



The Singapore Opinion or the End of Mixity as We Know It

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Publication date:
2017

Document Version
Publisher's PDF, also known as Version of record

[Link to publication](#)

Citation for published version (APA):
Kleimann, D., & Kübek, G. (2017, Mar 23). The Singapore Opinion or the End of Mixity as We Know It. Max Steinbeis Verfassungsblog GmbH. <https://verfassungsblog.de/the-singapore-opinion-or-the-end-of-mixity-as-we-know-it/>

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The Singapore Opinion or the End of Mixity as We Know It David Kleimann , Gesa Kübek Di 23 Mai 2017

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2017

Last week on Tuesday, with its decision in Opinion 2/15 on the Union's competence to conclude 'new generation' EU trade and investment agreements, the Court dropped a bombshell. The Court's ruling is set to significantly simplify the EU's economic relations with third countries. If the Commission, the Council and the member states had demanded clarity as to which institutions may legitimately pursue the Union's external action objectives in its commercial relations: clarity is what they earned. The decision has the strong potential to facilitate an 'EU-only' signing and conclusion of future EU trade agreements considerably. At the same time, as we argue below, the Court's reasoning entails a number of contradicting elements that may add confusion over the legal parameters of post-Lisbon EU external relations conduct.

Overall, the Court created the conditions for more effective, efficient, and politically legitimate EU external economic action while preserving its own credibility as the ultimate EU arbiter. Indeed, the Court has done no less than giving a clear mandate to the institutions of the EU, while placing a good amount of investment related homework on the desks of the member states.

The 'CETA drama' associated with the Wallonian opposition to the signing, provisional application, and conclusion of the Comprehensive Economic and Trade Partnership Agreement (CETA) had cast significant doubts over the Union's ability to exercise its role as the driver of EU external economic integration. The 'Wallonian Saga', and the veto-powers of member states when external treaties are concluded as mixed agreements, had exposed considerable weaknesses of the Union as an external actor associated with problems related to democratic representation as well as effectiveness and efficiency of CCP governance.

With its decision in Opinion 2/15, the Court provides permissive guidelines as to how mixed treaty making can be avoided through alternative design of EU trade and investment agreements. The EUSFTA reflects a blueprint of contemporary EU trade and investment agreements. With the exception of provisions relating to portfolio investment and the contentious ISDS mechanism, the Court now held that all components of the agreement can be concluded by the EU alone and without the approval of the member states in their own right. These conclusions, admittedly, cast dark clouds over the future of the EU investment policy and, at the very least, the Commission's endeavour to reform the current BIT system by means of a multilateral investment Court. In this area, the Court places the member states in the driver's seat. At the same time, the decision affords EU exclusive external competence over a vast amount of areas of EU external

economic action and dismisses scores of member states' 'attempts of mixity', which they had put forward in their written submissions to the Court and the Court's hearing in September of last year. Overall, the CJEU thereby further confirms the 2009 Lisbon Treaty reform of the Common Commercial Policy provisions and continues to walk on the path it had chosen in its post-Lisbon judgments on Daichii Sankyo and the Conditional Access Convention. In this spirit, the Court reaffirms that "the FEU Treaty differs appreciably from the EC Treaty previously in force, in that it includes new aspects of contemporary international trade in that policy. The extension of the field of the [CCP] by the FEU Treaty constitutes a significant development of primary EU law" (Opinion 2/15, para 141).

The Opinion of the Court

However, did the Court manage to advance such clear dividing lines in a legally sound manner? In December of last year, Advocate General Eleonor Sharpston had advanced a considerably more restrictive reading of the EUSFTA in light of the EU treaties. In her view, EUSFTA provisions governing non-commercial aspects of intellectual property rights, certain transport services, portfolio investment, as well as the agreement's sustainable development provisions (labour rights; environmental protection) made for competences shared with the member states. According to the AG, moreover, a single provision obliging the member states to terminate their bilateral investment treaties with Singapore upon entry into force made for an MS exclusive competence.

The key to understanding the Court's conclusions and its ability to clear the way for effective and efficient Union external economic action derives from an examination of the applicable standards of analysis and respective benchmarks. The Court, we find, used all the discretion available to it to produce a 'middle way' result with a view to enabling more effective, efficient, and legitimate governance of the Union's external economic relations, while seeking to preserve the integrity of its role as the ultimate arbiter. However, as we argue below, it appears that the coherence of the Court's legal reasoning, in some instances, has fallen victim to the purposes this decision seemingly attempts to advance.

First, in comparison to AG Sharpston's legal view, the Court applies a more inclusive 'aim and content' test to the EUSFTA in light of CCP Article 207 TFEU, which enables it to subsume EUSFTA content under the said provision in a more 'generous' manner. More precisely, the Court advances a wider application of the 'immediate and direct effects on trade' criterion, which it had developed in its past jurisprudence (Daiichi Sankyo (Case C-414/11) para 51; Commission vs Parliament and Council (C-411/06) para 71; Regione autonoma Friuli-Venezia Giulia and ERSA (C-347/03) para 75). By the same token, the Court's reasoning embeds the CCP into the context of EU external action objectives and thus gives full effect to the Lisbon reform in this regard. The combination of these two contingencies led the Court to the rather historic conclusion that the EUSFTA provisions on labour rights and environmental protection fall under the EU exclusive competence attributed to the CCP. In Article 13.1(3) EUSFTA, notably, the parties "recognise that it is inappropriate to encourage trade or investment by weakening or reducing the

protections afforded in domestic labour and environment laws.” In view of the Court, the EUSFTA provisions – by setting out minimum standards to which the parties are committed in context of other multilateral agreements – reaffirm the parties’ commitment not to lower the protections afforded to labour and the environment in order to gain a competitive commercial advantage. Such provisions, according to the Court, hence sufficiently affect trade among the parties to fall within the ambit of the CCP (para 147; 157).

Secondly, the Court casts a significantly wider web for ‘incidental’ treaty content than the Advocate General. Incidental treaty components or provisions, according to the Court’s jurisprudence, are subordinated to the agreement’s predominant purpose (i.e. commerce within the meaning of the CCP Article 207 TFEU) if they are ‘extremely limited in scope’ and thus do not have the potential to affect the allocation of competences (e.g. *Commission vs. Council* (Case C-377/12) para 34). In application of a markedly more generous understanding of what is ‘extremely limited in scope’, the Court dismisses the AG’s findings that ‘moral rights’ and ‘inland waterway transport’ could make for autonomous EUSFTA components. The Court hence does not require reference to legal bases for which the Union shares competence with the member states (para 129; 216-217).

Third, the Court, if compared to the AG’s opinion, advances a considerably more lenient interpretation of implied exclusive powers with respect to its ERTA case law (*Commission vs Council C-22/70* para 17), which results in a broader shelter for EUSFTA transport services commitments. According to the ERTA jurisprudence, the EU may obtain exclusive external powers if an area is covered to a large extent by common internal rules, which may be altered or affected by the conclusion of an international agreement (Article 3(2)(3) TFEU). While the Court confirms the validity of the transport services carve-out from the scope of the CCP (Article 207(5) TFEU), it found that exclusive EU powers for maritime, road and rail transport services could in fact be implied via Article 3 (2)(3) TFEU (paras 193, 202, 211). Building on its reasoning in Green Network and Opinion 3/15, the Court adopted a permissive application of the ERTA test’s “largely covered” criterion: even if EU legislation leaves considerable legislative powers to the Member States, it may still be affected or even altered by the conclusion of an international agreement. Complete internal harmonization is thus not required to trigger the ERTA effect. Indeed, the Court argued that any material overlap between EU internal and international commitments automatically “must be regarded as capable of affecting or altering the scope of those common rules” (para 201).

Fourth, the Court does not, in contrast to the AG, deem the termination of the Member States’ bilateral investment treaties as a competence falling within exclusive national prerogatives. Foreign Direct Investment (FDI) liberalisation and protection form part the EU’s exclusive CCP competence (para 87). Accordingly, the EU superseded the Member States for FDI and may approve, by itself, a provision in an international agreement with a third party that replaces the Member States’ prior bilateral FDI commitments with Singapore (para 249). Rather than engaging in the discussion of treaty termination

provisions of the VCLT, the Court refers to the doctrine of functional succession, which establishes “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” (C-21/72, para 248). The Court left unaddressed, however, how such reasoning would bode with its finding that the Union shares competence with the member states in respect to portfolio investment. Does the termination of respective BITs, in their entirety, require the involvement of the member states in their own right? Or does the doctrine of functional succession expand to shared external EU competence, so that the EU could, in theory, also enter into international obligations alone that terminate the Member States BITs for FDI as well as portfolio investment?

Fifth, the Court’s decision, in this instance, affirms AG Sharpston’s finding on portfolio investment and dismisses the more artistic arguments of the Commission in favour of implied ERTA exclusivity on the basis of a primary law provision, notably Article 63(1) TFEU. In doing so, the Court sets an important boundary for the ERTA doctrine: Triggering Article 3 (2)(3) TFEU pre-supposes the existence of internal EU legislation. Primary law provision cannot be altered or affected by international EU agreements (para 235). Yet, the Court found that the EU and the Member States share the power to conclude non-direct investment agreements (Art. 216 (1) TFEU) (para 239). In addition, the Court points out that, “as EU law currently stands”, there is no internal legislation that endows the EU with the power to conclude international agreements in the field of portfolio investment (para 236). As a consequence, Article 3(2)(1) TFEU is currently not applicable, but may trigger exclusive competence once such legislation will have been adopted. In contrast to treaty amendments, a respective secondary legal act may be adopted by QMV, depending on the political will of the member states.

Sixth, in a finding that is set to disturb the international investment arbitration community, the Court rules that the EUSFTA’s ISDS mechanism falls within a competence shared between the EU and the member states and thereby objects to AG Sharpston’s reasoning. The AG had considered that the investor-state dispute settlement mechanism is accessory to the substantive investment protection obligations of the EUSFTA. According to the Court, however, a regime that removes disputes from the jurisdiction of domestic courts may not be regarded as ancillary (or: accessory) to such substantive obligations (para 292). Consequently, it “cannot be established without the Member States’ consent” (para 292). It is puzzling, to say the least, that the Court does not endeavour to ground this finding on an appropriate legal basis. Which legal basis, indeed, would confer a shared competence for the establishment of an ISDS regime?

Finally, and most surprisingly, the final paragraph of Opinion 2/15 does not fully answer the preliminary question posed by the Commission (para 205). The Court’s response does set out the division and nature of competences as between the EU and the Member States. But it does not answer the question whether “the EU has the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore”. AG Wahl and AG Sharpston, in respective recent opinions, considered that the EU has the

requisite power to conclude agreements that fall under EU exclusive as well as shared powers. If an agreement contains content covered by exclusive and shared competence, the choice of procedure is subject to the political discretion of the EU institutions and, ultimately, the Council. In past commercial treaty-making practice, the EU institutions indeed opted for facultative mixity. However, facultative “EU-only” agreements do exist, too. To name but one recent example: The Stabilisation and Association Agreement with Kosovo was concluded by the Union alone. The Court, however, appears to eliminate the possibility of facultative “EU-only” treaty-making. In various paragraphs of its decision, it concludes that the EUSFTA “cannot be approved by the EU alone” because it contains substantive areas that fall under shared competence. The Court therefore appears to equalise the effect of non-exclusive and non-existing EU external competence. What does this finding mean for existing facultative EU-only agreements? And what is the value inherent to shared external EU competence in the first place, if the Union cannot exercise such competence without the consent of the member states in their own right?

Outlook

Opinion 2/15 confirms the tectonic shifts of competence that the Lisbon Treaty has brought about in the area of EU Common Commercial Policy. Treaty components governing trade in goods, services, commercial aspects of intellectual property, government procurement, competition policy, FDI admission and protection, transport services, e-commerce, and sustainable development provisions related to trade could now be concluded by the EU without the participation of the member states in their own right. As such, broad ‘EU-only’ economic agreements are now on the verge of becoming the new normal of EU external economic action, if such agreements were to exclude portfolio and ISDS and conclude such components separately as mixed agreements.

The Court’s decision, in fact, places considerable pressure on the member states to concede to this opportunity and to end the legal-political combat with the Commission over their involvement. With respect to portfolio investment, too, the ball is now in the court of the member states. They may, eventually, wish to hand over exclusive external competence over that second-to-last bastion of shared competence via the legal avenue of Article 3(2)(1) TFEU. Moreover, should the member states eventually come to the conclusion that they ought to advance a sensible reform of their old BIT regime, it is now up to national governments to take ownership and explain and sell the proposed Investment Court System to their domestic constituencies.

Nonetheless, the Court has left the interested observer with some puzzling contradictions. Most importantly, does the Court really intend to tell us that findings of shared competence render mixity mandatory? Moreover, where do we find the legal basis for a shared competence to establish an ISDS mechanism? Thus, despite providing for much needed clarity as to the scope of the CCP in light of ‘new generation’ of EU trade and investment agreements, Opinion 2/15 appears to add new questions over the legal parameters applying to the substance and process of EU trade and investment treaty-making.



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All the best, *Max Steinbeis*

SUGGESTED CITATION Kleimann, David; Kübek, Gesa: *The Singapore Opinion or the End of Mixity as We Know It*, *VerfBlog*, 2017/5/23, <https://verfassungsblog.de/the-singapore-opinion-or-the-end-of-mixity-as-we-know-it/>, DOI: <https://dx.doi.org/10.17176/20170523-074409>.