

# External dimension of green and digital transition: Global actorness and constitutional limits

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- Green transition:
  - Art 191 TFEU, Art 194 TFEU
- Digital transition:
  - Internal market / Art 114 TFEU/ Art 16 TFEU
  - GDPR/ DMA/ DSA/ AI
- External competence
  - Art 191(4) TFEU
  - External aspects of internal policies

- Art. 3(5) TEU
- “In its relations with the wider world, the Union shall uphold and **promote** its values and interests and contribute to the protection of its citizens. It shall **contribute** to peace, security, **the sustainable development** of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the **protection of human rights**, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”
- Art. 21 TEU
- “1. The Union's action on the international scene shall be guided by the **principles which have inspired its own creation, development and enlargement**, and which **it seeks to advance** in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.
- 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** [...] b) consolidate and support **democracy, the rule of law, human rights** and the principles of international law; [...] d) foster the **sustainable economic, social and environmental development** of developing countries, with the primary aim of **eradicating poverty**; [...]”

# Promotion of values/standards in the exercise of external competence

- **Global approach of external action objectives**
- Art 21 (3) TEU

“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.

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

- Art 205 TFEU

The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.

- Art 207 (1) TFEU

“The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.”

- Digital sovereignty
  - Proactively influence global standards
  - Align regulatory environments to its standards and policies
  - Promote human-centric digital governance
- External action
  - Enactment of Article 16 TFEU
  - Extra-territorial effect (Brussels effect)/ adequacy decisions
  - Cooperation / Digital diplomacy / Digital partnerships/ Global digital compact
  - Free trade agreements

- Brussels, 12.7.2022
- COM(2022) 336 final

Recommendation for a

- **COUNCIL DECISION**

**authorising the opening of negotiations for the inclusion of provisions on cross-border data flows in the Agreement between the European Union and Japan for an Economic Partnership**

Article 207(4) first subparagraph in conjunction with Article 218(3) and (4) of the Treaty on the Functioning of the European Union (TFEU) shall be indicated as legal basis for this proposal.

- **EU-Australia FTA**

## **Article 2**

### **Right to regulate**

- The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity.

## **Article 6**

### **Protection of personal data and privacy**

- 1. Each Party recognises that the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to trust in the digital economy and to the development of trade.
- 2. Each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards.

- EU Cariforum Economic Partnership agreement
- Article 120
- Regulatory aspects of e-commerce

1. The Parties shall maintain a dialogue on regulatory issues raised by electronic commerce, which will, inter alia, address the following issues:

a) the recognition of certificates of electronic signatures issued to the public and the facilitation of cross-border certification services;

- (...)

e) any other issue relevant for the development of electronic commerce

2. Such **cooperation** can take the form of exchange of information on the respective legislation of the Parties and the Signatory CARIFORUM States on these issues as well as on the implementation of such legislation



- EU Cariforum Economic Partnership agreement

- CHAPTER 6

## Protection of personal data

### Article 197

#### General objective

(...)

establish appropriate legal and regulatory regimes, as well as appropriate administrative capacity to implement them, including independent supervisory authorities, in order to ensure an

- Article 201

#### Cooperation

- 1. The Parties acknowledge the importance of cooperation in order to facilitate the development of appropriate legislative, judicial and institutional frameworks as well as an adequate level of protection of personal data consistent with the objectives and principles contained in this Chapter.

- **Sustainable Development as a goal to be achieved:**
  - Labour Standards
  - Environmental Standards
    - The EU and its trade partners must: effectively implement international labour conventions and environmental agreements, including:
      - respect of core principles of the International Labour Organization (ILO), and;
      - effective implementation of the Paris Agreement on Climate Change
- Obligation not to lower standards:
  - Direct obligation not to lower.
  - Obligation for best endeavour to increase.

# Promotion of values/standards in the exercise of external competence

- Institutions supervising SD standards:
  - Committees
  - Civil societies mechanisms (advisory groups, consultative committees)
  
- Dispute settlement
  - Normal DSM established under the agreements.
  - Specific DSMs: Consultations and Panel of Experts -> report.
- The party found to violate the clause / lower the standards has to adopt an action plan and implement it.
  
- Samoa Agreement: UE-Organisation of African, Caribbean and Pacific States (OACPS)
  - Cooperation in promotion and enforcement of the Paris agreement

# Promotion of values/standards in the exercise of external competence

- **Global approach of external action objectives**
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- Art 207 (1) TFEU

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## Objective > competence

- Art 21 (2) TEU

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:

(h) promote an international system based on stronger multilateral cooperation and good global governance.

- Opinion 2/15, 16 May 2017, EU-Singapore free trade agreement

The commitments concerning sustainable development

- **166.** (P)rovisions of Chapter 13 of the envisaged agreement 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.**
- **167.** In the light of all the foregoing, Chapter 13 of the envisaged agreement falls (...) within the common commercial policy and, therefore, within the exclusive competence of the European Union referred to in Article 3(1)(e) TFEU.

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# Sustainable development as external competence: withdrawal from the Energy Charter Treaty

- The Energy Charter Treaty (ECT) as a mixed agreement

EU law has to be preserved from external interference: institutional and regulatory autonomy

- Modernisation of the ECT
- Withdrawal of Member States
- Withdrawal of the Union
- Promotion of sustainability standards via the Member States

- Limits stemming from the principle of conferral and sincere cooperation
  - Mixity of the ECT as constitutional requirement (Art 194 TFEU ; ISDS provisions in Opinion 2/15)
  - Negotiating directives (10745/19) : unity “without prejudice to the division of competences”
  - EU position (Art 218(9) TFEU) and exercise of voting rights
  - Exercise of participation and voting rights by the Union, but
    - EU and the MS as autonomous contracting parties (Intra-EU ISDS, *Per se* agreement, disconnection clause)



- Withdrawal from the ECT

The limits of the principle of sincere cooperation?

- Coordinated withdrawal, COM(2023) 447 final
- The principle of sincere cooperation does not impose on the Member States an obligation of result as regards a common accord to conclude a mixed agreement
- Opinion 1/19, Istanbul Convention, para 274.
- Obligation of withdrawal?

# Sustainable development as external competence: withdrawal from the ECT

- The ECT beyond mixity
- COUNCIL DECISION on the withdrawal of the Union from the Energy Charter Treaty, 6509/24, 4 March 2024
- COUNCIL DECISION on the position to be taken on behalf of the European Union in the Energy Charter Conference, 9616/24, 21 May 2024 (Articles 194(2) and 207 TFEU, in conjunction with Article 218(9))
- The Member States that are Contracting Parties to the Agreement and that are present at Charter Conference shall exercise their vote so as: not to prevent the adoption by the Conference of the proposed amendments to the Agreement; not to prevent the approval of the proposed modifications and technical changes to the Annexes to the Agreement; not to prevent the approval of the proposed changes to decisions, declarations and understandings; and not to prevent the approval of a decision regarding the entry into force and provisional application of amendments to the Agreement and modifications and technical changes to its Annexes.
- Exercise of EU competence via the Member States? Promotion of standards?

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