Client Alert | International Trade

EU Court confirms EU competence on wide range of trade areas in opinion on EU-Singapore FTA

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Authors: **James Killick**, **Jasper Wauters**, **Sara Nordin**, **Genevra Forwood**, **Fabienne Vermeeren**, **Charlotte Van Haute**

Following the Advocate General's related advisory opinion in December 2016,[1] the Court of Justice of the EU (CJEU) has delivered its Opinion (2/15) on the EU-Singapore FTA.[2] While the Court's Opinion confirms that the EU alone does not have the required competence to sign and conclude the FTA, it also clarifies that the FTA areas of shared EU and Member State competence are limited to non-direct investment, investor-state dispute settlement and certain related issues.

The CJEU's Opinion

In a clear shift from Advocate General Sharpston's advisory opinion issued in late 2016, the CJEU's Opinion confirms that many trade related areas covered in the EU-Singapore FTA – including in relation to transport services and related public procurement, foreign direct investment, intellectual property rights, sustainable development and certain institutional, transparency and dispute settlement provisions – are within the exclusive competence of the EU. However, on two key topics, the CJEU agreed with the AG that the EU is not endowed with exclusive competence:

- non-direct foreign investment (i.e. 'portfolio' investments made without any intention to influence the management and control of an undertaking), including related rules on exchange of information, notification, verification, cooperation, mediation, transparency and dispute settlement.
- the ISDS regime, mainly because it removes disputes from the jurisdiction of the courts of the Member States, and therefore cannot be established without the Member States' consent.

In other words, with respect to investment protection, the EU only has exclusive competence to enter into international agreements which purely cover foreign direct investment and do not contain any ISDS provisions. Any broader investment related agreement would involve 'shared competence' between the EU and the Member States – i.e. a 'mixed' agreement – that would require approval by the Member States in accordance with their own constitutional requirements (including potentially ratification by regional parliaments).

1 See our client alert, with related background, here.

2 The text of the CJEU Opinion can be found here.

Wider implications

The CJEU's Opinion 2/15 will have an impact on the ratification process of other pending EU FTAs containing similar provisions. Any FTAs that include non-direct foreign investment and ISDS provisions, as most modern FTAs recently or currently negotiated by the EU (such as the EUSFTA) do, will need to be approved by all relevant national and regional parliaments before they can be signed by both the EU and the Member States. In turn, this could affect the content of FTAs, as it gives national and regional parliaments a greater influence on the content of agreements containing non-direct foreign investment and ISDS provisions, and may incentivise the EU to avoid 'mixed' areas such as ISDS.

Making the EU's FTA approval procedures more lengthy and complex could also hurt the EU's credibility as a unified and reliable trade partner. The Opinion could therefore result in in delays of several years before negotiated FTAs could enter into force, and make the EU's trade partners more reluctant to engage in negotiations for comprehensive FTAs with it. This being said, the Opinion has clarified the limited nature of shared competence areas – with a clear focus on investment-related provisions – and confirmed that the large majority of traditional trade matters addressed in FTAs are within the exclusive competence of the EU. Accordingly, the CJEU Opinion could also provide the EU with a useful 'roadmap' allowing it to steer clear of the shared competence areas and thereby streamline FTA ratification procedures in the future.

If the EU continues to aim for comprehensive FTAs including shared competence areas, involvement of all national and regional parliaments in the FTA approval process could give local politicians the power to essentially veto EU agreements, as was proven last year by the delay caused by the Walloon parliament's opposition to CETA approval, and its ISDS provisions in particular. It is recalled that the Commission, subject to considerable pressure, 'voluntarily' agreed to treat CETA as a mixed agreement. The Commission sought the present CJEU opinion in order to obtain confirmation of its exclusive competence, no doubt hoping to avoid repeating the difficulties in ratifying CETA. However, the Opinion means that other FTAs containing non-direct foreign investment and ISDS provisions could face similar difficulties.

As to the impact on any potential EU-UK FTA following Brexit, the Opinion could be seen as signalling the need to keep non-foreign direct investment and ISDS out of such a future EU-UK FTA given that this could enable it to fall under exclusive EU competence, making ratification and thus negotiations easier. The UK will know that if the European Commission (as the EU FTA negotiator) agrees to a deal, that deal will be more likely to stand. The EU, and the UK, will need to think about the need to include ISDS and non-direct foreign investment protection in a bilateral FTA. It may well be that such inclusion is not considered necessary given that any agreement would involve very similarly situated parties with sophisticated legal systems in respect of which the need for an ISDS mechanism may be less obvious. At the same time, it may also be that any future EU-UK FTA will need to cover a broad range of trade and trade related areas, including on non-direct investment (e.g. in relation to portfolio investment), which would make an already complicated situation even more complex.

Finally, the Opinion is not helpful for the EU's 2009 objective of replacing Member States' Bilateral Investment Treaties (BITs) with third countries by EU-wide investment agreements with such third countries. The Opinion considers that the inclusion of an ISDS mechanism would involve shared competence between the EU and the Member States. The Opinion recalls that under ISDS, the claimant investor may decide to submit the dispute to arbitration, without the Member State being able to oppose this. According to the Opinion '[s]uch a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature…and cannot, therefore, be established without the Member States' consent'. This is an important clarification that empowers Member States in the context of the discussion on replacing existing BITs with EU investment treaties containing ISDS provisions.

White & Case LLP
Wetstraat 62 rue de la Loi
1040 Brussels
Belgium

T +32 2 239 26 20