preemption stemming from the *ERTA* criterion: the external implied competence of the Union is not exclusive according to Article 3, paragraph 2, TFEU.

This limit on the application of the *ERTA*-exclusivity explains the position of Advocate General Sharpston in Opinion 2/15 with regard to the competence of the Union to approve the transport policy provisions of the

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EUSFTA. The Advocate General advanced the argument that the Union's internal rules did not cover establishment issues in maritime transports and did not cover internal waterway transport. As a consequence, Advocate General Sharpston suggested that those provisions should be considered as falling under shared external competence. However, the Court of Justice, with an obvious eye on reconciling a broad external preemption with the principle of conferral, examined the place of the provisions at issue in the Singapore agreement. The Court held that those provisions did not occupy an important place in the agreement and their scope was rather limited.[47] Thus, the Union would not exercise its competence by approving them. In other words, the relevant provisions in the agreement were found to be ancillary and absorbed due to their limited scope and, thus, they did not need to be taken into account in order to determine the Union's competence.

This position of the Court expresses an absorbing preemption in the external field, but such preemption is not possible in the internal field.[48] Moreover, said position raises further questions: if the Union concludes an agreement on the basis of an exclusive external competence and if that agreement contains ancillary provisions, is the Union deemed to have adopted common rules in the field covered by those provisions? It is difficult to argue the contrary, as the argument of the Court is a systemic interpretation based on the place of the provisions in the specific agreement. It could be argued that it would be more compatible with legal certainty to strictly apply the preemption criterion and to find that those provisions fall under shared EU competence that can, however, be exercised directly in the external field pursuant to the necessity criterion of Article 216, paragraph 1, TFEU. Indeed, as will be discussed below, Article 216, paragraph 1, TFEU offers the possibility to exercise a shared competence directly in the external field if the *ERTA* conditions are not met.

IV. The EU-Objectives' Perspective in the Exercise of a Shared Implied External Competence

The EU-perspective may intervene in a different way than impacting the qualification of the provisions of the international agreement. As men-

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47 Opinion of 16 May 2017, 2/15, *supra* note 26, paras 215-218.
48 *Supra* note 36.

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tioned above, in Opinion 2/15, the Court of Justice analyzed as ancillary some transport policy-related provisions of the international agreement, which by nature were normative and could require the exercise of a Union competence, because of their role in the specific agreement. Thus, they were absorbed by the transport policy provisions that the Union intended to adopt and implement in its relations with Singapore. In the same Opinion, in the portion concerning the agreement's non-direct investment provisions, the Court of Justice recognized a shared external competence of the Union based on the capital movement provision of the Treaty.[49] It acknowledged that those provisions could not be approved by the Union alone.[50] Rather, the preemption-through-absorption doctrine did not apply to the provisions related to non-direct investment and, according to the Court the absence of exclusivity would require the conclusion of a mixed agreement.

Such a different conclusion as to the transport policy and the non-direct investment provisions of the EUSFTA can be explained through an EU-objectives-based analysis. In both cases, the relevant provisions were not covered by the exclusivity criterion of Article 3, paragraph 2, TFEU, as they are not liable to affect or alter the scope of common rules.[51] In both cases, as the relevant provisions were liable to introduce rights and obligations, they correspond to a Union policy objective and require the exercise of the corresponding competence. And, in both cases, despite the absence of exclusivity, the Union could exercise its competence covering those provisions according to Article 216, paragraph 1, TFEU.

More precisely, in *Germany* v *Council* (*COTIF*)[52] the Court of Justice clarified the meaning of Article 216, paragraph 1, TFEU and its relationship with Article 3, paragraph 2, TFEU, concerning the question of the exercise of a Union's external competence. While an implied exclusive competence using the criteria of Article 3 TFEU leads to the conclusion of an international agreement by the Union alone and the question of mixity does not even comes under consideration,[53] Article 216, paragraph 1,

49 Opinion of 16 May 2017, 2/15, *supra* note 26, paras 225-241.
50 *Id.*, para 244.
51 See, in this volume, the chapter by Nicolas Pigeon.
52 Judgment of 5 December 2017, *Germany* v *Council, (Amendment of the Convention concerning International Carriage by Rail – COTIF),* C-600/14, EU:C:2017:935.
53 *Supra,* note 5.

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TFEU provides that the Union may conclude an international agreement if it is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to by the Treaties. On the one hand, this provision distinguishes the Union's express from its implied external competence[54] and confirms that the existence of an implied external competence is to be distinguished from its exclusive character. On the other hand, Article 216, paragraph 1, TFEU is related to the vertical dimension of the absorption doctrine,[55] as it appears to suggest that the Union may conclude an EU-only agreement if it is necessary to attain one of its objectives, even if the agreement contains provisions falling under shared competence. In such a way, provisions falling under shared competence are absorbed by those falling under exclusive EU competence.

However, in order to acknowledge that Article 216, paragraph 1, TFEU allows a vertical effect of the absorption doctrine, it is also necessary to acknowledge that the exercise of the shared EU competence is not only driven by the corresponding objective (which requires its definition and, thus, the legal basis choice), but is also subject to a global assessment of the objectives expressed in the different provisions of the agreement and the general EU objective of being an international actor. In this way, an agreement can be approved by the Union alone, even if it contains provisions falling under shared competence and even if the Union does not intend to exercise its competence with regard to those provisions. The Union may exercise its competence to conclude the international agreement as a whole, which implies that the objectives related to its exclusive competence absorb those related to shared competence.

Such a global approach has the merit of avoiding the qualification of some provisions of an agreement as ancillary, not because of objective elements, but because of the Union's objectives. With respect to the EUSFTA, that approach could have allowed the Union to exercise its external competence with regard to the whole agreement and, on the basis of Arti-

54 "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or (…)".

55 It could be qualified as vertical dimension of the absorption doctrine the absorption of provisions falling under shared competence by those falling under exclusive competence. Such a dimension determines the vertical division of competences, while the horizontal dimension relates to the choice of legal basis according to the center of gravity test. See, in this volume, the chapter by Merijn Chamon.

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cle 216, paragraph 1, TFEU, to attain the main objective expressed for the agreement – that of commercial policy – in combination with the general objective of acting as a global international actor. Such an approach, still guided by the Union's objectives, would not need to distinguish between the non-direct investment provisions, which are not absorbed and need the exercise of the Union's competence, and the transport-related provisions that were found, in Opinion 2/15, to be absorbed because of their ancillary nature in the specific context. Such an approach would thus have the merit of legal certainty.

Nevertheless, it seems that the interpretation of Article 216, paragraph 1, TFEU, in *Germany* v *Council,* precludes a global assessment of the Union's objectives when faces with the conclusion of an international agreement. On the contrary, the decision confirms the strict interpretation of the principle of conferral. The Court of Justice explicitly referred to Opinion 2/15 in *Germany* v *Council*:

> "Admittedly, the Court found, in paragraph 244 of that Opinion, that the relevant provisions of the agreement concerned, relating to non-direct foreign investment, which fall within the shared competence of the European Union and its Member States, could not be approved by the Union alone. However, in making that finding, the Court did no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area".[56]

It follows from this statement that the exercise of a shared implied external competence directly in the external field (without passing from the criterion of affecting the common rules or altering their scope), although possible, is subject to an assessment of the necessity thereof in order to attain the specific corresponding objective. Consequently, at that stage, the mere definition of the nature of the EU external competence is not sufficient, rather the exact legal basis therefor must be determined.

Besides, the Court of Justice acknowledged that the Union, in light of the ability granted by Article 216, paragraph 1, TFEU, could approve – alone – only the non-direct investment provisions of the EU-Singapore agreement and not all of the provisions falling outside the exclusive competence of the Union (such as the investor-State dispute settlement (ISDS) provisions), although that could have been possible if the global approach

56 Judgment of 5 December 2017, *Germany* v *Council, supra* note 52, para 68.

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had prevailed. As a consequence, the transport-related provisions outside the exclusive EU competence could not be deemed to be covered by the exercise of the shared competence, because the Union did not have the intention to exercise its competence with regard to those provisions.

Despite the rejection of the global approach with regard to Article 216 paragraph 1, TFEU, the policy-objective approach still entails a proper dynamic allowing the exercise of the Union's shared implied external competence. It should be noted that the rejection of such a global approach is indeed justified with regard to the principle of conferral: first, it does not contravene the correspondence between competences and objectives; second, a specific legal basis is required for the exercise of the EU competence which cannot be based merely on Article 216, paragraph 1, TFEU.

V. Concluding Remarks: Dynamic of EU-Objective-Based Analysis of the External Competence versus Content-Based Analysis of the International Agreement

As shown in the previous paragraphs, the analysis of the vertical division of external competences following an EU-objectives-based perspective allows a broad conception of the CCP objective, a broad interpretation of the *ERTA*-exclusivity and the exercise of the EU shared implied external competence.

However, the question as to what provisions of an international agreement the EU and Member States competence has to be determined depends, not on an analysis of EU objectives, but on an assessment of the content of the agreement as such. Indeed, it is settled case law that the non-substantive provisions of an international agreement – those that aim to ensure the effective implementation of the substantive provisions – do not raise a competence question, but are considered ancillary. They therefore "fall within the same competence as the substantive provisions which they accompany".[57]

Non-substantive provisions typically create a specific institutional framework for the implementation of the substantive provisions of the agreement and establish procedures, mechanisms and obligations (such as exchange of information). Such institutional provisions include the dispute

57 Opinion of 16 May 2017, 2/15, *supra* note 26, para 276.

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settlement regime set out in the agreement. As the Court of Justice reiterated in its Opinion 2/15, "the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions".[58] In Opinion 2/15, the Court of Justice held that the dispute settlement regime between the contracting parties did not raise a proper question of competence, as it formed part of the institutional framework for the substantive provisions of the agreement.[59]

Beyond such institutional provisions, and because they are intended to ensure the effectiveness of the substantive provisions, provisions imposing respect for general principles and fundamental rights (such as transparency, good administration, and effective judicial protection in the implementation of the agreement), are also considered ancillary.[60] However, despite their procedural nature and their aim to ensure the effectiveness of substantive provisions, they are not considered ancillary provisions that impose precise procedural obligations on the parties. For instance, the EU and the Member States have jointly concluded the so-called Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Information. To determine the sphere of competence with regard to the provisions of the Aarhus convention, the Court of Justice did not examine the substantive EU law in the environmental field; rather, it looked to the procedural directives adopted by the Union.[61] Provisions of the Aarhus convention, therefore, cannot be considered ancillary with regard to substantive environmental legislation.

It follows that the distinction-between-substantive-and-ancillary criterion for provisions of an international agreement, which establishes if the competence question is raised, lies in the establishment of prescriptive and precise obligations for the parties that impact the exercise of their compe-

58 *Id.*, para 298. Opinion of 14 December 1991, 1/91, *First Opinion on the EEA Agreement*, EU:C:1991:490, paras 40 and 70; Opinion of 8 March 2011, 1/09, *Agreement creating a Unified Patent Litigation System*, EU:C:2011:123, para 74; Opinion of 18 December 2014, 2/13, *Accession of the European Union to the ECHR*, EU:C:2014:2454, para 182.

59 *Id.,* para 303.

60 *Id.*, paras 281-284.

61 Judgment of 8 March 2011, *Lesoochranárske zoskupenie VLK,* C-240/09, EU:C:2011:125.

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tence and involve specific commitments relating to their administrative or judicial organisation. Ancillary provisions are thus identified according to an objective assessment of the content of the international agreement.

However, in Opinion 2/15, the EU-objectives-based analysis affected the content-based identification of the competence-related provisions of the EUSFTA.

First, the sustainable development provisions of the EUSFTA were not qualified as ancillary, even though the Court held that they did not raise a competence question. They were instead considered absorbed by the CCP objective. In that context, the agreement's sustainable development provisions did not introduce new commitments and they could have been considered non-substantive. The Court of Justice's reasoning is not clear in that regard: the provisions at issue could have been absorbed by the CCP, even if the Court of Justice had not underlined their non-prescriptive nature, merely because of their effects on international trade. By raising the question of their non-prescriptive character, the Court of Justice intended to justify – with regard to the principle of conferral – a broad conception of the CCP objective, but introduced uncertainty as to the qualification of a provision as ancillary.

Second, the ISDS provisions of the EUSFTA, while by definition institutional (and, therefore, ancillary) were found to raise a competence question. Despite the fact that the ISDS regime could apply to situations falling under both EU and Member States' competence (given that the Court of Justice held that non-direct investment provisions fall under shared competence), the competence to approve provisions introducing that regime should have been assessed separately. The Court of Justice held that "such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature … and cannot, therefore, be established without the Member States' consent.[62] As a consequence, the Court held that approval of the ISDS provisions "falls not within the exclusive competence of the European Union, but within a competence shared between the European Union and the Member States".[63]

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62 Opinion of 16 May 2017, 2/15, *supra* note 26, para 292. See C. Contartese, "The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again", *Common Market Law Review,* 54, no. 5 (2017), 1625, 1667.

63 *Id.,* para 293.

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It is interesting to note that, while in the sustainable development provisions analysis the EU-objectives dynamic prevailed over legal certainty, in the ISDS provisions analysis of the competence question the EU-objectives dynamic seems to regress. As well-known, the ISDS regime also raised an important question regarding compatibility with the autonomy of the EU legal order.[64] In Opinion 2/15, this question was transformed into a question of competence.[65] Consequently, the ISDS provisions require the conclusion of a mixed agreement, as they affect the Member States' obligation, even when the dispute would have concerned direct investment and otherwise would have fallen under EU exclusive competence. Moreover, the provisions do not correspond to a policy objective and are not covered by the Union's ability to exercise its shared competence pursuant to Article 216, paragraph 1, TFEU. However, despite the apparent regression of the EU-objectives dynamic, by transforming a question of compatibility into a question of competence, the Court of Justice revealed a new potential of the EU-objectives-approach, that of conciliating autonomy with effectiveness, which it should finally be up to the Union and its Member States.

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64 On 13 October 2017, Belgium submitted a request for an Opinion regarding the ISDS mechanism in the Canada-EU Comprehensive Economic and Trade Agreement (CETA). Opinion proceeding 1/17, OJ 2017 C 369/2.

65 Opinion 2/15 addresses only the question of competence with regard to that mechanism. Concerning the question of compatibility with the autonomy of the EU legal order see C. Eckes, "International Rulings and the EU Legal Order: Autonomy as Legitimacy?", in M. Cremona, A. Thies, R. Wessel (eds), *The European Union and International Dispute Settlement,* (Oxford: Oxford Hart Publishing, 2017), 161; A. Rosas, "The EU and International Dispute Settlement" *Europe and the World, A Law Review* 7, no. 1 (2017), 23.

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