OPINION 2/15 OF THE CJEU: DELINEATING THE SCOPE OF THE NEW EU COMPETENCE IN FOREIGN DIRECT INVESTMENT

ON 16 May 2017, the Court of Justice of the European Union (CJEU) delivered its Opinion 2/15 concerning the competence of the EU to conclude the Free Trade Agreement with Singapore (EUSFTA) (ECLI:EU:C:2017:376). The Opinion was requested by the Commission which argued, with the support of the European Parliament (EP), that the EU had exclusive competence to conclude the EUSFTA. The Council and 25 of the Member States countered that the EUSFTA should be concluded as a mixed agreement – that is, by the EU and each of its members – because some of its provisions fell under the shared competence of the organisation or the competence of the Member States alone.

Opinion 2/15 is significant in being the first instance where the Court has delineated the scope of the new EU exclusive competence in foreign direct investment (FDI), included in the Common Commercial Policy (CCP) with the 2009 Lisbon Treaty. This is also the first time the CJEU has interpreted the new generation of comprehensive free trade agreements (FTAs) concluded by the EU following Lisbon, which seek to liberalise both trade and investment and also to reconcile economic with non-economic objectives. Notably, the CJEU held that despite the CCP being an exclusive EU competence, the EUSFTA could not be concluded by the EU alone. Accordingly, Opinion 2/15 is likely to have important systemic implications for the drafting, negotiation and conclusion of all future EU FTAs, as well as for the ability of the EU to implement its initiative for reforming the existing regime of investor-state dispute settlement (ISDS). This note will focus on the investment aspects of Opinion 2/15 because they raised novel issues before the CJEU and also because these aspects of the EUSFTA motivated the Court's conclusion that the agreement should be concluded as mixed.

The questions before the CJEU required it to delineate the scope of the CCP and, more importantly, to define the criteria for such delineation. The Court confirmed the two-limb test set out in its pre-Lisbon CCP case law that "it must be established whether the commitments contained in that agreement are intended to promote, facilitate or govern such trade [with a third state] and have direct and immediate effects on it" (Opinion 2/15, at [38], citing *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:675). Regrettably, the CJEU did not take this opportunity to revisit this test in light of the expanded wording of Article 207 TFEU, which could arguably be read as including FDI as part of the CCP on an equal footing with trade, rather than as subordinated. Indeed, AG Sharpston had taken a different approach in her Opinion, proposing that the old CCP test should be adapted to considering whether "EU measures ... are essentially intended to promote, facilitate or govern foreign direct investment and have direct and immediate effects on foreign direct investment and investors [to] fall within the EU common commercial policy" (at [328]). AG Sharpston based her reasoning on the premise that the text of Article 207 TFEU and its preparatory works indicate that trade and investment are both essential components of a unified CCP (at [329]). Even though the CJEU's and the AG's approaches did not lead to material differences in their conclusion, it is suggested that the Advocate General's analysis would better reflect the intention of the parties to the Lisbon Treaty, and would enable the provision to be more effective in practice.

The first investment issue before the CJEU concerned the competence of the EU to regulate non-direct foreign investment. Article 3(1)(e) of the Treaty on the Functioning of the EU (TFEU) confers on the EU exclusive competence with respect to the CCP. Article 207(1) TFEU defines the scope of the CCP comprising, inter alia, "foreign direct investment". The EUSFTA, however, sets out a broad definition of investment referring to both direct and indirect forms of foreign ownership and control. Accordingly, this was the first opportunity for the CJEU to define FDI under the TFEU. The Court, however, omitted to do this, and merely recalled its previous case law on "direct investment" requiring effective participation by the investor in the management or control of the company (*Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774). While the "foreign" aspect of direct investment might appear obvious at first, it is an important part of the definition of FDI under international investment law, which can play a critical role in the outcome of cases. Therefore a holistic treatment of the whole concept of FDI by the CJEU would have been preferable. The Court did, however, helpfully engage with the concepts of portfolio and other non-direct forms of investment, dismissing the Commission's arguments that these could fall within the implied exclusive competence of the EU to conclude international agreements under Articles 3(2) and 216(1) TFEU. This engagement is persuasive because it is grounded in previous case law limiting the scope of Article 3 (2) to instances where the EU has exercised its internal competence and laid down secondary rules. Further, it aligns the external competence of the EU on non-direct investment with the shared character of its internal competence. Non-direct investments, as the Commission admitted, are only addressed by Article 63 TFEU as part of the regulation of the internal market, which is a shared competence between the EU and the Member States under Article 4(2)(a) TFEU. Accordingly, the CJEU concluded that the regulation of non-direct investments is a shared competence that could not be exercised by the EU signing the EUSFTA alone.

One discrete but novel question that arose in relation to the investment chapter was whether the EU has the exclusive competence to terminate

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prior investment treaties between Singapore and the Member States in the EUSFTA. The Commission argued that it did, inter alia, because after acquiring exclusive competence over FDI in the Lisbon Treaty, the EU succeeded the Member States in their investment agreements with third states. The Member States countered that only they had the competence to terminate such agreements because they alone were parties to them. Surprisingly, the CJEU sided with the Commission's argument without considering either any of the rules of the international law of treaties, which govern all international agreements, or the potential consequences for the Member States, incurring international responsibility due to the divergent approaches to treaty succession under EU and international law (at [246]–[249]).

AG Sharpston, in contrast, persuasively dismissed the Commission's far-reaching argument by clearly distinguishing between the legal consequences of the transfer of competence within the EU legal order on the one side and the applicable international rules on treaty succession on the other. She recalled that the principles of consent and *pacta sunt servanda* govern the law of treaties, emphasised the absence of an international rule allowing the EU to automatically succeed to the international agreements of its members, and concluded that the Member States alone can terminate such prior agreements (at [396]–[397]). Her approach is in line with Article 59 of the Vienna Convention on the Law of Treaties codifying the customary rule that only the parties to a treaty can terminate it through a later treaty. It is also in line with the principle that states and international organisations may not invoke their internal rules to justify a failure to perform under a treaty. The approach of the Court, in contrast, is capable of undermining legal certainty in the treaty relations between third states and the Member States.

The final and most controversial issue before the CJEU concerned the EU competence to include ISDS in the EUSFTA. The underlying difficulty of this issue is reflected in the different approaches of the AG, CJEU and the Member States. The Council and the Member States argued that the EU did not have competence to include ISDS in the EUSFTA due to the states' right to exercise diplomatic protection and bring international claims on behalf of their national investors under international law. The Court did not address this argument at any point, basing its reasoning instead on the potential of ISDS to remove disputes from the jurisdiction of the Member States' domestic courts, and concluding without further explanation that ISDS thus fell under a shared competence (at [290]–[293]). The Court dismissed the Commission's argument based on consistent case law establishing that, if the EU has competence with respect to the substantive provisions of an international agreement, it also has competence to agree to its dispute settlement mechanisms (Opinion 1/09, *Agreement Creating a Unified Patent Litigation System*, EU:C:2011:123). With some inconsistency, the CJEU did apply this case law in finding that the mechanism for dispute settlement between the EUSFTA parties fell within the exclusive competence of the EU (at [298]–[303]). The AG thought that the previous cases applied to both ISDS and the horizontal settlement of disputes, putting them under the exclusive competence of the EU so far as they concerned FDI (at [523]–[544]). While the AG's Opinion is more coherent, the conclusion of the CJEU on ISDS is preferable since both the EU and the Member States can be respondents in such cases and that the latter's consent is needed as basis for incurring international responsibility and for arbitration. The CJEU's reasoning, however, is less convincing. As the Court noted itself, the ISDS provisions constituted the consent of the respondent to the submission of investment claims against them. Since the principle of consent is fundamental to conferring jurisdiction on international dispute settlement bodies, this principle would have been the better reason for finding a shared competence for both ISDS and the inter-partes mechanism.

The CJEU's conclusion that the EUSFTA should be concluded as a mixed agreement will have a considerable impact on the content and the form of future FTAs concluded by the European Union. The EU will have to decide whether to go through the lengthy and uncertain process of FTAs being ratified by all Member States, which proved difficult in the case of the EU-Canada Comprehensive Economic and Trade Agreement. Alternatively, the EU could conclude separate investment agreements together with the Member States or adopt a hybrid approach, excluding portfolio investments and ISDS from its FTAs, and risking making them much less attractive to third states.

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LAWFUL-ACT DURESS AND MARITAL AGREEMENTS

IN *Thorne v Kennedy* [2017] HCA 49, the High Court of Australia was presented with an opportunity to consider the operation and intersection of undue influence, unconscionable conduct and duress in the context of marital agreements. Despite hopes that the Court would seize the chance to resolve an important open question in respect of duress, the decision was instead marked by an unhelpful caution, offering little guidance on the law's future development.

The appeal before the Court concerned a challenge to two marital agreements. Ms. Thorne and Mr. Kennedy, the (pseudonymously identified) parties to the impugned agreements, met over the Internet in 2006. Mr. Kennedy was, at the time the parties met, a successful property developer,