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Editorial

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A Game of Powers

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A character on a currently popular television series once noted that "when you play the game of thrones, you either win or you die; there is no middle ground". Perhaps unsurprisingly, this piece of rather Machiavellian wisdom has not rung true with one current power struggle within the EU. On 10 July 2015, the Commission of the European Union played a high-stake gambit: it requested an Opinion (2/15)[1] from the Court of Justice regarding whether or not the Union has the required portfolio of competences to independently conclude the *Free Trade Agreement* with Singapore. For the Commission, this specific agreement was to be the test case for a much-needed judicial clarification of the Union's exclusive powers to conclude a new generation of far-ranging free trade and investment agreements without the need to seek approval from its 28 member states. The Commission's patience with hammering out so called 'mixed agreements' ratified by both the Union and its member states on the one hand and the trading partner on the other hand was for a variety of reasons at an end: The tumultuous start to the 'mixed' free trade agreement with Canada ('CETA') and the 'mixed' association agreement with Ukraine were harbingers of the increasingly unpredictable haggling of individual national and regional parliaments designed to block or delay the member state's ratification process for reasons not necessarily linked to the agreement itself. As if that was not enough, threats of popular votes in place of national parliamentary approval as

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1 *Opinion 2/15 of the Court* (*Full Court*) (Court of Justice of the European Union, Case No. ECLI:EU:C:2017:376, 16 May 2017) (Full Court) ('*Opinion 2/15*').

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well as judicial constitutional review were instruments in member states' toolboxes that effectively spoiled the Commission's strategy of a close-knit global network of similarly structured bilateral trade and investment agreements.

The Commission's power play before the Court of Justice ('ECJ') was bold and pushed the envelope with creative legal reasoning, trying to use to its advantage the chaotic system and the vague wording of the EU treaty provisions on the Union's competences. These provisions were newly introduced by the *Lisbon Treaty* in 2009 and poorly reflect the, at times, enigmatic jurisprudence of the Court of Justice on the matter. It is not the object here to go into the technical details of the Commission's arguments; rather it suffices to observe that at an institutional level the Commission's allies and foes during the proceeding were quite informative. The European Parliament unconditionally supported the Commission's exclusivity claim, even though both institutions have been for decades locked in a power struggle between themselves. This time however, the European Parliament saw its own position being reinforced by the Commission's arguments: in the event of a legal victory, the European Parliament would be the only player who directly safeguards the democratic legitimacy of future trade and investment agreements; individual regional and national parliaments would be barred from claiming such, particularly as they only speak for a small fraction of EU citizens. Arrayed against the Commission were the Council and 25 member states, who were united in their rejection of what they saw as an egregious ploy. For member states the issue was all the more pressing as the common trade policy allows for a qualified majority vote in the Council when negotiating and concluding trade agreements with third states. Consequently, the preservation of the 'mixed agreements' secured through the back door the need for a measure of unanimity. For one particular member state, the implications of this game of powers are even more far-reaching, but intriguingly from the perspective of a future non-member state role: The United Kingdom's hope for a comprehensive EU-UK free trade agreement after BREXIT would profit from the Union having an all-embracing exclusive competence to conclude such an agreement because the possible negative sentiments of national parliaments about the way their nationals' interests were handled during the BREXIT process would have no impact on future EU trade relations which Britain so badly needs. However, the United Kingdom's long standing fight to preserve member states' sovereignty (and the appalling impression it would give to make a BREXIT driven reversal in the middle of the court proceedings) remained the driving force for its consistent opposition against any power grab by the Union.

The Union's perpetual struggle with its member states over every miniscule division of executive and legislative powers is without doubt peculiar to the

Union and its quasi-federal structures. It would, however, be fundamentally wrong to assume that other more traditional international organizations are not also ridden by these kinds of disputes. It is true that the thin veil of many organizations' legal personality allows their member states to remain clearly visible, as Niels Blokker put it in one of the first contributions to this journal.[2] However, the organizations' autonomy necessarily produces friction over competences. Member states are confronted with the organization's expanding power through majority votes in plenary organs, decisions of non-plenary organs as well as independent secretaries. These disputes are normally sorted out on a day-to-day basis in the organization's corridors and assembly rooms, through formal or informal political interventions. Rarely do such disputes over powers lead to judicial clarification, which is the decisive difference to the EU, who as an organization has the ECJ as an effective judicial tool for member states and EU organs alike. Only the United Nations has—to a certain degree—a history of judicial clarifications of power delimitations delivered by the International Court of Justice ('ICJ') via advisory opinions, most famously in *Reparation for Injuries*,[3] *Effect of Awards*,[4] *Certain Expenses*,[5] and the *Namibia* case.[6] An equally prominent example is the ICJ's rejection of the World Health Organization's ('WHO') request for an advisory opinion on the (il)legality of the use of nuclear weapons in armed conflict due to the organization's lack of powers to address such an issue,[7] a view shared by some (but not all) WHO member states in the written proceedings. Even though not valid for the WHO, in the context of the United Nations the ICJ has been rather generous with implying powers for the benefit of the organization and its organs.[8] The

2 Niels Blokker, 'International Organizations and their Members' (2004) 1 *International Organizations Law Review* 139, 144.

3 *Reparation for Injuries Suffered in the Service of the United Nations* (*Advisory Opinion*) [1949] ICJ Rep 174, 184.

4 *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* [1954] ICJ Rep 47, 56 ff.

5 *Certain Expenses of the United Nations* (*Article 17, paragraph 2, of the Charter*) (*Advisory Opinion*) [1962] ICJ Rep 151, 164 ff.

6 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*) (*Advisory Opinion*) [1971] ICJ Rep 16, [110].

7 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (*Advisory Opinion*) [1996] ICJ Rep 66, [21].

8 Dapo Akande, 'The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice' (1998) 9 *European Journal of International Law* 437, 445.

same can quite rightly be said for ECJ jurisprudence on the division of powers between the EU and its members. There is, however, a considerable difference between allocation and confirmation of implied powers by the ICJ and by the ECJ. The ECJ's decision has an immediate impact on member states' sovereignty, given that in a multitude of cases the confirmation of EU powers entails for member states not only the legal prohibition to act as a sovereign actor in that particular field but also a loss of profile and prestige on the international plane. That is exactly what was at stake for member states when the Commission reasoned before the ECJ that the Union has exclusive powers to conclude comprehensive trade and investment agreements with third states. These types of far-reaching consequences have repeatedly put the Court of Justice into a political minefield, which has always required careful and solid interpretation efforts as well as a good portion of Solomonic wisdom. Whereas the Solomonic wisdom is without doubt present in Opinion 2/15 when delivered by the Court of Justice in May 2017, the careful and solid interpretation deserves some critical analysis.

Large portions of the Opinion are dedicated to the interpretation of the Common Commercial Policy (article 207(1) of the *Treaty on the Functioning of the European Union* ('*TFEU*')), which explicitly grants the Union exclusive external competences in the field of trade. Recognising that modern free trade agreements, such as the one with Singapore, cover various policy fields, eg, environment, labour rights and sustainable development, the ECJ construed article 207 of the *TFEU* in the light of the common objectives of all external actions (article 21 of the *Treaty on European Union* ('*TEU*')) as a legal gravity well: it pulls auxiliary, facilitating, and complementary policy areas toward the exclusivity of the Union's Commercial Policy under the condition that these other policy fields have a direct and immediate effect on trade, which is straightforward enough to reason. On top of that, the ECJ construed the provision that enshrines the implicit powers of the Union (article 3(2) of the *TFEU*) quite generously: the exclusive competence to conclude an international agreement is already given if internal EU legislation covers the respective policy field "to a large extent", which leaves some room for manoeuvre.[9] This package of broadly interpreted exclusive competences still quite literally brings a smile to the faces of the Commission staff that dealt with the court proceedings. But the ECJ also had a sweetener for member states in its Opinion, and here is where Solomonic wisdom won the day against solid norm interpretation. Without normative base and, more importantly without explanation, the Court introduced a new form of "shared competences", applicable to core

9 *Opinion 2/15*, above n 1, [202].

components of modern free trade and investment agreements, ie, provisions on portfolio investment and investor-state dispute settlement. In its reasoning, the Court apodictically stated that the competence shared between the Union and its member states entails that the "envisaged agreement cannot be approved by the European Union alone".[10] This enigmatic conclusion contrasts markedly with the concept of "shared competences" enshrined in article 2(2) of the *TFEU*, which explicitly does not envisage a competence exercised jointly but either/or.

From a purely political perspective, the ECJ's blatant judicial development of EU primary law contrary to the wording of the *EU Treaty* can be based on some sound rationale. It arises from the Lisbon drafters' failure to pay farsighted attention to the Union's competence to conclude international agreements (especially the abortive wording of article 216(1) of the *TFEU*). This failure, which clearly falls within member states' sphere of responsibility, has been temporarily adjusted by the Court. So one could argue that the ECJ indeed found a way to avoid the win or die scenario and successfully created something of a middle ground. However, this will have limited impact on the broader game of powers between the Commission and member states … BREXIT is coming …

10 Ibid [244].