



# The Court's Opinion on the EU-Singapore FTA: Throwing off the shackles of mixity?

Guillaume Van der Loo

## Summary

In its landmark Opinion 2/15 the Court of Justice of the European Union concluded that the entire EU-Singapore FTA falls under the exclusive competences of the EU, with the notable exception of portfolio investment and the Investor-State Dispute Settlement (ISDS) mechanism. Although the result is that the trade agreement with Singapore is 'mixed', and therefore also needs to be ratified by all the 28 member states, this Opinion may actually contribute to the credibility and effectiveness of the EU's trade policy. In line with the EU's broadened trade competences, brought about by the Treaty of Lisbon, the Court confirmed that the EU has the exclusive competences to realise almost all its broad trade-related objectives in 'EU-only' FTAs, covering trade in goods, services, intellectual property rights, public procurement and sustainable development. If investor-state dispute settlement and portfolio investment are excluded, such future EU FTAs will not be jeopardised by 28 additional – and sometimes unpredictable – ratification procedures in the member states. The Commission should therefore pursue 'EU-only' FTAs and cover portfolio investment and investor-state dispute settlement, such as the new Investment Court System, in separate agreements, or not at all. Member states on the other hand should refrain from deliberately making EU FTAs mixed, as this would contradict the spirit of the Lisbon Treaty and the Court's case-law.

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On May 16<sup>th</sup>, the Court of Justice of the European Union (CJEU) finally delivered its landmark opinion<sup>1</sup> on the EU-Singapore free trade agreement (EUSFTA). The CJEU declared that this trade agreement cannot be concluded by the EU alone, but only together with the member states. In particular, the Court argued that the agreement's provisions related to portfolio investment and the Investor-State Dispute Settlement (ISDS) mechanism fall under the competences shared between the EU and the member states. Accordingly, the agreement is 'mixed' and must be ratified by all 28 member states, as well as by the EU. As demonstrated by the 'CETA saga', caused by the Walloon opposition to signing CETA in October 2016, such a ratification procedure may challenge the effectiveness and credibility of the EU's trade policy.<sup>2</sup>

Although this outcome may suggest a victory for the member states and a defeat for the European Commission, which aimed to avoid this 'mixed' outcome, Commission officials were not disappointed. On the contrary, the Court recognised that almost the entire agreement falls under EU exclusive competences, including its provision related to trade in goods and services, intellectual property rights (IPRs), sustainable development, competition and foreign direct investment. On several points, the Court went further than the Opinion of Advocate General Sharpston, who concluded in her Opinion that several provisions related to transport services, government procurement, non-commercial aspects of IPR, sustainable development and the termination of the Bilateral Investment Treaties (BITs) did not fall within the EU's exclusive competences.<sup>3</sup>

Because the Court broadly interpreted the EU's post-Lisbon trade competences, the Union is now reassured that it has the competence to conclude ambitious FTAs without the involvement of all the member states in the ratification process, if provisions related to portfolio investment and ISDS are left out. This Opinion may change the current practice of mixed FTAs and pave the way for 'EU-only' trade agreements. Indeed, despite the fact that the Lisbon Treaty further expanded the scope of the exclusive Common Commercial Policy (CCP), for example by including foreign direct investment, all post-Lisbon EU FTAs were concluded as mixed agreements. Member states often insist on 'mixity' for trade agreements because this equips them with a veto right, nullifying the qualified majority voting in the Council, and increases their presence and visibility during the process of concluding the agreement.

The Opinion of the Court offers rather clear guidelines on which trade-related areas fall under the CCP, i.e. the EU's exclusive competences, and which do not. This Policy Insight first discusses

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<sup>1</sup> Opinion 2/15 (*Singapore FTA*), 16 May 2017.

<sup>2</sup> On the 'CETA saga', see G. Van der Loo, "CETA's signature: 38 statements, a joint interpretative instrument and an uncertain future", CEPS Commentary, 31 October 2016. For a more detailed analysis of the consequence of non-ratification of mixed agreements by a member state, see G. Van der Loo, R. Wessel, "The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions", *Common Market Law Review* 54(3), 2017, *forthcoming*.

<sup>3</sup> Opinion of Advocate General Sharpston, Opinion 2/15 (*Singapore FTA*), 21 December 2016.

the scope of the EU's trade competences, as presented by the Court in this Opinion and then explores its implications for the conclusion of future FTAs and EU investment policy.

### 1. The scope of the exclusive CCP

The vantage point of the Court's legal reasoning to determine whether an international commitment falls under the CCP Article 207(1) TFEU was its own 'direct and immediate effect on trade' criterion. This criterion, developed by the Court in its recent case-law,<sup>4</sup> states that an EU act falls within the CCP:

if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on it (para 36).

It is therefore no surprise that the Court concluded that the EUSFTA's **chapters related to market access** meet these criteria (i.e. National Treatment and Market Access for Goods; Trade Remedies; Technical Barriers to Trade; Sanitary and Phytosanitary Measures; Customs and Trade Facilitation; Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation; and Government Procurement). With regard to the FTA's chapter on **services and establishment**, covering cross-border supply of services (GATS mode 1 and 2), establishment (GATS mode 3) and the temporary presence of natural persons (GATS mode 4), the Court also concluded that all these provisions intend to promote, facilitate and govern trade and have direct and immediate effect on trade in services, and therefore fall under the CCP. Contrary to the assertions of several member states, the Court also concluded that this applied to trade in financial services and the mutual recognition of professional qualifications (paras 52-55). The Court had indeed already argued in its previous case-law that the four modes of supply of services fall within the scope of the CPP.<sup>5</sup>

A notable exception, however, relates to the agreement's **services provisions in the field of transport**. This field is excluded from the CCP by the carve-out of Article 207(5) TFEU, which is recognised by the Court.<sup>6</sup> Nevertheless, the Court concluded that the EUSFTA provisions related to maritime, rail and road transport services fall under the exclusive competences of the EU pursuant to the Court's well-known "ERTA doctrine" (paras 193, 202, 211). According to this doctrine, which is now codified in Article 3(2) TFEU, the Union has exclusive competence for the conclusion of an international agreement "insofar as its conclusion may affect common rules or alter their scope". The Court confirmed its previous broad interpretation and application of this doctrine and recalled that it is already sufficient when there is a "risk" that international commitments fall within the scope of EU rules and that the area covered by the

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<sup>4</sup> Daiichi Sankyo and Sanofi-Aventis Deutschland, C414/11, para. 51, Commission v Council, C137/12, para. 57 and Opinion 3/15 (Marrakesh Treaty) para. 6.

<sup>5</sup> Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS), paras. 4, 118 and 119.

<sup>6</sup> Ibid.

international agreement and that covered by EU rules do not have to coincide fully, but that it is sufficient if the area of commitments of an international agreement is “covered to a large extent” by those EU rules (e.g. paras 180-181).<sup>7</sup> Contrary to the assertions of the Council and the member states (and even the Advocate General), the Court came to the conclusion that the EUSFTA provisions in all the aforementioned types of transport services overlap with EU legislation in those areas and may affect or alter their scope, and therefore fall under the exclusive competences of the Union. On the basis of this doctrine, the Court also argued that the agreement’s provision on public procurement in respect of these transport services fall under the EU’s exclusive competences.

With regard to **investment** (Chapter 9 of the EUSFTA), it should first be recalled that the Treaty of Lisbon expanded the scope of the exclusive CCP with foreign direct investment. The Court argued that the use, by the drafters of the Treaty, of the words “foreign direct investment” in Article 207(1) is an “unequivocal expression of their intention not to include other foreign investment in the common commercial policy” (para 83). Accordingly, non-direct investment such as portfolio investment (i.e. investments made without any intention to influence the management and control of an undertaking) does not fall under the exclusive CCP. The Council and several member states tried to convince the Court that even the EUSFTA’s provisions on direct investment cannot fall within the CCP because this chapter only concerns the protection of direct investments and not their admission. However, the Court argued that provisions on investment protection contribute to the legal certainty of investors and therefore have a direct and immediate effect on that trade (para 94). Thus, the EUSFTA’s chapter on investment protection falls within the CCP in so far as it relates to foreign direct investment. The elements of the investment chapter which do not fall under the CCP (i.e. portfolio investment and ISDS) are discussed below.

With regard to **intellectual property rights**, the Court already recently relied on the ‘direct and immediate effect on trade’ criterion to determine when international commitments entered into by the EU fall under ‘commercial aspects of intellectual property’, included in Article 207(1) TFEU.<sup>8</sup> In this Opinion, the Court essentially held that the EUSFTA IPR provisions (covering i.a. copyrights, trademarks, geographical indications, designs, patents, and civil enforcement mechanisms) aim to create a degree of homogeneity between the levels of IPR protection in the EU and Singapore, contributing to the creation of a level-playing field for trade of goods and services for economic operators (para 122). Therefore, the Court concluded that these provisions have a direct and immediate effect on trade and thus fall under the exclusive CCP.

The Court also held the EUSFTA’s provision concerning **competition** meet the ‘direct and immediate effect on trade’ criterion because these relate specifically to the combatting of anti-

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<sup>7</sup> Commission v Council, C-114/12, paras. 68-70; Opinion 1/13 (Accession of third States to the Hague Convention) paras. 71-73; Green Network, C-66/13, para. 29; and Opinion 3/15 (Marrakesh Treaty) paras. 105-107.

<sup>8</sup> Daiichi Sankyo and Sanofi-Aventis Deutschland, C414/11, paras. 49 to 52; Opinion 3/15 (Marrakesh Treaty), para 78.

competitive activity and of concentrations whose object or effect is to prevent trade between the EU and Singapore from taking place in “healthy conditions of competition” (para 134).

An important and innovative element of this Opinion is the Court’s conclusion that also the entire chapter on **sustainable development** in the EUSFTA falls, in accordance with the ‘direct and immediate effect on trade’ criterion, within the CCP. The Treaty of Lisbon explicitly submitted the CCP to the general external policy principles and objectives of the Union’s external actions, enshrined in Article 21 TEU.<sup>9</sup> The Treaty link created between the CCP and the general provisions of Article 21 TFEU has been considered as leading to a ‘politicisation’ of trade policy.<sup>10</sup> The CCP should now not only aim at gradual liberalisation of trade, but also at the non-economic policy objectives included in Article 21 TEU, which relate to, inter alia, the promotion of sustainable and environmental development. Therefore, the Court stressed in this Opinion that “the objective of sustainable development forms an integral part of the common commercial policy” (para 147).

Just like in the other new generation EU FTAs (e.g. the EU’s FTAs with Korea, Vietnam, Colombia/Peru, Ukraine and CETA), the EU has included in the EUSFTA a chapter on sustainable development. This chapter essentially aims to ensure that the bilateral trade takes place in compliance with the obligations that stem from international agreements concerning social protection of workers (e.g. ILO conventions) and environmental protection to which they are party. The Court concluded that this chapter does not aim to regulate the levels of social and environmental protection in the Parties’ respective territory but rather to govern trade between the EU and 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 (para 166). Therefore, there is a “direct and immediate effect” on trade, which implies that this chapter falls under the exclusive CCP.

With regard to the **institutional provisions** of the agreement, the Court argues that the provisions related to exchange of information, cooperation, mediation, decision-making powers and transparency have no effect on the nature of the competence to conclude the agreement. According to the Court, these provisions are of an ancillary nature, intend to ensure the effectiveness of the substantive provisions of the FTA and fall within the same competence as the provisions which they accompany (para 276). Therefore, these provisions fall within the exclusive competences of the EU, unless they relate to an area falling under shared competences (i.e. portfolio investment). Also the chapter on State-to-State dispute settlement (Chapter 15), which is largely built on the WTO dispute settlement system and applies with respect to differences concerning the interpretation and application of the provisions of the EUSFTA, falls within the exclusive competences of the EU, unless the dispute relates to portfolio

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<sup>9</sup> Combined reading of Articles 205 and 207(1) TFEU and 21 TEU.

<sup>10</sup> P. Hilpold, “The ‘Politization of the EU’s Common Commercial Policy – Approaching the ‘Post-Lockean’ Era”, in M. Cremona, et al. (eds), *Reflections on the Constitutionalisation of International Economic Law*, Brill, 2013.

investment. The competence to conclude the EUSFTA's provisions related to the specific dispute settlement mechanism between investors and states (ISDS) is discussed below.

## 2. Shared competences: Portfolio investment and ISDS

As explained above, on the basis of a textual interpretation of Article 207(1) TFEU, the Court argued that non-direct foreign investment (portfolio investment) does not fall within the CCP. However, the Commission introduced a creative argument to persuade the Court that non-direct investment is nevertheless covered by the EU's exclusive competences. In the proceedings before the Court, the Commission argued that the EUSFTA's provisions on (the protection of) portfolio investment may "affect" the TFEU provision on movement of capital (Article 63 TFEU) in the meaning of the ERTA doctrine/Article 3(2) TFEU (cf. *supra*), and therefore fall within the Union's exclusive competences. However, considering the primacy of the Treaties over acts adopted on their basis, including agreements concluded by the EU, the Court rightfully argued that "common rules" in the meaning of Article 3(2) TFEU cannot consist of rules of primary EU law/TFEU provisions, but only of rules of secondary law (paras 233-235). Therefore, the Court concluded that the EU has no exclusive competence to conclude the EUSFTA's provisions on portfolio investment. However, the Court relied on its own implied powers doctrine (i.e. the Opinion 1/76 principle), codified in Article 216(1) TFEU, to argue that the provisions on portfolio investment fall within a competence shared between the EU and the member states. Article 216(1) states that the EU may conclude an international agreement "where the conclusion is necessary in order to achieve, within the framework of EU policies, one of the objectives referred to in the Treaties". According to the Court, the conclusion of an international agreement which contributes to the establishment of free movement of capital and payments on a reciprocal basis may be classified as necessary in order to achieve Treaties' objective of free movement of capital and payments between member states and third states (Art. 63 TFEU) (para 240).

The Court also concluded that the ISDS mechanism, included in Section B of Chapter 9, does not fall within the CCP or the EU's exclusive competences. A crucial element of this procedure is, according to the Court, that if a claimant submits a dispute to arbitration, the EUSFTA requires that the claimant "withdraws any pending claim submitted to a domestic court or tribunal concerning the same treatment as alleged to breach [the agreement's investment protection provisions]" (Article 9.17.1(f)). Although the Court recognised that this provision does not rule out the possibility of a dispute between a Singapore investor and a member state being brought before the courts of that member state, "the fact remains that this is merely a possibility in the discretion of the claimant investor" (para 290). Because the member state would not be able to oppose the claimant investor to submit the dispute to arbitration, the Court argues that such a regime "removes disputes from the jurisdiction of the courts of the Member States" (para 292). Therefore, the Court argues that such a regime cannot be established without the member states' consent. The Court thus concludes that the ISDS mechanism does not fall within the exclusive competence of the Union, but within a competence shared between the EU and the member states.

### 3. The end of mixed EU FTAs?

It is clear from the analysis above that the Court has paved the way for broad and ambitious EU free trade agreements, which do not require ratification by all the member states. The Court held that the EU is exclusive competent for the conclusion of almost the entire EUSFTA, covering all the areas which are now pivotal to the global trade agenda, including trade in goods, services, public procurement, competition, foreign direct investment, sustainable development, intellectual property rights and state-to-state dispute settlement. Only for provisions related to portfolio investment and ISDS must member states be taken on board. This means that future EU FTAs, excluding these two ‘shared’ elements, can be swiftly concluded by the EU alone (i.e. by the Council deciding with QMV – although unanimity is still required in a limited number of cases – and the consent of the European Parliament), without 28 additional national ratification procedures. This also applies to the future EU-UK trade agreement, but it could be that this agreement includes more sophisticated – or in any case different – dispute settlement procedures, leading to new questions related to competences and compatibility with EU law.

The fact the Court considers that the chapter on sustainable development falls under the CCP is especially crucial in the current political trade climate. More than ever before, as illustrated by the protests against TTIP and CETA, the consequences of international trade liberalisation on the environment and social standards is being called into question. Civil society groups, for example the authors of the ‘Namur-Declaration’,<sup>11</sup> have therefore called for stronger sustainable development provisions in EU FTAs. Also the Commission committed itself in its 2015 ‘Trade for all’ strategy<sup>12</sup> and in the recent reflection paper on “Harnessing Globalisation”, the second of five reflection papers foreseen to steer the future debate on the EU following publication of the White Paper on the Future of the EU in March this year,<sup>13</sup> to use trade policy to promote the social and environmental pillars of sustainable development and to promote fair and ethical trade schemes. The Court has now made it possible for the EU to address these concerns and to develop ambitious sustainable development chapters in its FTAs without this leading to mixity, as long as these chapters have an immediate and direct link with trade.

Thus, in the spirit of the reforms brought by the Treaty of Lisbon,<sup>14</sup> the Court equipped the Union with the necessary competences to act more unified and efficient in the global trade arena. Moreover, it can even be argued that the Court’s legal reasoning opened the door to an even wider scope of the CCP. As noted above, in order to determine whether a provision falls

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<sup>11</sup> <http://declarationdenamur.eu/>

<sup>12</sup> European Commission, ‘Trade for all - Towards a more responsible trade and investment policy’, October 2015.

<sup>13</sup> European Commission, ‘Harnessing Globalization’, COM(2017) 240, 10 May 2017.

<sup>14</sup> For a recent comprehensive overview of the post-Lisbon CCP, see M. Cremona, “A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon”, SIEPS Paper 2017:2, Swedish Institute for European Policy Studies, Stockholm.

under the CPP, the Court made broad use of its own 'immediate and direct effect on trade' criterion. It is therefore not unthinkable that the Court in the future may argue that also international commitments related to other forms of economic cooperation essentially are intended to promote trade, and have direct and immediate effects on it. For example, in this view, several chapters that are now covered in the titles on sectoral and economic cooperation in partnership and cooperation agreements may fall under the CCP if these are framed in such a way to promote trade, such as taxation, industrial and digital cooperation or even provisions that aim to regulate currency manipulation.

Several points in the Opinion related to mixity, however, may puzzle legal experts and policy-makers. For example, the Court concluded that the EUSFTA covers provisions that fall under exclusive or shared competences. It has been argued, even by several Advocates General that when an agreement falls under shared competences (whether or not together with EU exclusive competences), the choice between a mixed agreement or an EU-only agreement is a matter for the discretion of the Council.<sup>15</sup> Indeed, recent EU treaty-making practice includes some examples of such 'facultative mixity'. For example, in order to prevent several member states from *de facto* recognising Kosovo through a national ratification procedure, the EU opted to conclude the EU-Kosovo Association Agreement as an EU-only agreement.<sup>16</sup> The Court ignored this possibility in the Singapore Opinion and concluded in several paragraphs, but strangely enough not in the concluding paragraph, that where the agreement falls under shared competences, "the agreement cannot be approved by the EU alone" (paras 244 and 304).

#### 4. How to avoid 'deliberate' mixity?

The Court has now presented the EU legislature with a more or less clear picture of what it can include in a trade agreement without triggering mixity. As argued below, the Commission should therefore leave out provisions falling under shared or exclusive member state competences in its future FTAs in order not to 'pollute' a potential exclusive EU FTA with a few 'mixed' provisions. With the notable exception of ISDS and portfolio investment, the Court confirmed that the EU has the exclusive competence to realise almost all of its trade(-related) treaty and policy objectives in an 'EU-only' trade agreement. However, it is not unthinkable that the member states will react in the opposite way. Fearing that their involvement in the ratification process of EU FTAs is slipping away as a consequence of this Opinion, it could be that, just as has happened in previous cases, the member states deliberately insist on including a few provisions falling under shared or exclusive member state competence in order to make a future FTA mixed. This would imply that they can keep their *de facto* veto-right, nullifying the

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<sup>15</sup> See for example Advocate General Wahl, Opinion 3/15 (Marrakesh Treaty) and Advocate General Sharpston, Opinion 2/15 (Singapore FTA) paras 73-75.

<sup>16</sup> On this point, see also D. Kleimann and G. Kübek, "The Singapore Opinion or the End of Mixity as We Know It", *Verfassungsblog*, 23 May 2017.



qualified majority voting in the Council. Obviously, such a move would run against the spirit of exclusive CCP, expanded by the Treaty of Lisbon and the Court (in previous post-Lisbon jurisprudence) and confirmed in this Opinion. However, it is not clear how the Commission would be able to challenge this.

For future FTAs, the Commission's recommendation to the Council asking the latter for authorisation to launch FTA negotiations with a third country and to provide for negotiating directives (Article 207(3) TFEU) should only cover EU exclusive competences. The Council can however easily divert from these recommendations (with QMV, and not unanimity as in the case for formal legislative proposals),<sup>17</sup> for example to include 'mixed' provisions. It would be difficult for the Commission to challenge this, especially because the Council has great autonomy in establishing negotiating directives to the Commission. In the event, however, that the Council amends the Commission's recommendation in such a way as only to make the envisaged FTA mixed, the Commission can (threaten to) withdraw the recommendation.<sup>18</sup> As the Court has held in Case 409/13 *Council v. Commission*, the Council cannot authorise the Commission to open negotiations without such a recommendation.<sup>19</sup> In this case, the Court indeed held that with regard to the adoption of a legal act, the Commission has the power, as long as the Council has not acted, to withdraw its proposal. In particular, the Court argued that, where an amendment planned by the European Parliament or the Council distorts the Commission proposal "in a manner which prevents achievement of the objectives pursued by the proposal", the Commission is entitled to withdraw the proposal. However, in line of the Court's reasoning in this case, if the Commission would want to withdraw its recommendation to launch FTA negotiations, it would clearly need to argue why it is in the best interest of the EU to conclude the agreement as an EU-only agreement, or not at all. This withdrawal procedure should be used carefully, and only as a last-resort option. Before adopting a recommendation to launch FTA negotiations, the Commission would therefore need to step up its efforts to (informally) consult with member states, reducing the risk that they will insist on mixity in the next steps of the procedure.

## 5. Quid investment (protection) in future EU FTAs?

As explained above, the Court has argued that foreign direct investment falls within the scope of the CCP (both the admission and the protection of direct investments), whereas non-direct investments (portfolio investments) and ISDS fall within shared competences. This conclusion actually seriously challenges the EU's investment policy, in particular the Commission's ambition to include in future FTAs the new Investment Court System (ICS) and its ambition to establish a multilateral investment Court. ISDS/ICS was already the subject of a heated debate

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<sup>17</sup> Article 293(1) TFEU.

<sup>18</sup> On this point, see also P.-J. Kuijper, "Post-CETA: How we got there and how to go on", ACELG Blog, 28 October 2016.

<sup>19</sup> Case C-409/13, *Council v. Commission*, paras. 74-83. However, it should be noted that this case concerned the proposal of an EU legal act, pursuant to Article 293 TFEU, and not a trade agreement pursuant to Article 207 TFEU.

in Brussels and beyond. Because the Court now made clear that investment arbitration in EU FTAs – in any case as it stands in the EUSFTA – triggers mixity, the Commission will be less enthusiastic to incorporate such a system in its future FTAs. Moreover, also third countries will be less keen to include ISDS/ICS in its broad trade agreements with the EU, realising that this is one of a few elements that leads to a burdensome – and sometimes unpredictable – ratification procedure in 28 member states. It appears that the procedural consequences of including ISDS/ICS in future EU FTAs is a price too high to pay. An option would be to reverse the merger of trade and investment and to separate investment provisions from FTAs by concluding stand-alone investment agreements in parallel with the envisaged broad FTAs. Whereas the latter can be concluded as ‘EU-only’ agreements, the former will need to be concluded as mixed agreements.

The question, however, is what should be included in such separate investment agreements? The EU (i.e. the Commission) will be reluctant to include its newly acquired exclusive competences in the area of foreign direct investment in such ‘mixed’ investment agreements. Most likely, the Commission will prefer to keep provisions on foreign direct investment in ‘EU-only’ FTAs. The conclusion of a mixed agreement with a limited scope, covering only portfolio investment and ISDS, also does not appear to offer an attractive or realistic option. Moreover, it is not excluded that in the future provisions on portfolio investment will fall under exclusive EU competences if the EU were to adopt internal legislation in this area (triggering exclusivity pursuant to the ERTA doctrine/Article 3(2) TFEU).

Another scenario would be to include an investment chapter in EU FTAs covering foreign direct investment, but that provisions related to portfolio investment and the ICS would be incorporated in a separate protocol. Whereas the FTA would be an ‘EU-only’ agreement, the mixed protocol would require member state ratification. During the temporal gap between the ratification of the two legal instruments, the FTA provisions on foreign direct investment would at least be covered by the state-to-state dispute settlement mechanism included in the FTA. The final option is to tweak the ISDS/ICS in such a way that it does not “remove disputes from the jurisdiction of the courts of the Member States”, for example by requiring that disputes before a national court of member states need to be suspended (and not withdrawn) during the ISDS/ICS procedures. However, such amendments may trigger new legal challenges, for example conflicting interpretations between member state courts and ISDS/ICS tribunals.

Finally, it should be stressed that with regard to ISDS, the Court stressed that it only had the task of ruling on the nature of the competence to establish such a dispute settlement regime, and not on the question whether the provisions of the agreement are compatible with EU law. The compatibility of the ICS with EU law, however, will be the subject of a new Opinion procedure. In the context of the ‘CETA saga’, Belgium will seek an Opinion of the Court under Article 218(11) TFEU to ask whether the ICS in CETA is compatible with EU law. It is expected that Belgium will initiate the Opinion procedure in June 2017. It actually waited for the Singapore Opinion before phrasing its questions to the Court. In any case, a negative outcome in this procedure would further complicate the inclusion of the ICS in future EU FTAs.

## 6. Conclusion

In line with the broadened post-Lisbon competences in the area of trade, the Court has paved the way in its Opinion on the EU-Singapore FTA towards ambitious and broad ‘EU-only’ FTAs. With the notable exception of portfolio investment and ISDS, the EU has now the exclusive competences to realise all its broad trade-related objectives, including (transport) services, IPR, foreign direct investment and sustainable development. This can contribute to the credibility and effectiveness of the EU’s trade policy as trade agreements do not necessarily need to be jeopardised by 28 additional – and sometimes unpredictable – ratification procedures in the member states. The Commission should therefore pursue ‘EU-only’ FTAs and cover portfolio investment and ISDS/ICS in separate agreements, or not at all. Member states, on the other hand, should refrain from deliberately making EU FTAs mixed, as this would contradict the spirit of the Lisbon Treaty and the Court’s case-law.

EU-only agreements are not ‘less democratic’ than mixed agreements, as sometimes argued. On the contrary, EU-only agreements prevent situations arising in which a single member state, or even a small minority in a member state through a referendum, can block the entry into force of a trade agreement for the entire EU, even if this agreement mainly covers areas for which the member state has no competences. Member states should actively pursue their objectives in the framework of the Council and the Trade Policy Committee throughout the entire procedure of the conclusion of a FTA, as foreseen in the Treaties. Moreover, democratic legitimacy is also ensured by the increased role of the European Parliament, which has already proven that it is not afraid to fully use its post-Lisbon trade competences. Since the heated debate on TTIP and CETA, the Commission has already considerably stepped up its engagement with civil society over envisaged FTAs. In order to avoid member states continuing to insist on mixity, however, the Commission should strengthen its (informal) consultation process with the member states and their national parliaments before adopting a recommendation to launch FTA negotiations. In this way, national parliaments would be provided with the possibility to debate and influence various elements of an envisaged trade agreement at an early stage.



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