The Brexit-decision and its Implications and Consequences for the EU-Korea Free Trade Agreement

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Abstract

The prospect of Brexit raises a number of questions.
The EU has concluded 1,139 bilateral and multilateral agreements with third parties.
For those accords that fall squarely within the realm of the EU's exclusive competences (e.g. classic free trade agreements) there is in principle no discussion: thanks to its single international legal personality, the EU and the third parties are the sole signatories to the agreements and will remain bound by them. A simple notification by the EU to the third parties might thus suffice to inform them that the EU no longer consists of 28 but 27 member states.
The situation is far more complex for 'mixed' agreements, however. These are agreements concluded by third parties, on the one hand, and the EU and its member states, on the other. These agreements cover elements of both exclusively EU and member state competence. The procedural consequence of 'mixity' is that the 28 EU member states have to ratify the agreement alongside the EU, each according to their own 'constitutional' ratification procedures. In some cases, for example Belgium, this will require the consent of the constituting parts of the federation. When more than 35 national and regional parliaments are involved on the EU side alone, one can imagine that this renders the disentanglement of mixed agreements much more vulnerable, requiring negotiations that provide an opportunity for each of the respective third parties too to try and squeeze out a better deal.
In view of the above, leaving the EU would mean that the UK ceases to be bound by the 'EU-only' elements of mixed agreements. By the same token, it could, if it wanted to — and the other parties agreed to it, remain bound by the 'mixed' elements of such agreements because they were signed and ratified by the UK as a contracting party in its own right.
The EU-South Korea FTA is the first of the new generation of FTAs launched in 2007 as part of the 'Global Europe' initiative. It is the most comprehensive free trade agreement ever negotiated by the EU. Therefore, it is also a 'mixed agreement'.
The proposed article identifies and discusses all implications and consequences arising from the Brexit. Finally, it indicates and evaluates the 'legal options' for the future of the EU-South Korea FTA.

Keywords: Brexit, Consequences, FTA, EU, South Korea, Mixed Agreement

I. Introduction

On 23 June 2016 the majority of the people of the United Kingdom (UK) voted in favour of Brexit — i.e. to leave the European Union (EU). Currently the political and legal discussion focuses on the Article 50 of Treaty of the European Union, the so called withdrawal procedure, and the form, scope and sequence of the 'divorce' and future framework agreements between the EU and the UK. One issue that has received far less attention is whether the international agreements concluded by the EU will continue to apply to the UK after Brexit, and if so, how.[1]

The EU has concluded 1,139 bilateral and multilateral agreements with third parties, ranging from trade, development and sectoral economic issues like aviation, energy and fisheries, to matters related to visa, human rights, and the Common Foreign and Security Policy (CFSP).[2]

For those accords and agreements that fall squarely within the realm of the EU's exclusive competences (e.g. classic free trade agreements) there is in principle no discussion: due to its single international legal personality, the EU and the third parties are the sole signatories to the agreements and will remain bound by them. A simple notification by the EU to the third parties might thus suffice to inform them that the EU no longer consists of 28 but 27 member states.[3]

However, the situation is far more complex for 'mixed' agreements. These are agreements concluded by third parties, on the one hand, and the EU and its member states, on the other, because these agreements cover elements of both exclusively EU and member state competence. The procedural consequence of 'mixity' is that each of the 28 Member States has to ratify the agreement alongside the EU, each according to its own 'constitutional' ratification procedures. In some cases, for example Belgium, this will require the consent of the constituting parts of the federation. When more than 35 national and regional parliaments are involved on the EU side alone, one can imagine that this renders the disentanglement of mixed agreements much more vulnerable, requiring negotiations that provide an opportunity for each of the respective third parties too to try and squeeze out a better deal.

A considerable number of EU international agreements are mixed, namely almost all the Association Agreements ever concluded by the EU and most of the recent trade and investment agreements. Therefore, the Brexit decision by the people of the

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1) Guillaume Van der Loo & Steven Blockmans, *The Impact of Brexit on the EU's International Agreements*, Centre for European Policy Studies (C.E.P.S.) Commentary (July 15, 2016).

2) See http://ec.europa.eu/world/agreements/SimpleSearch.do (last visited Sept. 18, 2016).

3) Van der Loo, *supra* note 1.

UK population has opened up a legal Pandora's Box. A (potential) UK exit from the EU gives rise to potentially complex questions about the UK's status under treaties to which the EU is a party.

The Free Trade Agreement between the European Union and South Korea is one of these mixed agreements.

The Global Europe Initiative (GEI) was the clear declaration of the European Commission to focus on competitiveness in the EU in external trade, securing real and total market access.[4] The EU-Korea Free Trade Agreement (FTA) is the first agreement concluded under this new initiative. So far, the EU has concluded regional trade agreements which were more or less accession-oriented or had a particular focus on development issues. As the EU-Korea FTA is the most comprehensive free trade agreement that the EU ever negotiated and concluded until now, it is also of a new generation of FTAs. Not only does it include provisions to eliminate tariffs for goods and services, but it also includes provisions on difficult areas such as investments in services and industrial sectors, as well as on protection of intellectual property, public procurement, competition rules, transparency of regulation and sustainable development.[5]

Ⅱ. The EU and the common commercial policy

The EU is a customs union, not simply a free trade area. The key point of a customs union is that all of its members operate a single unified system of customs tariffs so that any particular category of goods will be charged the same tariff wherever it enters the EU. Because the external tariff wall is identical for all Member States, the members of a customs union need to operate as a bloc when they enter into trade agreements involving tariffs with other countries.

An agreement to reduce or get rid of tariffs on imports from another country necessarily involves the customs union as a whole. For this reason, a common external trade policy was built already into the Treaty of Rome 1957(the 'founding' treaty of European integration process) from the inception of the European

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4) *Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy, Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions*, COM (2006) 567 final (Oct. 4, 2006).

5) Chun-Kyung Paulus Suh, *The EU-Korea Free Trade Agreement as the First Global Europe FTA to Herald a New Era of World Trade?*, 53 Seoul Law Journal No. 3, 693-712, (Sept. 2012).

Economic Community (EEC), as a necessary counterpart of the customs union created by that Treaty. This was called the *'Common Commercial Policy' (CCP).* Under that policy, the European Commission is entrusted with the primary responsibility for negotiating trade agreements, under the supervision of the Member States acting through the Council of Ministers. Trade agreements may then be concluded by the EEC (now the EU) in its own name, which has so-called "exclusive competence" to conclude agreements with non-member countries falling within the field of the common commercial policy. The word "competence" here has the French legal meaning of the legal power to do something.[6]

In practice, trade agreements almost always extend to cover broader subject matter than just tariffs and related matters falling within the scope of the CCP. Where an external agreement contains provisions which extend beyond the scope of the CCP or the EU's other powers to conclude external agreements in its own name, it is necessary for all EU Member States as well as the EU to be parties to the agreement. This is called a 'mixed' or 'shared competence' agreement: where part of the competence to conclude the agreement belongs to the EU, but part of it remains with the Member States.

Ⅲ. EU rules for negotiating and concluding treaties

The internal EU procedural rules for negotiating and concluding treaties are, with two exceptions, concentrated in only one Article, Art 218 Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU). The exceptions concern (i) the conclusion of exchange rate and monetary agreements (Art 219 TFEU) and (ii) 'specific provisions' (Art 207 TFEU) for trade and investment agreements.

The general rules of Art 218 TFEU mean (a) that the EU Commission will always be the negotiator for trade agreements, and (b) in some circumstances decisions within the EU Council of Ministers must be taken unanimously. These provisions constitute, as regards the conclusion of international treaties, an autonomous and general provision of constitutional scope. It covers all agreements between the EU and third countries or international organisations. This is interpreted to include '*any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation'*. It thus covers treaties, conventions, memoranda of understanding (MOUs), exchanges of letters etc.[7]

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6) *Brexit and International Trade Treaties*, Lawyers For Britain, http://www.lawyersforbritain.org/brexit-trade-treaties.shtml (last visited Sept. 18, 2016).

The generic term used in Article 218 TFEU is 'agreement'. This term also covers the adoption of unilateral acts which are intended to form part of an agreement, such as a decision on the acceptance of the accession of new parties to an international convention, and a unilateral 'offer' to a third country which was intended to become binding on acceptance by that third country.[8]

Although Art 218 TFEU provides a common procedural framework, there are points in the procedure where the rules differ according to the substantive legal basis (i.e. the subject matter), in particular rules concerning voting in the EU Council of Ministers and the role of the European Parliament. The procedure involves close interaction between the institutions, governed by the obligation of sincere inter-institutional cooperation (Art 13(2) TEU[9]).[10]

However, the initial proposal to enter into any negotiations with a third country is made to the EU Council of Ministers by the EU Commission, or (for agreements relating 'exclusively or principally' to the common foreign and security policy) by the High Representative for Foreign Affairs and Security Policy to the Council.

The EU Council of Ministers adopts a decision authorizing the opening of negotiations which may be accompanied by more or less detailed directives — the so called *'negotiating directives'*.[11]

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7) Marise Cremona, *Implementation of the Lisbon Treaty - Improving Functioning of the EU: Foreign Affairs*, at 20 (Nov., 2015), http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536475/IPOL_IDA(2015)536475_EN.pdf.

8) *Id.* at 21.

9) "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation." Consolidated Version of the Treaty on European Union art. 13(2), June 7, 2016 O.J. (C202) 13 [hereinafter TEU].

10) *See also*, Case C-425/13, Comm'n v. Council, 2015 E.C.R. ¶¶ 102-206.(commenting on the institutional balance and the principle of sincere cooperation between institutions during negotiations with a third country).

11) The term 'negotiating mandate' is quite often used, but has been argued to be incorrect and misleading.

[O]nce the Council has authorised the Commission to commence negotiations, it can have no direct decision-making role during those negotiations. Indeed, it should be emphasised that, even though the Council's authorisation and negotiating directives are commonly referred to as 'the negotiating mandate', the Commission is in no way 'mandated' by the Council; it is 'authorised' by it... the expression 'negotiating mandate' 'misrepresents the legal situation: the Council cannot, in fact, choose to mandate anyone it sees fit to negotiate on behalf of the Community, since the Commission has the monopoly in that regard. Its role is to initiate the procedure enabling the Commission, and only the Commission, to conduct

The Council also appoints the negotiator, or the head of the negotiating team. This in general simply the EU Commission (without any further detailed indication), but it may also be the High Representative, depending on the content of the agreement. Normally a special committee within the EU Council working structure may be appointed by the Council; this (ad hoc) Working Group has a consultative role in the negotiations, it cannot be empowered to adopt specific negotiating positions intended to be binding on the negotiator.[12] However, this special committee/ working group is a permanent forum for discussions between EU Member States and the EU Commission (as negotiator) on the state of play in the relevant negotiations. If greater problems arise during these discussions and exchange of views the committee/group can always send information via the Permanent Committee of Representatives to the Council of Ministers. The EU Council of Ministers and/or the Representatives of the EU Member States meeting within the Council (if Member States competences are concerned) can always and at every time take necessary steps within a negotiations process with a third country. This includes — in theory — also the decision to change or even to terminate the mandate given to the EU Commission.

The Council adopts a decision authorizing signature and possibly provisional application of an agreement (Art 218(5) TFEU). The Council also adopts the decision concluding the agreement on behalf of the Union (Art 218(6) TFEU). This decision will render the agreement a part of EU law, binding on the institutions and the Member States (whether or not the latter are parties) as a matter of EU law, Art 216(2) TFEU.[13] The EU Council normally acts by qualified majority vote[14] for both

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the negotiations'…. The word 'mandate' is only meaningful where the Commission negotiates on behalf of the Member States.... the Treaties do not mention any 'mandate' in the context of Article 218 TFEU, even though the word is used in other provisions, for example, in Article 18(2) TEU, where it is used in connection with the High Representative of the Union for Foreign Affairs and Security Policy. In my opinion, if the authors of the Treaties had intended the Commission to act in accordance with a 'mandate', they would have used that term.

See id. at ¶¶ 157-63.

12) Consolidated Version of the Treaty on the Functioning of the European Union art. 218(4), May 9, 2008, 2008 O.J. (C115) 47 [hereinafter TFEU]. "The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted." *See also*, Comm'n v. Council, *supra* note 10, at ¶¶ 85-93.

13) TFEU art 216(2). "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."

14) A qualified majority (QM) is the number of votes required in the EU Council of Ministers for a decision to be adopted when issues are being debated on the basis of Article 16 TEU and Article 238 TFEU. Under the ordinary legislative procedure, the Council acts by QM,

signature and conclusion, but in some cases unanimity is required, in particular where unanimity is required by the field in question (substantive legal basis), for Association Agreements and agreements referred to in Article 212 with the States which are candidates for EU accession (Art 218(8) TFEU) and for some trade agreements (Art 207(4) TFEU).

There may be occasions when the Member States conclude a treaty *on behalf of* the EU. If a proposed treaty falls within the EU's exclusive competence, but the EU is not able to become a party then the EU (via a Council decision) may authorise the Member States to conclude the agreement on behalf of the Union. This gives rise to legal obligations within EU law but does not affect the legal position in international law.[15]

A simplified procedure governs the adoption of decisions on the Union's position in bodies set up by an agreement, where that body will adopt acts having legal effects (Art 218(9) TFEU), i.e. a qualified majority vote in the EU Council on a proposal from the Commission or High Representative, even where the substantive legal basis requires unanimity,[16] and with no formal role for the European Parliament other than

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in co-decision with the Parliament. On 1 November 2014, a new procedure for QM voting, the 'double majority' rule, was introduced. Here, when the Council votes on a proposal by the Commission or the EU's High Representative for Foreign Affairs and Security Policy, a QM is reached if two conditions are met:

- 55% of EU countries vote in favour - i.e. 16 out of 28;
- the proposal is supported by countries representing at least 65 % of the total EU population.

When the Council votes on a proposal not made by the Commission or the High Representative, a decision is adopted if:

- there are 72 % of EU country votes in favour; and
- they represent at least 65 % of the EU population.

Until 31 March 2017, any EU country may request that a decision be taken in accordance with the rules in force before 1 November 2014 (i.e. in accordance with the rules as defined by the Treaty of Nice).

Glossary of Summaries, Eur-Lex, http://eur-lex.europa.eu/summary/glossary/qualified_majority.html?locale=en (last visited Sept. 18, 2016).

15) Cremona, *supra* note 7, at 21..

16) Thus the possibility of requiring unanimity under Article 218(8) has been held, without much explanation, not to apply to this procedure.

[S]ince the contested decision does not relate to the conclusion of an association agreement or is not aimed at supplementing or amending the institutional framework of such an agreement, but is aimed solely at ensuring its implementation, it is, in accordance with the combined measures of the first paragraph of Article 218(8) TFEU and Article 218(9) TFEU, by a qualified majority and without the approval of the European Parliament, that the Council

the general injunction to keep the Parliament fully informed at all stages. This procedure also covers situations where the Member States are parties to an international agreement but the Union is not, as long as the decision adopted under that provision relates to a 'position of the Union'.[17] A substantive legal basis will be required for such decisions,[18] but although this legal basis may be important in determining whether competence is exclusive or shared, it does not affect the decision-making procedure established by Art 218(9). The advantages of a simplified procedure in such cases are clear, but the important decision-making powers of such bodies, and the fact that their decisions will have legal effects and may be directly effective, suggests that the current balance may not be right.[19]

Mixed agreements (to which both the EU and Member States are party) are a reality but there is no special provision for them in the Treaty rules on negotiation and conclusion of international agreements. The Lisbon Treaty did however introduce more flexibility into the concept of the Union's 'negotiating team' in Art 218(3) TFEU which could potentially be used in (at least some) cases of mixity. At present ad hoc arrangements may be made, normally via Council Conclusions, and some practice has emerged, e.g. for the negotiation of mixed multilateral environmental agreements, combining the Commission and the Presidency. Use could be made of Art 218(3) TFEU to formalise the appointment of a joint EU — Member State negotiating team (note: the Union's 'negotiator', who proposes signature and conclusion of the agreement by the Union, would have to be either the Commission or the HR/VP).

Such flexibility is less easy when it comes to the decision authorising signature or conclusion of the agreement. In a recent judgment the CJEU has held that a so-called 'hybrid' decision on the signature of a mixed agreement, combining into one instrument a Council decision and a decision of the representatives of the Member States meeting in Council, was in breach of the Treaty. While acknowledging the duty of close cooperation between EU and Member States in the context of mixed agreements, the Court held that *'that principle cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU.'*[20] The hybrid decision resulted in the Member States

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should have, in any event, adopted the contested decision.
Case C-81/13, U.K. v. Council, 2014 E.C.R. ¶ 66.

17) Case C-399/12, Germany v. Council, 2014 E.C.R. ¶ 20.

18) Case C-370/07, Comm'n v. Council, 2009 E.C.R. ¶¶ 3-4.

19) One may contrast the internal legislative implementation of an international agreement, which will require its own legal basis with appropriate decision-making procedures.

20) Case C-28/12, *Comm'n v Council*, 2015 E.C.R. ¶ 55. ("However, that principle cannot justify

participating in a decision which should have been for the Council alone, according to Art 218(5), and in the use of a procedure which did not respect the voting rules set out in Art 218(8).Two separate decisions should have been adopted.

Ⅳ. Legal and practical management of mixed agreements

So called mixed agreements, their negotiation, conclusion and implementation cause serious legal and practical problems.[21] Where to draw the line between the European Union and its Member States competence? If the participation of the European Union is being made conditional on the submission of a list of competences, how detailed should it be? Who negotiates and for which parts? Who participates in decision-making procedures, including dispute settlement if so established by the agreement? Who is liable in case of breach of obligations resulting from the agreement? Which Courts, Member States and/or the Union Courts have jurisdiction to interpret the agreement?

Only exceptionally have these issues or some of them been expressly dealt with in the agreements themselves[22] or in a code of conduct agreed between the Member States and the EU institutions.[23] It has been the EU Court of Justice which over the years has been confronted with most of these questions and made to develop, more particularly on the basis of the general principle of sincere cooperation between the Union and the Member States, now laid down in Article 4(3) TEU, a number of more precise and rather stringent rules which have much contributed to a proper functioning of mixed agreements. Particularly interesting in this regard is the case-law on the jurisdiction of the Court to interpret mixed agreements and on the consequences of the principle of sincere co-operation for institutional issues such as those regarding negotiation and representation.[24]

One of these key decisions by the EU Court of Justice is its *Opinion 1/94*[25]

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the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU.").

21) Mixed Agreements: A List of Problems 1 (O'Keeffe D. & Schermers H.G. eds., Deventer: Kluwer 1983).

22) *E.g.*, U.N. Convention on the Law of the Sea [hereinafter UNCLOS], Annex IX Participation by international organisations, *see* Case C-459/03, Comm'n v. Ireland, 2006 E.C.R. n. 9.

23) Case C-25/94, Comm'n v. Council, 1996 E.C.R. ¶¶ 48-50.

24) Christiaan W. A. Timmermans, *The Court of Justice and Mixed Agreements, in: Court of Justice of the European Union,* in The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law 659-73 (T.M.C. Asser Press 2013).

concerning the competence to conclude the WTO Agreements. The questions put to the Court by the EU Commission in its request for an Opinion, seeks to ascertain, first, whether or not the Community has exclusive competence to conclude the Multilateral Agreements on Trade in Goods, in so far as those Agreements concern European Community on Steel and Coal (ECSC) products and Euratom products. Those questions further relate to the exclusive competence the Community may enjoy by virtue of either the European Community (EC) Treaty, or the parallelism of internal and external competence, to conclude the General Agreement on Trade in Services (GATS) and the Agreement on Trade- Related Aspects of Intellectual Property Rights, including trade in counterfeit goods (TRIPs).

Although the core provisions of the WTO Agreements relating to trade in goods fell within the Europena Community's exclusive competence under the CCP, the Court ruled that other areas covered by the WTO Agreements relating to services (parts of the General Agreement on Trade in Services - GATS) and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) were outside the EC's competence or were areas where the EC's competence was shared with the Member States. Therefore, the Court gave the following opinion:

- The Community has sole competence to conclude the Multilateral Agreements on Trade in Goods.
- The Community and its Member States are jointly competent to conclude GATS.
- The Community and its Member States are jointly competent to conclude TRIPs.

The disagreement between the EU Commission and the Council of Ministers and several EC Member States led to this request to the European Court of Justice (ECJ) for an Advisory Opinion on the extent of EC competence to conclude and implement the WTO Agreement. The Court's Opinion indicated that the EC Treaty raised several fundamental issues about the division of powers between the EC and its Member States in relation to the negotiation and conclusion of external trade agreements, the relationship between international treaty law and that of the EC and the position of the EC in the WTO.[26]

The upshot of this 'mixed competence' scenario is that vis-a-vis other parties, the

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25) Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty, 1994 E.C.R.

26) Pat McCarthy, *Civil Society Participation and Environmental Protection in the European Community's Multilateral Trade Negotiations Policy and Procedure, http://www.nuigalway.ie/dern/documents/8_pat_mccarthy.pdf* (last visited Sept. 18, 2016)

former European Community (EC), now European Union (EU) is responsible for compliance with, and entitled to the benefit of, certain aspects of the WTO Agreements; while the Member States individually remain responsible for, and entitled to the benefit of, the remaining aspects. The boundary between EC/EU and Member State competences is not stationary: under the ECJ's Lugano doctrine[27], the EU acquires external competence in areas where internal EU harmonisation occurs, and a significant shift in competence took place under the Lisbon Treaty which made the trade-related aspects of intellectual property part of the EU's commercial policy. While this fluctuating boundary line may be confusing for other WTO members, it is in general accepted by them.[28]

V. Exclusive competence and shared competence

The (EU-internal) division of competences between the EU and its Member States is also expressed at international level. Where the EU negotiates and concludes an international agreement, it has either *exclusive* competence or competence which is *shared* with Member States.

Where it has *exclusive* competence, the EU alone has the power to negotiate and conclude the agreement. Moreover, Article 3 of the Treaty on the Functioning of the EU specifies the areas in which the EU has exclusive competence to conclude international agreements:

- customs union;
- the establishing of the competition rules necessary for the functioning of the internal market;
- monetary policy for the Member States whose currency is the euro;
- the conservation of marine biological resources under the common fisheries policy;
- common commercial policy;
- 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.

Where its competence is *shared* with Member States, the agreement is concluded

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27) 'Implied power doctrine'.

28) Lawyers For Britain, *supra* note 6.

both by the EU and by the Member States. It is therefore a *mixed agreement* to which Member States must give their consent. The areas in which competences are shared are defined in Article 4 of the Treaty on the Functioning of the EU. The EU shall therefore share competence with its Member States where the EU Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6[30] of the Treaty on the Functioning of the EU. This hared competence applies in the following principal areas:

- internal market;
- social policy, for the aspects defined in this Treaty;
- economic, social and territorial cohesion;
- agriculture and fisheries, excluding the conservation of marine biological resources;
- environment;
- consumer protection;
- transport;
- trans-European networks;
- energy;
- area of freedom, security and justice;
- common safety concerns in public health matters, for the aspects defined in this Treaty.
- In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
- In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

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30) "The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation." TFEU art. 6.

VI. European Court of Justice: Opinion 2/15

On 30 October 2014 the EU Commission decided to request the European Court of Justice to deliver an opinion pursuant to Article 218 (11) TFEU on the competence to conclude the EU-Singapore Free Trade Agreement. The opinion should solve the on-going difference of opinion between the Commission and the Council on the interpretation of the Lisbon Treaty, clarify which procedures to follow; and increase EU predictability towards its trade partners. While in principle the opinion will be restricted to the competence to conclude the EU-Singapore FTA, it will determine the overall division of horizontal and vertical competences in relation to other FTAs currently being negotiated (Transatlantic Trade and Investment Partnership (TTIP) with the United States of America) or concluded but not yet in force (Comprehensive Economic and Trade Agreement (CETA) with Canada).[31]

The aim of the EU Commission is to bring clarity which provisions of the Free Trade Agreement with Singapore fall within the EU's exclusive or shared competence and which remain in the Member States' remit. The Commission wants the European Court for Justice to clarify whether the Union has competence to conclude alone the EU-Singapore FTA. More specifically, the Commission is asking about the EU's competences to conclude an FTA[32]:

- *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?*

Moreover, the recitals of the Commission decision[33] to request this opinion mention that doubts have been raised with regard to the extent and the nature of the

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31) Andrés Delgado Casteleiro, *Four Cases for 2015 (IV) – Opinion 1/15 concerning the scope of the new exclusive competence on Foreign Direct Investment*, Durham Eur. L. Inst. Blog (16 Mar. 16, 2015), https://delilawblog.wordpress.com/2015/01/21/andres-delgado-casteleiro-four-cases-for-2015-ii-article-40-teu-and-pirates-transfer-agreements/.

32) *Commission Decision Requesting an Opinion of the Court of Justice Pursuant to Article 218(11) on the Competence of the Union to Sign and Conclude a Free Trade Agreement with Singapore*, at 2, C (2014) 8218 final (Oct. 30, 2014).

33) *Id.* at 1.

Union's competence in respect of some elements of the chapters of the agreement on the protection of foreign investment, transport services, intellectual property, transparency and sustainable development.

Among these many competence issues, the scope and competence of the EU in relation to foreign investment will be the most debated and novel issue that the Court will decide on. The main reason for that is that so far the European Court of Justice has not delineated the scope of these new competences, and in the legal literature there is a lively debate about how that delimitation should be carried out.[34]

Opinion 2/15[35] has already the potential of becoming one of those fundamental opinions of the Court like Opinion 1/94 or Opinion 2/13 which would set the debate on the upcoming years on the issue of the division of competences in the field of trade and investment. Moreover, the opinion will allow the Court to once again apply the different principles concerning the existence and nature of EU competence to such a wide-ranging and ambitious agreement like the EU-Singapore FTA. Negotiations and discussions within the European Court of Justice on this request are ongoing. However, it could be expected that the opinion will (1) analyse the scope of the CCP and establish how much of the EU-Singapore FTA is covered by it; (2) give an updated interpretation of the implied powers doctrine and (3) most likely examine issues concerning the dispute settlement established in the EU-Singapore FTA.

Ⅶ. European Court of Justice: Opinion 3/15

Already before the EU Commission has asked the European Court of Justice for a legal opinion on whether the EU has exclusive competence to conclude the Marrakesh Treaty, which aims to help people with reading difficulties access published works.

On 21 October 2014, the EU Commission published its *'Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled'*.[36] Following some legal disputes with the

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34) Casteleiro, *supra* note 31.

35) The official number for this case given by the administration of the European Court of Justice is 2/15. However, in some publications (like that of Andrés Delgado Casteleiro) it is referred to as 'opinion 1/15'; this is wrong.

36) *Commission Proposal for a Council Decision on the Conclusion, on Behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled,* COM (2014) 638 final (Oct. 21, 2014).

EU Council of Ministers (non-commercial aspects of intellectual property, links with the TRIPS Agreement) the EU Commission asked the Court for its legal opinion to the referred question:

> Does the European Union have exclusive competence to conclude the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled?[37]

On 8 September 2016 the Opinion of Advocate General Wahl was given to the Grand Chamber of the European Court of Justice. The Advocate General concluded:

> 'The European Union has exclusive competence to conclude the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled adopted by the World Intellectual Property Organization (WIPO) on 27 June 2013.'[38]

The two expected rulings of the European Court of Justice on Opinion 2/15 und Opinion 3/15 will give an updated advice on open legal questions in exclusive and shared competences as well as on the general understanding of mixed agreements.

VIII. The EU-Korea FTA as mixed agreement

The official negotiations on the EU — South Korea FTA were launched in May 2007. It took almost two years and eight rounds of talks to achieve a consensus and sign the new FTA by both partners. The new agreement was officially signed on 6 October 2010 during the EU-South Korea Summit in Brussels. In February 2011 the European Parliament consented to the agreement that finally entered into force on 1 July 2011.[39] The negotiated EU-South Korea FTA is a comprehensive agreement (15 chapters plus special sector specific annexes on automotive products, pharmaceuticals,

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37) 2015 O.J. (C 311) 13, 21. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CU0003&from=DE (last visited Sept. 18, 2016).

38) Conclusion of International Agreement by the European Union – Marrakesh Treaty to Facilitate Access to Published Works for Person Who Are Blind, Visually Impaired or Otherwise Disabled, Opinion Procedure 3/15, E.C.J. ¶ 155 (Sept. 8, 2016).

39) European Commission, *The EU–Korea Free Trade Agreement in Practice*, at 3, Publications Office of the E.U. (2011).

chemicals and consumer electronics) regulating, at the bilateral level, a broad spectrum of economic and trade co-operation rules. The agreement not only eliminates tariffs on almost all EU-South Korea manufactured trade and many non-tariff barriers, but also regulates trade-related issues, such as investments, public procurement, intellectual property rights (IPR), labour rights and environmental protection.[40] This makes the agreement both consistent with the 'WTO-plus'-option of new FTAs and the most comprehensive FTA ever negotiated by the EU and the first with a partner country in Asia.[41]

Having Article 4 of the Treaty on the Functioning of the EU in mind, it is out of discussion, that the EU-South Korea FTA is a mixed agreement. Beside the relevant competences the title of the FTA itself makes it clear: *'FREE TRADE AGREEMENT between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part'*.[42] The FTA is signed by all Member States of the European Union in their function as *'Contracting Parties to the Treaty on European Union and the Treaty on the Functioning of the European Union'*[43], the European Union and South Korea.

In light of the mixed character of the EU-South Korea FTA, a future Brexit raises a number of questions concerning the future of the FTA itself as well as the role, function and position of the UK in the future legal trade relations between the EU, South Korea and the UK.

Ⅸ. The impact of Brexit for the EU-Korea FTA

Although the situation is not described in Article 50 of the Treaty of the European Union[44], the international agreements concluded by the EU will no longer be applicable to the UK from 'Brexit Day' onwards.[45] There is some discussion ongoing,

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40) Cooper W.H. et al., *The EU–South Korea Free Trade Agreement and Its Implications for the United States,* Cong. Research Serv., at 6 (2011).

41) Cooper W.H. et al., *The EU–South Korea Free Trade Agreement and Its Implications for the United States,* Cong. Research Serv., at 6 (2011).

42) 2011 O.J. (L127) 6.

43) *Id.* at 7.

44) TEU art. 50 indicates, inter alia, that "…any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements." *Id.* at ¶ 3, "the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification' of the wish to withdraw from the EU."

if this would also include mixed agreements with a view to the shared Member States competences. Some scholars[46] argue that leaving the EU would mean that the UK ceases to be bound by the 'EU-only' elements of mixed agreements. But, the UK could, if it wanted to — and the other parties agreed to it, remain bound by the 'mixed' elements of such agreements because they were signed and ratified by the UK as a contracting party in its own right.

As a matter of law, this interpretation is — at least for the EU-South Korea FTA — wrong. From the 'Brexit Day' on the EU-South Korea FTA will no longer be applicable to the UK. This clear cut arrives from following arguments:

First, he UK is not a sovereign contracting party to the EU-South Korea FTA since the Member States of the European Union are listed at the beginning in alphabetic order as parties of the FTA in their function as 'Contracting Parties to the Treaty on European Union and the Treaty on the Functioning of the European Union'. The party position derives from the fact that the UK is a contracting party of the EU Treaties. In the moment the UK leaves the EU, it will no longer be a contracting party to the Treaty on European Union and the Treaty on the Functioning of the European Union. Therefore it will automatically lose its 'deducted party position' in the EU-South Korea FTA.

In addition, under *'General definitions'* Article 1.2 of the EU-South Korea FTA states that *'throughout this Agreement, references to: the Parties mean, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Korea;'. The wording 'within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union'* supports the opinion, that a former EU Member State could not be in any kind party to the EU-South Korea FTA.

Second, the EU-South Korea FTA includes, as most international agreements concluded by the EU with third parties, a so called *'territorial application'* clause, restricting the application of the agreement to the territories in which the Treaties on the European Union are applied. In a post-Brexit situation this would clearly no longer cover the UK or even its overseas territories. The territorial application clause in the EU-South Korea FTA reads as follows:

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45) Van der Loo, *supra* note 1.

46) *Id.*

Article 15.15
Territorial application

1. *This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties, and, on the other hand, to the territory of Korea. References to 'territory' in this Agreement shall be understood in this sense, unless explicitly stated otherwise.*
2. *As regards those provisions concerning the tariff treatment of goods, this Agreement shall also apply to those areas of the EU customs territory not covered by paragraph 1.*

In light of this clear formulated clause the EU-South Korea FTA will automatically no longer be applicable to the UK from the moment on, the EU Treaties ceases to apply to the UK.

From the day the EU Treaties ceases to be applied to the UK, South Korea also looses access to the UK market under the rules of the EU-South Korea FTA. This 'silent' change in the composition of the EU could, however, trigger objections from South Korea. In strict legal terms there is little South Korea could do against this territorial reduction of the EU. Of course, there is a theoretical possibility to terminate the whole FTA under a special denunciation clause (Article 15.11 of the FTA). South Korea may well argue that the UK withdrawal would be, in effect, *a fundamental change of circumstances* (Article 62 Vienna Convention on the Law of Treaties). It would even be entitled to terminate the agreement on this account.[47] However, from a realistic point of view, the existing EU-South Korea FTA will have just to be amended after the Brexit. What and especially how this amendments could take place, will be discussed in the following.

X. Necessary Amendments to the FTA after the Brexit

In general, if a State were to decide to leave the EU, in circumstances where it had already ratified an agreement in its own right, it could make a formal declaration, stating that it intended to assume all of the obligations under the agreement in its own right. However, for the EU-South Korea FTA territorial application is defined by

47) Panos Koutrakos, *Brexit and International Trade Treaties: A Complex, Long, and Expensive Process*, Lawyers – In For Britain, http://lawyers-inforbritain.uk/briefings/brexit-and-international-trade-treaties-a-complex-long-and-expensive-process/ (last visited Sept 18, 2016).

reference to the territory of the third State, and the territories *"in which the Treaty of the European Union and the Treaty on the Functioning of the European Union are applied"*. Once the UK had left the EU, it would of course no longer be covered by this definition in Article 15.15. of the FTA.[48]

However, the EU-South Korea FTA does not include provision for any party leaving the EU to remain able to benefit from the treaty and the territorial scope is defined by reference to the EU treaties. On the other hand, the FTA contains a provision for accession of new countries to the EU. Which means: extending the territory and scope of the EU is possible under the existing FTA. In order to adjust the EU-South Korea FTA to the Brexit-scene, the reverse procedure of an EU enlargement can be used.

On the 1 July 2013 Croatia became 28nd Member State of the European Union. In order to include Croatia into the EU-South Korea FTA (namely with a view to the mixed competences, which derive from the individual EU Member State), the parties of the FTA used the amendment procedure in Article 15.5 of the FTA which reads as follows:

Article 15.5
Amendments

1. *The Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties exchange written notifications certifying that they have completed their respective applicable legal requirements and procedures, on such date as the Parties may agree.*
2. *Notwithstanding paragraph 1, the Trade Committee may decide to amend the Annexes, Appendices, Protocols and Notes to this Agreement. The Parties may adopt the decision subject to their respective applicable legal requirements and procedures*

On 24 September 2012, the EU Council of Ministers authorised the EU Commission to open negotiations, on behalf of the Union and its Member States and Croatia, with the Republic of Korea in order to conclude an *Additional Protocol to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, to take account of the accession of Croatia to the European Union ('the Additional Protocol').* Those

48) Herbert Smith Freehills LLP, *Brexit: Treaties, Trade Agreements, "Acquired Rights" and Other Practical Impacts Under International Law, Brexit-E-Briefing,* at 3 (May 20, 2016), http://www.lexology.com/library/detail.aspx?g=d02f6a57-8d3b-439a-bbdd-3fd642471e48(lastvisitedNov.9,2016).

negotiations were successfully completed by initialling the Additional Protocol on 8 November 2013. In view of Croatia's accession to the Union on 1 July 2013, the Additional Protocol should be applied on a provisional basis with effect from that date, the *'ADDITIONAL PROTOCOL to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, to take account of the accession of Croatia to the European Union'* was published on 14 May 2014.[49]

With a view to the withdrawal of the UK from the EU, this additional protocol could be used as a role model for the necessary adjustment of the EU-South Korea FTA. This 'Brexit-Protocoll' will have to indicate that (i) the UK is withdrawn as party to the FTA; (ii) the UK is determined from the list of Parties to the Agreement; and (iii) the necessary amendments within the section on rules of origin and other relevant chapters und protocols take place in accordance with the withdrawal of the UK.

XI. Negotiating new agreements before the Brexit?

According to the official EU interpretation and understanding of Article 50 TEU, that withdrawal negotiations must wait until the UK has officially notified its intention to leave the EU, that any negotiations for UK's future relationship with the EU must wait until the withdrawal agreement has been finalised, and that therefore negotiations with non-EU trading partners must wait until the UK's withdrawal actually takes effect.

On the other hand the new established UK Minister for Exiting the European Union, David Davis, states that he aims to have a great number of new trade agreements all-but-signed within the next two years, well before any feasible withdrawal date. For example, the Financial Times already reported that US trade officials are in preliminary talks with UK officials, and the UK Prime Minister Theresa May has spoken with Australia's Prime Minister Malcolm Turnbull about the two countries' future trade relations.[50]

During the latest G 20 meeting in Peking, the EU side (represented by the President of the EU Commission Jean-Claude Juncker and the President of the European Council Donald Tusk) made it clear again: until the UK withdrawal takes effect, the UK has no legal competence to negotiate any kind of trade agreements

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49) 2014 O.J. (L140), 3.

50) Shawn Donnan, *Washington Not Yet Ready to Shut Door on Trade Deals*, Fin. Times (July 18, 2016), https://www.ft.com/content/bf20b55a-4aec-11e6-8d68-72e9211e86ab.

with third countries. The UK is — for the moment — still Member of the EU and therefore the competence for such trade talks lies exclusively with the EU Commission. There is no scope for unilateral EU Member State actions towards the negotiation and conclusion of trade agreements falling within the Common Commercial Policy (CCP) except as authorised by the EU Council of Ministers and the core of the new generation of trade agreements, including services, is clearly within EU exclusive trade competence.

The EU Member States are bound by the obligation of *sincere cooperation*[51] to *'refrain from any measure which could jeopardise the attainment of the Union's objectives'* and this means that where EU competence is exclusive they should not engage in making even non-binding proposals, where such proposals *may lead*[52] to legally binding measures which would affect EU rules. Indeed, even in cases where EU competence is *not* exclusive, EU Member States are bound not to depart from an agreed common position in international negotiations, and once the EU Council of Ministers has authorised the EU Commission to start negotiations with a third

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51) Cooperation between the institutions is essential to the proper functioning of the European Union. Indeed, the Court of Justice has recognised the duty of sincere cooperation as a general principle of Community law. While sincere cooperation is not explicitly mentioned in the Treaties, this does not affect its status as a requirement with which all Member States and European institutions must comply. The principle of 'sincere cooperation' stems from TEU art. 4 in the context of relations between the European Union (EU) and Member States and TEU art. 13 in the context of relations between the EU institutions. In substance, this Article states that the Member States must take all appropriate measures to fulfil their obligations arising out of the Treaty and do nothing detrimental to the proper functioning of the European Union. *See also, Cooperation Between the EU's Institutions*, EUR-Lex (Aug. 8, 2016), http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=URISERV%3Al10125 (last visited Sept. 18, 2016).

52) The European Court of Justice has held that a Member State is in breach of its EC Treaty obligations by submitting a proposal to the International Maritime Organisation for monitoring compliance with international rules that have been incorporated into Community legislation. The Court thereby extends the scope of its AETR ruling (Commission v Council (22/70)) to a unilateral act initiating a process which may lead to the adoption of new international rules, although those rules would not be directly binding on the Community. The Court also throws light on the nature of the duty of co-operation based on Art.10 EC, and on the obligations of Member States participating as members of an international organisation of which the Community is not a member in order to ensure that Community competence may nonetheless be exercised by the Member States acting jointly in the Community interest.
Marise Cremona, Abstract, Comm'n v. Greece (C-45/07), 34 Eur. L. Rev. No. 5, 754 (2009), http://cadmus.eui.eu/handle/1814/14824 (last visited, Sept. 18, 2016).

country the EU Member States are under a duty of *close cooperation*[53] with the EU institutions 'to ensure the coherence and consistency of the action and its international representation'.[54]

A possible way out may be seen in so called informal talks before the withdrawal. However, even under informal talks there is still a great deal of uncertainty over the UK's future relationship with the EU, no likely post-Brexit option will involve the UK remaining part of the EU's customs union and common commercial (trade) policy; this will need to negotiate a whole range of new relationships, including the UK commitments within the WTO.

To understand the nature of the obligations on an EU Member State planning departure from the EU it could be helpful to distinguish between

(i) the period before the formal Article 50 notification,
(ii) (ii) the period after notification but before the withdrawal agreement takes effect, and
(iii) (iii) after withdrawal.

The post-withdrawal position seems clear: the former EU Member State is no longer bound by EU law as such, but will of course be bound by whatever transitional arrangements have been put in place in the concrete withdrawal treaty, which may well also include trade policy.

Before the Article 50 TEU notification has been handed in, in contrast, the UK is clearly still under full EU Member State obligations; there is no certainty that the notification will ever be given and existing obligations cannot be weakened simply by political statements on the possibility of a future exit. During this period (in which we are currently today) the UK is clearly not empowered to negotiate any aspects on trade matters, and would be in breach of its obligations of sincere cooperation by

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53) "Community acquires exclusive external competence by reason of the exercise of its internal competence, where the international commitments fall within the scope of the common rules or, in any event, within an area which is already largely covered by such rules, even if there is no contradiction between those rules and the commitments." Case C-433/03, Comm'n v. Germany, 2005 E.C.R. I-06985, ¶ 3. Therefore the Court declares that, by ratifying and implementing agreements (1) between Germany and Romania on inland waterway transport, (2) between Germany and Poland on inland waterway transport and (3) between Germany and the Ukraine on inland waterway transport, without consulting or cooperating with the EU Commission of the European Communities, Germany has failed to fulfil its obligations under Article 10 EC. *See id.* at ¶ 86.

54) Marise Cremona, *Negotiating Trade Deals Before Brexit?*, Soc. Eur. (July 25, 2016), https://www.socialeurope.eu/2016/07/negotiating-trade-deals-brexit/

engaging in informal talks about possible future negotiations, especially where this takes place in the context of ongoing EU negotiations with that specific trade partner.[55]

It is undermining the EU's unity of international representation for one Member State to sound out the possibility of a separate bilateral deal — even if it is made clear that negotiations will not begin until after withdrawal from the EU. The UK is not under any obligation to 'speed up' and trigger the Article 50 TEU procedure by notifying its intention to withdraw from the EU; but correspondingly until it does so, it must behave like an EU Member State and owes the EU an obligation of loyalty and cooperation.

The period between notification of the wish to withdraw from the EU in accordance with Article 50 TEU and the entry into force of the concrete withdrawal is the most complex one. Although still an EU Member State and under obligations of cooperation, the procedure for withdrawal will have been set in motion and a withdrawal agreement will be under negotiation. Part of this agreement will likely be designed to ensure a smooth legal transition for those international accords binding the UK by virtue of EU participation, as well as the future of so-called 'mixed' agreements, to which both EU and its Member States are parties, in particular those where the UK is a party as an EU Member State (such as the FTA with Korea). It is in the interest of both the EU and the UK to ensure clarity in discussions with third country partners. This implies both that the future withdrawal of the UK should not be ignored in the EU's own trade relations and that the UK will need to discuss future relations and the management of the transition with the EU's existing (and future UK) trade partners.[56]

Legally speaking, in the framework of the duty of sincere cooperation, it could be argued that this requires the EU and UK to work together in discussions with third country partners, including the WTO, USA, Canada, Korea, the EEA partners and others, and that this should take place during the post-notification period. It would, for example, make sense for the UK and the EU together to discuss with the USA or Canada whether the UK would become a party to the TTIP or CETA in its own right alongside the EU-27. Since the UK would not be an 'EU Member State' party it could discuss the possibility of specific trade terms while still being part of the TTIP or CETA. It would also be possible for the EU and UK jointly to discuss with Korea what the implications of an eventual UK withdrawal would be, and whether the UK would continue as a party to the existing FTA or would wish to negotiate a new and different arrangement.[57]

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55) *Id.*

56) *Id.*

These discussions would be exploratory and not formal negotiations; in practice the UK will not be able to negotiate the details that matter in new trade agreements, especially on services, until its future relationship with the EU is clear. But they could signal to third countries that the EU and UK were working together. Such an approach would be legally defensible (a practical expression of the duty of cooperation working in a post-notification transitional context), and politically astute. However, even in such a constructive context it would not be possible — within the given EU Treaties that the EU Council of Ministers would authorise the UK to start any kind of actual negotiations on revised trade relations before formal withdrawal. This argument is sometimes brought forward by certain optimistic scholars, but it is no realistic scenario.

XII. Conclusion

According to the UK Government, the EU-South Korea FTA is estimated to be worth over £500 million to UK business each year. Once the UK had left the EU, it would no longer be covered by this FTA. This will have wide-range implications for the UK. Sincerely, the UK would need to negotiate some other arrangement, but this may require an amendment to the territorial scope of the EU Treaties or at least at the territorial scope of the EU-South Korea FTA. Under international law rules this would require an amending treaty, which itself would need, in the case of a mixed agreement, the unanimous consent of all the Member States left in the EU and the third party concerned (i.e. South Korea), and thereafter a ratification process in all of them in accordance to their own 'constitutional' ratification procedures. This means a lot of goodwill from a number of States. However, for the moment this political willingness seems limited. Under a more realistic approach the UK will have to find a bilateral basis for its future trade relations with South Korea. This could be achieved by renegotiations of substantive provisions for trade or by simply agreeing on a 'rolling over' of the provisions of the existing FTA. However, one aspect should not be underestimated: The UK has not negotiated such agreements for decades, as competence has been transferred to the EU forty years ago.

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57) *Id.*

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