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EU Court's Advocate General delivers opinion on EU-Singapore FTA

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An Advocate General of the Court of Justice of the EU (CJEU) has delivered an advisory opinion on the EU-Singapore FTA. In this opinion – which is non-binding on the Court, but would normally influence its decision – AG Sharpston concludes that because the EU alone does not have the required competence to sign and conclude the FTA, the EU and Member States need to act jointly.

Background

The text of the EU-Singapore FTA (EUSFTA) was initialled by the European Commission and Singapore in 2013. It covers matters for which the EU has exclusive competence under the EU Treaties to negotiate and conclude agreements, but also features certain topics which, it can be argued, both the EU and Member States have competence over – resulting in a so-called "mixed agreement" (which the EU and the Member States must jointly conclude, with lengthy ratification procedures). The precise division of power between the EU and the Member States in international trade agreements has been a subject of internal EU dispute, as displayed recently in relation to the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

In 2014, the Commission asked the CJEU to rule on the allocation of competences between the EU and the Member States in relation to EUSFTA. More specifically, it asked whether the FTA can be concluded by the EU only (through the EU Council and the European Parliament), or should national parliaments also be included in the ratification process. The pending Court decision is expected to have an impact on the ratification process of other pending EU FTAs.

The CJEU decision in this case (which will be Opinion 2/15), is expected sometime in 2017. On December 21, 2016, Advocate General (AG) Eleanor Sharpston, QC issued an advisory opinion on the case in her role as an impartial legal advisor to the Court.[1] AG opinions do not bind the Court but are considered influential and are followed in the majority of cases.

The AG's opinion

AG Sharpston concludes that certain parts of EUSFTA do not fall under exclusive EU competence. Accordingly, the full agreement can only be concluded if the EU and the Member States ratify it jointly (despite possible difficulties in the process). To reach this conclusion, the AG identifies within each EUSFTA chapter the parts over which the EU has exclusive external competence, and those where the EU's external competence is shared with the Member States.

[1] The text of the AG opinion can be found here.

In her opinion, matters over which the EU has exclusive competence (including with respect to related dispute settlement, mediation and transparency) are:

- trade in goods;
- trade and investment in renewable energy generation;
- trade in services and public procurement (with the exception of transport services);
- foreign direct investment (FDI);
- commercial aspects of intellectual property rights (IPR);
- competition;
- trade and sustainable development (when it relates to commercial policy);
- conservation of marine and biological resources; and
- trade in rail and road transport services.

On the other hand, she considers the EU's competence to be shared with the Member States (again, including with respect to related dispute settlement, mediation and transparency) with respect to:

- certain air, maritime and inland waterway transport services, and public procurement relating to transport services;
- non-FDI investment (e.g. portfolio investment);
- non-commercial IPR aspects; and
- fundamental labour/social policy and environmental standards.

Significantly, AG Sharpston also writes that the EU has no external competence to terminate and replace bilateral agreements previously concluded between certain Member States and Singapore (such as bilateral investment treaties, which EUSFTA FDI provisions aim to replace). That power sits exclusively with the relevant Member State, and it would have to take appropriate steps to eliminate any incompatibilities between the agreements to which they are a party and their EU law obligations.

A key issue was whether the EU had exclusive competence with regard to the Investor-State Dispute Settlement ("ISDS") mechanism. The Commission had argued that it had exclusive competence, based on its position that it has exclusive competence over the substantive investment provisions. AG Sharpston agreed on the principle that competence over dispute settlement provisions was ancillary to the competence over the substantive provisions, but noted that for some of these substantive areas, the EU shared competence with Member States, so the same applied to the relevant dispute settlement provisions.

AG Sharpston underlined that this case does not concern the material compatibility of the EUSFTA, in particular its ISDS mechanisms, with other EU law provisions. The extent to which ISDS mechanisms (albeit with a Member State – Third Country BIT) are compatible with EU law will be considered in another case pending before the CJEU, Case C-284/16 *Slovak Republic v Achmea*.

Impact on other pending FTAs

If the Court were to follow the AG's opinion, this would not necessarily mean major alterations to the content of the EUSFTA (or other pending EU agreements). However, the EUSFTA (and other pending EU agreements) would be considered mixed agreements, which must be approved by all relevant national and regional parliaments before they can be signed by both the EU and the Member States. This would make the approval procedures for any pending EU FTAs more lengthy and complex, and would be especially difficult in the context of the debates around CETA, where it is important for the EU to show that it is a unified and reliable trade partner. It could also complicate Brexit by delaying any EU-UK FTA. So far, several mixed agreements, such as the EU-Korea FTA, have entered into provisional application after being signed by the EU (subject to fairly swift EU Council approval) – and only after that will the national parliaments need to ratify the specific provisions over which Member States have competence. The AG's opinion would drastically

change the EU FTA ratification procedure, most likely resulting in delays of several years before negotiated FTAs could enter into force.

The involvement of all national and regional parliaments in the FTA approval process could also give local politicians the power to essentially veto EU agreements, as was recently proven by the delay caused by the Walloon parliament's opposition to CETA approval (which the Commission, subject to considerable pressure, agreed to treat as a mixed agreement).

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