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The CJEU's Opinion on EU-SING FTA: More Confusion than Clarity

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On his last day in office, former EU Trade Commissioner De Gucht sent the request for an opinion from the Court of Justice of the EU (CJEU) aiming to get a seal of approval from the CJEU that the EU-SING FTA and all future EU trade and investment treaties fall completely within the EU's exclusive trade and FDI competence (Art. 207 TFEU). This move was born out of frustration with the Council and the Member States, which from the very beginning rejected that view and claimed that ISDS, investment protection and expropriation would fall within the shared/mixed competence or even in their exclusive competence.

In order to clarify this highly disputed issue once and for all, the CJEU was called upon to provide an answer and thereby fundamentally determine the future EU trade and investment policy, in particular with regard to CETA, EU-Japan FTA and all other ongoing and future trade and investment negotiations.

Since a full and detailed analysis is beyond the scope of this blog, I want to highlight the following points.

Non-direct foreign investments are mixed competence

One of the most notorious issues, which has been splitting from the very beginning the European Commission and European Parliament on the one hand, and the Council (i.e. the Member States) on the other hand has been the exact scope of 'foreign direct investment' as contained in Art. 207 TFEU.

The European Commission and European Parliament have always adopted a maximalist view by claiming that foreign direct investment covers all types of investments, including non-direct foreign investments, such as portfolio investments. In contrast, the Member States have always furiously defended the restrictive literal interpretation of the treaties, which would mean that all types of non-direct foreign investments fall outside the exclusive trade competence under Art. 207 TFEU.

The CJEU sided with the Council and Member States, which is a big blow to the European Commission.

However, the European Commission advanced further arguments, which for claiming exclusive competence over all types of foreign investments. For example, the European Commission was claiming that non-direct foreign investments may be considered as capital movement, which fall within the scope of Art. 63 TFEU, which is a mixed competence unless the EU has adopted secondary legislation that has significantly regulated this area. Since the EU has not adopted any secondary legislation regarding non-direct foreign investments, the CJEU found that this legal basis cannot be used for claiming EU exclusive competence.

The Court also rejected the final argument of the European Commission that the conclusion of international agreement may prove "necessary in order to achieve objectives of the EU Treaties" (Art. 216 TFEU).

As a result, non-direct foreign investments remain within the mixed competence.
This conclusion, however, does not solve the problem of where exactly the difference lays between direct and non-direct investments. This lack of clarity will certainly be the source for more court cases.

Dispute settlement provisions are also mixed competence

The other most contested competence issue concerns the dispute settlement provisions contained in the EU-SING FTA. The European Commission has always argued that ISDS is directly connected with foreign direct investments and therefore falls squarely within its exclusive competence, whereas the Council argued that ISDS is a mixed competence.

This is the first time that the Court is called upon to give its views on ISDS. The Court remained careful not to reveal its view on investment treaty arbitration and its (non)compatibility with EU law, instead it focused on the position of the national courts of the Member States. The Court argued that arbitration "removes disputes from the jurisdiction of the courts of the Member States, [which] cannot be of a purely ancillary nature and therefore cannot be established without the Member States' consent". Accordingly, ISDS provisions remain within the mixed competence.

Apart from the fact that this is a massive simplification of the arbitration process since domestic courts remain involved in the recognition, enforcement and annulment of arbitral awards, this argument echoes the main reason for rejecting international tribunals in its previous opinions, namely, the fact that such international courts operate outside the preliminary ruling mechanism between the CJEU and national courts. This could already be a hint of how the Court would judge the ICS provisions in CETA.

In addition to ISDS, the EU-SING FTA also contains state-state dispute settlement (SSDS) provisions.

The Court recalled that the EU has the power to submit itself to SSDS provisions when concluding an international agreement, as was the case with the WTO, but it avoids expressing a view whether SSDS is (in)compatible with EU law. It simply refers to its arguments made with regard to ISDS in order to conclude that SSDS is also of mixed nature.

Transparency is also mixed competence

Another issue which the Court considered were the various transparency obligations, which are scattered around the treaty. The Court opined that to the extent that substantive provisions fall within the mixed competence, the related transparency provisions, which must be considered to be of an “ancillary” nature, also fall within the mixed competence. This means that the transparency rules regarding ISDS, in particular the UNCITRAL Transparency Rules 2014, which are referred to in EUSFTA, must be considered to be mixed. Accordingly, the so-called ‘Mauritius Convention’ must be signed and ratified as a mixed agreement. That is something the European Commission certainly would have wanted to avoid.

The EU de jure replaced the Member States in their BITs with Singapore

One of the most surprising outcomes of this opinion relates to a rather technical but nonetheless very important point, namely, the question of what happens with the dozen or so existing BITs which the Member States have concluded with Singapore, many dating back 20 years or more.

The EU-SING FTA simply states in Article 9.10 that “upon the entry into force of the EU-SING FTA, all BITs between the Member States and Singapore, including the rights and obligations derived therefrom, shall cease to have effect and shall be replaced and superseded by this agreement.”

The Court argued that with the entry into force of the Lisbon Treaty in December 2009, which conferred to the EU the exclusive competence regarding foreign direct investments means that once the EU-SING FTA enters into force it replaces all Member States’ BITs – at least as far as foreign direct investment is concerned.

Neither the so-called grandfathering Regulation 1219/2012 nor Art. 351 TFEU, which protects the existence and performance of pre-EU accession agreements of the Member States, prevents the EU from replacing the Member States as regards their BITs – as far as foreign direct investments are concerned.

Accordingly, by virtue of obtaining exclusive competence, the EU can replace and subsequently in effect terminate all Member States’ BITs with Singapore to which the EU itself is not even a contracting party.

This is a very far-reaching and surprising conclusion, which seems difficult to reconcile with public international law and the law of treaties. In fact, this line of argument was explicitly – and for the right reasons – rejected by the Advocate General in her opinion.

As a justification for its argument, the Court referred to the single case of the old GATT 1947 in which the EEC, later EC, de facto replaced the Member States while never having been contracting party to the GATT 1947. However, de jure the Member States always remained contracting party to the GATT 1947 and remained legally bound by it. That was exactly also the position of the Advocate General. The GATT 1947 comparison is therefore clearly misleading.

In short, the Court seems to have equated the obtainment of exclusive competence by the EU, i.e., the power to act externally by exclusion of the Member States with the power to replace Member States in their international treaties, which seems to me to be of an entirely different order.

In any event, the Court's approach creates legal uncertainty for all third states which have concluded BITs with EU Member States. They can never be sure anymore whether or not the EU may have 'replaced' the Member State as a contracting party simply by virtue of an internal shift of competence within the EU.

Also, from the perspective of international law, it seems impossible that an outside party (i.e. the EU) can simply intrude in international treaties which it is not even a party.

This solution further creates problems of delineation. Does this mean that the BITs with Singapore as far as they concern non-direct foreign investments are not replaced by the EU or that Member States retain the competence to modify or terminate them? Are we talking about a mixed competence to modify or terminate Member States' BITs? What happens if a Member State, for example the UK, refuses to terminate its BIT with Singapore?

Finally, the Court did not discuss the issue of what happens with the so-called sunset clauses, contained in the Member States' BITs with Singapore. These sunset clauses provide for continued protection and access to ISDS for all investments made before the termination of the BITs. Typically, sunset clauses have a duration of between 10-20 years. But what does this "partial replacement" by the EU of the Member States' BITs mean for the application of those sunset clauses? Will they continue to be applicable to non-direct foreign investments?

It is unclear how this could work in practice.

In conclusion, the Court created more confusion than clarity.

One thing is clear: the European Commission did not obtain the full exclusive competence which it was hoping. At the same time the Council and the Member States maintain significant control over the future shape and form of EU trade and investment agreements. The question of course is whether mixity will be beneficial for the quick conclusion of such agreements, if they have to be ratified by all Member States. The Wallonian's effort to hijack CETA suggests otherwise.

One alternative for the European Commission could be to avoid including mixed elements in FTAs in order to get them approved only by the Council and the European Parliament. However, it seems very unlikely that the Council, which is mandating the European Commission to negotiate FTA, would be ready to give up its control.

As far as ISDS and ICS and their (in)compatibility with EU law is concerned, that is still an open question, which the Court may provide an answer, if and when CETA is referred to it for an opinion – as was promised by the federal Belgian government to Wallonia. Until such time, the EU investment policy remains in limbo.

Disclaimer: This blogpost is partly based on my much more detailed and extensive analysis, which has been published by Borderlex.

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