***Convenience translation***
***of the summary of the legal expertise by Prof. Dr. Franz C. Mayer, LL.M. (Yale), University of Bielefeld, for the Federal Ministry of Economics and Energy***
***regarding the question: "Is the planned free trade agreement of the EU with Canada (Comprehensive Economic and Trade Agreement, CETA) a mixed agreement?"***

**Summary**


1. CETA is a new type of comprehensive free-trade and investment agreement between the EU and Canada and sets the course for similar future agreements (and especially TTIP). Unlike the multilateral WTO agreements, which resolve interests that are of potentially global impact and that are correspondingly diverse by imposing a (minimal) consensus, CETA is an agreement between two sides which goes well beyond the reduction of tariff barriers and has the potential for far more far-reaching agreements than are currently possible in the WTO framework.

2. In view of the novel nature of this and of similar free-trade agreements, the framework of European law governing CETA has yet to be finally clarified. This is true of the transferability of existing case-law, which was mainly focused on different issues of free trade, and the scope of the relevant changes made by the Treaty of Lisbon (2009).

3. This uncertainty particularly affects the question of competence, i.e. whether the EU can conclude CETA with Canada on its own, or whether it needs to do so together with the EU Member States.

4. Where the EU does not have competence of its own for substantive matters in the agreement, it has to rely on the Member States for the commitments made in such an agreement to be adhered to in relations with Canada, the other contracting party. For this reason, if the EU "lacks" specific competences, the EU and the Member States conclude an agreement together with the contracting party (in this case: Canada plus EU plus 28). This has led to the concept of a "mixed agreement", whereby for the EU this is less about mixing and more about working together in an appropriate manner, with the possibility of assigning the respective subsections to the competent levels for a large number of legal reasons.

5. The difference between a mixed agreement and an EU-only agreement is that all the Member States are involved not only via the Council, but also by a national ratification procedure in all 28 Member States. Specifically, this means that not only the European Parliament, but also - depending on specific national rules - all the national parliaments need to approve the agreement.

6. Any need to gain the approval of national parliaments entails actual risks like non-ratification by one Member State, and certainly a time delay before the agreement can enter into force. These risks rise in line with the number of Member States.

7. This is one reason why the European Commission aims to minimise the involvement of the Member States in such agreements and to avoid mixed agreements where possible. For their part, the Member States insist on the involvement of the national parliaments, not least due to increasing demands on the democratic legitimacy of actions by the EU and by the Member States with regard to the EU, also in terms of external relations.

8. This is the background against which it is necessary to ascertain whether CETA should be categorised as a mixed agreement. The answer to this question and the way in which it is answered - it is possible that the Commission or the European Parliament or a Member State will appeal to the European Court of Justice - will also have a major impact on the legal course of TTIP.

9. The starting point for considerations is the exclusive competence of the EU to conclude trade agreements pursuant to Art. 207 TFEU (common commercial policy), which was

historically oriented to the multilateral GATT/WTO contexts which referred to tariff barriers. In this field, the EU can conclude agreements on its own. The Treaty of Lisbon changed the rules, so that all current WTO issues are covered, plus “foreign direct investments”.

10. Even if an agreement governs issues not covered by Art. 207 TFEU, under certain conditions an exclusive EU external competence can exist (“implied powers”). This is the case if there is currently or potentially a well advanced legal development within the EU. The Member States then have no role to play.

11. In all other cases (i.e. the agreement also governs a Member State competence), the EU cannot conclude an agreement alone, and needs the Member States as additional parties to the agreement (mixed agreement), for example if an agreement covers aspects of criminal law, for which the EU has no internal competence. Just as a drop of pastis colours a whole glass of water, individual aspects of an agreement make the entire agreement dependent on Member State approval.

12. The provisions on investment protection contained in the CETA draft of 1 August 2014 necessitate the involvement of the Member States in the agreement because the comprehensive approach of its investment protection section embraces forms of investment for which the Member States are competent. This certainly is true of portfolio investments, i.e. investments which serve financial gain without pursuing any entrepreneurial purpose. In its review of the Treaty of Lisbon and the addition to Art. 207 TFEU to include “foreign direct investments”, the Federal Constitutional Court also assumed that agreements with rules on portfolio investments remain mixed agreements, i.e. it is necessary for the Bundestag to play a role in Germany. Furthermore, a mixed agreement is necessary in view of the rules on termination of existing bilateral investment agreements of the Member States, on expropriation and property protection, on investment protection by an arbitral tribunal, and on the extent of Member State liability.

13. The CETA provisions on transport (the inclusion of certain maritime transport services), on the mutual recognition of professional qualifications (particularly the inclusion of third country nationals), on health and safety at work (particularly due to the stipulations regarding compliance with labour law) and the “good manufacturing practice” for pharmaceutical products (particularly due to continuing main responsibility of the Member States in the field of health) necessitate a mixed agreement, even if the gap in EU competence appears to be less broad here than in the case of the investment protection rules.

14. In the field of criminal provisions on the protection of intellectual property rights, sanitary and phytosanitary measures (SPS), entry and temporary entry, transparency rules and regulatory cooperation, there are indications of the possible need for a mixed agreement, although these are not upheld by the CETA text in the version of 1 August 2014.

15. Because mixed agreements have frequently been drafted in the past without the question of ratification by the Member States ultimately being clarified for legal reasons, it is possible to think cautiously about a narrowly defined further category of “mixed agreements for political reasons”, particularly if the competence issue is unclear or contentious.

16. From the German point of view, a mixed agreement also generates constitutional advantages, if this ensures that the Bundestag is involved, as may in any event be demanded in view of the case-law of the Federal Constitutional Court, given the scope of CETA.

17. This means that CETA should be concluded as a mixed agreement. This does not imply a move towards the intergovernmental method in European integration. Rather, the joint action of the EU and the Member States reconfirms once more the special structure of the association between the EU and the Member States.