Investment Arbitration and National Interest

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Balazs Horvathy*

OPINION 2/15 OF THE EUROPEAN COURT OF JUSTICE AND THE NEW PRINCIPLES OF COMPETENCE ALLOCATION IN EXTERNAL RELATIONS – A SOLID FOOTING FOR THE FUTURE?

Abstract

In economic terms, the Common Commercial Policy is the most important policy area in EU external relations, needing a solid and predictable framework in terms of allocation of competences and national sovereignty. This paper addresses these facets of Opinion 2/15, which – in the context of the EU-Singapore Free Trade Agreement (EUSFTA) – clarified the division of competences between the European Union and the Member States in relation to international trade policy.

I. Introduction

Cecilia Malström, the EU Commissioner for Trade, is strikingly active on social media networks and her concise comments on recent developments of the EU external trade policy always are inspirational for headlines. In May 2017, followers of her Twitter account were informed on Malmström's relevant observation straight after the Court of Justice announced Opinion 2/15 concerning the conclusion of Free Trade Agreement negotiated between the European Union and the Republic of Singapore (EUSFTA).[1] Commissioner Malmström claimed that the Court's "[o]pinion should put us on solid footing for the future […]" and expressed her commitment to work with the Governments and the European Parliament to define the way forward,[2] indicating that the Court's Opinion clarifies all sort of questions regarding the Common Commercial Policy (CCP).

In economic terms, the CCP is the most important policy area in the EU external relations and therefore it is indisputable that the CCP would need a solid framework and clarity relating to its EU law setting. This 'solid footing' might be essential, especially to the Member States, as the competence in the CCP is conferred exclusively on the European Union, consequently the allocation and scope of the competence might raise concerns about sovereignty and national regulatory freedom as well. This paper aims at

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1 Opinion of the Court 2/15., ECLI:EU:C:2017:376.

2 Tweet of Cecilia Malmström (@MalmstromEU), commissioner for trade (EU external trade policy). Available at https://twitter.com/MalmstromEU/status/864427382647738368 .

reviewing these aspects of Opinion 2/15 and assessing its implications on the competence allocation between the European Union and the Member States.

II. CCP and the 'New Generation' Free Trade Agreements

The EUSFTA is a new generation trade and investment agreement[3] that covers not only the standard free trade issues but also lays down provisions concerning investments and non-trade concerns, e.g. sustainable development and environmental protection. These agreements are definitely opening a new era in international economic relations and generate the need to rethink the concepts of state sovereignty and autonomy.[4] In EU policy, the 'new generation agreements' are rooted in the European Union's Global Europe strategy[5] that paved the way to an ambitious trade agenda and a new approach to the negotiations of trade agreements. It is notable for the current case of EUSFTA, that the investment chapter of these 'new generation agreements' usually lays down detailed provisions with regard to the investment activities, such as investment protection, obligations and regulatory leeway of the host states, principles of appropriation.[6] Moreover, procedural rules are also enshrined in these agreements in order to facilitate the enforcement of their provisions and reconcile disputes between the contracting parties (state-state dispute settlement, SSDS) as well between investors and states (investor-state dispute settlement, ISDS). The overall objective of these agreements is to provide legal certainty to investors operating in the EU or in third countries concerned. The EUSFTA follows this line and covers substantial provisions beyond trade in goods, therefore, in the terminology of the World Trade Organization (WTO), the EUSFTA encompasses both 'WTO+'[7] and 'WTO-x'[8] rules. The investment provisions included in Chapter Nine of EUSFTA address a relatively broad range of issues.[9] The 'new generation agreements', as

[3] For a comprehensive analysis of the new generation agreements *see* Ewa Zelazna, *New Generation of EU Regional Trade Agreements*, 1 Lund Student EU Law Review 1 (2012).

[4] Csongor István Nagy, *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*, 9 Czech Yearbook of International Law, 197–216, 198 (2018).

[5] European Commission: Global Europe: Competing in the World, COM (2006) 567 final.

[6] In general, *see* Zoltán Víg & Slobodan Doklestić, Requirements of Lawful Taking of Foreign Property in International Law (2016).

[7] So called WTO+ (WTO plus) provisions: all commitments building on those already agreed to at the multilateral level, *see* Henrik Horn & Petros C. Mavroidis & André Sapir, Beyond the WTO? An anatomy of EU and US Preferential Trade Agreements 3–7 (2009).

[8] WTO-x (WTO extra) commitments dealing with issues going beyond the current WTO mandate, *e.g.* on labor standards. *See id*. at 4.

[9] The Commission, however, intended originally to negotiate an agreement without investment provisions and its mandate has been extended to an investment chapter only afterwards. See details below. The Chapter encompasses the provisions on investment protection, lays down the definition of investment, which is based on the standard concept enshrined in several BITs (every kind of asset which has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, or a certain duration). Moreover, EUFSTA covers also requirements concerning national treatment, fair and equitable treatment and full protection and security, as well as compensation for losses suffered owing to war or other events (armed conflict, revolution, a

EUSFTA is also indicating, are becoming more important and will gradually replace the Member States' BITs, as the founding treaty provides the European Union with exclusive competence in the field of foreign direct investments. Even though the Lisbon Treaty extended the competence of the CCP to new areas, including investments, the character and scope of the competence has left questions unanswered.

This ambiguity over the competences, however, has always been seen during the evolution of the CCP. At the very outset, the founding treaties remained silent on the competence over the CCP, and the Court's intensive case law was to establish the concept of exclusivity in the 1970s.[10] The underlying arguments behind the exclusive competence character were the establishment of the customs union, the common interest, and the requirement that the CCP should be based on uniform principles. This argumentation expressed the need for unity of action of the Member States in the area of the external trade, e.g. the unity of positions in trade negotiations. The line of reasoning on the 'uniform principles'[11] referred to the fact that the internal market and the customs union would be inoperable if the Member States would have retained the competence to implement different trade policies. Moreover, different trade policies could set off distortions in the internal market as well. Therefore the Court's extensive case law resulted in a shift of competence over trade policy, drastically limiting the autonomy of the Member States in this area.

The ECJ clearly established the exclusive nature of the competence in its case law but this only reflected on the vertical allocation of competences between the EU and Member States, and did not specify which subjects were covered by the EU competence. Therefore, it is also important to identify the extent of the competence because the EU can exercise its powers exclusively within the material scope of the CCP. The Treaty originally laid down an exemplificative list of subjects relating to trade in goods, where the Community was empowered to act. However, from quite early on, the Court has gone beyond this narrow scope. The Court recapped the CCP in a wide and dynamic interpretation and did not restrict the CCP to instruments intended to have an effect only on the traditional aspects of external trade. In line with this approach, international commodity agreements,[12] customs valuation,[13] or the Generalized System of Preferences introduced by the Community,[14] had to be regarded as part of the CCP, even if the founding treaty did not make any reference to these subjects. Later the Court limited this dynamism and took a more restrained view of the extent of the EU's competence. In Opinion 1/94,[15] the Court had

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state of national emergency, revolt, insurrection or riot), provisions of expropriation, and specific ISDS mechanisms.

[10] *See* especially Case 8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson*, ECLI:EU:C:1973:90; Opinion of 11 November 1975 in Case 1/75 *Local Cost Standard*, ECLI:EU:C:1975:145, Case 41/76 *Donckerwolcke v Procureur de la République*, ECLI:EU:C:1976:182.

[11] *See* Case 174/84 *Bulk Oil (Zug) AG v Sun International Limited and Sun Oil Trading Company*, ECLI:EU:C:1986:60, para 29.

[12] Opinion of 4 October 1979 in Case 1/78 *Natural Rubber*, ECLI:EU:C:1979:224.

[13] Case 8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH*, ECLI:EU:C:1973:90.

[14] Case 45/86 *Commission v Council*, ECLI:EU:C:1987:163.

[15] Opinion of 15 November 1994 in Case 1/94 *WTO*, ECLI:EU:C:1994:384.

to give an Opinion whether the Community had the competence to conclude all parts of the WTO Agreement on an exclusive basis. Even though the ECJ verbally kept the open nature of CCP[16] and held that the Community had exclusive competence to conclude multilateral agreements on trade in goods, the Community's competence did not cover the most part of subjects related to GATS and TRIPS. Therefore the WTO agreement fell in part within the competence of the Community and in part within that of the Members States and had to be concluded as a mixed agreement. This limited approach was represented also in subsequent Treaty amendments but the Treaty of Lisbon finally made major progress on consolidating the exclusive competence character and transferred key external trade policy competences to the supranational level.[17] The new language of Article 207 TFEU encompasses not only trade in services and the commercial aspects of intellectual property but also foreign direct investments.[18] As a result, the scope of the CCP has been extended to negotiations by the EU on agreements covering investment issues. [19] The TFEU explicitly lays down that the EU has *exclusive* competence in the areas of the CCP[20] and even the objectives of the CCP refer to the FDI as well.[21]

It was important also for the EUSFTA that these provisions have not been fully clear about the extent of the new competences conferred on the European Union as the TFEU applies the term 'foreign direct investment' without any definition. It was argued that the notion of FDI obviously differs from the term established in the WTO terminology which uses 'trade related investment measures.'[22] Compared to this, the

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[16] Opinion of 15 November 1994 in Case 1/94 *WTO*, ECLI:EU:C:1994:384, para 41.

[17] Marc Bungenberg, *Außenbeziehungen und Außenhandelspolitik*, 44 Europarecht Beiheft 1 (2009); Jan Ceyssens, *Towards a Common Foreign Investment Policy*? – *Foreign Investment in the European Constitution*, 32 Legal Issues of Economic Integration, 3 (2005); Christoph Herrmann, *Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon*, 21 Europäische Zeitschrift für Wirtschaftsrecht 6 (2010); Steffen Hindelang & Niklas Maydell, *Die Gemeinsame Europäische Investitionspolitik – Alter Wein in neuen Schläuchen*? *in* Internationaler Investitionsschutz und Europarecht (Marc Bungenberg & Joern Griebel & Steffen Hindelang eds., 2010); Joachim Karl, *The Competence for Foreign Direct Investment – New Powers for the EU*, 5 Journal of World Investment & Trade 3 (2004); László Knapp, *Mixed Agreements and the Treaty of Lisbon in* COFOLA 2010 – The Conference Proceedings 1539–1553 (Nadezda Rozehnalová & Roman Onderka eds., 2010); Markus Krajewski, *External Trade Law and the Constitutional Treaty*, 42 Common Market Law Review 1 (2005).

[18] Article 207 (1) TFEU.

[19] It should be mentioned here that despite the lack of competence, the Commission made attempts to have the support of the Member States to include investment provisions already before the Treaty of Lisbon, *see* Niklas Maydell, *The European Community´s Minimum Platform on Investment or the Trojan Horse of Investment Competence in* International Investment Law in Context 73–92 (August Reinisch & Christina Kahr eds., 2008).

[20] Article 3 (1) (e) TFEU. In addition to the explicit competence, the EU holds also 'implied powers', *see* Article 3 (2) TFEU: "The Union shall also have exclusive competence for 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." Inclusion of this provision in the TEU, however, is merely a codification of a principle established by the ECJ alredy in 1971 in Case 22/70 *Commission v. Council* (*ERTA*), 1971 ECR 263.

[21] *See* Article 206 TFEU. The EU must contribute "[...] in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers."

[22] The Agreement on Trade-Related Investment Measures (TRIMs) has been adopted as a part of the Marrakesh Agreements. The EU was already empowered for topics that are covered by the TRIMs agreement even

standard interpretation of 'foreign direct investment' implies a much wider term covering not only trade related aspects but the whole concept of direct investment activities conducted by EU investors in third countries or conversely, by third country investors in the European Union.[23] Reference to "FDI" also indicates a terminological restriction, since FDI specifically refers to 'direct' investments. This poses the question which factors can determine whether an investment activity is 'direct'. The notion can be traced back to the internal market provisions regarding the free movement of capital.[24] The CJEU has also applied the distinction between indirect and direct investments in a number of cases.[25] According to these interpretations, 'direct investment' covers all cross-border investment transactions conducted by natural or legal person investors, where the investor makes capital available to an undertaking in order to establish or maintain lasting and direct economic ties with this undertaking. If the investment is carried out by acquisition of shares from an undertaking (company), only transactions can be regarded as 'direct investment', in which the shares enable the investor to participate effectively in the management of that undertaking or in its control. [26] Following these lines of arguments, it is plausible that 'foreign direct investments' do not cover portfolio investments when the investors want to get shares in a company only for reason of making short-term profits without any intention to control or manage the target company.[27] It means that the difference between direct and indirect investments lays in the intention of control of the undertaking. However objective criteria are also applied for making the distinction easier. The Court's case law follows the method elaborated by the IMF that considers all acquisitions in a company below 10% of shares necessarily as portfolio investment,[28]

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before the Lisbon amendment, *see* Markus Krajewski, *External Trade Law and the Constitutional Treaty*, 42 Common Market Law Review 16 (2005), and commentary to Article 207, *in* Das Recht der Europäischen Union (Eberhardt Grabitz & Meinhard Hilf & Martin Nettesheim eds., 43th ed., 2011).

[23] According to Article 207 (1) TFEU, transactions carried out by EU investors in the EU internal market are not to be regarded as 'foreign' investments. These investments fall within the internal market competence. For further analysis, *see*: Christoph Herrmann, *Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon*, 21 Europäische Zeitschrift für Wirtschaftsrecht 6 (2010), and Steffen Hindelang & Niklas Maydell, *Die Gemeinsame Europäische Investitionspolitik – Alter Wein in neuen Schläuchen*? *in* Internationaler Investitionsschutz und Europarecht (Marc Bungenberg & Joern Griebel & Steffen Hindelang eds., 2010).

[24] Council 88/361/EEC Directive of 24 June 1988 for the Implementation of Article 67 of the Treaty.

[25] The term 'direct investments' is also applied by the provisions on the free movement of capital in Articles 63–66 TFEU. The Court of Justice interpreted and defined this term in a number of cases, *see* for instance: Case C-446/04 *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue*, ECLI:EU:C:2006:774; Case C-157/05 *Holböck v. Finanzamt Salzburg-Land*, ECLI:EU:C:2007:297, para 34; Case C-112/05 *Commission v. Germany*, ECLI:EU:C:2007:623, para 18; Case C-101/05 *Skatteverket v. A.*, ECLI:EU:C:2007:804, para 46; Case C-194/06 *Staatssecretaris van Financiën v. Orange European Smallcap Fund NV.*, ECLI:EU:C:2008:289, para 100; Case C-274/06 *Commission v. Spain*, ECLI:EU:C:2008:86; para 18; Case C-326/07 *Commission v. Italy*, ECLI:EU:C:2009:193, para 35.

[26] *See* the above cited case law, specifically: C-446/04, para 182; C-157/05, para 35; C-112/05, para 18; C-194/06, para 101; C-326/07, para 35.

[27] *See* the Court's definition of 'portfolio investments': "[…] acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking ('portfolio' investments)." Joined Cases C-282/04 and C-283/04 *Commission v. Netherlands*, ECLI:EU:C:2006:608, para 19.

[28] *See* IMF, Balance of Payments Manual 86–87 (5th. ed., 1993): "[…] a direct investment enterprise is defined

although from the very outset, the Court applied additional criteria as well. Accordingly, the CJEU highlighted that not only the proportion of the shares can determine the nature of a transaction, but other factors, e.g. special forms of participation in the management, or particular provisions of the domestic company law, might also be decisive.[29] These interpretations, however, left important questions unanswered. Therefore the negotiations of the new generation trade agreements opened a debate over the scope of competences and their allocation between the EU and the Member States. The seminal case in this debate was the CJEU Opinion procedure on EUSFTA.

III. The EUSFTA and Lack of Clarity on the Scope of the Competence

The EUSFTA was the result of a five years long negotiation but the original idea to conclude a wider, regional agreement with the ASEAN countries (Association of Southeast Asian Nations), dates back to earlier times. In 2006, the Commission intended to open negotiations with ASEAN but this 'interregional' approach proved to be unsuccessful and the negotiations were suspended. Consequently, the Commission changed this approach and proposed bilateral agreements to be concluded with individual ASEAN countries. The Council adopted the Commission's mandate for negotiations with Singapore in 2009 and the negotiations were launched in 2010.[30] In the beginning, the mandate did not cover investments but the Council extended the scope of negotiations and added investments to the mandate in 2011. The text of EUSFTA was initialled in 2015.

It was not surprising that no compromise was found between the Council and the Commission on the competence distribution for the agreement, since the Treaty, as examined in the previous subchapter, was not fully clear about the scope of the EU exclusive competence. Therefore, the Commission submitted a request for an Opinion procedure before the Court on the allocation of competences between the EU and the Member States concerning the conclusion of EUSFTA. The Commission sought guidance from the CJEU on whether the EUSFTA had to be concluded as an agreement between the EU and Singapore, without participation of the Member States, or as a mixed agreement that requires ratification on behalf of the Member States as well.[31]

[…] as an incorporated or unincorporated enterprise in which a direct investor, who is resident in another economy, owns 10 percent or more of the ordinary shares or voting power (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise). […]" This requirement can give guidance also for the interpretation of the treaty, however it can be established only as a presumption (i.e., in certain cases, also an ownership interest below 10% can be understood as direct investment).

[29] *See* the above cited case law, C-446/04, para 182.

[30] The first country, the EU commenced negotiations with, was Singapore.

[31] The Opinion procedure related only to the issue of whether the EU has exclusive competence and the Court did not examine whether the content of the agreement is compatible with EU law. The Commission submitted the following four questions: 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?; Is there any provision of the agreement that falls within the exclusive competence of the Member States?

The Commission's main position was that the EU has exclusive competence to conclude the EUSFTA alone. The Commission argued, first, that most parts of the agreement come within the exclusive competence under Article 207 TFEU. According to the Commission, the competence covering other provisions not falling within the scope of Article 207 TFEU is also of exclusive nature resulting partly from a legislative act giving authority for that,[32] or from the fact that conclusion of the EUSFTA may affect common rules or alter their scope.[33] Similarly, the European Parliament shared the view that the Agreement should be concluded by the EU on its own. However the Council and the Member States[34] submitted observations in order to claim that the Member States should also be a contracting party to the Agreement for the reason that certain topics of the Agreement fall within the shared competence of the EU and the Member States and some parts remained even in the (exclusive) competence of the Member States.

IV. The Opinion of the Advocate General

Advocate General Sharpston submitted an analytical and detailed Opinion to the procedure on 21 December 2016[35] and took the view that the EUSFTA can be concluded only by the European Union and the Member States acting jointly. Even though the major part of the agreement fell into the exclusive competence of the European Union, the Advocate General found that the European Union's external competence was shared on several topics, including the provisions on types of investment other than foreign direct investment.

The Advocate General gave a very detailed insight into the Treaty provisions as well as the permanent case law with respect to the exclusive competences in the CCP and aimed at establishing the material scope of the EU competence. This framework was then applied to the text of EUSFTA. The Opinion analysed the agreement from chapter to chapter and suggested deliminations for the subjects falling within the exclusive EU competence, shared competences between the EU and the Member States, and the competences retained by the Member States at the domestic level.

According to the Advocate Generat, the subjects of the EU exclusive competence cover the standard matters of trade in goods, services (including rail and road transport services), commercial aspects of intellectual property rights and foreign direct investment. Regarding the meaning of FDI, the Advocate General relied on the concept established in the Court's case law.[36] Keeping in line with the Commission's submission, the Advocate General argued that the objectives and general provisions of EUSFTA also fell within the scope of the CCP as those provisions corresponded with the objectives laid down in Article 206 TFEU or were purely accessory and therefore these provisions were not

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[32] *See* the first ground under Article 3 (2) TFEU.

[33] *See* the third ground under Article 3 (2) TFEU.

[34] All Member States submitted written observations with the exception of Belgium, Croatia, Estonia and Sweden.

[35] Opinion of Advocate General Sharpston in procedure 2/15, ECLI:EU:C:2016:992.

[36] *See* the previous sub-chapter above.

such as to alter the allocation of competences between the European Union and the Member States as regards the other provisions of the EUSFTA.[37] It was crucial from the perspective of EUSFTA whether the dispute settlement and other procedural provisions (mediation, transparency mechanisms) might be established on the basis of the EU competence. In the Advocate General's reasoning, the dispute settlement and mediation mechanisms are ancillary in nature. Consequently the allocation of competences in those fields should be done in the same way as the substantive provisions to which they relate.[38] The EU enjoyed exclusive competence in those fields in so far as those provisions applied to ancillary parts of the agreement falling within the scope of the exclusive competence. Along with the latter areas, the assessment of the Advocate General also touched upon the competences vis-à-vis competition and related issues. Sharpston's Opinion followed the arguments of the Commission and held that the link between international trade and competition policy might be reasonably established. This connection can be seen in certain provisions in the WTO agreements and the detailed analysis of the related chapters in EUSFTA showed, according to the Opinion, that the provisions are covered by the CCP. The Opinion also highlighted that the EU enjoyed competence even relating to those provisions of EUSFTA that required harmonization of competition rules in some degree. This was because these harmonization requirements stemmed from competition law provisions of EU law the agreement extended to Singapore, or provisions concerning cooperation and coordination in law enforcement that were all ancillary to the main substantive obligations set out in EUSFTA.[39] Moreover it is also notable, how the Advocate General evaluated the position of the 'trade and environment' issues. The EUSFTA lays down provisions regarding the investments in renewable energy sectors in a separate chapter[40] and in accordance with the major objectives of the 'new generation agreements', contains a complete set of rules on sustainable development.[41] Sharpston referred conceptually to the consistency requirement of the Treaty between the CCP and the general objectives and principles of EU external relations and made plausible that levels of environmental protection demonstrated links with international trade.[42]

Regarding investments in renewable energy sectors, the Opinion argued that these provisions in EUSFTA are limited to measures which may affect trade and investment that are primarily concerned with regulating commercial policy instruments and eliminating trade and investment barriers and have direct and immediate effects on trade. Therefore, the exclusive competence of the EU can be based on the CCP. Similarly, she found that to some extent, trade and sustainable development relate to commercial policy instruments, therefore these elements thereof establish the exclusive competence at EU level.[43]

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[37] Advocate General's Opinion, para 136.

[38] Advocate General's Opinion, paras 523–529.

[39] Advocate General's Opinion, paras 459–465.

[40] EUSFTA, Chapter Seven.

[41] EUSFTA, Chapter Thirteen.

[42] 473–483.

[43] Advocate General's Opinion, paras 484–504. The Opinion found the same conclusion relating to the conservation of marine biological resources.

The competences shared with the Member States covered subjects that were partly related to the above issues, but were excluded from the scope of the exclusive competence. The provisions of the EUSFTA on trade in air transport services, maritime transport services and transport by inland waterway (including services inherently linked to those transport services), were not part of the trade in services competence. Even though the exclusive competence comprised government procurements as well, those relating to transport services and services inherently linked to transport services were exempted as falling within the scope of the shared competence.[44] Similarly, Sharpston emphasized that EU has exclusive competence with regard to foreign direct investments as well as commercial aspects of IP rights. However, in the fields of indirect investments and non-commercial aspects of intellectual property rights, the EU enjoys only competences shared with the Member States. Since the Opinion found the procedural provisions (ISDS, mediation, transparency mechanisms) as falling only partly within the exclusive competence, all aspects of EUSFTA's procedural provisions were based on competences shared with the Member States that apply to the parts of the agreement for which the EU enjoys shared external competences. Moreover, the Opinion divided also the sustainable development chapter with respect to the available competence. In the Advocate General's reasoning, the fundamental labor and environmental standards were not covered by Article 207 TFEU. Therefore these matters fell within the scope of either social policy or environmental policy – consequently the EU enjoyed only competences shared with the Member States.

It was significant from the perspective of the competence allocation and the position of the Member States that the Opinion found also a subject where the EU was not empowered. Sharpston held that the EU had no external competence to agree to be bound by that part of the EUSFTA which terminated bilateral agreements concluded between certain Member States and Singapore. In her view, that competence belongs exclusively to the Member States concerned.[45]

V. The Opinion of the Court of Justice

The Court delivered its Opinion on 16 May 2017 and held that EUSFTA cannot be concluded by the European Union alone; therefore EUSFTA implies a 'mixed' agreement signed and concluded by both the EU and the Member States. The assessment of the exclusive competence for conclusion of EUSFTA was based on the standard approach conducted by the Court in the well-settled case law. The Court held that the CCP belongs within the context of the Union's external action and thus the CCP relates to trade with non-EU countries.[46] It was emphasized that only the fact that the measure has implications for international trade is not quite enough for deciding whether the subject is covered by the CCP. It can be classified as falling within the scope of the CCP if it relates

[44] EUSFTA, Chapter Eight and Ten.

[45] *See* Advocate General's Opinion, para 563.

[46] *See* Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para 50; Judgment of 22 October 2013, Case C-137/12 *Commission v Council*, EU:C:2013:675, para 56.

specifically to international trade, which means that the measure is essentially intended to promote, facilitate, or govern trade, and has direct and immediate effects on trade. In other words, the existence of a specific link between the measure and international trade between the European Union and Singapore has to be established.[47]

Even though it is not expressly argued in the Opinion, it is obvious that this investigation is rooted conceptually in the case law on principles of choice of legal basis. More precisely, the assessment whether the EUSFTA falls within the scope of the CCP can be regarded as not only a question of the competence allocation between the EU and the Member States, but also as a question of delimitation of the Union's policies. Therefore the Opinion is significant for both the vertical and the horizontal aspects of the competence allocation. This conceptual basis is also palpable behind the reasoning, when the Court aims at finding objective factors, e.g., the purpose and the content of matters laid down in EUSFTA. This approached follows a very similar logical pathway that the Court usually applies concerning the choice of legal basis, where a provision pursues two- or multifold purposes or objectives. Accordingly, the Court is looking intuitively for the main or predominant objective and identifies the competence character of EUSFTA on the basis thereof.

Similar to the view of the Advocate General, the Court also found that the most part of the agreement can be covered by the exclusive competence of the CCP. However, disagreeing with the Advocate General, the Court's Opinion scrutinized the status and competence character of certain EUSFTA chapters differently. These major differences are related to services (Chapter Eight), investment (Chapter Nine), government procurement (Chapter Ten), IP rights (Chapter Eleven), and environmental concerns (Chapter Thirteen). The position as well as the argumentation of the Court regarding these issues shall be discussed in some detail.

a) Services

The Advocate General held that major parts of the services were covered by the exclusive competence, including rail and road transport services, while other important areas were shared between the EU and the Member States (trade in air, maritime and inland waterway services). However, the Court did not fully share this view and reassessed the extent of the competence in this area. The Court did not differentiate between the types of activities covered by trade in services ('modes' in WTO

[47] Opinion of the Court 2/15., ECLI:EU:C:2017:376., paras 34–36. *See*, for related cases, inter alia, Case C-137/12 *Commission v Council*, EU:C:2013:675, para 57, and Opinion of 14 February 2017 in Case 3/15 *Marrakesh Treaty on Access to Published Works*, EU:C:2017:114, para 61. For a general analysis, *see* Marise Cremona, *Shaping EU trade policy post-Lisbon: Opinion 2/15 of 16 May 2017*, 14 European Constitutional Law Review 1, 231–259 (2018); Rumiana Yotova, *Opinion 2/15 of the CJEU: Delineating the Scope of the New EU Competence in Foreign Direct Investment*, The Cambridge Law Journal, 29–32 (2018); László Knapp, *The Doctrine of Implied External Powers and the EU-Singapore Free Trade Agreement in* The Influence and Effects of EU Business Law in the Western Balkans (Judit Glavanits & Balázs Horváthy & László Knapp, eds., 2018, forthcoming); Charlotte Beaucillon, *Opinion 2/15: Sustainable Is the New Trade. Rethinking Coherence for the New Common Commercial Policy*, 2 European Papers 3, 819–828 (2017).

classification)[48] and found that there was no reason to make a distinction between the provisions relating to the cross-border supply of services and the supply of services by establishment or by the presence of natural persons. Thus, the Court held that all four modes fell within the scope of the CCP.[49] As Article 207 (5) TFEU excludes the negotiation and conclusion of international agreements in the field of transport from the scope of the CCP, the Court examined specifically transport services regulated in the EUSFTA. Some of them were held to be 'business services' and not auxiliary services in the area of transport e.g., aircraft repair and maintenance services during which an aircraft is withdrawn from service; the selling and marketing of air transport services and computer reservation system services. The Court concluded that these three types of services were covered by the EU exclusive competence.[50] For maritime, rail, and road transport services it was decisive that under Article 3 (2) TFEU and in line with the permanent case-law, the Treaty grants to the EU exclusive competence to conclude also agreements which may affect common rules or alter their scope. Considering the provisions of EUSFTA regarding the maritime, rail and road transport services, the Court concluded that these areas were largely covered by common rules already and may affect also common rules or alter their scope, therefore the EU enjoys exclusive competence in these areas. Concerning the internal waterways transport services, the Court, consistently with the permanent case law, found that there is no need to take into account of the provisions of an agreement, which are extremely limited in scope.[51] As the provisions regarding those services were very marginal in EUSFTA, it did not imply the delimitation of the EU competence. For this reason the Court concluded that the EU had exclusive competence in respect of services (Chapter Eight) in its entirety.[52]

b) Investment

One of the most complex issue was the competence allocation in the area of investments. It follows from the above analysis that the Opinion of the Advocate General strictly delimited the competences for direct and indirect investments (falling within the exclusive and shared competences respectively), and also the competences regarding ISDS were split along this logic. The Court drew similar conclusions concerning investment

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[48] Trade in services encompasses the following four modes of activities in the terminology of the WTO: the supply of a service from the territory of one WTO Member into the territory of another Member (mode 1); the supply of a service in the territory of one Member to the consumer of another Member (mode 2, the latter two modes are cross-border services); the supply of a service by a service provider of one Member through commercial presence in the territory of another Member (mode 3); and the supply of a service by a service provider of one Member through presence of natural persons of a Member in the territory of another Member (mode 4). This differentiation was also applied by the Court in its Opinion 1/94.

[49] Opinion of the Court, paras 54–55. *See* for related case: Opinion 1/08, 30 November 2009, *Agreements Modifying the Schedules of Specific Commitments under the GATS*, EU:C:2009:739, paras 4 and 118 and 119.

[50] Opinion of the Court, paras 64–68.

[51] Opinion of the Court, para 217.

[52] *See id*., and Opinion of the Court, para 69.

protection and the competence nature of FDI and non-direct investment, but assessed the powers for ISDS differently.

The distinction between the two aspects of foreign investments was made on the basis of the permanent case law. Thus, the Court defined FDI as "[…] investments made by natural or legal persons of that third state in the European Union and vice versa which enable effective participation in the management or control of a company carrying out an economic activity."[53] On the other hand, non-direct investment concerns, *inter alia*, acquisition of company securities with the aim of making a financial investment without any intention to influence the management and control of the undertaking (portfolio investments).[54] For the reason that the Treaty (Article 207 (1) TFEU) explicitly lists FDI as part of the CCP, it is undebatable that the foreign direct investment provisions fall within the exclusive competence of the EU. It follows also from this provision that the Treaty does not intend to include other foreign investment categories in the CCP. Therefore non-direct investments (portfolio investments) are not covered by the CCP. The commitments in the EUSFTA relating to foreign investments, other than direct investments do not fall within the exclusive competence of the EU. The Court, however, assessed these investment activities to be covered by the movements of capital provisions (Article 63 TFEU). Consequently non-direct investments fall within the shared competence between the EU and the Member States pursuant to Article 4 (2) (a) TFEU.[55]

The Court did not share the view of the Advocate General regarding investor-state dispute settlement provisions of EUSFTA. Sharpston found that ISDS is ancillary to the investment protection provisions. Therefore ISDS provisions related to FDI could be concluded within the scope of CCP but ISDS provisions concerning non-direct investment fall under shared competences. Contrary to this view, the Court considered that the whole concept of ISDS falls outside of the scope of the exclusive competence. The Court's argument was that the ISDS regime removes disputes from the jurisdiction of the courts of the Member States. Therefore these provisions of EUSFTA cannot be of a purely ancillary nature. It follows that ISDS cannot be established without the consent of the Member States.[56]

The third major question regarding the investment chapter was, whether the competence over CCP empowers the EU to replace the BITs between the Member States and Singapore. The BITs concluded by the Member States with third countries are now authorized by a regulation adopted in 2012[57] that enables the Member States to maintain their BITs in force until the EU concludes an investment agreement with the same third country. The Advocate General held that the EU had no power to terminate these pre-existing agreements but the Court took a different view and found that provisions in the EUSFTA terminating the BITs concluded by the Member States with Singapore do

[53] Opinion of the Court, para 82.

[54] Opinion of the Court, para 227.

[55] Opinion of the Court, paras 240–242.

[56] Opinion of the Court, para 292.

[57] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, [2012] OJ L351/40.

not encroach upon a competence of the Member States, in so far as that provision relates to a field in respect of which the European Union has exclusive competence. The reasoning of the Court was based on the argument that if the EU negotiates and concludes an agreement with a third country relating to a field in respect of which it is empowered with exclusive competence, the EU replaces the Member States. In light of the well-settled case law,[58] it was clear "[…] that the European Union can succeed the Member States in their international commitments when the Member States have transferred to it […] their competences relating to those commitments and it exercises those competences."[59] The EU has exclusive competence to terminate these agreements with respect to those provisions falling within the scope of FDI.[60]

c) Government Procurement

Contrary to the Advocate General's Opinion, the Court held that the provisions of EUSFTA regarding government procurement should be based completely on the exclusive competence of the European Union. It was argued, that these rules specifically aim at laying down the requirements under which economic operators of each party of the agreement may participate in procurement procedures in the other contracting party. The Court emphasized, as those requirements are founded on considerations of non-discriminatory access, transparency and efficiency, they have direct and immediate effects on trade in goods and services between the EU and Singapore.[61] Therefore these provisions were regarded as covered by the scope of the CCP. For the provisions on government procurement in the field of transport services, the Court followed the same logic and found an overriding argument in Article 3 (2) TFEU: since those related areas are already covered by common rules, the exclusive external competence for the whole Chapter Ten on government procurement was established.[62]

d) Intellectual Property Protection

The Advocate General supported the position of some Member States and held that EUSFTA addresses both commercial and non-commercial aspects of intellectual property but the CCP conferred only competences regarding commercial aspects on the EU. The main argument was that the EUSFTA referred to multilateral conventions in the context of IP and copyright, which include also provisions relating to moral rights.[63] The Court opposed this argumentation and took the view that such reference by EUSFTA was

[58] This started early, *see* Joined Cases 21/72 to 24/72 International Fruit Company and Others, EU:C:1972:115, paras 10–18.

[59] Opinion of the Court, para 248.

[60] Opinion of the Court, para 247.

[61] Opinion of the Court, para 76.

[62] Opinion of the Court, paras 77 and 224.

[63] *See* EUSFTA Article 10.24.

not sufficient for the subject to be regarded as a component of the agreement. This reasoning suggests that only the content and inherent provisions of the agreement play a role in delimiting the competence of the EU. Other sources like conventions referred to by the text of EUSFTA, are irrelevant.[64] The agreement itself does not contain provisions relating to moral rights. Therefore the Court concluded that the Chapter covered only the commercial aspects of IP rights and as a result, the EU enjoys exclusive competence for conclusion of Chapter Eleven.[65]

e) Trade and Sustainable Development

Disagreeing with the Advocate General, the Court saw the issues regarding trade and sustainable development covered by the CCP and the exclusive competence of the European Union. The conceptual framework of the Court's reasoning in this respect was, first, underpinned by the Treaty provisions regarding horizontal principles and objectives of EU external relations. Those principles and objectives enshrined in Article 21(1) and (2) TEU include sustainable development linked to preservation and improvement of the quality of the environment and the sustainable management of global natural resources. The CCP must be 'guided' by these principles and objectives.[66] In view of the Court, these provisions establish an obligation on the EU to integrate these objectives and principles into the conduct of the CCP.[67] The Court's argument implies that the EU is obliged to include these provisions into the agreements to be concluded with third countries. The Court argued that the relevant provisions of the EUSFTA on trade and sustainable development have a direct and immediate effect on trade. The Court highlighted that in terms of a specific provision of EUSFTA it is undisputable that parties to the agreement did not want to encourage trade by reducing the levels of social and environmental protection in their respective territories below the standards laid down by international commitments or to apply those standards in a protectionist manner. The Court concluded that the sustainable development of the EUSFTA (Chapter Thirteen) falls within the CCP and, therefore, within the exclusive competence of the EU. [68]

VI. Conclusions

The Opinion of the Court on the EUSFTA has made a novel contribution to a more precise separation of powers in the CCP, specifically regarding new generation trade agreements of the European Union. Delimiting clearly the competences in the areas of the CCP is vital for the Member States, as the exclusive competence character implies their sovereignty and autonomy not only in theoretical terms. The competence allocation

[64] Opinion of the Court, para 129.

[65] Opinion of the Court, para 130.

[66] Articles 205 and 207 (1) TFEU.

[67] Opinion of the Court, paras 142–145.

[68] Opinion of the Court, para 167.

might have a number of practical consequences as well. Even though the TFEU already lays down the framework of competence allocation, it is obvious that the founding treaties can answer only the abstract-categorical questions concerning the separation of powers between the EU and Member States in the CCP. It is pressing, however, to reach beyond these abstract questions and define the scope of the CCP in several matters, which might determine even the future of the external trade relations of the EU. From this point of view, it is strikingly important, how the emerging EU policy will gradually take the place of the Member States' own investment policies, which are still anchored in their more than one thousand agreements concluded with third countries bilaterally.

Considering these expectations, the message of the Opinion seems to be clear. Despite the exclusive competence character of the CCP, the new generation agreements are not fully covered by the EU competence. Therefore these agreements will require also the ratification on behalf of the Member States. Early commentaries regarding the Opinion confirmed a victory of the Member States in the competence debate. However, in the view of the present author, the picture may be much more sophisticated. First, the Court made evident the exclusivity of the EU competence in a number of areas, from services, over government procurement, to trade and sustainable development, among which the latter is, probably, of great importance. It does not affect only trade and environment issues. The Court's argumentation pulls indeed the whole domain of horizontal principles and objectives into the center of the CCP, which evidently expresses the conviction, that the CCP is based not only on pure economic decisions, but it is guided by shared values.

The mixed nature of the new generation agreements is telling not only with respect to the sovereignty of the Member States. It points also toward their legitimacy. In this perspective, the mixity can improve the legitimacy of the new generation trade agreements, as those must also be assessed by the national parliaments and ratified by the Member States. It must not be neglected, however, that the domestic ratification processes might be slowed down and that unforeseeable events can influence their outcome (see Wallonia's rejection of CETA).

Since the FDI is undenyably covered by the exclusive EU competence, the status of the Member States' extra-BITs are not implied essentially by the Opinion. The authorization under Regulation 1219/2012 is still relevant and enables the Member States to maintain the bilateral investment agreements in force until the Union concludes an agreement with the same third country. Even though the EU has already finished investment negotiations – apart from Singapore – with Canada, Japan and Vietnam, the signature or ratification procedures are still pending at this time. Therefore the related BITs maintained by several Member States with the latter countries have not yet been replaced. Moreover, the Member States are able to open new negotiations on a BIT or to sign and conclude a new treaty with third countries even in the future, under the authorization of the Commission (until now, 17 extra-BITs or additional protocols have been signed by Member States). Even though these concerns indicate that it will take longer time to replace the Member States' agreements, the Opinion made clear an important aspect of the replacement: the Court held that the EU has exclusive competence to terminate these agreements with respect to those provisions falling within the scope of FDI.

The Opinion left also questions unanswered regarding new generation trade agreements. Specifically, the EU competences regarding the ISDS mechanisms are

not fully clear yet. It was much disputed, whether Article 207 TFEU covers also the procedural aspects of the investment protection, i.e., whether the exclusive competence empowers the EU to participate in dispute settlement procedures established under the agreements. This issue implies also practical concerns, knowing that the investor-state dispute settlement (ISDS) mechanisms are *sine qua non* instruments of comprehensive investment protection. The Court only argued that the ISDS regime removes disputes from the jurisdiction of the courts of the Member States. Therefore these provisions of EUSFTA cannot be concluded without the consent of the Member States. However, the ISDS mechanism, as a specific forum, has not been assessed profoundly by the Opinion. Specifically, the Investment Court System introduced in CETA raises questions of incompatibility with EU law. Therefore the ongoing procedure of Opinion 1/17 is expected to be decisive on these aspects of the new generation trade agreements and to move the CCP toward a more solid footing.