



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 21 December 2016¹

Opinion procedure 2/15

initiated following a request made by the European Commission

(Request for an Opinion pursuant to Article 218(11) TFEU — Conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore — Allocation of competences between the European Union and the Member States)

Table of contents

The EUSFTA	5
EU law	8
Treaty on European Union	8
Treaty on the Functioning of the European Union	9
The request for an Opinion of the Court	11
The issues raised by the Commission's request for an Opinion	12
The allocation of competences between the European Union and the Member States and the legal basis for concluding the EUSFTA	19
Article 207(1), (5) and (6) TFEU	20
Article 3(2) TFEU	25
Objectives of and general definitions relevant to the EUSFTA (Chapter One of the EUSFTA)	27
Arguments	27
Analysis	28
Trade in goods (Chapters Two to Six of the EUSFTA and Protocol 1 to the EUSFTA)	28

¹ — Original language: English.

Arguments	28
Analysis	29
Services, Establishment and Electronic Commerce (Chapter Eight of the EUSFTA)	31
Arguments	31
General arguments	31
Arguments regarding transport	33
Analysis	38
Introduction	38
Exclusive competence on the basis of Article 207(1) TFEU, read together with Article 3(1) TFEU	39
Matters excluded from the scope of the common commercial policy as a result of Article 207(5) TFEU	41
Exclusive competence on the basis of Article 3(2) TFEU	43
– The first ground under Article 3(2) TFEU	43
– The third ground under Article 3(2) TFEU	44
Investment (Chapter Nine, Section A, of the EUSFTA)	52
Arguments	52
Analysis	58
Introduction	58
Exclusive competence on the basis of Article 207(1) TFEU, read together with Article 3(1) TFEU	59
– The meaning of ‘foreign direct investment’ in Article 207(1) TFEU	59
– The regulation of ‘foreign direct investment’ as part of the common commercial policy	62
– Conclusion in relation to the European Union’s competence under Article 207(1) TFEU	62
The European Union’s competence on the basis of Article 63 TFEU, read together with Article 3(2) TFEU	66
The European Union’s shared competences with the Member States	68
Whether the EUSFTA may terminate bilateral agreements concluded between the Member States and Singapore	70
Government Procurement (Chapter Ten of the EUSFTA)	75
Arguments	75

Analysis	75
Intellectual Property (Chapter Eleven of the EUSFTA)	76
Arguments	76
Analysis	79
The meaning of ‘commercial aspects of intellectual property’ in Article 207(1) TFEU	79
The European Union’s competence over Chapter Eleven of the EUSFTA	82
Competition and Related Matters (Chapter Twelve of the EUSFTA)	84
Arguments	84
Analysis	85
Non-tariff barriers to trade and investment in renewable energy generation (Chapter Seven of the EUSFTA) and trade and sustainable development (Chapter Thirteen of the EUSFTA).....	86
Arguments	86
Non-tariff barriers to trade and investment in renewable energy generation	86
Trade and sustainable development	87
Analysis	88
Trade and non-trade related objectives: general principles	88
Non-tariff barriers to trade and investment in renewable energy generation	89
Trade and sustainable development	90
Transparency and administrative and judicial review of measures having general application (Chapter Fourteen of the EUSFTA and related provisions of other chapters)	93
Arguments	93
Analysis	93
Dispute settlement and mediation (Chapters Nine, Section B, and Chapters Thirteen, Fifteen and Sixteen of the EUSFTA)	95
Arguments	95
Analysis	96
Institutional, general and final provisions (Chapter Seventeen of the EUSFTA)	100
Arguments	100
Analysis	100
Assessment of the European Union’s external competence to conclude the EUSFTA	101

Conclusion	104
Annex — Summary description of the EUSFTA	105

1. The European Commission seeks an Opinion from the Court under Article 218(11) TFEU on the allocation of competences between the European Union and the Member States as regards concluding the Free Trade Agreement envisaged between the European Union and the Republic of Singapore ('the EUSFTA').² The text of the EUSFTA as negotiated by the Commission provides that it is to be concluded as an agreement between the European Union and the Republic of Singapore ('Singapore'), without participation of the Member States. The Commission seeks guidance from the Court on whether that approach is correct.

2. The Commission argues that the European Union has exclusive competence to conclude the EUSFTA. It submits that most of that agreement comes within the European Union's competence under Article 207 TFEU for the common commercial policy, which is an exclusive competence (Article 3(1)(e) TFEU), and that the European Union's exclusive competence to conclude other parts of the agreement results from a legislative act giving it authority to do so (the first ground under Article 3(2) TFEU) or from the fact that conclusion of the EUSFTA may affect common rules or alter their scope (the third ground under Article 3(2) TFEU). The European Parliament generally agrees with the Commission. All the other parties having submitted observations contend that the European Union cannot conclude that agreement on its own, because certain parts of the EUSFTA fall within the shared competence of the European Union and the Member States and even the exclusive competence of the Member States. It follows that the Member States should also be a party to the EUSFTA.

3. The EUSFTA forms part of a new generation of trade and investment agreements negotiated or in the course of negotiation by the European Union and trade partners in other regions of the world. The agreement is not a 'homogeneous agreement': it does not cover one particular area or subject matter nor does it pursue a single objective. It seeks to achieve, in particular, liberalisation of trade and investment and guarantees certain standards of protection in a manner that reconciles economic and non-economic objectives. Whilst building on existing rules found in the World Trade Organisation ('WTO') agreements,³ the EUSFTA also extends those rules and covers matters that are not (yet) part of those agreements.

2 — The text of the EUSFTA is publicly available on the Commission's website: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>. For a very brief overview, see points 9 to 30 below and, for a more detailed summary, see the Annex to this Opinion. The summary in the Annex to this Opinion is based on the version of the English text of the EUSFTA which the Commission submitted to the Court (as an annex to its request). It subsequently provided the Court with translations of the EUSFTA into all the official languages of the European Union. It transpired during the process of drafting and translating this Opinion that there were certain differences between the version originally supplied by the Commission in English and (i) the publicly available version in English as also (ii) the other language versions provided by the Commission. For example, the publicly available version contains an additional recital in English: 'Reaffirming each Party's right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity'. It also appears that the numbering of the footnotes differs as between the English-language version (both as supplied to the Court and as available on the internet) and the other language versions. Since the only publicly available version at the time of delivery of this Opinion is in English, I have used the footnote numbers appearing in that version but have indicated, when it has come to my attention, where a particular footnote may have a different number in other language versions. I can offer no concluded view as to whether other changes have been made of which I am unaware.

3 — That is to say, the agreements listed in Appendix 1 to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.

4. In order to determine whether the European Union may conclude the EUSFTA without the Member States, it is first necessary to reach a clear understanding of the matters which that agreement covers and the objectives that it pursues.⁴ That will then serve as a basis for applying the different Treaty rules on the allocation of competences to the European Union and the nature of those competences. In so doing, it is appropriate to apply the rules set out in Article 3(1) TFEU (on express exclusive competence) before applying those laid down in Article 3(2) TFEU (on implied exclusive competence⁵) and, if necessary, in Article 4 TFEU (on shared competence).

The EUSFTA

5. In December 2006, the Commission recommended that the Council of the European Union authorise it to negotiate a free trade agreement with countries of the Association of Southeast Asian Nations ('ASEAN') on behalf of the European Community and the Member States. In April 2007, the Council authorised the Commission to start negotiations. The negotiations relating to a region-to-region agreement proved to be difficult and were therefore suspended. The Commission then suggested pursuing bilateral free trade agreements with relevant ASEAN countries, starting with Singapore. In December 2009, the Council, relying on the negotiating directives it had issued for negotiations with ASEAN, authorised the Commission to negotiate a trade agreement with Singapore. Those negotiations commenced in March 2010. In September 2011, the Council modified the negotiating directives so as to add investment to the list of topics covered. In so doing, the Council stated that the objective was that the investment chapter of the agreement would cover areas of shared competence, such as portfolio investment,⁶ dispute settlement and property and expropriation.

6. On 20 September 2013, the European Union (acting through the Commission) and Singapore initialled the text of the EUSFTA (meaning that they accepted it as definitive), with the exception of the chapter on investment. That text was made publicly available on the same day.

7. When it became clear that that text provided for signature and conclusion of the EUSFTA by the European Union without participation of the Member States, the Trade Policy Committee (a committee appointed by the Council under Article 207(3) TFEU) in February 2014 referred the matter to the Committee of Permanent Representatives ('Coreper'). The Trade Policy Committee invited Coreper to confirm the procedure for signing and concluding the EUSFTA and asked it to invite the Commission, as negotiator on behalf of the European Union and the Member States, to adapt the text to the mixed character of that type of agreement. Coreper indicated that there was a clear sense of agreement among delegations that the EUSFTA should be signed and concluded as a mixed agreement, meaning that both the European Union and the Member States should be a party to it.

8. The negotiations on the investment chapter were concluded in October 2014. In June 2015, the Commission sent the Trade Policy Committee the consolidated text of the investment chapter and indicated that the entire agreement was now initialled.

9. The EUSFTA consists of a preamble, 17 chapters, a protocol and five understandings.

4 — See, in that regard, Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraphs 34, 53, 71, 98 and 105. In that Opinion, the Court examined the subject matter and objectives of different international agreements forming part of the Marrakesh Agreement Establishing the World Trade Organisation ('the WTO Agreement'), in particular the General Agreement on Trade in Services ('the GATS') and the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement') and various agreements governing trade of goods which are included in Annex 1A ('Multilateral Agreements on Trade in Goods') to the WTO Agreement, such as the General Agreement on Tariffs and Trade 1994 ('the GATT 1994') and the Agreement on Technical Barriers to Trade ('the TBT Agreement').

5 — By 'implied' exclusive external competence, I mean that exclusivity is *not* based on a Treaty provision expressly conferring exclusive competence as regards a particular area on the European Union.

6 — That term is used by the Parties in their submissions. See further, in particular, points 307 and 346 below.

10. *Chapter One ('Objectives and General Definitions')* states that the objectives of the EUSFTA are to establish a free trade area consistent with Article XXIV of the GATT 1994⁷ and Article V of the GATS⁸ and to liberalise and facilitate trade and investment between the Parties in accordance with the EUSFTA.

11. *Chapter Two ('National Treatment and Market Access for Goods')* begins by reaffirming the obligation of the Parties to accord national treatment⁹ pursuant to Article III of the GATT 1994 (which that chapter incorporates into the EUSFTA). It also sets out obligations regarding non-tariff measures. Separate provisions apply to the making available and sharing of information, notifications and enquiries and the administration of measures covered.

12. *Chapter Three ('Trade Remedies')* sets out obligations regarding, on the one hand, anti-dumping and countervailing measures and, on the other hand, two types of safeguards (global safeguard measures and bilateral safeguard measures).

13. *Chapter Four ('Technical Barriers to Trade')* aims to facilitate and increase trade in goods between the Parties by providing a framework to prevent, identify and eliminate unnecessary barriers to trade within the scope of the TBT Agreement (which is made part of the EUSFTA).

14. *Chapter Five ('Sanitary and Phytosanitary Measures')* aims to (a) protect human, animal and plant life and health in the respective territories of the Parties while facilitating trade between the Parties in the area of sanitary and phytosanitary measures ('SPS measures'); (b) to collaborate on the further implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures ('the SPS Agreement'); and (c) to provide a means to improve communication, cooperation and resolution of issues related to the implementation of SPS measures affecting trade between the Parties.

15. *Chapter Six ('Customs and Trade Facilitation')* recognises the importance of customs and trade facilitation in the evolving global trading environment and of reinforcing cooperation in that area. It sets out the principles on which the customs provisions and procedures of the Parties are to be based.

16. The objectives of *Chapter Seven ('Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation')* are to promote, develop and increase the generation of energy from renewable and sustainable non-fossil sources ('green energy'), particularly through facilitating trade and investment. The chapter applies to measures which may affect trade and investment between the Parties concerning the generation of green energy but not to the products from which energy is generated.

17. In *Chapter Eight ('Services, Establishment and Electronic Commerce')*, the Parties reaffirm their respective commitments under the WTO Agreement.¹⁰ That chapter lays down the necessary arrangements for the progressive reciprocal liberalisation of trade in services, that is to say, the cross-border supply of services from the territory of a Party into the territory of the other Party and in the territory of a Party to a service consumer of the other Party, establishment, and the temporary presence of natural persons for business purposes. It addresses electronic commerce separately. It also contains provisions regarding domestic regulation of computer services, postal services, telecommunications services, financial services and international maritime transport services.

18. *Chapter Nine ('Investment')* consists of two parts.

7 — Article XXIV is entitled 'Territorial Application — Frontier Traffic — Customs Unions and Free-trade Areas'.

8 — Article V concerns 'Economic Integration'.

9 — In essence, 'national treatment' means that internal taxation and regulation should not be applied to imported or domestic products so as to afford protection to domestic production.

10 — The text of the WTO Agreement and of all of the WTO agreements that form part of it are available at: https://www.wto.org/english/docs_e/legal_e/final_e.htm.

19. Section A contains the substantive provisions on investment protection. For the purposes of that chapter, an ‘investment’ is ‘every kind of asset which has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, or a certain duration’. The main requirements concern national treatment, fair and equitable treatment and full protection and security as well as compensation for losses suffered owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the other Party. Section A also provides that neither Party is directly or indirectly to nationalise, expropriate or subject to measures having an effect equivalent to nationalisation or expropriation the investments of investors of the other Party covered by that section except when certain conditions are satisfied. Each Party must, in addition, allow all transfers relating to an investment covered by Chapter Nine to be made in a freely convertible currency without restriction or delay. Upon the entry into force of the EUSFTA, the bilateral agreements between Member States and Singapore listed in Annex 9-D are to cease to have effect and to be replaced and superseded by the EUSFTA.

20. Section B puts in place an ‘Investor-State Dispute Settlement’ (‘ISDS’) mechanism. That mechanism, which may involve arbitration, applies to a dispute between a claimant of one Party and the other Party concerning treatment (including failure to act) by the latter Party allegedly breaching the provisions of Section A and causing loss or damage to the claimant or its locally established company. A separate provision states that in principle neither Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Party have consented to submit or has submitted to arbitration under Section B of Chapter Nine.

21. *Chapter Ten (‘Government Procurement’)* applies to any measure regarding a form of procurement covered by the agreement, that is to say, procurement carried out by a listed entity and having a value which exceeds a given threshold.

22. *Chapter Eleven (‘Intellectual Property’)* sets out rights and obligations with respect to seven categories of intellectual property rights that are also covered by the TRIPS Agreement and one category that is not covered by that agreement, namely, plant variety rights. The structure of that section follows that of the TRIPS Agreement: each sub-section addresses an intellectual property right covered by the EUSFTA and also incorporates rights and obligations set out in other multilateral agreements (some of which are part of the TRIPS Agreement and others of which are not).

23. *Chapter Twelve (‘Competition and Related Matters’)* focuses on the importance of free and undistorted competition in the Parties’ trade relations. It sets out principles relating to antitrust and mergers, public undertakings, undertakings entrusted with special or exclusive rights and State monopolies and subsidies.

24. *Chapter Thirteen (‘Trade and Sustainable Development’)* concerns the Parties’ commitment to developing and promoting international trade and their bilateral trade and economic relationship in such a way as to contribute to sustainable development. The main obligations require each Party to establish its own levels of environmental and labour protection and to adopt or modify its relevant laws and policies accordingly, consistently with the principles of internationally recognised environmental and labour standards or agreements to which it is a party. The chapter also includes separate obligations regarding trade in timber and timber products and in fish products, as well as specific provisions governing dispute settlement.

25. *Chapter Fourteen (‘Transparency’)* contains obligations seeking to establish a transparent and predictable regulatory environment for economic operators and laying down clarifications and improved arrangements for transparency, consultation and better administration of measures of general application. Those obligations apply in principle together with more specific rules in other chapters of the EUSFTA.

26. *Chapter Fifteen ('Dispute Settlement')* sets out the generally applicable rules governing the avoidance and settlement of any difference between the Parties concerning the interpretation and application of the EUSFTA with a view, where possible, to reaching a mutually acceptable solution. The different stages in that dispute settlement procedure are: the request for consultations, (the request for) the establishing of an arbitration panel, the issuing of an interim report and the issuing of the final ruling. Separate provisions address implementation proceedings and remedies to induce compliance.

27. *Chapter Sixteen ('Mediation Mechanism')* establishes a mediation mechanism aimed at finding a mutually agreed solution through a comprehensive and expeditious procedure with the assistance of a mediator. It applies to any measure falling within the scope of the EUSFTA that adversely affects trade or investment between the Parties, except as otherwise provided.

28. *Chapter Seventeen ('Institutional, General and Final Provisions')* contains three categories of provisions. A first category lays down an institutional structure consisting of various committees in which the Parties are to meet in order to supervise and facilitate the implementation and application of the EUSFTA. A second category concerns decision-making, amendments, the entry into force, direct effect, accession, territorial application of the EUSFTA, the different annexes and other texts forming an integral part of the EUSFTA and the authentic versions of the text of the EUSFTA. A third category concerns substantive matters, including taxation, current account and capital movements, sovereign wealth funds, restrictions to safeguard the balance-of-payments and security exceptions.

29. Attached to the text of the chapters of the EUSFTA is a protocol on rules of origin, understandings concerning Article 17.6 (taxation), the remuneration of arbitrators, additional customs-related provisions, mutual recognition of authorised economic operator programmes and Singapore's specific constraints of space or access to natural resources.

30. A more detailed summary of the EUSFTA is included in the Annex to my Opinion. The purpose of that annex is not to summarise every aspect of the EUSFTA but rather to provide a summary of the main points that are relevant to this Opinion. Both the description of the request, the Parties' submissions and my analysis of the request should be read together with that annex.

EU law

Treaty on European Union

31. Article 5 TEU establishes the principle of conferral, according to which competences not conferred upon the European Union by the Treaties remain with the Member States.¹¹ Article 5(2) TEU provides that '... the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein' and that 'competences not conferred upon the Union in the Treaties remain with the Member States'.

32. Article 21(2) TEU refers to the principles to be respected and objectives to be pursued by the European Union in defining and pursuing common policies and actions. The same principles and objectives apply to the development and implementation of the European Union's external action and the external aspects of its other policies (Article 21(3) TEU). Those objectives include 'encourag[ing] the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade' (Article 21(2)(e) TEU) and 'help[ing] develop international measures to preserve and improve the quality of the environment and the sustainable development management of global natural resources, in order to ensure sustainable development' (Article 21(2)(f) TEU).

¹¹ — See also Article 4(1) TEU.

Treaty on the Functioning of the European Union

33. Article 2 TFEU provides, in particular:

‘1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence.^[12] The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

...’

34. The sole article in Protocol No 25¹³ on the exercise of shared competence states: ‘With reference to Article 2(2) [TFEU] on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.’

35. Article 3(1) TFEU describes the areas where the European Union has exclusive competence, including:

‘(a) customs union;

...

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy’.

36. Pursuant to Article 3(2) TFEU, the European Union also enjoys exclusive competence to conclude an international agreement ‘... when its conclusion is provided for in a legislative act of the Union [first ground] or is necessary to enable the Union to exercise its internal competence [second ground], or in so far as its conclusion may affect common rules or alter their scope [third ground]’.

37. Article 4 TFEU concerns shared competences and states:

‘1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.^[14]

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

12 — See also Declaration No 18 in relation to the delimitation of competences in the declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon (OJ 2016 C 202, p. 335). That declaration confirms that ‘... competences not conferred upon the Union in the Treaties remain with the Member States’. It further states that ‘when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence ...’.

13 — OJ 2012 C 326, p. 307.

14 — Article 6 TFEU contains an exhaustive list of the areas in which the European Union has competence to carry out actions to support, coordinate or supplement the actions of the Member States.

(b) social policy, for the aspects defined in this Treaty;

...

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

...

(g) transport;

...

(i) energy;

...'

38. According to Article 9 TFEU, which is part of the provisions having general application, in defining and implementing Union policies and activities, the European Union is to '... take into account requirements linked to the promotion of a high level of employment [and] the guarantee of adequate social protection ...'.

39. Article 11 TFEU (also part of the provisions having general application) states that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'.

40. Part Five, Title I, of the TFEU, which comprises Articles 205 to 207 TFEU, contains the general provisions on the European Union's external action.

41. Article 206 TFEU states that 'by establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions in international trade and on foreign direct investment, and the lowering of customs and other barriers'.

42. Article 207(1) TFEU provides:

'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.'

43. According to Article 207(5) TFEU, 'the negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three ?comprising the provisions regarding the common transport policy? and to Article 218'.

44. Article 207(6) TFEU states that 'the exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation'.

45. Article 216 TFEU sets out when the European Union may conclude an international agreement with one or more third countries. In accordance with Article 216(1) TFEU, it may do so ‘... where the Treaties so provide [first ground] or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties [second ground], or is provided for in a legally binding Union act [third ground] or is likely to affect common rules or alter their scope [fourth ground]’. Article 216(2) TFEU provides that such agreements are binding upon the EU institutions and on the Member States.

46. Article 218 TFEU sets out the procedural rules governing, inter alia, the negotiation, signature and conclusion of international agreements:

‘1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission ... shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations ...

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

...

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.’

The request for an Opinion of the Court

47. By application dated 10 July 2015, the Commission requested, pursuant to Article 218(11) TFEU, an Opinion from the Court on the following question:

‘Does the Union have the requisite competence to sign and conclude alone [the EUSFTA]? More specifically,

- which provisions of the agreement fall within the Union’s exclusive competence?;
- which provisions of the agreement fall within the Union’s shared competence?; and
- is there any provision of the agreement that falls within the exclusive competence of the Member States?’

48. Written observations on the Commission's request have been submitted by the Council, the Parliament and the Governments of all Member States apart from Belgium, Croatia, Estonia and Sweden. A hearing was held on 12 and 13 September 2016, at which the Commission, the Council, the Parliament, and the Austrian, Belgian, Czech, Danish, Finnish, French, German, Greek, Irish, Italian, Lithuanian, Netherlands, Polish, Romanian, Slovenian and Spanish Governments participated.

The issues raised by the Commission's request for an Opinion

49. The Commission's request for an Opinion is clearly admissible, since the EUSFTA has not yet been concluded and is therefore an agreement that is 'envisaged' within the meaning of Article 218(11) TFEU. In essence, the request consists of two parts.

50. The first part concerns the question whether the European Union may sign and conclude the EUSFTA alone, that is to say, without the involvement of the Member States.

51. The second part asks what provisions of the EUSFTA fall within the European Union's exclusive competence, the European Union's shared competence and the Member States' exclusive competence.

52. If the Court's answer to the first part of the request is 'yes' because the whole of the EUSFTA falls within the European Union's exclusive external competence (on the basis of either Article 3(1) TFEU or Article 3(2) TFEU), it is not necessary to address the second part. The EUSFTA must then be concluded by the European Union alone.

53. If the European Union does not have exclusive competence for the whole of the EUSFTA, the position is more complicated. Where the competence over the EUSFTA is in part exclusive to the European Union (by virtue of Article 3 TFEU) and in part shared (pursuant to Article 4 TFEU), who may (or should) sign that agreement?¹⁵

54. It is necessary at this stage for me to set out how I understand the system of internal and external competence to interrelate.

55. Articles 2 to 4 TFEU have to be read against the background of Articles 4 and 5 TEU. They also need to be read having regard to their place right at the beginning of the TFEU ('Part One — Principles'; 'Title I — Categories and areas of Union competence') and against the background of what went before, in previous versions of the Treaties.

56. Here, it is important to recall the versions of what has become the TFEU as they stood after the Treaties of Maastricht (1992), Amsterdam (1997) and Nice (2001). In particular, Article 3b of the EC Treaty as amended by the Treaty on European Union at Maastricht (subsequently Article 5 EC (Amsterdam and then Nice)) contained, in its three constituent paragraphs, an analysis of competence that incorporated sequentially the principles of conferral, subsidiarity and proportionality.¹⁶ Throughout that period there was, however, no detailed list of competences. The abortive Treaty establishing a Constitution for Europe would have introduced such a list; and the contents and essential elements of what is now to be found in Articles 2, 3 and 4 TFEU were taken more or less straight across from the draft constitution and inserted by the Treaty of Lisbon.¹⁷

15 — It is common ground that the European Union enjoys exclusive external competence, pursuant to Articles 3(1)(e) and 207(1) TFEU, as regards certain parts of the EUSFTA.

16 — Article 5 EC stated: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'

17 — For a useful summary, see Lenaerts, K., and Van Nuffel, P., *European Union Law*, Sweet & Maxwell, 2011, paragraphs 7.021 to 7.025.

57. Those previous versions make it clear that this opening section of what is now the TFEU is not about external relations as such. It is about the core constitutional issue of the *division of power between the European Union and its constituent Member States* — the *principle of the conferral of powers*. Competences are conferred on the European Union essentially for the purpose of enabling it to legislate in various areas of policy and economic activity within the territory of the European Union. It is an EU-centric view of the world (rather than a '*Weltanschauung*'). It is about striking the desired balance between the unifying (supra-national) central authority set up under the Treaties and the European Union's constituent, still sovereign, Member States (the '*Herren der Verträge*'). It has to be clear, from the division of competences on which the whole European Union project is based, who has competence to act in specific fields. The primary focus is, 'who is competent to act within the territory of the European Union: the European Union or the Member States?' That said, the division of competences between the European Union and the Member States will necessarily also have implications for the exercise of external competence.

58. What was the effect of the changes introduced by the Treaty of Lisbon?

59. Competences in a short and exhaustive list of areas are irretrievably (barring Treaty change) assigned to the European Union (Article 3(1) TFEU). Most areas of competence, however, appear in the list of 'principal areas' — that is, in a non-exhaustive list — of shared competences (Article 4(2) TFEU). A competence defined as 'shared' never metamorphoses into an a priori exclusive EU competence in the sense of Article 3(1) TFEU. It is true that if the European Union, by exercising its right of pre-emption under Article 2(2) TFEU (which I shall discuss in a moment) has effectively occupied the field, the field so occupied becomes an area where the European Union de facto enjoys exclusive competence. However, the difference between a priori exclusive EU competences under Article 3(1) TFEU, on the one hand, and competences that become de facto exclusive EU competences through the mechanism of Article 2(2) TFEU,¹⁸ on the other hand, is this: an a priori exclusive EU competence can never (barring Treaty change) be turned into a non-exclusive EU competence. In contrast, it is in theory possible that an area currently occupied by EU legislation adopted in the exercise of the right of pre-emption under Article 2(2) could be returned to the Member States. The EU legislature would merely need to decide to stop legislating and to repeal existing EU legislation in that field.

60. Shared competences under Article 4 TFEU are, moreover, inextricably tied to the presence of a (separate) Treaty provision conferring on the European Union a competence that is neither an exclusive competence (Article 3 TFEU) nor a flanking competence (Article 6 TFEU: 'competence to carry out actions to support, coordinate or supplement the actions of the Member States'). That is because Article 4(1) TFEU states that 'the [European Union] shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6'.¹⁹ Article 4 TFEU thus defines the *existence* of various competences that are shared between the European Union and the Member States.

61. Article 2 TFEU then deals with various aspects of the *exercise* of competence. In particular, the second sentence of Article 2(2) contains the European Union's 'right of pre-emption'. That provision gives the European Union the right to choose to start exercising one of the listed shared competences. *To the extent that it does so* (but *only* to that extent) the Member States can no longer exercise their shared competence in that specific respect. Thus, Protocol No 25 expressly states that, 'when the

18 — I do not speculate on whether that reversibility also applies to exclusive external EU competence under Article 3(2) TFEU. It has been argued that, if the EU occupies the field internally and proceeds to conclude an international agreement on the basis of Article 3(2) TFEU, the fact that it later ceases to legislate internally does not affect the exclusive character of its now long-established external competence. However, academic opinion is divided on that point.

19 — It has to be said that the drafting here is less than ideal. The pre-emption mechanism in Article 2(2) TFEU applies to all shared competences, unless an exception is expressly provided for (such as in Article 4(3) and (4) TFEU). On its wording, Article 4(1) TFEU logically defines Common Foreign and Security Policy (CFSP) competences also as 'shared' competences that are therefore open to pre-emption under Article 2(2): a result that might disconcert at least some Member States.

[European Union] has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the [EU] act in question and therefore does not cover the whole area'. Pre-emption under Article 2(2) TFEU is expressly stated to be reversible. If the European Union ceases to act in respect of a particular part of a particular shared competence, that competence reverts to the Member States. And the parts must always add up to a whole — every competence exercised in a shared area is *either* exercised by the European Union *or* exercised by the Member States. It cannot be in limbo between the two.

62. Much of the exercise of the European Union's competence continues to be concerned with what happens 'internally' — that is, within the territory of the European Union. Certain aspects of the division of competences continue necessarily to have implications for external action. That is true both of areas where the European Union enjoys exclusive competence and of areas of shared competence. As and when such external action is taken, it must respect the agreed division of competences as between the European Union and its constituent Member States. Those principles must be respected in all action taken by the European Union, whether internal or external.²⁰

63. Competence for the customs union and competence for the common commercial policy (both of which are listed as exclusive competences of the European Union in Article 3(1) TFEU) finds detailed recognition and expression in Article 206 TFEU (the customs union) and Article 207 TFEU (the common commercial policy) in Part Five of the TFEU entitled 'The Union's external action'. The common commercial policy is one of the rare examples of a purely external EU competence. Whilst Article 207(2) TFEU empowers the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, to adopt the measures defining the framework for implementing the common commercial policy, such regulations are measures of external action (intended to regulate, through EU legislative acts, trade with third States). The equivalent *internal* competence is the competence for the approximation of laws in Articles 114 and 115 TFEU to regulate the internal market, which Article 4(2)(a) TFEU defines as a shared competence.

64. In contrast to Article 3(1) TFEU, which does not speak expressly of *external* competence, Article 3(2) TFEU refers to the circumstances in which the European Union 'shall have exclusive competence to conclude an international agreement'. The four²¹ grounds provided for by the Treaty draftsmen ('when its conclusion is provided for in a legislative act of the [European Union]', '[when its conclusion] is necessary to enable the [European Union] to exercise its internal competence', 'in so far as its conclusion may affect common rules or alter their scope') reflect and mostly codify earlier case-law of the Court.²² Article 216 TFEU (which contains the detailed provisions governing when the European Union 'may conclude an agreement with one or more third countries or international organisations') likewise reflects and codifies the Court's case-law on the existence of EU external competence; it is directly tied to the division of competences operated by Articles 2 to 4 TFEU. Article 216(1) TFEU determines the *existence* of EU external competence but not its exclusive nature — the latter is determined by Article 3(1) and (2) TFEU.

65. Against that background, I turn to consider external competence in greater detail.

20 — See, for example, as regards the principle of conferral: Opinion 2/94 (Accession of the Community to the ECHR) of 28 March 1996, EU:C:1996:140, paragraph 24, and Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraph 5.

21 — Although Article 3(2) lays down four grounds, since the final alternative ('affect common rules *or* alter their scope') makes provision for two possibilities, I shall treat the last two of these together in what follows. References below to 'the third ground' under Article 3(2) should therefore be construed as including both possibilities.

22 — Each of those grounds reflects the principle of conferral (see Opinion 1/13 of 14 October 2014, EU:C:2014:2303, paragraph 67 and the case-law cited). The first ground reflects (in part) Opinion 1/94 of 15 November 1994, EU:C:1994:384, paragraph 95; the second ground encapsulates Opinion 1/76 of 26 April 1977, EU:C:1977:63, paragraph 3; the third and fourth grounds reflect the principle (though expressed in broader terms) established in judgment of 31 March 1971, *Commission v Council*, 22/70, EU:C:1971:32, paragraphs 17 and 18 ('the judgment in *ERTA*'). For a more detailed discussion of the *ERTA* principle, see points 120 to 131 below.

66. In relation to the common commercial policy, Article 3(1)(e) TFEU states that the European Union has exclusive competence in this area. Article 207 TFEU makes it clear that the common commercial policy ‘shall be based on ... the conclusion of tariff and trade agreements relating to [various areas]’. The first ground under Article 216(1) indicates that the European Union may conclude an international agreement ‘where the Treaties so provide’. So, *provided* that a particular subject matter falls within the common commercial policy (a thorny question to which much of the analysis in the rest of this Opinion is devoted), the European Union will enjoy exclusive external competence to conclude an international agreement pertaining to that subject matter. Other exclusive competences listed in Article 3(1) TFEU may link across to other grounds under Article 216(1) TFEU, notably the second ground (‘where the conclusion of an agreement is necessary in order to achieve, within the framework of the [European Union’s] policies, one of the objectives referred to in the Treaties’).

67. If one of the grounds under Article 3(2) TFEU is satisfied and the European Union enjoys external competence in accordance with the detailed rules granting competence to conclude international agreements found in Article 216(1) TFEU, that external competence will be exclusive. Let us examine each ground briefly in turn.

68. First, can we identify a ‘legally binding [EU] act’ that provides for the European Union to conclude such an international agreement (the third ground under Article 216(1) TFEU)? If so, and if that act is a ‘legislative act of the [European Union]’ (the first ground under Article 3(2) TFEU),²³ the resulting external EU competence will be exclusive.²⁴

69. Second, is the conclusion of an international agreement ‘necessary in order to achieve, within the framework of the [European Union’s] policies, one of the objectives referred to in the Treaties’ (the second ground under Article 216(1) TFEU)? If so, and if an internal competence of the European Union simply cannot in practice be exercised without there being also an external component (the second ground under Article 3(2) TFEU), the resulting external EU competence will likewise be exclusive. As the pre-Lisbon case-law shows, such situations are rare but possible.²⁵

23 — A ‘legislative act’ is a legal act adopted by legislative procedure (Article 289(3) TFEU). On the distinction between legislative acts and regulatory acts, see judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625. The EU Treaty prohibits legislative acts in the CFSP: see the second subparagraph of Article 24(1) TEU.

24 — Here again the Treaty drafting post-Lisbon is a little curious. What I have set out in the main text would seem to be the natural reading of the third ground of Article 216(1) TFEU taken in conjunction with the first ground of Article 3(2) TFEU; and it indeed leads to the conclusion that the external competence that the European Union thereby acquires is exclusive in nature. But that conclusion is not easy to reconcile with the wording of Article 4(4) TFEU. Suppose (for example) that the European Union adopted a legislative act in the area of development cooperation that provided for the conclusion of an international agreement. Article 4(4) TFEU says that the European Union ‘shall have competence to carry out activities and conduct a common policy’ in the areas of development cooperation and humanitarian aid; but continues, ‘however, the exercise of that competence shall not result in Member States being prevented from exercising theirs’. Given that wording, can it really be said that the resulting EU competence is *always* exclusive? (Article 4(3) TFEU contains broadly similar wording in relation to competences in the areas of research, technological development and space and presents the same conundrum.)

25 — See, in particular, Opinion 1/76 (Agreement establishing a European laying-up Fund for Inland Waterway Vessels) of 26 April 1977, EU:C:1977:63, paragraphs 1 to 3. In that case, the agreement at issue sought to rationalise the economic situation of the inland waterway transport industry in a geographical region in which transport by inland waterway is of special importance within the whole network of international transport (paragraph 1). The Court found that it was ‘... impossible fully to attain the objective pursued by means of the establishment of common rules pursuant to Article 75 of the [EEC] Treaty, because of the traditional participation of vessels from a third State, Switzerland, in navigation by the principal waterways in question, which are subject to the system of freedom of navigation established by international agreements of long standing’ (paragraph 2). Although the Court did not state in terms in that Opinion that the ensuing EU competence was exclusive, the Court has clearly interpreted Opinion 1/76 in that sense in subsequent case-law. See, for example, Opinion 2/92 (Third Revised Decision of the OECD on National Treatment) of 24 March 1995, EU:C:1995:83, paragraph 32.

70. Finally, has there already been so much EU legislative activity that the European Union now has exclusive EU external competence through the codified ‘ERTA effect’?²⁶ Showing that the conclusion of an international agreement ‘may affect common rules or alter their scope’²⁷ automatically satisfies the conditions of the fourth ground under Article 216(1) TFEU and the third ground under Article 3(2) TFEU; and the European Union will accordingly have exclusive external competence.

71. If the European Union does not enjoy exclusive external competence by virtue of Article 3 TFEU, does it have shared external competence by virtue of Articles 2 and 4 TFEU (governing shared competence) and Article 216 TFEU (conferring external competence); *or is there no EU external competence at all*, other than perhaps flanking external competence?²⁸ Here, the situation is more complicated.

72. First, it is necessary to check that shared competence actually exists under Article 4 TFEU. Assuming that the answer to that question is ‘yes’, one then looks at Article 216(1) TFEU to see whether one of the grounds there listed giving the European Union competence to enter into an international agreement is satisfied. Since, on this hypothesis, there is no exclusive external competence under Article 3(2) TFEU, it is likely that it is the first, second and third grounds under that provision that will be relevant. The combination of Article 4 TFEU and Article 216(1) TFEU creates the conditions necessary for the *existence* of EU shared external competence. What, then, of its exercise?

73. Here, it is necessary to return to Article 2(2) TFEU and the European Union’s right of pre-emption. If the European Union does *not* choose to exercise that right, external competence — like internal competence — will remain with the Member States and it follows that they (and not the European Union) will be competent to negotiate, sign and conclude an international agreement whose subject matter falls within that area of shared competence. However, the text of Article 2(2) TFEU can be read as permitting the European Union to exercise its right of pre-emption in relation to both external and internal competence.

74. Accepting that proposition does not imply that the European Union enjoys an unfettered right to assert external competence over any area of shared competence listed in Article 4 irrespective of whether it has chosen to exercise that right internally. At the hearing, the Council emphasised that whether the European Union or the Member States exercise external competence to conclude a particular international agreement in an area of shared competence is ‘a political choice’. As I see it, the legal safeguards underpinning that political choice lie in the detailed procedures set out in Article 218 TFEU. Article 218(2) provides that ‘the Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them’. Subsequent paragraphs indicate that the opening of negotiations (Article 218(3) TFEU), the signing of the agreement (Article 218(5) TFEU) and its conclusion (Article 218(6) TFEU) each require separate Council decisions — that is, decisions of the Member States acting in their capacity as members of the Council which authorise the appropriate EU institution to act. Throughout the procedure, the Council acts by qualified majority save for certain areas where unanimity is required (Article 218(8) TFEU); and conclusion of the agreement in so far as it represents an exercise of EU external competence normally also requires the consent of, or at least consultation with, the European Parliament (Article 218(6)(a) and (b) TFEU, respectively).

26 — The pre-Lisbon ‘added value’ of the Court’s ruling in *ERTA* was twofold: first, it created external competence and second, it defined that competence as exclusive. If an area (appropriately defined) is occupied by common rules, this suffices to trigger the third ground under Article 3(2) TFEU in respect of that area. See further points 120 to 131 below.

27 — The fourth ground of Article 216(1) TFEU reads ‘likely to affect common rules or alter their scope’, whilst the third ground of Article 3(2) TFEU reads ‘in so far as its conclusion may affect common rules or alter their scope’. I do not consider that anything material turns on the slight difference in wording between the two provisions.

28 — See point 60 above.

75. It follows that an international agreement covering areas that fall within shared external competence that is eventually signed and concluded by the European Union alone is conceptually totally different from an international agreement that covers only areas falling within the European Union's exclusive external competence. In the former case, the Member States together (acting in their capacity as members of the Council) have the power to agree that the European Union shall act *or* to insist that they will continue to exercise individual external competence. In the latter case, they have no such choice, because exclusive external competence already belongs to the European Union.

76. If an international agreement is signed by both the European Union and its constituent Member States, both the European Union and the Member States are, as a matter of international law, parties to that agreement. That will have consequences, in particular in terms of liability for a breach of the agreement and the right of action in respect of such a breach. For the sake of transparency within the European Union and in the interests of the third country (or countries) with which that international agreement is being concluded, it would therefore seem desirable for such decisions to indicate very clearly the precise aspects of shared competence which the Member States (acting in their capacity as members of the Council) have agreed shall be exercised by the European Union, on the one hand, and which are (still) being exercised by the Member States, on the other hand. A declaration of competences annexed to the agreement in question would, it seems to me, also not come amiss.

77. Finally, where an international agreement is signed by both the European Union and its Member States, each Member State remains free under international law to terminate that agreement in accordance with whatever is the appropriate termination procedure under the agreement. Its participation in the agreement is, after all, as a sovereign State Party, not as a mere appendage of the European Union (and the fact that the European Union may have played the leading role in negotiating the agreement is, for these purposes, irrelevant). If the Member State were to do so, however, the effect of Article 216(2) TFEU will be that — *as a matter of EU law* — it continues to be bound by the areas of the agreement concluded under EU competence (because it is an EU Member State) unless and until the European Union terminates the agreement.²⁹ The ability to act independently as an actor under international law reflects the continuing international competence of the Member State; the fact that the Member State remains partially bound by the agreement even if, acting under international law, it terminates it reflects not international law but EU law.

78. The position is different where the Member States enjoy exclusive competence for one or more part(s) of an international agreement (and the remainder of the agreement falls within the exclusive or shared competence of the European Union): there, both the Member States and the European Union must conclude the agreement.³⁰

79. However, assuming always that it is necessary for the Court to answer the second part of the request, is it necessary for the Court to establish who has competence in relation to *each and every* provision of the EUSFTA?

80. In my view, it is not.

81. The Court made it clear in Opinion 2/00 that, assuming that competence to conclude an international agreement is shared between the European Union and its Member States, the precise extent of both the European Union's exclusive competences and the Member States' shared (or exclusive) competences as regards a specific agreement cannot, as such, have any bearing on the

29 — I leave to one side the question whether, if a Member State were unilaterally to withdraw from an agreement concluded by both the Member States and the European Union without first engaging in dialogue with the EU institutions (in particular, with the Commission and the Council), that might be considered to contravene the duty of sincere cooperation under Article 4(3) TEU.

30 — In her Opinion in *Commission v Council*, C-13/07, EU:C:2009:190, point 121, Advocate General Kokott wrote: 'Just as a little drop of pastis can turn a glass of water milky, individual provisions, however secondary, in an international agreement based on the first subparagraph of Article 133(5) EC can make it necessary to conclude a shared agreement'. See also judgment of 3 December 1996, *Portugal v Council*, C-268/94, EU:C:1996:461, paragraph 39 and the case-law cited.

competence of the European Union for concluding that agreement and, more generally, on the substantive or procedural validity of the European Union's decision to conclude it.³¹ The purpose of the procedure in Article 218(11) TFEU is specifically to forestall the complications which could arise, both at the international level and at the EU level, if the decision to conclude the agreement were found to be invalid.³² It is not for the Court, in the context of that procedure, to provide specific guidance on who has competence in relation to each and every single provision of the agreement concerned and who should be responsible for performing the international obligation that it entails.³³

82. Rather, in answering the second part of the Commission's request, I shall examine for what parts of the EUSFTA the European Union enjoys exclusive competence (based on either Article 3(1) TFEU or Article 3(2) TFEU), whether there are parts in respect of which competence is shared with the Member States (on the basis of Article 4 TFEU); and whether there are still other parts for which the European Union enjoys no competence. The EUSFTA is a very heterogeneous agreement. That means that, of necessity, the analysis to establish competence and its (exclusive or shared) nature will need (depending on the context) to focus on an individual chapter or groups of chapters of the EUSFTA, on a part or parts of that agreement or, occasionally, on an individual provision.

83. Despite the fact that the request concerns only the allocation of competences between the European Union and the Member States, some written observations (especially those of the Council) suggest that there might also be an issue regarding the process through which the Commission negotiated the EUSFTA and now proposes to sign it. Whilst the negotiating directives provided for the negotiation of a mixed agreement, the Commission negotiated the EUSFTA as an agreement between the European Union and Singapore alone. Did the Commission thereby disregard Article 218(4) TFEU and the principle of mutual sincere cooperation laid down in Article 13(2) TEU?

84. In my view, it is neither necessary nor appropriate, in the context of the present proceedings, to take a position on that issue. The process through which the EUSFTA was negotiated does not, as such, affect the allocation of competences between the European Union and its Member States for concluding it. It is therefore outside the scope of the Commission's request. Nor (in principle) could a failure to respect rules as to process under EU law affect the validity of the agreement as a matter of international law.³⁴ I shall therefore not address that issue further.

85. It is also important to bear in mind that the Commission's request does *not* concern the material compatibility of (any part of) the EUSFTA with the Treaties. Thus, the Court is not asked to consider, for example, the compatibility of an ISDS mechanism with the Treaties. That type of dispute resolution appears not only in the EUSFTA but also in other trade and investment agreements currently negotiated or in the course of negotiation by the European Union. In the present proceedings, the issue as regards the ISDS mechanism (and other forms of dispute resolution for which the EUSFTA provides) is only the question '*who* may decide'. My analysis in this Opinion is therefore without prejudice to such issues (if any) as there may be concerning the material compatibility of the EUSFTA, including the provisions regarding the ISDS mechanism, with the Treaties.³⁵

31 — See, to that effect, Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraph 15.

32 — See, inter alia, Opinion 1/75 (OECD Understanding on a Local Cost Standard) of 11 November 1975, EU:C:1975:145, pp. 1360 and 1361; Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraphs 6 and 17; and Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 145.

33 — See, inter alia, Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraphs 6 and 17.

34 — In accordance with Article 46(1) of the 1969 Vienna Convention on the Law of Treaties (1155 UNTS 331; the '1969 Vienna Convention'), 'a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance'. A manifest violation is, according to Article 46(2), one that 'would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'. Article 46 of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (not yet entered into force) (25 ILM 543 (1986)) provides for similar rules.

35 — In that connection, I note that the Court has now received a request for a preliminary ruling regarding the compatibility with Articles 18, first paragraph, 267 and 344 TFEU of an ISDS provision in a bilateral investment protection agreement between Member States of the European Union: see Case C-284/16 *Slovak Republic v Achmea BV* (pending before the Court).

86. Finally (and perhaps self-evidently) my Opinion in the present proceedings is limited to the EUSFTA. It is thus without prejudice to the allocation of competences between the European Union and the Member States as regards other trade and investment agreements.

87. In the remainder of my Opinion, I shall first set out the basic principles governing the allocation of external competences between the European Union and the Member States and the legal basis of EU action. I shall then discuss the basic features of the European Union's express exclusive competence over the common commercial policy (Article 207(1) TFEU), its implied exclusive competence (Article 3(2) TFEU) and its shared competence (Article 4 TFEU) over external action. Against that general background, I shall then turn to the allocation of competences as regards the matters covered by the EUSFTA.

The allocation of competences between the European Union and the Member States and the legal basis for concluding the EUSFTA

88. At the hearing, it became clear that the Council and a number of Member States consider that the allocation of competences between the European Union and the Member States as regards the EUSFTA must first be established before determining, as a subsequent step, the legal basis on which the European Union's decision to sign and conclude the EUSFTA should rest.

89. Clearly, the Court is not being asked to determine that second issue here. However, in my view, the Council and a number of Member States misunderstand the relationship between the principles governing the allocation of (external) competences and those governing the choice of legal basis of EU action.

90. The European Union enjoys conferred powers only.³⁶ It must therefore link a measure which it adopts to a Treaty provision empowering it to approve that measure.³⁷ That legal basis must be established on the grounds of objective factors amenable to judicial review, which include the aim and content of the measure.³⁸

91. In Opinion 1/08, the Court explained that the character, whether exclusive or not, of the European Union's competence to conclude agreements and the legal basis which is to be used for that purpose are two closely linked questions.³⁹ Indeed, whether the European Union alone has the competence to conclude an agreement or whether such competence is shared with the Member States depends, inter alia, on the scope of the provisions of EU law which are capable of empowering the EU institutions to participate in the agreement.⁴⁰

92. Establishing that the European Union has competence to act at all in a particular field (and thus identifying the legal basis for such action) is therefore a precondition to determining the allocation of competences between the European Union and the Member States, in accordance with Articles 3 and 4 TFEU, as regards a specific external action.⁴¹

36 — See Articles 4(1) and 5(2) TEU. See also Articles 2 to 6 TFEU and the discussion at points 55 to 64 above.

37 — See, inter alia, Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraph 5, and judgment of 1 October 2009, *Commission v Council*, C-370/07, EU:C:2009:590, paragraph 47.

38 — See, most recently, judgment of 14 June 2016, *Parliament v Council*, C-263/14, EU:C:2016:435, paragraph 43 and the case-law cited.

39 — Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraph 111.

40 — Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraph 112 and the case-law cited.

41 — That appears from the structure of the Court's reasoning in Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739.

93. In identifying the legal basis, it follows from well-settled case-law that, where an agreement of the European Union pursues more than one purpose or comprises two or more components of which one is identifiable as the main or predominant purpose or component, whereas the other(s) is (or are) merely incidental or extremely limited in scope, the European Union has to conclude that agreement based on a single legal basis, namely that required by the main or predominant purpose or component.⁴² Thus, if the predominant purpose of the EUSFTA is that of pursuing the common commercial policy and other aspects of it are properly to be regarded either as constituting a necessary adjunct to that main component or as being extremely limited in scope, the substantive legal basis for concluding that agreement would be Article 207(1) TFEU.⁴³ It would then follow from Article 3(1)(e) TFEU that the European Union has exclusive competence to conclude the EUSFTA.⁴⁴

94. On the other hand, if the Court were to establish that the EUSFTA simultaneously pursues a number of objectives, or has several components, which are inextricably linked without one being incidental to the other, such that various provisions of the Treaties are applicable, the European Union's act concluding that agreement would need to be founded on the various legal bases corresponding to those components.⁴⁵

95. Against that background, I now turn to the scope of the common commercial policy within the meaning of Article 207 TFEU.

Article 207(1), (5) and (6) TFEU

96. The Court clarified the European Union's exclusive competence over the common commercial policy long before the entry into force of Article 3(1)(e) TFEU, which now expressly confirms the European Union's exclusive competence over that policy. Thus, in its very first Opinion delivered on the basis of (what is now) Article 218(11) TFEU, the Court held that exclusive competence over the common commercial policy was justified because permitting the Member States to exercise concurrent powers in that area 'would amount to recognising that, in relations with third countries, Member States may adopt positions which differ from those which the [European Union] intends to adopt, and would thereby distort the institutional framework, call into question mutual trust within the [European Union] and prevent the latter from fulfilling its task in the defence of the common interest'.⁴⁶ That reasoning is consistent with the construction of the customs union set up by the Treaty of Rome. Internally, that union consists of an absolute prohibition on customs duties on imports and exports and charges having equivalent effect between the Member States.⁴⁷ At the same time, the Treaties entrust the European Union and its institutions with the task of defending the European Union's commercial interests externally. Enabling the Member States to conduct their own commercial policies with the outside world (and indeed to pursue their own interests in that context) in parallel with the actions of the European Union would clearly risk jeopardising that essential function.

42 — See, for example, judgments of 12 December 2002, *Commission v Council*, C-281/01, EU:C:2002:761, paragraph 43, and of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675, paragraph 76.

43 — See Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraph 166.

44 — See, for example, Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 68; judgments of 12 December 2002, *Commission v Council*, C-281/01, EU:C:2002:761, paragraph 43; and of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675, paragraph 76; and Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraphs 37 and 44.

45 — Judgment of 14 June 2016, *Parliament v Council*, C-263/14, EU:C:2016:435, paragraph 44 and the case-law cited; see also judgment of 10 January 2006, *Commission v Council*, C-94/03, EU:C:2006:2, paragraph 51.

46 — Opinion 1/75 (OECD Understanding on a Local Cost Standard) of 11 November 1975, EU:C:1975:145, p. 1364. See also judgment of 15 December 1976, *Donckerwolcke and Schou*, 41/76, EU:C:1976:182, paragraph 32.

47 — Article 30 TFEU.

97. The Commission in the present proceedings invites the Court to revisit its past case-law concerning the scope of the common commercial policy. How far has the scope of that policy expanded as a result of changes introduced by Treaty of Lisbon (in particular, as regards commercial aspects of intellectual property, foreign direct investment, trade in services, the exception relating to the field of transport in Article 207(5) TFEU and the limits resulting from Article 207(6) TFEU)?

98. Certain Member States have suggested that, following the Court's Opinion 1/94, it is no longer appropriate to regard the common commercial policy as 'dynamic'.

99. I am not convinced that it is particularly useful to debate whether or not the common commercial policy is 'dynamic'. What matters is that Article 207(1) TFEU should be interpreted in a manner that both respects the wording of that provision and guarantees that the European Union is able to conduct an effective common commercial policy in an international commercial environment that is permanently evolving.

100. I agree with the view expressed by Advocate General Wahl in the context of Opinion procedure 3/15 that, since trade practices, patterns and trends evolve over time, the subject matter of international trade can neither be determined in the abstract nor identified in a static and rigid manner.⁴⁸ However, what is to be regarded as 'trade policy' or 'investment policy' in international relations and what constitutes the common commercial policy, as a matter of EU law, is not necessarily the same.

101. The Court has also emphasised the need to guarantee the *effectiveness* of the European Union's common commercial policy. In Opinion 1/78, the Court explained that it would no longer be possible to carry on any worthwhile common commercial policy if the European Union were not in a position also to avail itself of means of action going beyond instruments intended to have an effect only on the traditional aspects of external trade. A 'commercial policy' understood in that sense would be destined to become nugatory in the course of time,⁴⁹ and thus gradually preclude the European Union from fulfilling its role as a global trade partner, both through bilateral relations with non-member countries and through multilateral action.⁵⁰ The common commercial policy is therefore not limited to measures which pursue commercial objectives. It may encompass measures which pursue objectives that are not purely commercial such as development,⁵¹ foreign and security policy,⁵² or the protection of the environment or of human health,⁵³ *provided* always that those measures have also direct and immediate effects on trade. The interaction between the common commercial policy and the (other) principles and objectives of the European Union's external action is expressly recognised in the final sentence of Article 207(1) TFEU.

102. However, that does not mean that there are no limits to the scope of the common commercial policy. Nor is the fact that a matter is addressed in a trade (and investment) agreement sufficient for that matter to fall within the common commercial policy. Agreements or provisions which other actors in international law may frame as part of trade or commercial policy do not necessarily fall within the definition of 'common commercial policy' in the Treaties. In defining that policy, the Court is limited by the wording of Articles 206 and 207 TFEU.

48 — Opinion of Advocate General Wahl in Opinion procedure 3/15 (Marrakesh Treaty on Access to Published Works), EU:C:2016:657, point 43.

49 — Opinion 1/78 (International agreement on natural rubber) of 4 October 1979, EU:C:1979:224, paragraph 44, and judgment of 26 March 1987, *Commission v Council*, 45/86, EU:C:1987:163, paragraph 20.

50 — See Opinion of Advocate General Wahl in Opinion procedure 3/15 (Marrakesh Treaty on Access to Published Works), EU:C:2016:657, point 43.

51 — Opinion 1/78 (International agreement on natural rubber) of 4 October 1979, EU:C:1979:224, paragraphs 41 to 46.

52 — Judgments of 17 October 1995, *Werner*, C-70/94, EU:C:1995:328, paragraph 10, and of 17 October 1995, *Leifer and Others*, C-83/94, EU:C:1995:329, paragraph 11.

53 — Judgment of 29 March 1990, *Greece v Council*, C-62/88, EU:C:1990:153, paragraphs 17 to 20, and Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraph 40. See also, more recently, Opinion of Advocate General Wahl in Opinion procedure 3/15 (International agreement on natural rubber), EU:C:2016:657, point 69.

103. What matters for the purposes of Article 207 TFEU is that the European Union's (internal or external) action should *specifically* relate to international trade, meaning trade with non-member countries (not trade in the internal market),⁵⁴ in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade.⁵⁵ Thus, the mere fact that an act of the European Union is liable to have implications for international trade is not enough for it to fall within the common commercial policy.

104. In distinguishing between (international) commitments falling under the common commercial policy and those whose primary objective is to improve the functioning of the internal market, it is important to determine whether or not the purpose of the agreement is essentially to extend beyond the territory of the European Union the approximation of the laws of the Member States that has already been 'largely achieved' by EU secondary legislation relating to trade in the internal market.⁵⁶ If that is the case, that agreement may be presumed to seek to promote international trade and its conclusion therefore falls within the common commercial policy. Conversely, where that 'internal' approximation is precisely the object of the agreement, the predominant purpose of the agreement is to improve the functioning of the internal market and it therefore falls outside the common commercial policy, even if it has effects on international trade.⁵⁷

105. A number of parties are concerned, either in general or in the context of a specific chapter of the EUSFTA, that the Commission's wide interpretation of the scope of the common commercial policy following the entry into force of the Treaty of Lisbon undermines Article 207(6) TFEU.

106. In my opinion, Article 207(6) TFEU concerns only the exercise of the competences which the European Union derives from Article 207(1) TFEU. It presupposes that that competence has been established. Thus, it cannot alter the European Union's exclusive external competence under Article 207(1) TFEU. Article 207(6) TFEU imposes two limits, even if the second appears to be an application of the first.

107. First, the exercise of the competence over the common commercial policy cannot affect the delimitation of competences between the European Union and the Member States. In my view, that first limitation constitutes an expression of the principle of conferral laid down in Article 2(1) and (2) TFEU and further elaborated in Declaration No 18 in relation to the delimitation of competences.⁵⁸ In other words, the exercise of the European Union's exclusive competence over the common commercial policy may not alter or otherwise affect the Treaty provisions on the allocation of competences in *other* areas falling outside the scope of that competence (such as, for example, trade in the internal market). I am fortified in that interpretation by Article 207(2) TFEU, which provides for a legal basis to adopt '... the measures defining the framework for implementing the common commercial policy' rather than stating that the European Union has exclusive competence over all measures that may have to be adopted in order to perform obligations resulting from an agreement concluded by the European Union in the exercise of its exclusive competence over the common commercial policy.

54 — Judgments of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520, paragraph 50, and of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675, paragraph 56.

55 — See, inter alia, judgments of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520, paragraphs 51 and 52 and the case-law cited, and of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675, paragraphs 57 and 58.

56 — Judgment of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675, paragraph 67.

57 — That approach finds support in Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraphs 44 and 45 (concerning services) and 59 and 60 (concerning intellectual property rights).

58 — That declaration states that 'in accordance with the system of division of competences between the Union and the Member States as provided for in the [TEU] and the [TFEU], competences not conferred upon the Union in the Treaties remain with the Member States'.

108. Thus, for example, the exercise by the European Union of its exclusive competence under Article 207(1) TFEU as regards the entire TRIPS Agreement⁵⁹ does not mean that it is competent to regulate each and every matter covered by that agreement in the internal market. Nor can such exercise modify the allocation of external competences between the Member States and the European Union as regards intellectual property rights in general.

109. Conversely, I do *not* read the first limitation to mean that the exercise of the European Union's competence over the common commercial policy depends on whether the European Union enjoys internal competence on some other basis or has exercised that competence.⁶⁰ In particular, insisting on parallelism between the external aspect of the common commercial policy and the internal aspect of other EU policies finds no support in other parts of Article 207 TFEU. Thus, Article 207(4) TFEU expressly confirms that the common commercial policy may include trade in cultural and audiovisual services and trade in social, education and health services. However, the European Union's internal competences in the area of public health are limited, as they merely complement the actions of the Member States.⁶¹ Moreover, EU action must respect the responsibilities of the Member States for defining their health policy and for organising and delivering health services and medical care.⁶²

110. The second limitation imposed by Article 207(6) TFEU is that the exercise of competences under the common commercial policy cannot lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation. As Article 207(4) TFEU expressly confirms, that limitation does not mean that the common commercial policy cannot cover trade in matters with respect to which other Treaty provisions preclude harmonisation (such as, for example, in matters of social policy, education, public health or culture).⁶³ Rather, it means that, through the exercise of its competences under Article 207 TFEU, the European Union cannot act so as to circumvent the prohibition of harmonisation under the Treaties. That limitation is thus a particular application of the first limitation.

111. The present procedure for an Opinion also requires the Court to interpret Article 207(5) TFEU, especially in relation to the commitments regarding transport in Chapter Eight of the EUSFTA ('Services, Establishment and Electronic Commerce').⁶⁴ According to that provision, the negotiation and conclusion of international agreements in the field of transport are subject to Title VI of Part Three of the TFEU, that is to say, the Treaty provisions on the European Union's transport policy. Such agreements therefore fall outside the scope of the common commercial policy.

112. That exception is not new. The Treaties have always kept transport policy outside the common commercial policy. In fact, it was that exception which led the Court to establish, in its judgment in *ERTA*, the principle of *implied* exclusive external competences, as opposed to the express exclusive competence over the common commercial policy.⁶⁵

59 — See further points 424 to 430 below.

60 — For that reason, I do not share the interpretation which Advocate General Kokott gave to the limitation that previously resulted from Article 133(6) EC. See Opinion of Advocate General Kokott in *Commission v Council*, C-13/07, EU:C:2009:190, points 120 to 122 and 139 to 142. According to Advocate General Kokott, the meaning and purpose of the first subparagraph of that provision is '... very generally, to put the ?European Union's? internal and external powers on a parallel footing and to prevent the ?European Union? from entering into external commitments to which it would be unable to give effect internally for want of sufficient powers'.

61 — See Article 6 TFEU.

62 — See Article 168 TFEU. Article 6 TFEU provides that the European Union has, as regards the protection and improvement of human health, competence to carry out actions to 'support, coordinate or supplement the actions of the Member States'.

63 — See, respectively, Articles 153(2)(a), 165(4), 168(5) and 167(5) TFEU.

64 — See points 208 to 219 below.

65 — Judgment of 31 March 1971, *Commission v Council*, 22/70, EU:C:1971:32, paragraph 16.

113. Although the judgment in *ERTA* was concerned with an agreement establishing safety rules, the Court in Opinion 1/94 saw no reason to draw a different conclusion in relation to commercial agreements that also deal with transport, such as the GATS.⁶⁶ It confirmed ‘the idea underlying the judgment in *ERTA*’ that international agreements in transport matters are not covered by ‘the common commercial policy’.⁶⁷ The position remained unchanged under the Treaty of Nice⁶⁸ and the Treaty of Lisbon.⁶⁹ As regards international trade in transport services, the Treaties therefore seek to ‘maintain ... a fundamental parallelism between internal competence whereby [EU] rules are unilaterally adopted and external competence which operates through the conclusion of international agreements, each competence remaining ... anchored in the title of the Treaty specifically relating to the common transport policy’.⁷⁰

114. For that reason, the application of Article 207(5) TFEU is not limited to international agreements exclusively or predominantly relating to trade in transport services. As the Court held in Opinion 1/08, to conclude otherwise would mean that provisions of an international agreement having strictly the same object would fall in some cases within transport policy and in some cases within commercial policy depending solely on whether the parties to the agreement decided to deal only with trade in transport services or whether they agreed to deal at the same time with that trade and with trade in some other type of services or in services as a whole.⁷¹

115. Notwithstanding the broad scope of Article 207(5) TFEU, it seems to me that the expression ‘international agreements in the field of transport’ should not mean that every agreement applicable to transport (that is to say, in essence, the service of carrying goods or persons by one or more means of transport from one point to another) must be excluded from the common commercial policy. The fact that measures of general application may, in practice, also be applied to transport does not necessarily trigger the exception in Article 207(5) TFEU. Rather an international agreement ‘in the field of transport’ is an agreement that contains provisions specifically concerning transport. That explains why, in Opinion 1/08, the Court focused on the sector-specific commitments (and the horizontal commitments that applied in addition to those commitments) to conclude that the conditions for applying the exception in Article 207(5) TFEU were satisfied.

116. The present proceedings show that there remains uncertainty as to the scope of Article 207(5) TFEU. The issues concerning commitments relating to trade in *transport services* include that of whether the exception in Article 207(5) TFEU covers establishment (as defined in the EUSFTA) even if Title VI of Part Three of the TFEU does not govern it and whether services ‘auxiliary’ to transport services fall within the exception. I shall address those issues in my analysis of Chapter Eight of the EUSFTA.⁷²

66 — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraphs 49 and 50.

67 — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 48.

68 — See the third subparagraph of Article 133(6) EC (‘The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300’). That provision reflected the intention of the draftsmen of the Treaty of Nice ‘that a form of status quo ante should be preserved in that field’ (see Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraph 159).

69 — See Article 207(5) TFEU.

70 — Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraph 164.

71 — Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraph 163. The same conclusion could already be drawn (albeit by implication) from Opinion 2/92 (Third Revised Decision of the OECD on National Treatment) of 24 March 1995, EU:C:1995:83, paragraph 27.

72 — See points 208 to 219 below.

Article 3(2) TFEU

117. Where the European Union does not have express exclusive competence pursuant to Article 3(1) TFEU to conclude an international agreement, it may nonetheless enjoy implied external exclusive competence on the basis of Article 3(2) TFEU. Both paragraphs of Article 3 TFEU specifically concern the allocation of competences between the European Union and the Member States. However, unlike Article 3(1) TFEU, Article 3(2) TFEU concerns external competence alone. The various grounds that it lays down all necessarily imply, however, some exercise of internal competence.

118. The Commission relies on two grounds under Article 3(2) TFEU to establish the European Union's exclusive external competence.

119. For one part of Chapter Eight regarding services, establishment and electronic commerce,⁷³ the Commission relies on the first ground under Article 3(2) TFEU according to which the European Union shall have exclusive competence '... when its conclusion is provided for in a legislative act of the Union'. According to the Court's case-law, the underlying rationale of that provision is that there may be situations where, although the Treaties themselves do not establish an external competence of the European Union, common rules laid down by the institutions establish such competence by providing for the conclusion of international agreements.⁷⁴ In such situations, the European Union acquires exclusive competence as a result of common rules,⁷⁵ because enabling the Member States to conclude their own international agreements would be liable to jeopardise concerted external action in the spheres covered by those EU rules.⁷⁶

120. For certain other parts of the EUSFTA,⁷⁷ the Commission relies on the third ground under Article 3(2) TFEU. According to that ground, the European Union enjoys exclusive competence to conclude an international agreement '... in so far as its conclusion may affect common rules or alter their scope'. That ground corresponds with the test laid down by the Court in the judgment in *ERTA* for defining '... the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions, where common EU rules have been promulgated for the attainment of the objectives of the Treaty'.⁷⁸

121. The so-called '*ERTA* principle' offers a basis for the European Union to enjoy implied exclusive competence to conclude an international agreement. It was originally developed taking into account, on the one hand, the primary law requirement that the Member States take all appropriate measures to ensure fulfilment of their obligations arising out of the Treaties or resulting from action taken by the institutions and, on the other hand, the Member States' duty to abstain from any measure capable of jeopardising the attainment of the objectives of the Treaties.⁷⁹ Thus, the European Union has exclusive external competence where there is a risk that the Member States, acting outside the framework of the EU institutions, might assume international obligations affecting common rules or altering their scope. That would circumvent the rules set out in the Treaties for implementing EU policies and would therefore be liable to call into question the very essence of the EU integration process.

73 — See points 221 to 224 below.

74 — See, inter alia, judgment of 5 November 2002, *Commission v Germany*, C-476/98, EU:C:2002:631, paragraph 109 and the case-law cited.

75 — Judgment of 5 November 2002, *Commission v Germany*, C-476/98, EU:C:2002:631, paragraph 108 and the case-law cited.

76 — See, to that effect, Opinion 1/03 (New Lugano Convention) of 7 February 2006, EU:C:2006:81, paragraphs 45, 121 and 122.

77 — See points 225 to 268 below.

78 — Judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 66.

79 — Judgment of 31 March 1971, *Commission v Council*, 22/70, EU:C:1971:32, paragraph 21. Those obligations are now enshrined in the second and third subparagraphs of Article 4(3) TEU.

122. The Court's case-law offers some guidance on how to verify whether the conditions for applying the third ground are satisfied. There must be a specific analysis of the relationship between the proposed international agreement and EU law as it is in force at the material time. For the purposes of that analysis, and taking into account the principle of conferral, it is for the party asserting exclusive external competence to demonstrate it.⁸⁰

123. The first step of that analysis involves defining the area concerned by the international agreement so as to identify what common rules are relevant. The subject matter of the agreement may be determined by taking into account the content and purpose of the agreement. In that regard, whilst it might be possible, when analysing so-called homogenous agreements, to describe the entire agreement as covering 'an area' and then verify whether common rules fully harmonise that area or whether that area is largely covered by such common rules,⁸¹ that approach cannot be transposed so easily to an agreement such as the EUSFTA, which regulates different 'areas' in different chapters or parts thereof.

124. The Commission's arguments in the present proceedings raise a novel question. Does the third ground under Article 3(2) TFEU apply only where 'common rules' have already been adopted by the EU institutions in the exercise of the European Union's legislative competences, or can Treaty provisions themselves also constitute, under certain conditions, 'common rules'? The Commission argues that the European Union's exclusive competence as regards provisions of the EUSFTA concerning types of investment other than foreign direct investment results from the 'common rules' contained in Article 63 TFEU itself. I shall address that question when analysing Section A of Chapter Nine of the EUSFTA.⁸²

125. The second step is to identify what common rules exist in the area. However, the scope of the international agreement and the common rules need not coincide fully.⁸³ It might be sufficient that the area within which the international agreement falls is largely covered by those common rules.⁸⁴ Relevant common rules may include not only legislation applicable to the specific area covered by the agreement but also legislation that has a broader scope of application.⁸⁵ Nor does it matter that such common rules are (not) found in one and the same EU legal instrument.⁸⁶

126. Common rules are not only those rules that regulate situations involving a non-EU element and thus having an external dimension.⁸⁷ In identifying the common rules, it is necessary to consider both EU law as currently in force and the future development of those rules in so far as that development is foreseeable at the time of the analysis.⁸⁸

80 — Judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 75.

81 — Thus, that approach could be applied to the Convention of the Council of Europe on the protection of the rights of broadcasting organisations (judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraphs 78 to 103) or the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled (see Opinion of Advocate General Wahl in Opinion procedure 3/15 (Marrakesh Treaty on Access to Published Works), EU:C:2016:657, points 137 to 154).

82 — See points 350 to 359 below.

83 — Judgments of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 69 and the case-law cited, and of 26 November 2014, *Green Network*, C-66/13, EU:C:2014:2399, paragraph 30. That step in the analysis distinguishes the test under Article 3(2) TFEU from the identification of areas 'pre-empted' by EU action under shared competences.

84 — Judgments of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 70 and the case-law cited, and of 26 November 2014, *Green Network*, C-66/13, EU:C:2014:2399, paragraph 31.

85 — See, for example, judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 81.

86 — See, for example, judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 82.

87 — See, for example, Opinion 1/03 (New Lugano Convention) of 7 February 2006, EU:C:2006:81, paragraph 172.

88 — Opinion 1/13 (Accession of third States to the Hague Convention) of 14 October 2014, EU:C:2014:2303, paragraph 74 and the case-law cited, and judgment of 26 November 2014, *Green Network*, C-66/13, EU:C:2014:2399, paragraph 33.

127. The parties' arguments regarding what common rules are relevant to the application of the *ERTA* principle to the areas of transport services and types of investment other than foreign direct investment suggest that there are various misunderstandings about 'common rules'. The present proceedings offer an opportunity for the Court to provide the necessary clarification.⁸⁹

128. The third step involves examining the (possible) impact of the conclusion of the international agreement on the relevant common rules. It is not necessary to show that there *is* such an impact: the risk that common rules may be affected or that their scope may be altered is sufficient.⁹⁰ Such a risk exists where the commitments under the international agreement fall within the scope of the common rules.⁹¹ It is not necessary to show a possible contradiction, that is to say, a conflict, between the international agreement and the common rules.⁹²

129. Where common rules fully harmonise the area governed by the international agreement,⁹³ exclusive competence to conclude that agreement is easy to establish. The harmonised rules are presumed to be affected by the international commitments resulting from concluding that agreement.

130. Where harmonisation is only partial, the fact that an international agreement (or part(s) thereof) concerns an area that is 'largely covered' by EU rules does not of itself automatically lead to the conclusion that the European Union has exclusive competence to negotiate that entire international agreement (or the relevant part) without examining whether the *ERTA* principle applies. Everything depends on the content of the commitments entered into and their possible connection with EU rules.⁹⁴

131. Protocol No 25 on the exercise of shared competence does not undermine the principles I have just set out. That protocol only concerns Article 2(2) TFEU. Its sole purpose is to define the scope of the European Union's exercise of a competence that is shared with the Member States. It makes it clear that the scope of the exercise of that competence 'only covers those elements governed by the ? European? Union act in question and therefore does not cover the whole area'. Protocol No 25 therefore cannot be construed as limiting the scope of the European Union's exclusive external competence in the cases referred to in Article 3(2) TFEU, as clarified by the case-law.⁹⁵

132. Against that background, I now turn to examine the allocation of competences as between the European Union and the Member States as regards the EUSFTA.

Objectives of and general definitions relevant to the EUSFTA (Chapter One of the EUSFTA⁹⁶)

Arguments

133. The *Commission* submits that Chapter One falls entirely within the common commercial policy. According to the Commission, the overall objectives set out in Articles 1.1 and 1.2 of the EUSFTA fall, to a large extent, within the scope of the objectives of the common commercial policy laid down in Article 206 TFEU. The objectives of the EUSFTA are only marginally broader than those of the common commercial policy. Where that is the case, those objectives nonetheless fall within the scope of the TFEU's objectives (in particular Articles 63(1), 91 and 100 TFEU).

89 — See points 234 and 349 to 361 below.

90 — Judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 68 and the case-law cited.

91 — Judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 68 and the case-law cited.

92 — Judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 71 and the case-law cited.

93 — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 96.

94 — I have already expressed this view in my Opinion in *Commission v Council*, C-114/12, EU:C:2014:224, points 104 to 111.

95 — Judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 73.

96 — See point 2 of the Annex to my Opinion.

134. The *other parties* have made no specific arguments in relation to Chapter One.

Analysis

135. In my opinion, the European Union enjoys exclusive competence, on the basis of Article 207(1) TFEU, for deciding to establish a free trade area consistent with Article XXIV of the GATT 1994 and with Article V of the GATS⁹⁷ and for agreeing that the objectives of the EUSFTA are to liberalise and facilitate trade and investment. Such matters clearly fall within the common commercial policy.

136. Furthermore, the provisions listing generally applicable definitions are purely accessory. Those provisions are not such as to alter the allocation of competences between the European Union and the Member States as regards the other provisions of the EUSFTA.

137. I therefore conclude that Chapter One falls entirely within the European Union's exclusive competence under Article 207 TFEU.

Trade in goods (Chapters Two to Six of the EUSFTA⁹⁸ and Protocol 1 to the EUSFTA⁹⁹)

Arguments

138. The *Commission* submits that Chapters Two to Six fall entirely within the common commercial policy.

139. The Commission argues that all the provisions of Chapter Two relate specifically to international trade in goods because they seek to liberalise trade in goods between the Parties and have a direct and immediate effect on that trade. That is so both as regards the provisions of that chapter on tariffs, to which reference is made in Article 207(1) TFEU, and as regards non-tariff provisions, which reproduce, incorporate by reference or elaborate upon existing provisions of the GATT 1994 and other multilateral agreements on trade in goods (and thus, as the Court held in Opinion 1/94, fall automatically within the common commercial policy).

140. The Commission puts forward similar arguments regarding Chapter Three (Article 207(1) TFEU covers 'measures to protect trade such as those to be taken in the event of dumping and subsidies'); Chapter Four (because it facilitates trade in goods by providing a framework to prevent, identify and eliminate unnecessary barriers to trade within the scope of the TBT Agreement) and Chapter Five (because it seeks to minimise the negative effects of SPS measures on trade). The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('the Anti-Dumping Agreement'), the Agreement on Subsidies and Countervailing Measures ('the SCM Agreement'), the Agreement on Safeguards, the TBT Agreement and the SPS Agreement all form part of the multilateral agreements on trade in goods which, according to Opinion 1/94, fall within the scope of the common commercial policy.

97 — A separate issue is whether all matters covered by the EUSFTA chapter on services (Chapter Eight) effectively fall within the European Union's exclusive competence. See points 195 to 268 below.

98 — See points 3 to 12 of the Annex to my Opinion.

99 — See point 131 of the Annex to my Opinion.

141. Finally, Chapter Six is also specifically related to international trade because it seeks to facilitate trade in goods and ensure effective customs controls. The Commission adds that most of the provisions of that chapter correspond with more detailed provisions on the same subject matter in the WTO Agreement on Trade Facilitation, which has now been inserted in Annex 1A of the WTO Agreement.¹⁰⁰ According to the Commission, neither the Member States nor the other institutions contest the European Union's exclusive competence with regard to that new WTO agreement.

142. The *Parliament* agrees in essence with the Commission's position.

143. Whilst the *Council* and almost all of the *Member States* have made no specific argument in relation to Chapters Two to Six, one Member State submits that the European Union's exclusive competence does not cover the customs cooperation for which the second sentence of Article 6.1.1 of the EUSFTA provides. Article 206 TFEU refers only to the establishment of a customs union in accordance with Articles 28 to 32 TFEU. It therefore does not cover Article 33 TFEU, which provides a legal basis for adopting '... measures in order to strengthen customs cooperation between Member States and between the latter and the Commission'. Furthermore, it follows from Article 6(g) TFEU as confirmed in Article 197(2) TFEU (the single provision of Title XXIV on 'Administrative Cooperation') that, as regards administrative cooperation, the European Union only has competence to support, coordinate or supplement actions of the Member States.

Analysis

144. Chapters Two to Six govern different aspects of the regulation of trade in goods. The matters covered by those chapters and the type of obligations for which they provide correspond to some extent to certain WTO agreements relating to trade in goods.

145. Prior to the entry into force of the Treaty of Lisbon, the common commercial policy already covered trade in goods. In Opinion 1/94, the Court concluded that (what was then) the European Community had, pursuant to Article 113 of the EC Treaty, exclusive competence to conclude 'the Multilateral Agreements on Trade in Goods', that is to say, the agreements included in Annex 1A to the WTO Agreement ('the Annex 1A agreements').¹⁰¹ That encompasses the GATT 1994 but also 12 other agreements. The Court concluded that all of the agreements in Annex 1A fell within the common commercial policy without examining each individually.¹⁰² Therefore, all were deemed to relate specifically to international trade in that they essentially intended to promote, facilitate or govern trade and had direct and immediate effects on trade. Most of the agreements in Annex 1A to the WTO Agreement encompass obligations regarding, inter alia, market access, national treatment and other forms of domestic regulation, transparency, judicial and administrative review and the balancing of trade objectives with non-trade objectives. The scope of application of some of those agreements is defined by reference to the type of goods (for example, the Agreement on Agriculture and the Agreement on Textiles and Clothing); others apply to specific types of trade instruments (for example, the TBT Agreement; the Agreement on Trade-Related Investment Measures; the Anti-Dumping Agreement; the SCM Agreement; and the Agreement on Safeguards); trade measures having a specific objective (for example, the SPS Agreement) or certain stages of the importation or exportation process (for example, the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ('the Customs Valuation Agreement'); the Agreement on Preshipment Inspection; the Agreement on Rules of Origin; and the Agreement on Import Licensing Procedures).

100 — The text of that agreement is available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

101 — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 34.

102 — The Court examined some of those agreements (the Agreement on Agriculture, the SPS Agreement and the TBT Agreement) in the light of the specific arguments raised by parties in relation to them. See Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraphs 28 to 33.

146. It is therefore clear from Opinion 1/94 that the European Union enjoys exclusive competence regarding the matters covered by those agreements and the obligations assumed thereunder.¹⁰³ That position remains the same under the Treaty of Lisbon, which did not alter the description of the common commercial policy in so far as it relates to trade in goods.

147. Against that background, it is clear to me that Chapters Two to Five specifically concern trade in goods. Their subject matter corresponds in essence with the matters covered by certain agreements in Annex 1A to the WTO Agreement falling within the European Union's exclusive competence over the common commercial policy. Thus, Chapter Two relates to the subject matters of Articles I, II, and XI of the GATT 1994, which contain the core market access obligations on trade in goods. The matters covered by Chapter Three relate to the GATT 1994 provisions on anti-dumping, subsidies and safeguards and the corresponding more specific agreements (the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures and the Safeguards Agreement) in Annex 1A to the WTO Agreement. Chapters Four and Five concern non-tariff barriers covered by the disciplines in Article III of the GATT 1994 ('national treatment') and the more specific disciplines found in the TBT Agreement and the SPS Agreement, also included in Annex 1A to the WTO Agreement.

148. Those matters concern the process of moving goods across borders, releasing and clearing them and their treatment within a market. They are thus *specifically* related to international trade.

149. Furthermore, rules aimed at facilitating that process (essential to the importation and exportation of goods) and making that process and the rules governing the treatment of those goods within a market more transparent, predictable, efficient and cost-effective promote, facilitate or govern trade and have direct and immediate effects on trade.¹⁰⁴

150. That conclusion also applies to customs cooperation under Chapter Six and to the additional customs-related provisions found in Understanding 3 and the rules in Understanding 4 on mutual recognition of authorised economic operator programmes (both understandings are related to Chapter Six).

151. Chapter Six relates to customs procedures and valuation and trade facilitation (partly covered by the GATT 1994), the Customs Valuation Agreement, and the recent WTO Trade Facilitation Agreement. The forms of cooperation provided for in Chapter Six correspond to some extent with those applicable to customs matters under the GATT 1994 and the Customs Valuation Agreement. The latter agreements also provide, apart from general provisions on publication,¹⁰⁵ for consultation on matters relating to the administration of the customs valuation system.¹⁰⁶ Furthermore, at a more general level, the GATT 1994 and the Annex 1A agreements provide for many similar forms of cooperation on various matters regarding trade in goods.¹⁰⁷ Such provisions did not preclude the Court from concluding, in Opinion 1/94, that those agreements fall in their entirety within the common commercial policy.¹⁰⁸

103 — The position was the same under the GATT 1947, in so far as the European Community had progressively assumed powers previously exercised by the Member States. See judgments of 12 December 1972, *International Fruit Company and Others*, 21/72 to 24/72, EU:C:1972:115, paragraph 18, and of 3 June 2008, *The International Association of Independent Tanker Owners and Others*, C-308/06, EU:C:2008:312, paragraphs 48 and 49.

104 — See also points 510 to 512 below.

105 — See Article 12 of the Customs Valuation Agreement and Article X:1 of the GATT 1994.

106 — See Articles 18(1) and 19 of the Customs Valuation Agreement.

107 — See, for example, Article IX:6 of the GATT 1994 (cooperation with a view to preventing the use of trade names in certain manners); Article XV of the GATT 1994 (cooperation, consultation and exchange of information with the IMF regarding exchange arrangements); Article XXV of the GATT 1994 (joint action by the Contracting Parties); Article XXXVIII of the GATT 1994 (joint action to further the objectives set forth in Article XXXVI on trade and development); Article 4(2) of the SPS Agreement (consultation with the aim of achieving agreements on recognition of the equivalence of specified SPS measures); Article 7 and Annex B of the SPS Agreement (transparency and the exchange of information); Article 10 of the TBT Agreement (the exchange of information).

108 — See Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 34.

152. I cannot subscribe to the formalistic argument based on a distinction, as regards the trade in goods within the internal market, between the Treaty provisions governing the customs union (Articles 30 to 32 TFEU) and customs cooperation (Article 33 TFEU). It is true that Article 206 TFEU, which sets out the objectives of the customs union, refers only to Articles 28 to 32 TFEU. However, that is because those are the provisions which *establish* the customs union. That is not the purpose of a provision such as Article 33 TFEU, which offers a legal basis for adopting legislation to strengthen customs cooperation within the European Union. No inference on the scope of the common commercial policy can therefore sensibly be drawn from the fact that Article 206 TFEU does not expressly refer to Article 33 TFEU. Nor do Articles 6(g) and 197 TFEU have any impact on the scope of that policy. Those provisions address in general terms administrative cooperation among the Member States and between them and the European Union. They are therefore without prejudice to the exclusive competence of the European Union to include within its common commercial policy measures aimed at improving administrative cooperation with third States as regards matters falling within that policy.

153. Finally, my analysis of Chapters Two to Six also applies to Protocol 1 concerning the definition of the concept of ‘originating products’ and methods of administrative cooperation. That protocol concerns rules of origin. It is clearly *specifically* related to international trade in goods.

154. I therefore conclude that Chapters Two to Six fall entirely within the European Union’s exclusive competence over the common commercial policy under Article 207 TFEU.

155. I now turn to Chapter Eight. Because Chapters Seven (Non-tariff barriers to trade and investment in renewable energy generation) and Thirteen (Trade and sustainable development) raise similar questions regarding the scope of the common commercial policy and the relationship between trade and non-trade related objectives,¹⁰⁹ I discuss Chapter Seven later in conjunction with Chapter Thirteen.

Services, establishment and electronic commerce (Chapter Eight of the EUSFTA ¹¹⁰)

Arguments

General arguments

156. The *Commission* states that Section A sets out the objective and scope of Chapter Eight of the EUSFTA. Sections B to D of that chapter fall within the European Union’s exclusive competence because their scope corresponds with that of the commitments on modes 1, 2, 3 and 4 supplies of services under the GATS, which is covered by Article 207(1) TFEU. In accordance with Article I:2(a) to (d) of the GATS, those four modes cover the supply of a service: (a) from the territory of one (WTO) Member into the territory of any other (WTO) Member (‘mode 1’ or ‘cross-border supply’); (b) in the territory of one (WTO) Member to the service consumer of any other (WTO) Member (‘mode 2’ or ‘consumption abroad’); (c) by a service supplier of one (WTO) Member, through commercial presence in the territory of any other (WTO) Member (‘mode 3’ or ‘commercial presence’); and (d) by a service supplier of one (WTO) Member, through presence of natural persons of a (WTO) Member in the territory of any other (WTO) Member (‘mode 4’ or ‘presence of natural persons’).

¹⁰⁹ — See points 467 to 504 below.

¹¹⁰ — See points 19 to 51 of the Annex to my Opinion.

157. For each sub-section of Section E of Chapter Eight ('Regulatory Framework'), the Commission maintains that there is a sufficiently close connection with international trade.

158. As regards the *provisions of general application* (Sub-section 1), the Commission relies on a comparison with the provisions in the GATS and a number of non-binding instruments adopted by various WTO bodies. The Commission further argues that Article 8.16 of the EUSFTA on the *mutual recognition of qualifications* falls within the common commercial policy because it facilitates market access for foreign service suppliers and the Court has confirmed that such obligations in the GATS are part of the common commercial policy. Article 8.17 of the EUSFTA on *transparency* lays down obligations that are common in international trade agreements and similar to those resulting from Articles III:1 and III:4 of the GATS. Uncertainties regarding applicable measures regulating commercial actions may cause service suppliers to forego access to foreign markets.

159. As regards *domestic regulation* (Sub-section 2), the Commission argues in essence that that sub-section imposes conditions ensuring that licensing and qualification requirements and procedures do not hamper international trade. Their purpose is similar to that of Article VI:4 of the GATS, which aims to ensure that such standards and procedures, even if not discriminatory, do not constitute unnecessary barriers to trade in services. Furthermore, the obligation in Article 8.19.3 of the EUSFTA to maintain or institute judicial, arbitral or administrative tribunals or procedures which provide for review of decisions is similar to that found in Article VI:2(a) of the GATS.

160. Moreover, the specific provisions on *computer services, postal services, telecommunication services and financial services* (Sub-sections 3, 4, 5 and 6), some of which reaffirm or build upon commitments under the GATS, are likewise within the European Union's competence under Article 207(1) TFEU.

161. Section F mostly contains declarations of intent. The sole substantive obligation (in Article 8.58 of the EUSFTA) prohibits the imposition of customs duties, which is a matter clearly falling within the common commercial policy.

162. The *Parliament* and the *Council* have not made specific arguments in relation to the provisions of Chapter Eight that do *not* concern transport.¹¹¹

163. The *Member States* focus in particular on specific provisions such as those relating to financial services and the mutual recognition of professional qualifications.

164. A number of Member States argue that Sub-section 6 on financial services does not fall fully within the European Union's common commercial policy. Directive 2014/65/EU on markets in financial instruments ('the MiFiD II Directive'),¹¹² which is to enter into effect in January 2017, harmonises only certain aspects of the supply of financial and investment services by third country nationals.

165. Rules governing the mutual recognition of professional qualifications also do not fall within the common commercial policy. First, contrary to the Commission's contention, the mere fact that a matter has an impact on external commercial relations or is governed by international economic law is not sufficient to bring it within the common commercial policy. Second, Directive 2005/36/EC on the recognition of professional qualifications¹¹³ is without prejudice to the Member States' exclusive competence as regards the recognition of professional qualifications obtained outside the territory of the European Union. Likewise, in the area of maritime transport, the common rules adopted, in particular in Council Directive 96/50/EC (on the conditions for obtaining national boatmasters'

111 — For the arguments relating to transport, see points 168 to 194 below.

112 — Directive of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349).

113 — Directive of the European Parliament and of the Council of 7 September 2005 (OJ 2005 L 255, p. 22), as amended.

certificates) and Directive 2008/106/EC (on the minimum level of training of seafarers),¹¹⁴ lay down only minimum rules which cannot be affected by Article 8.16 of the EUSFTA. Third, the Commission fails to take account of the fact that the GATS (in particular Article VII:1) does not require WTO Members to recognise professional qualifications of third countries or to conclude international agreements in that regard.

166. Furthermore, the manner in which liberalisation is to be achieved under the EUSFTA, in particular in the area of establishment, will or might affect health and social services for which Member States remain competent. That is incompatible with Article 207(6) TFEU. The Commission also wrongly argues that the provisions regarding electronic commerce contain only declarations of intent.

167. Finally, the Commission cannot rely on Article 216 TFEU to justify the existence of shared competence in areas falling outside the European Union's exclusive competence. The Commission has not shown the need to conclude the EUSFTA in order to achieve one of the objectives referred to in the Treaties.

Arguments regarding transport

168. The *Commission* treats separately the obligations under Chapter Eight that specifically relate to *transport* (in the European Union's Schedule of Specific Commitments in Annex 8-A and in Sub-section 7 of Section E concerning international maritime transport services).

169. The Commission argues that, whilst a very significant part of trade between Singapore and the European Union in the five transport sectors covered by the EUSFTA (air, rail, road, inland waterway, maritime) is supplied under mode 3 (establishment), the provisions relating to the establishment of transport service providers do not fall within the exception in Article 207(5) TFEU. That is because establishment with respect to transport services does not fall within the scope of Title VI of Part Three of the TFEU (read together with Article 58(1) TFEU), to which Article 207(5) TFEU refers, and no Treaty provision precludes the provisions on the freedom of establishment from applying to transport. The Commission draws an analogy here with the distinction between, on the one hand, the freedom to provide transport services under secondary law adopted in accordance with Title VI of Part Three of the TFEU, which is limited to modes 1, 2 and 4, and, on the other hand, the freedom of establishment under Article 49 et seq. TFEU.

170. As regards commitments in the EUSFTA falling under the exception in Article 207(5) TFEU, the Commission submits that the European Union's exclusive competence follows from the third ground under Article 3(2) TFEU. External action by the Member States would risk affecting the common rules adopted in the area of transport services, which is largely covered by common rules. Should the Court disagree and find that it is necessary to consider the commitments for each transport sector individually, at least the EUSFTA commitments with respect to international maritime transport, rail transport and road transport as well as certain auxiliary services fall within the European Union's exclusive competence.

171. With respect to *air transport services*, the Commission submits that the European Union's exclusive competence over aircraft repair and maintenance services during which an aircraft is withdrawn from service, selling and marketing of air transport services, and computer reservation systems (to which Sections B and C apply) is based, in part, on Article 207(1) TFEU and, in part, on the first and third grounds under Article 3(2) TFEU. For aircraft repair and maintenance services,

¹¹⁴ — Directive of 23 July 1996 on the harmonisation of the conditions for obtaining national boatmasters' certificates for the carriage of goods and passengers by inland waterway in the Community (OJ 1996 L 235, p. 31) and Directive of the European Parliament and of the Council of 19 November 2008 on the minimum level of training of seafarers (OJ 2008 L 323, p. 33).

Article 12 of Regulation (EC) No 216/2008¹¹⁵ envisages the conclusion of an agreement by the European Union (first ground under Article 3(2) TFEU). As regards selling and marketing of air transport services, the Commission argues that they do not as such involve the transport of goods or passengers: thus, they fall within the common commercial policy. Computer reservation system services are extensively regulated by common rules, in particular Regulation (EC) No 80/2009,¹¹⁶ and therefore fall within the European Union's exclusive competence in accordance with the third ground under Article 3(2) TFEU.

172. Due to the geographical situation of the European Union and Singapore, the practical relevance of modes 1, 2 and 4 is limited.

173. Thus, with respect specifically to *internal waterway transport*, there is, in practice, no exercise of external competence through the EUSFTA.

174. As regards *rail transport*, the European Union has accepted no modes 1 or 4 commitments and full commitments only with respect to mode 2. These are in any event ancillary to the EUSFTA commitments in the transport area or relating to the common commercial policy. With respect to the supply of rail transport services by a subsidiary of a Singapore company established in a Member State to another Member State (mode 3), Directive 2012/34/EU authorises free provision of intra-Union services by operators established in a Member State, without stipulating nationality requirements regarding owners of the subsidiary.¹¹⁷ Thus, that matter is covered by common rules.

175. As regards *road transport*, the European Union has accepted limited commitments on passenger and freight transport. No mode 1 commitments are made. By contrast, the European Union makes a full commitment (without reservations) for mode 2 and a commitment, subject to reservations, for mode 4. In the same way as rail transport, the commitments made are of limited practical concern. In any event, the specific mode 2 commitment is ancillary to the other commitments under the EUSFTA. With respect to the supply of such services by a subsidiary of a Singapore company established in a Member State to another Member State (mode 3), Regulations (EC) Nos 1072/2009¹¹⁸ and 1073/2009,¹¹⁹ read together with Regulation (EC) No 1071/2009,¹²⁰ establish common rules concerning the conditions of establishment of road transport operators in the European Union. Since those regulations apply irrespective of the nationality of the owners of the subsidiary, the cross-border supply of road transport services by companies established in the European Union is largely covered by common rules. The European Union thus enjoys corresponding exclusive external competence under Article 3(2) TFEU. Finally, the Commission puts forward the same arguments regarding mode 4 in relation to road transport as it does for maritime transport.¹²¹ In practice, a road transport company from Singapore might send key personnel (most likely intra-corporate transferees¹²²) to the establishment created in a Member State. In that situation, Directive 2014/66/EU applies to the entry

115 — Regulation of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC (OJ 2008 L 79, p. 1), as amended.

116 — Regulation of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89 (OJ 2009 L 35, p. 47).

117 — Directive of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32).

118 — Regulation of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (OJ 2009 L 300, p. 72).

119 — Regulation of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006 (OJ 2009 L 300, p. 88).

120 — Regulation of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (OJ 2009 L 300, p. 51).

121 — See point 177 below.

122 — See Article 8.13 of the EUSFTA.

and residence of those third country nationals in the framework of an intra-corporate transfer.¹²³ In any event, those commitments are ancillary to the European Union's commitment with respect to the provision of road transport through mode 3 (for which the European Union has exclusive competence¹²⁴).

176. As regards *maritime transport*, the Commission argues that common rules are found in Council Regulation (EEC) No 4055/86,¹²⁵ which covers at least a significant part of the supply of maritime transport services between the Member States and third States. It also covers the treatment of third country nationals (namely certain shipping companies that are established in third countries). Unlike the regulations relevant to air transport, Regulation No 4055/86 applies to certain third country shipping companies.¹²⁶ That regulation is also not limited to intra-Union shipping routes. Moreover, it applies to the (cross-border) supply of maritime transport services by subsidiaries of Singapore companies established in a Member State from that Member State to another Member State.

177. As regards mode 4, the Commission submits that, in practice, a maritime transport company from Singapore will send key personnel (most likely intra-corporate transferees) to the establishment created in a Member State. In that situation, Directive 2014/66 applies to the conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer. In any event, the mode 4 commitment is a necessary adjunct to the mode 3 commitment for which the European Union enjoys exclusive competence.¹²⁷

178. The Commission adds that port services, which are the subject of Article 8.56.6 of the EUSFTA (part of Sub-section 7), have not been liberalised for foreign suppliers of those services. That is so because the European Union has not accepted commitments in its Schedule. Article 8.56.6 of the EUSFTA is merely a further elaboration of the national treatment obligation with respect to international maritime transport, as far as it is liberalised.

179. As regards *services auxiliary to maritime transport, internal waterway transport, rail transport and road transport*, the Commission argues that some of those services are not transport services. They thus fall within the European Union's common commercial policy. That is specifically the case for customs clearance services. With respect to the maintenance and repair of equipment for maritime transport, inland waterway transport, rail transport and road transport, the Commission argues that those services are covered by the European Union's commitments on business services. They therefore fall within the common commercial policy.

180. Should the Court find that certain provisions of the EUSFTA relating to transport services do not fall within the European Union's exclusive competences, the Commission submits that those provisions fall within the European Union's shared competences because, in accordance with the second ground under Article 216(1) TFEU, those international commitments are necessary to achieve an objective of the Treaties. The Commission refers in particular to the objective of establishing common rules for transport services between the European Union and third States under Article 91(1) TFEU.

123 — Directive of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (OJ 2014 L 157, p. 1).

124 — See point 169 above.

125 — Regulation of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1).

126 — Article 1(2) of Council Regulation No 4055/86.

127 — The Commission relies on Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 51, and Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraph 166.

181. The *Parliament* argues that certain services (such as storage and warehousing, freight forwarding, pushing and towing) are auxiliary to maritime transport services and therefore have to be treated in the same way as those services. The Parliament further submits that commitments in mode 4 (temporary presence of natural persons) are necessary to ensure an effective right of establishment. The legal regime of the supply of services in mode 4 must therefore follow that of mode 3 and must accordingly also fall outside the exception set out in Article 207(5) TFEU. Should services in mode 4 nevertheless be considered autonomously, the corresponding commitments still fall within Article 207(1) TFEU because the temporary presence of natural persons is governed by the Treaty provisions on the entry and stay of third country nationals in the territory of the Member States, rather than by the provisions on transport policy in Title VI of Part Three of the TFEU. As regards maritime transport, the Parliament adds that, as a result of Regulation No 4055/86, the European Union enjoys exclusive competence over cargo-sharing arrangements.

182. The *Council* and many *Member States* argue that there is no basis for excluding establishment in the area of transport from the scope of Article 207(5) TFEU. Neither the provisions of Title VI on Transport nor the case-law suggest that establishment in the area of transport is entirely outside the scope of application of those provisions. Article 58(1) TFEU does not support the Commission's reading of Article 207(5) TFEU. Whilst it is true that there is no similar provision on the right of establishment, nor is there for the freedom of movement for workers and the free movement of capital. The Commission's reading would limit the title on transport to matters relating to the freedom to provide services. In any event, Article 58(1) TFEU is not in the title on transport. It would be inconsistent with the structure of the Treaties if a provision that significantly reduces the scope of the title on transport were not to be found in that title itself. The Council and many Member States mention examples of legislative acts of the European Union based on Article 91(1) or Article 100(2) TFEU and which concern freedom of establishment or free movement of workers in the area of transport.¹²⁸

183. The Council submits that the scope of the matters relating to transport covered by the EUSFTA is far broader than the Commission suggests. The Council and many Member States add that the practical relevance of a provision of the EUSFTA (in particular as regards inland waterways, rail and road) does not affect the allocation of external competence. Likewise, the scope of a matter does not become more limited as a result of reservations undertaken by the European Union to the benefit of individual Member States¹²⁹ (for example as regards rental and leasing services without operators relating to ships, aircraft and other transport equipment in the European Union's Schedule of Specific Commitments, or maintenance and repair of vessels, of rail transport equipment, of motor vehicles, motorcycles, snowmobiles and road transport equipment and of aircraft and parts thereof in that schedule).

184. The Council takes the view that the Commission has not shown that the conditions in Article 3(2) TFEU are met as regards all of the provisions relating to transport in Chapter Eight. Areas not falling within the European Union's exclusive competence thus include: (i) services auxiliary to road, rail and inland waterway transport and many of the services auxiliary to maritime transport services; (ii) maritime transport services as far as vessels flying the flag of a third State are concerned, maritime transport services supplied through mode 3 and maritime transport services supplied through mode 4 with regard to business service sellers and business visitors for establishment purposes; (iii) inland waterway transport services; (iv) rail transport services supplied through mode 2 and maintenance and repair of urban and suburban rail transport equipment; (v) road transport services supplied through mode 2 and those supplied through mode 4 with regard to business service sellers

128 — Those examples include Directive 2012/34; Directive 2005/45/EC of the European Parliament and of the Council of 7 September 2005 on the mutual recognition of seafarers' certificates issued by the Member States and amending Directive 2001/25/EC (OJ 2005 L 255, p. 160); and Regulation No 1071/2009.

129 — The Parties have not focused, in their submissions, on the internal processes that led the European Union to reach agreement with Singapore on the terms of those reservations.

and business visitors for establishment purposes; and (vi) the mutual recognition of professional qualifications. Even if the Court were to agree with the Commission's narrow reading of Article 207(5) TFEU, parts of Chapter Eight would not in any event fall within the European Union's exclusive competence.

185. The Council and many Member States also contend that the Commission cannot group together all matters related to transport in the EUSFTA as a single relevant 'area' for the purpose of applying the third ground under Article 3(2) TFEU. The Council argues that some auxiliary services are so distinct that they form an area of their own. For the purposes of the third ground under Article 3(2) TFEU, the relevant 'areas' are to be defined by reference to the different modes of transport and are not largely covered by common rules.

186. Thus, as regards *maritime transport*, the relevant provisions in the EUSFTA contain obligations which do not fall within the scope of Regulation No 4055/86. That regulation accordingly has a narrower scope of application. In addition, unlike the EUSFTA, Regulation No 4055/86 does not apply to all modes of services. It does not concern (auxiliary) port services or other auxiliary maritime transport services but only the carriage of persons and goods.

187. Where the regulation does apply, a distinction is to be made between cargo-sharing arrangements, which are largely covered by Article 3 of Regulation No 4055/86, and all other restrictions of the freedom of movement of services in the maritime transport sector, which are largely not covered by that regulation.

188. As regards *inland waterway transport*, the Commission has not identified any common rules that might be affected by the EUSFTA's provisions. Exclusive competence pursuant to the third ground under Article 3(2) TFEU cannot be established in that area on the basis of Council Regulations (EEC) No 3921/91¹³⁰ or (EC) No 1356/96.¹³¹

189. As regards *rail transport*, the mode 3 commitments under the EUSFTA might affect Directive 2012/34 establishing a single European railway area. However, that directive contains no rules concerning mode 2.

190. As regards *road transport*, the Commission has failed to show any common rules that relate to mode 2. Furthermore, as regards mode 4, Directive 2014/66 does not apply to a Singapore undertaking that does not yet have an establishment in a Member State. Common rules exist only as regards mode 3. Those are found, in particular, in Regulations Nos 1071/2009, 1072/2009 and 1073/2009, which do not impose a nationality condition for supplying road transport services.

191. As regards *air transport*, the European Union enjoys, in accordance with Article 3(2) TFEU, exclusive external competence over computer reservation system services as a result of Regulation No 80/2009. However, the Commission is wrong as regards aircraft repair and maintenance services (concerning the alleged basis for the conclusion of an international agreement in Article 12 of Regulation No 216/2008) and the selling and marketing of air transport services (which, in the Commission's view, are not covered by the exception in Article 207(5) TFEU). Such services are indissociably linked to transport and even essential to the supply of transport.

130 — Regulation of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State (OJ 1991 L 373, p. 1).

131 — Regulation of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services (OJ 1996 L 175, p. 7).

192. As regards modes of supply of transport services (rather than modes of transport), there are no common rules regarding the supply of transport services in mode 3 (establishment). Nor is the adoption of such rules planned in the foreseeable future. Mode 4 is not fully covered by common rules, in particular Directive 2014/66. That directive applies in particular to intra-corporate transfers of third country nationals such as managers, specialists or trainee employees, but not to other key personnel. Moreover, its provisions on the conditions of entry and residence of third-country nationals apply without prejudice to more favourable provisions of (a) EU law, including bilateral and multilateral agreements; and (b) bilateral or multilateral agreements concluded between one or more Member States and one or more third countries.¹³² Such favourable provisions are found in the EUSFTA, in particular Article 8.14 read together with Article 8.13. Whilst the European Union has implied exclusive external competence over short-term residence (as a result of the adoption of Regulation (EC) No 810/2009 establishing a Community Code on Visas¹³³), the Member States remain competent as regards long-term visas except for specific cases that are governed by common rules (such as in the case of an intra-group transfer).

193. Furthermore, unlike the Commission, the Member States argue that mode 4 is a distinct mode of supply of services. Mode 4 cannot be regarded as a necessary adjunct to establishment (mode 3), which often involves hiring local staff.

194. Finally, recognising the European Union's exclusive external competence as regards the provisions in Chapter Eight concerning the temporary presence of natural persons would result in harmonisation and thus disregard both the allocation of competences between the European Union and the Member States resulting from Protocol 21 and Article 207(6) TFEU.

Analysis

Introduction

195. In Opinion 1/94, the Court held that, as regards trade in services — other than transport — regulated by the GATS, only cross-border supplies not involving any movement of persons ('mode 1') could be assimilated to trade in goods and therefore fell within the common commercial policy.¹³⁴ By contrast, modes 2 to 4 (that is to say, respectively, consumption abroad, commercial presence, and presence of natural persons) involved movements of persons and concerned the treatment of nationals of non-member countries on crossing external frontiers of Member States. Those modes therefore remained outside the common commercial policy.¹³⁵

196. The Treaty of Nice then widened the scope of the common commercial policy so as to cover, in particular, the negotiation and conclusion of agreements on trade in services, in so far as those agreements were not yet covered by the common commercial policy.¹³⁶ No distinction was made depending on the mode of supply. However, that competence was subject to a complex set of rules in Article 133(5) and (6) EC. An exception provided that agreements relating to trade in services in certain sectors (cultural, audio-visual, educational services, social and human health sectors) remained

¹³² — Article 4(1)(a) and (b) of Directive 2014/66.

¹³³ — Regulation of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243, p. 1).

¹³⁴ — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 44.

¹³⁵ — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraphs 45 to 47. The Court confirmed that position in Opinion 2/92 (Third Revised Decision of the OECD on National Treatment) of 24 March 1995, EU:C:1995:83, paragraphs 24 to 26.

¹³⁶ — See Article 133(5) EC. The Treaty of Amsterdam had introduced a legal basis in the EC Treaty for extending the scope of the common commercial policy. However, the option to do so was never exercised.

within the shared competence of the (then) European Community and the Member States.¹³⁷ Subject to those exceptions, the Court held in Opinion 1/08 that the Community had acquired exclusive competence to conclude, in particular, international agreements relating to trade in services supplied in modes 2 to 4.¹³⁸ It did so without examining in detail the type of obligation assumed as regards each of those modes of supply.

197. Following the entry into force of the Treaty of Lisbon, Article 207(1) TFEU now covers trade in services under the four modes governed by Article I:2(a) to (d) of the GATS, as the distinction between trade in goods and services has now been removed. Article 207 TFEU no longer contains any (sectoral) derogation to the European Union's exclusive competence in that area, though the general exception as regards transport continues to apply.¹³⁹ Thus, the common commercial policy now covers the whole of the GATS in so far as that agreement applies to services other than transport.

198. What is the position with regard to Chapter Eight of the EUSFTA?

199. In order to establish the European Union's competence over Chapter Eight and the nature of that competence, it is necessary to distinguish between those parts of that chapter that fall under the common commercial policy (Article 207 TFEU) and those that may come within the European Union's competence on another basis. That is so because Article 207(5) TFEU expressly excludes transport services from the scope of the common commercial policy.

200. I shall therefore begin by examining whether Chapter Eight, in so far as it does not apply to transport services, falls within the European Union's exclusive competence for the common commercial policy. I shall then consider separately the European Union's competence with respect to the provisions of Chapter Eight that apply to transport services. In that context, it is necessary to take account of the provisions that expressly address whether or not that chapter applies to such services, the generally applicable provisions, the specific provisions governing international maritime services and the commitments in the Schedule of Specific Commitments for the European Union. That schedule comprises separate schedules for the cross-border supply of services, establishment and key personnel and graduate trainees and business services sellers. Those separate schedules contain (sub) sector-specific commitments for transport (in particular maritime transport, internal waterway transport, rail transport; road transport; pipeline transport of goods other than fuel) and services auxiliary to those different modes of transport.

Exclusive competence on the basis of Article 207(1) TFEU, read together with Article 3(1) TFEU

201. Sections B to D of Chapter Eight (cross-border supply, consumption abroad,¹⁴⁰ establishment and temporary presence of national persons for business purposes) apply to the supply of services corresponding to modes 1 to 4 under the GATS. Rules relating to those modes of supply therefore fall in principle within the scope of Article 207(1) TFEU. The same applies to the horizontal obligations in Section E ('Regulatory Framework'), Sub-sections 1 ('Provisions of general application') and 2 ('Domestic Regulation'), and to the sector-specific obligations in Sub-sections 3 ('Computer Services'), 4 ('Postal Services'), 5 ('Telecommunications Services'), and 6 ('Financial Services'). Likewise, Section F on 'Electronic Commerce' essentially aims to increase trade opportunities which may result

137 — The second subparagraph of Article 133(6) EC provided that 'by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, [fell] within the shared competence of the Community and its Member States'.

138 — Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraph 119.

139 — See points 208 to 219 below. Specific procedural rules still apply as regards certain areas or sectors of trade in services. See Article 207(4) TFEU.

140 — Section B applies to measures affecting the cross-border supply of services. However, for the purposes of that section, the cross-border supply of services is defined as also covering consumption abroad (Article 8.4 of the EUSFTA).

from the use and development of electronic commerce. Section G sets out the conditions under which the Parties may adopt measures that otherwise might be inconsistent with Chapter Eight and provides for review of that chapter. Those sections therefore have direct and immediate effects on trade and accordingly fall within the European Union's common commercial policy.

202. A separate question is whether Section C ('Establishment', that is to say, the supply of services under mode 3), also concerns foreign direct investment. The Commission accepts that Section C of Chapter Eight may apply, in accordance with Article 8.8(d) of the EUSFTA, to forms of establishment created for performing an economic activity that does not (exclusively) involve the supply of services. Those forms of establishment may therefore not be covered by 'trade in services' under Article 207(1) TFEU. However, the Commission argues that, where establishment satisfies the conditions for qualifying as 'foreign direct investment', it nonetheless comes within the European Union's common commercial policy. I shall deal with that argument at point 326 below.

203. Next, as I have explained,¹⁴¹ trade in services supplied under mode 4 (temporary presence of natural persons) falls within the scope of the common commercial policy, subject only to the exception in Article 207(5) TFEU. On that basis, I reject the arguments made by some Member States in relation to Protocols 21 and 22. Those protocols are not capable of having any effect on the question of the correct legal basis for adopting a decision of the Council concluding an international agreement. It is the legal basis for a measure that determines the protocols to be applied, not the other way round.¹⁴² Both protocols cover Title V of Part Three of the TFEU ('Area of Freedom, Security and Justice'). There is nothing to suggest that that title might be part of the legal basis of the decision concluding the EUSFTA. That is especially so because of Article 8.1.4 of the EUSFTA and the fact that mode 4 (as covered by the EUSFTA) is concerned with the temporary presence of natural persons for *business* purposes.

204. Similarly, I cannot subscribe to the argument put forward by some Member States as regards financial services. That argument requires the European Union to have adopted secondary legislation in order for an area to fall within the European Union's exclusive competence over the common commercial policy. I have already explained that neither Article 3(1)(e) TFEU nor Article 207(1) TFEU make the European Union's competence dependent on the prior adoption of harmonised rules or other rules governing commercial relations between the European Union and third States.¹⁴³ In this context, it is unnecessary to explore the scope of the MiFiD II Directive, to which reference was made at the hearing.

205. I am also not convinced that the common commercial policy does not cover Article 8.16 of the EUSFTA on the mutual recognition of professional qualifications. Such mutual recognition is liable to have a direct impact on the liberalisation of trade in services, in particular as regards modes 3 and 4, because it facilitates the movement of persons for the purpose of supplying services. Furthermore, Article 8.16 of the EUSFTA does not harmonise qualification or professional experience requirements nor does it require or preclude the Parties from imposing such requirements. Rather, it seeks to encourage the Parties to adopt a recommendation (and possibly to negotiate an agreement) on the mutual recognition of qualification or professional experience requirements. Its function is therefore similar to that of Article VII of the GATS.

¹⁴¹ — See point 197 above.

¹⁴² — See, to that effect, judgments of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675, paragraphs 73 and 74, and of 18 December 2014, *United Kingdom v Council*, C-81/13, EU:C:2014:2449, paragraph 37.

¹⁴³ — See point 109 above.

206. Lastly, as I have already explained,¹⁴⁴ the scope of the common commercial policy, which is an autonomous policy, cannot be made dependent on the prior adoption of EU secondary legislation regulating the internal market or a fortiori on the scope and content of that legislation. For that reason, Directive 2005/36 cannot alter the allocation of competences that results from Articles 3(1)(e) and 207(1) TFEU.

207. My conclusion is therefore that, subject to the transport exception in Article 207(5) TFEU, Sections B to G of Chapter Eight fall within the scope of Article 207(1) TFEU. It follows that Section A, setting out the objectives and scope of that chapter, also comes within the common commercial policy (subject to the same exception).

Matters excluded from the scope of the common commercial policy as a result of Article 207(5) TFEU

208. Rules on transport fall outside the exclusive competence of the European Union as a result of Article 207(5) TFEU. In so far as Chapter Eight applies to transport services, it is therefore necessary to examine whether the European Union nevertheless enjoys exclusive competence on the basis of Article 3(2) TFEU.¹⁴⁵

209. The observations lodged in the present proceedings show that the precise scope of the exclusion in Article 207(5) TFEU remains uncertain. Does Article 207(5) TFEU cover *establishment* in the transport sector? And are services that can be supplied in relation to the transport sector only also caught by that exception? I shall address each question in turn.

210. As regards the first question, I do not read Article 207(5) TFEU in the same manner as the Commission.

211. Article 207(5) TFEU places ‘international agreements in the field of transport’ outside the common commercial policy. Although that provision states that such agreements are subject to, inter alia, Title VI of Part Three of the TFEU, that reference concerns the *effects* of the exception rather than the latter’s *scope*. The arguments of the Council and the Member States in the context of transport have essentially focused on issues relating to establishment (mode 3).

212. Since Article 207(5) TFEU does not distinguish between modes of services, I see no basis for considering that the exception it contains does not apply to services supplied under mode 3. That is confirmed (at least by implication) by Opinion 1/08, where the Court found that the transport aspect of the agreements at issue, which also covered mode 3, fell within the sphere of transport policy. The Court thus made no distinction between the different modes of supply in applying (what is now) Article 207(5) TFEU.¹⁴⁶

213. In any event, establishment is not excluded from the scope of Title VI of Part Three of the TFEU on ‘Transport’. That title applies to all modes of supply in so far as transport services are concerned. Thus, for example, establishment might be covered by legislation adopted pursuant to Article 91(1)(b) TFEU and laying down conditions under which non-resident carriers may operate transport services within a Member State.

¹⁴⁴ — See point 109 above.

¹⁴⁵ — See points 225 to 268 below.

¹⁴⁶ — See Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraphs 168 to 173.

214. It is true that Article 58(1) TFEU (part of Chapter Three of Title IV on services) states that the freedom to provide services in the field of transport is governed by Title VI of Part Three of the TFEU and that there is no similar provision in Chapter Two of Title IV on the right of establishment. The Court has held that Article 58(1) TFEU is included in Chapter Three ('Services') of Title IV of the Treaty on the Functioning of the European Union because transport is in essence a service. Since it was necessary to have a special system for transport, taking into account the specific aspects of this branch of economic activity,¹⁴⁷ transport services are singled out and expressly stated to be governed by Title VI of Part Three of the TFEU, rather than by the provisions of that treaty relating to the free movement of services.¹⁴⁸

215. However, the absence of a provision similar to Article 58(1) TFEU in Chapter Two of Title IV on the right of establishment does not mean that establishment is excluded as such from Title VI of Part Three of the TFEU. It simply means that establishment in the transport sector is not excluded from the scope of Chapter Two of Title IV. The Court has held in essence that that chapter directly applies to transport, at least in so far as more specific rules enacted on the basis of Title VI of Part Three do not apply.¹⁴⁹

216. I now turn to the question whether services supplied in relation to the transport sector are caught by the exception in Article 207(5) TFEU. Answering that question involves taking a view as to whether the degree of connection between the service and transport must reach a certain threshold level in order to trigger the exception in Article 207(5) TFEU. In particular, the question arises as to whether services such as cargo handling, customs clearance, maritime agency, rental of vessels with crew, and selling and marketing of air transport services fall within the common commercial policy or the common transport policy.

217. In my opinion, the expression 'international agreements in the field of transport' covers agreements (or parts thereof) that apply not only to transport services as such (namely the service of carrying goods or persons by air, road, rail, sea or inland waterway) but also to services that are *inherently and indissolubly linked* to such services, that is to say, services both specifically connected to, and conditional upon, the transport service.¹⁵⁰

218. The coherence of external action in transport requires the transport service itself and the service auxiliary to it to form part of the same common policy. The coherence of the European Union's policy as regards transport services as such and the appropriate liberalisation of those services might be undermined in the absence of a corresponding policy regarding services that are inherently linked to transport and in practice make it possible to deliver a transport service. Thus, for example, transporting cargo in containers by ship serves no purpose if there are no services available to offload the containers from the ship so that their contents can be further transported and eventually delivered to the recipients. Measures liberalising access to ports for cargo ships might therefore be jeopardised if, for example, cargo handling services remained subject to protectionist measures. The same is true of, for instance, the maintenance and repair of transport equipment, which can be assumed to require know-how and technical gear specific to the transport mode concerned and to be necessary to ensure that that transport is effective. Similarly, computer reservation systems are computerised systems in which data are collected and made available to the public in order to reserve and eventually to buy (in particular) transport services. The fact that such systems may also be used to reserve and buy accommodation for travellers does not alter the fact that the primary reason why such systems exist is

147 — See judgment of 4 April 1974, *Commission v France*, 167/73, EU:C:1974:35, paragraph 27.

148 — See, for example, judgment of 1 October 2015, *Trijber and Harmsen*, C-340/14 and C-341/14, EU:C:2015:641, paragraph 47.

149 — Judgment of 22 December 2010, *Yellow Cab Verkehrsbetrieb*, C-338/09, EU:C:2010:814, paragraphs 31 to 33.

150 — See, by analogy, judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685.

to sell transport services. I find support for that interpretation in Opinion 1/08, where the Court described ‘certain air transport services’ covered by the schedule at issue in that procedure as including ‘services for the repair and maintenance of aircraft, sales and marketing of transport services or computer reservations systems’.¹⁵¹

219. On the other hand, services that are *not* inherently and indissolubly linked to transport services, such as customs clearance services, fall outside the exception in Article 207(5) TFEU. Such services are supplied because goods are imported and exported. That would of course involve movement of goods across borders, using different forms of transportation. However, the need for such services arises independently from the modes of transport used.

Exclusive competence on the basis of Article 3(2) TFEU

220. For matters within the scope of the exclusion in Article 207(5) TFEU and therefore in the area of transport, competences are in principle shared between the European Union and the Member States.¹⁵² The Commission claims, however, that the European Union enjoys exclusive external competence on the basis of either the first or the third ground under Article 3(2) TFEU, depending on the transport service concerned.

– The first ground under Article 3(2) TFEU

221. The Commission argues that Article 12 of Regulation No 216/2008 envisages the conclusion of an agreement by the European Union. Therefore, the European Union enjoys exclusive competence to conclude an agreement in so far as it concerns the service of maintenance and repair of aircraft.

222. I disagree.

223. Regulation No 216/2008 creates a European Aviation Safety Agency and establishes an appropriate and comprehensive framework for defining and implementing common technical requirements and administrative procedures in the area of civil aviation and for the safety of third country aircraft using EU airports.¹⁵³ It applies, *inter alia*, to the maintenance and operation of aeronautical products (thus including aircraft¹⁵⁴), parts and appliances.¹⁵⁵

224. Pursuant to Article 12, the European Union is to conclude recognition agreements with third countries regarding the *use of certificates issued by aeronautical authorities* of those countries which certify compliance with civil aviation safety requirements. That provision, combined with the third ground under Article 3(2) TFEU, offers a basis for the European Union to conclude, without its Member States, international agreements with third countries concerning the recognition of such certificates. However, it does not create an EU exclusive external competence to conclude international agreements intended to liberalise trade in services of maintenance and repair of aircraft. In other words, the fact that the legislature has decided that Member States may not conclude their own international agreements as regards a particular aspect of a policy does not mean that the first ground under Article 3(2) TFEU can then be used to claim exclusive external competence over the entire policy or over other aspects of that policy.

151 — Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraph 169.

152 — Article 4(2)(g) TFEU.

153 — Recitals 32, 33 and 34 of Regulation No 216/2008.

154 — Article 3(d) of Regulation No 216/2008.

155 — Article 1(1)(a) of Regulation No 216/2008.

– The third ground under Article 3(2) TFEU

225. The first step in applying Article 3(2) TFEU involves defining the *area* concerned.¹⁵⁶ There is disagreement among the Parties as to what constitutes the relevant area for examining whether the European Union has exclusive competence as regards the EUSFTA in so far as it applies to transport services.

226. In making no or only very limited commitments as regards certain modes of supply for certain modes of transport in Chapter Eight, the European Union has chosen to exercise its competence in a particular manner. In such circumstances, a legal basis for exercising that external competence must be found in the Treaties. For example, it appears from the Schedule of Specific Commitments annexed to Chapter Eight that the European Union makes no commitments as regards mode 1 for rail transport services.¹⁵⁷ It has thus chosen not to accept obligations. That presupposes that the European Union has the competence to make such a choice. That competence requires a legal basis in the Treaties. The same reasoning applies to commitments that might be of limited practical relevance (for example, due to the geographical distance between the European Union and Singapore). Where competence is exercised, the relevant Treaty rules on the allocation of external competences between the European Union and the Member States apply. I therefore agree with the Council that that allocation cannot differ depending on the geographical situation of the third parties with which the European Union concludes a particular international agreement.

227. Conversely, the choices made in exercising competences as well as the practical effects of those choices may have an impact on whether the international agreement *affects* common rules or alters their scope. The last step in the *ERTA* analysis requires, as I have explained, specifically examining the consequences of international commitments on EU secondary law in the corresponding area.¹⁵⁸

228. The horizontal commitments in Chapter Eight and both the horizontal and sector-specific commitments in the Schedule of Specific Commitments, annexed to that chapter, show that the EUSFTA liberalises trade in transport services between the European Union and Singapore on the basis of the relevant mode of transport. Thus, whilst the horizontal commitments apply in principle to all transport services (except for a large part of air transport services), specific principles apply to the liberalisation of international maritime transport. Furthermore, the Schedule of Specific Commitments (Appendix 8-A-1) for mode 1 (cross-border supply) distinguishes under heading 11 ('Transport services') between commitments for maritime transport (Section 11.A); internal waterway transport (Section 11.B); rail transport (Section 11.C); road transport (Section 11.D); and pipeline transport of goods other than fuel (Section 11.E). Specific commitments are listed under heading 12 ('Services auxiliary to transport') for auxiliary services corresponding to each of those types of transport. The same distinctions appear in Appendix 8-A-2 on mode 3 (establishment) and in Appendix 8-A-3 on mode 4 (key personnel and graduate trainees, and business services sellers).¹⁵⁹ The degree of commitment depends on whether the Schedule uses the expression 'unbound' (meaning no commitments have been made, for all or some of the services concerned) or 'none' (meaning full commitments have been made) or specifies the terms of a particular commitment (for example, a nationality condition may still be applied).

¹⁵⁶ — See point 123 above.

¹⁵⁷ — Appendix 8-A-1, Schedule of Specific Commitments in conformity with Article 8.7 (Cross-Border Supply of Services), Section 11.C.

¹⁵⁸ — See points 128 to 130 above.

¹⁵⁹ — Headings 16 and 17.

229. That is consistent with the fact that, as EU secondary legislation implementing the EU common transport policy illustrates,¹⁶⁰ each mode of transport (air, road, rail, sea and inland waterway)¹⁶¹ has characteristics which are to a large extent specific to it and which therefore call for the adoption of specific rules, including with a view to their liberalisation.

230. It follows that the relevant areas for the purposes of the third ground under Article 3(2) TFEU in the present case correspond with the supply of transport services by each mode of transport, that is to say, air transport, road transport, rail transport, maritime transport and inland waterway transport.¹⁶² Each area includes services that are inherently linked to the transport services concerned. Those services cannot simultaneously be inherently linked to a mode of transport and constitute a separate area for the purposes of Article 3(2) TFEU (because they are distinct from other services).

231. I shall now examine whether those areas are ‘largely covered’ by common rules before examining what impact the conclusion of the EUSFTA would have on those rules.

232. As regards *maritime transport*, I reject the argument that the fact that Regulation No 4055/86 is not (primarily) concerned with the supply of international maritime transport services *from* third countries *to* the European Union is sufficient to rule out exclusive external competence on the basis of the third ground under Article 3(2) TFEU.

233. It is true that Regulation No 4055/86 applies to ‘intra-Community shipping services’ (defined as ‘the carriage of passengers or goods by sea between any port of a Member State and any port or off-shore installation of another Member State’) and ‘third-country traffic’ (defined as ‘the carriage of passengers or goods by sea between the ports of a Member State and ports or off-shore installations of a third country’).¹⁶³ Since it seeks in essence to implement the Treaty rules on the freedom to provide services and the case-law relating thereto,¹⁶⁴ that regulation applies only to either (i) EU nationals who are established in a Member State other than that of the person for whom the services are intended (Article 1(1)) or (ii) nationals of a Member State established outside the European Union and shipping companies established outside the European Union but controlled by EU nationals, provided their vessels are registered in that Member State in accordance with its legislation (Article 1(2)).¹⁶⁵ Unlike the EUSFTA, Regulation No 4055/86 is thus *not* concerned with the elimination of restrictions on the supply of international maritime transport services where those services are supplied by nationals of third countries or shipping companies established outside the European Union and controlled by third country nationals, or where the vessels are registered in a third State, *except* if the services are supplied by EU nationals who are established in a Member State other than that of the person for whom the services are intended.¹⁶⁶

234. However, whether or not Regulation No 4055/86 applies to situations having a non-EU element (and thus an external dimension) is not relevant when conducting an *ERTA* analysis. An international commitment is perfectly capable of affecting or altering the scope of common rules governing ‘intra-EU’ situations only. Opinion 1/03 offers an illustration.¹⁶⁷ The new Lugano Convention which

160 — An overview of that legislation is available at: www.eur-lex.europa.eu/summary/chapter/transport.html?root_default=SUM_1_CODED%3D32,SUM_2_CODED%3D3205&locale=en (accessed 4 October 2016).

161 — Each of those modes is mentioned in Article 100 TFEU.

162 — The Commission has put forward nothing regarding the allocation of competences with respect to pipeline transport of goods other than fuel.

163 — Article 1(4)(a) and (b) of Regulation No 4055/86.

164 — Judgment of 8 July 2014, *Fonnship and Svenska Transportarbetareförbundet*, C-83/13, EU:C:2014:2053, paragraph 41 and the case-law cited.

165 — Article 1(1) and (2) of Regulation No 4055/86.

166 — Whilst Article 7 of Regulation No 4055/86 entitles the Council to ‘... extend the provisions of [that] Regulation to nationals of a third country who provide maritime transport services and are established in the [European Union]’, that provision has not so far been implemented.

167 — Opinion 1/03 (New Lugano Convention) of 7 February 2006, EU:C:2006:81.

formed the subject matter of the request for an Opinion there aimed to extend to non-Member States the common rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters resulting from Council Regulation (EC) No 44/2001.¹⁶⁸ Whilst those common rules were *not* designed to govern jurisdiction of courts in non-Member States and recognition and enforcement of judgments delivered by these courts, the Court concluded that the new Lugano Convention would affect the uniform and consistent application of the system put in place by Regulation No 44/2001.¹⁶⁹

235. Does Regulation No 4055/86 largely cover the area of maritime transport services?

236. For *maritime transport*, the European Union accepts under Chapter Eight, in addition to the horizontal obligations laid down in that chapter, full commitments in modes 1 and 2, certain commitments in mode 3 and limited commitments in mode 4.¹⁷⁰ As regards *auxiliary maritime transport services*, modes 1 and 3 commitments depend on the Member State at issue and the type of auxiliary services, and full mode 2 commitments have been accepted. A few Member States have accepted limited commitments in mode 4.

237. There is certainly an overlap between Regulation No 4055/86 and Chapter Eight of the EUSFTA. The purpose of that regulation is, in accordance with Article 58(1) TFEU, to apply the Treaty rules governing the freedom to provide services to the sphere of maritime transport between Member States.¹⁷¹ Accordingly, it precludes the application of any national legislation whose effect is to make the provision of services between Member States more difficult than the provision of purely domestic services within a Member State, unless that legislation is justified by compelling reasons of public interest and the measures enacted thereby are necessary and proportionate.¹⁷² Like the EUSFTA, Regulation No 4055/86 thus aims to liberalise the cross-border supply of maritime transport services (that is to say, the supply of those services under modes 1 and 2). Moreover, both the EUSFTA and that regulation contain specific rules concerning cargo-sharing arrangements in bilateral agreements concluded with third countries.¹⁷³

238. However, the presence of those rules in Regulation No 4055/86 is insufficient to lead to the conclusion that the liberalisation of maritime transport services is largely covered by common rules.

239. First, Regulation No 4055/86 is concerned only with *cross-border trade* in maritime services (modes 1 and 2). It does not liberalise the supply of services under mode 3, that is to say, establishment. That may be because maritime transport (like other modes of transport) is already governed, within the European Union, by the Treaty rules on the freedom of establishment in Articles 49 to 55 TFEU. Those provisions contain no exclusion comparable to that which Article 58 TFEU lays down in respect of services.¹⁷⁴ Thus mode 3 in maritime transport is subject to the Treaty provisions on freedom of establishment. However, as I shall explain in the context of portfolio investment, Treaty provisions cannot, in my view, be regarded as ‘common rules’ for the purposes of

168 — Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

169 — Opinion 1/03 (New Lugano Convention) of 7 February 2006, EU:C:2006:81, paragraph 172.

170 — A nationality condition may be applied.

171 — See, *inter alia*, judgments of 5 October 1994, *Commission v France*, C-381/93, EU:C:1994:370, paragraph 13, and of 11 January 2007, *Commission v Greece*, C-269/05, not published, EU:C:2007:17, paragraph 20.

172 — See, *inter alia*, judgment of 14 November 2002, *Geha Naftiliaki and Others*, C-435/00, EU:C:2002:661, paragraph 20.

173 — Article 3 of Regulation No 4055/86.

174 — See points 214 and 215 above.

the third ground under Article 3(2) TFEU.¹⁷⁵ Moreover, whilst Article 50(1) TFEU offers a legal basis for adopting common rules aimed at ‘attain[ing] freedom of establishment as regards a particular activity’, none of the parties to the present proceedings has suggested that that provision has been used in the sector of maritime transport.¹⁷⁶

240. Second, as regards mode 4, the Commission rightly submits that common rules are laid down in Directive 2014/66. However, that directive applies specifically in the context of an *intra-corporate transfer* of managers, specialists or trainee employees.¹⁷⁷ As Article 8.13.2 of the EUSFTA shows, Section D of Chapter Eight has a significantly broader scope of application, covering as it does not only intra-corporate transfers of personnel but also other forms of ‘temporary presence of natural persons for business purposes’. Thus, Article 8.13(2)(a), second subparagraph, of the EUSFTA indicates that key personnel comprise, besides ‘intra-corporate transferees’, ‘business visitors for establishment purposes’. Likewise, that section applies to ‘business service sellers’, defined as ‘natural persons who are representatives of a service supplier of a Party seeking temporary entry into the territory of the other Party for the purpose of negotiating the sale of services or entering into agreements to sell services for that service supplier’. Again, that supply of services does not involve any ‘intra-corporate transfer’ of a workforce.

241. I therefore conclude that the area of liberalisation of maritime transport services is not already largely covered by common rules and that, as a consequence, no exclusive external competence over that area can be established within the meaning of the third ground under Article 3(2) TFEU.

242. However, I accept that the European Union enjoys shared competence to conclude an international agreement aimed at liberalising maritime transport services.

243. In my opinion, the provisions of the EUSFTA on maritime transport services can be regarded as necessary to achieve the objectives of Title VI of Part Three of the TFEU, concerning the European Union’s transport policy (the second ground under Article 216(1) TFEU). A common transport policy requires, *inter alia*, adopting common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States (Article 91(1)(a) TFEU). That includes transport by rail, road, internal waterway, sea and air (Article 100 TFEU). A necessary corollary is the competence to conclude international agreements so as to obtain reciprocal commitments from the third countries from which the transport originates or which are its destination. I therefore consider that the European Union and the Member States share competence over those provisions, pursuant to Article 4(2)(g) TFEU (‘transport’) and the second ground under Article 216(1) TFEU, in conjunction with Articles 91 and 100(2) TFEU.

244. I now turn to *inland waterway transport*. In addition to the horizontal obligations laid down in Chapter Eight, the European Union accepts limited commitments under that chapter in modes 1 and 2, together with mode 3 (depending on the Member State concerned). No mode 4 commitments are made. As regards *auxiliary inland waterway services* (such as cargo-handling services or storage and warehouse services), the modes 1, 2 and 3 commitments accepted depend on the Member State at issue and the type of auxiliary services.

175 — See points 350 to 359 below.

176 — As I have explained, it is for the party asserting the exclusive competence to demonstrate the exclusive nature of the European Union’s external competence on which it relies (point 122 above).

177 — Article 2(1) of Directive 2014/66.

245. I have already explained why I disagree with the Commission's argument that, due to the limited practical relevance of certain services, the European Union essentially makes no commitments and in practice does not exercise competences through the EUSFTA.¹⁷⁸ Furthermore, the Commission has not put forward anything to demonstrate that the conditions of the third ground under Article 3(2) TFEU are satisfied. In those circumstances, it is unnecessary to explore further the possible application of Article 3(2) TFEU to the provisions of Chapter Eight in so far as they apply to transport by inland waterway. The European Union does not enjoy exclusive external competence in respect of such transport under Article 3(2) TFEU.

246. However, as in the case of maritime transport,¹⁷⁹ the provisions of the EUSFTA on inland waterway transport can be regarded as necessary to achieve the objectives of Title VI of Part Three of the TFEU (the second ground under Article 216(1) TFEU), and therefore fall, for the same reasons, within the shared competence of the European Union and the Member States on the basis of Article 4(2)(g) and the second ground under Article 216(1) TFEU, in conjunction with Articles 91 and 100(1) TFEU.

247. As regards *air transport*, apart from the horizontal obligations laid down in Chapter Eight, the European Union accepts full commitments in modes 1 and 2, although those commitments are limited to (i) aircraft repair and maintenance services during which an aircraft is withdrawn from services; (ii) the selling and marketing of air transport services; and (iii) computer reservation system services. The European Union moreover accepts some commitments in mode 3 and limited commitments in mode 4 (a nationality condition may be applied) for international air transport services.

248. I have already rejected the Commission's claim of exclusive EU competence over aircraft repair and maintenance services on the basis of the first ground under Article 3(2) TFEU.¹⁸⁰

249. It follows that whether the European Union enjoys exclusive competence over air transport depends on whether the conditions of the third ground under Article 3(2) TFEU are satisfied.

250. In my opinion, the Commission has not shown that they are. Its arguments regarding aircraft repair and maintenance services are limited to the first ground under Article 3(2) TFEU. Its position on the selling and marketing of air transport services is that they fall within the common commercial policy. The only type of airport transport service with respect to which the Commission puts forward an *ERTA* analysis is computer reservation system services. It is common ground that Regulation No 80/2009 lays down common rules applicable to any computerised reservation system in so far as it contains air transport products offered for use or used in the EU. Furthermore, the Court has confirmed that, as a result of that regulation's predecessor (Council Regulation (EEC) No 2299/89¹⁸¹), the European Union has acquired exclusive competence to enter into international agreements relating to computerised reservation systems offered for use or used in its territory.¹⁸² However, that alone is not sufficient to conclude that the supply of air transport services is an area largely covered by common rules. The European Union therefore does not enjoy exclusive external competence over that area.

178 — See point 226 above. Nor is it relevant to the allocation of competences that the European Union's Schedule of Commitments was negotiated on the basis of GATS schedules.

179 — See point 243 above.

180 — See points 221 to 224 above.

181 — Regulation of 24 July 1989 on a code of conduct for computerised reservation systems (OJ 1989 L 220, p. 1).

182 — See, for example, judgment of 5 November 2002, *Commission v Denmark*, C-467/98, EU:C:2002:625, paragraph 103.

251. The provisions of the EUSFTA concerning air transport services can nevertheless be regarded as necessary to achieve the objectives of Title VI of Part Three of the TFEU (the second ground under Article 216(1) TFEU) for reasons that are similar to those that apply to maritime transport and inland waterway transport.¹⁸³ Therefore, the European Union and the Member States share competence over those provisions pursuant to Article 4(2)(g) and the second ground under Article 216(1) TFEU, in conjunction with Articles 91 and 100(2) TFEU.

252. Turning now to *rail transport*, apart from the horizontal obligations laid down in Chapter Eight, the European Union has accepted no mode 1 commitments and full mode 2 commitments. Full commitments have been made for most Member States in relation to mode 3, although the Member States may subject the use of the public domain to public monopolies or to exclusive rights granted to private operators. No reservations apply as regards mode 4.¹⁸⁴ For *auxiliary rail transport services*, modes 1 and 3 commitments depend on the Member State concerned and the type of auxiliary service. Full mode 2 commitments have been accepted.

253. I reject the Commission's argument that Opinion 1/94 and Case C-268/94 *Portugal v Council*¹⁸⁵ offer support for concluding that the commitments in the EUSFTA as regards the supply of railway transport services under mode 2 are 'extremely limited in scope' and therefore ancillary to the commitments in the area of the common commercial policy (for which the European Union enjoys exclusive competence). In the relevant part of Opinion 1/94, the Court distinguished an international agreement 'of the type and scope of TRIPS', which could not be regarded as falling within the scope of the common commercial policy, from trade agreements dealing with intellectual property rights in a purely incidental way.¹⁸⁶ That part of Opinion 1/94 therefore concerned the scope of agreements that have (what is now) Article 207(1) TFEU as their legal basis. It has no relevance when, as in the present procedure, the Court is required to ascertain whether the European Union enjoys exclusive external competence on the basis of Article 3(2) TFEU as regards an area (here, rail transport) falling outside the common commercial policy. The same reasoning applies to the judgment in *Portugal v Council*.¹⁸⁷

254. I now turn to whether Directive 2012/34 largely covers the area of rail transport services in the European Union.

255. Directive 2012/34, which applies to the use of railway infrastructure for domestic and international rail services,¹⁸⁸ aims to subject the railway sector to the principle of freedom to provide services, taking into account that sector's specific characteristics.¹⁸⁹ Accordingly, Directive 2012/34 regulates access by a railway undertaking to the railway infrastructure in all Member States (including a Member State other than that in which that undertaking is established), for the purpose of operating either rail freight services or an international passenger service.¹⁹⁰ It therefore covers the supply of *cross-border rail transport services* (modes 1 and 2) in the European Union. Furthermore, the directive lays down substantive and procedural rules concerning the conditions under which a railway undertaking may obtain a licence enabling it to provide rail transport services in the European Union,

183 — See points 243 and 246 above.

184 — There is no mention of rail transport services in relation to mode 4 in the Schedule of Specific Commitments concerning key personnel and graduate trainees and business services sellers in Appendix 8-A-3, whose purpose is, in accordance with its first point, to enumerate 'the economic activities liberalised pursuant to Articles 8.7 ... and 8.12 ... for which limitations on key personnel and graduate trainees in accordance with Articles 8.14 ... and 8.15 applies' and to specify those limitations.

185 — The Commission relies on, in particular, Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 67, and judgment of 3 December 1996, *Portugal v Council*, C-268/94, EU:C:1996:461, paragraph 75.

186 — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraphs 66 to 68.

187 — Judgment of 3 December 1996, *Portugal v Council*, C-268/94, EU:C:1996:461, paragraph 75.

188 — Article 1(2) of Directive 2012/34.

189 — Recital 7 of Directive 2012/34.

190 — See Articles 1(1)(b), 10(1) and (2) and 17 of Directive 2012/34.

including from the territory of one Member State to the territory of another Member State. Those conditions relate, in particular, to the undertaking's good repute, financial fitness and professional competence.¹⁹¹ Directive 2012/34 therefore contains detailed rules on market access through establishment (mode 3).

256. In those circumstances, I take the view that Directive 2012/34 largely covers the area of rail transport.

257. I also consider that the relevant rules in the EUSFTA would alter the scope of the common rules which that directive lays down. For example, the provisions regarding establishment (Section C of Chapter Eight) apply to 'measures adopted or maintained by the Parties affecting establishment in all economic activities'.¹⁹² Those provisions include protection against discriminatory treatment. Thus, a railway transport undertaking from Singapore seeking to access the EU market by establishing a commercial presence there is to be granted non-discriminatory market access, subject to the limitations set out in the European Union's Schedule of Specific Commitments.¹⁹³ Once established in a Member State, that undertaking should not be treated less favourably than like undertakings of that Member State.¹⁹⁴ The effect of those market access and national treatment provisions is thus to offer railway transport undertakings from Singapore access to the single European railway area established by Directive 2012/34. For example, a railway transport undertaking from Singapore would be entitled in principle to obtain a licence under the same conditions as 'domestic' railway undertakings.¹⁹⁵ Subject to the horizontal limitation for public utilities in the European Union's Schedule of Specific Commitments concerning establishment,¹⁹⁶ that undertaking would also have the right to be granted access to railway infrastructure in the Member States¹⁹⁷ and not be treated less favourably than a 'domestic' railway undertaking as regards capacity allocation.¹⁹⁸ In other words, the EUSFTA would alter the scope of Directive 2012/34.

258. Since the EUSFTA would have that effect on the existing common rules concerning access to the EU market of rail transport services, the European Union has acquired exclusive external competence in the area of rail transport. That conclusion cannot be called into question by the fact that, as regards the supply of rail transport services under mode 4, Directive 2014/66 has a more limited coverage than the relevant provisions of the EUSFTA. The third ground under Article 3(2) TFEU does not require that the areas covered by the international commitments and those covered by the EU rules coincide fully.¹⁹⁹

259. I therefore consider that the European Union enjoys exclusive external competence over the provisions of the EUSFTA concerning rail transport services, on the basis of Articles 91 and 100(1) TFEU, in conjunction with the third ground under Article 3(2) TFEU and the third ground under Article 216(1) TFEU.

260. As regards *road transport*, apart from the horizontal obligations resulting from Chapter Eight, the European Union has accepted no mode 1 commitments and full mode 2 commitments. Mode 3 commitments are subject to various reservations in certain Member States, depending on the type of transport (passenger transport or freight transport). As regards mode 4, a few Member States have

191 — Articles 18, 19, 20 and 21 of Directive 2012/34.

192 — Article 8.9 of the EUSFTA. The exceptions to that rule laid down in that provision are not relevant here.

193 — Article 8.10.1 of the EUSFTA. See also point 252 above.

194 — Article 8.11.1 of the EUSFTA.

195 — Article 17(1) and (3) of Directive 2012/34.

196 — Appendix 8-A-2 to the EUSFTA. That limitation, which applies to rail transport services requiring the use of the public domain, enables economic activities considered as public utilities at a national or local level to be subject to public monopolies or to exclusive rights granted to private operators.

197 — Article 10 of Directive 2012/34.

198 — Articles 38 to 54 of Directive 2012/34.

199 — See point 125 above.

made reservations (taking the form of nationality and residence conditions). For *auxiliary road transport services*, modes 1 and 3 commitments depend on the Member State at issue and the type of auxiliary service concerned. Full mode 2 commitments have been accepted. Three Member States have made reservations under mode 4 (taking the form of a nationality condition).

261. The Commission argues that the mode 2 commitments for road transport services are of limited practical relevance. I reject that argument for the reasons which I have already explained.²⁰⁰

262. Does Regulation No 1071/2009 nonetheless largely cover the area of road transport services?

263. Regulation No 1071/2009 lays down extensive rules concerning admission to, and the pursuit of, the occupation of road transport operator applicable to both road haulage and road passenger transport.²⁰¹ It sets out requirements for engagement in that occupation, namely having an effective and stable establishment in a Member State, being of good repute and having appropriate financial standing and the requisite professional competence.²⁰² Regulation No 1071/2009 moreover requires each Member State to designate one or more competent authorities responsible for granting undertakings the authorisations to engage in the occupation of road transport operator if they comply with those requirements.²⁰³ Those rules are completed by sectoral rules in Regulation No 1072/2009 concerning access to the road haulage market²⁰⁴ and in Regulation No 1073/2009 concerning access to the market for coach and bus services.²⁰⁵ The latter two regulations require the undertakings concerned to obtain a Community licence before engaging in those activities.²⁰⁶

264. Against that background, Regulations Nos 1071/2009, 1072/2009 and 1073/2009 regulate the *cross-border supply* of road transport services (modes 1 and 2) as well as access to the market of road transport services through *establishment* (mode 3). Regulation No 1072/2009 also contains rules on driver attestation and thus regulates the *temporary presence* of natural persons in the territory of the Member States for delivering road haulage services (mode 4).²⁰⁷ Although Directive 2014/66 has more limited coverage than the relevant commitments under the EUSFTA concerning mode 4, I consider that existing common rules largely cover the area of road transport.

265. I consider moreover that the scope of Regulations Nos 1071/2009, 1072/2009 and 1073/2009 would be altered by international commitments such as those contained in the EUSFTA. My reasoning is in essence similar to that concerning rail transport.²⁰⁸

266. In particular, the provisions regarding establishment (Section C of Chapter Eight) apply to 'measures adopted or maintained by the Parties affecting establishment in all economic activities'.²⁰⁹ Those provisions include protection against discriminatory treatment. Thus, a road transport operator from Singapore seeking to access the EU market by establishing a commercial presence there is to be

200 — See point 226 above.

201 — Article 1(1) of Regulation No 1071/2009.

202 — Articles 3 and 5 to 9 of Regulation No 1071/2009.

203 — Article 10 of Regulation No 1071/2009.

204 — The regulation applies both to international road haulage, defined as international carriage of goods by road for hire or reward for journeys carried out within the territory of the Union, and the national carriage of goods by road undertaken on a temporary basis by a non-resident haulier ('cabotage') (Article 1(1) and (4) of Regulation No 1072/2009).

205 — That regulation applies to the international carriage of passengers by coach and bus within the territory of the European Union by carriers for hire or reward or by own-account carriers established in a Member State in accordance with its law, using vehicles which are registered in that Member State and are suitable or intended, by virtue of their construction and equipment, to carry more than nine persons, including the driver, and to the movement of such vehicles when empty in connection with such carriage (Article 1(1) of Regulation No 1073/2009). It also applies to national road passenger services for hire or reward operated on a temporary basis by a non-resident carrier ('cabotage') (Article 1(4) of Regulation No 1073/2009).

206 — See Article 4 of Regulations Nos 1072/2009 and 1073/2009.

207 — See Articles 5 and 7 of Regulation No 1072/2009. A 'driver attestation' is, in essence, a certificate delivered by a Member State to any haulier for the carriage of goods by road for hire or reward under a Community licence.

208 — See points 257 and 258 above.

209 — Article 8.9 of the EUSFTA. The exceptions to that rule laid down in that provision are not relevant here.

granted non-discriminatory market access, subject to the limitations set out in the European Union's Schedule of Specific Commitments.²¹⁰ Once established in a Member State, that operator would have the right not to be treated less favourably than like operators of that Member State.²¹¹ The effect of those market access and national treatment provisions is thus to grant a road transport operator from Singapore non-discriminatory access to the EU market by removing obstacles to their effective establishment there. As a result of the EUSFTA, that operator is to be granted access to that market subject to the same conditions (for example, concerning financial standing or professional competence²¹²) as those applicable to domestic operators. In other words, the EUSFTA would alter the scope of Regulations Nos 1071/2009, 1072/2009 and 1073/2009.

267. Since the EUSFTA would have that effect on the existing common rules concerning access to the EU market of road transport services, the European Union has acquired exclusive external competence in the area of road transport. Consequently, the European Union enjoys exclusive external competence over the provisions of the EUSFTA concerning road transport services, on the basis of Articles 91 and 100(1) TFEU in conjunction with the third ground under Article 3(2) TFEU and the third ground under Article 216(1) TFEU.

268. In the light of those considerations, I conclude that the European Union shares external competence with the Member States for entering into commitments under Chapter Eight of the EUSFTA, in so far as it concerns air transport, maritime transport and inland waterway transport, including services inherently linked to those transport services; and exclusive external competence on the basis of the third ground under Article 3(2) TFEU to enter into commitments under Chapter Eight of the EUSFTA in so far as it concerns rail transport and road transport (and services inherently linked to those transport services). The European Union enjoys exclusive external competence on the basis of Articles 3(1)(e) and 207(1) TFEU as regards all other services covered by that chapter.

269. I now turn to Section A of Chapter Nine of the EUSFTA. I shall discuss Section B of that chapter together with Chapters Thirteen, Fifteen and Sixteen of the EUSFTA.²¹³

Investment (Chapter Nine, Section A, of the EUSFTA²¹⁴)

Arguments

270. The *Commission* submits that Section A of Chapter Nine of the EUSFTA, which relates specifically to international investment and does not apply to inter-EU investments, falls within the European Union's exclusive competence over the common commercial policy in so far as it applies to foreign direct investment. Relying on the test applied in cases concerning trade in services and goods and commercial aspects of intellectual property, the Commission argues that an agreement falls within the scope of Article 207(1) TFEU if it relates specifically to international investment in that it is essentially intended to promote, facilitate or govern international investments and has direct and immediate effects on those investments.

271. In distinguishing between portfolio investment (or other non-direct investments) and foreign direct investment (both of which may fall within the definition of Article 9.1 of the EUSFTA), the Commission proposes to transpose the Court's definition of 'direct investment' in the context of the free movement of capital and payments to Article 207(1) TFEU.

210 — Article 8.10.1 of the EUSFTA. See also point 260 above.

211 — Article 8.11.1 of the EUSFTA.

212 — Articles 7 and 8 of Regulation No 1071/2009.

213 — See points 523 to 544 below.

214 — See points 52 to 60 of the Annex to my Opinion.

272. According to the Commission, the common commercial policy covers both rules governing the initial access of investments to the market of the host State and the protection to be given to an investment after it has been admitted to the market ('post-admission protection'). The latter includes protection against, for example, discrimination, unfair and inequitable treatment and expropriation without compensation. The Commission argues that, in referring to 'foreign direct investment', Articles 206 and 207(1) TFEU do not distinguish between market access and post-admission protection. Furthermore, excluding post-admission protection of foreign direct investment from the common commercial policy would also be contrary to the objectives laid down in Article 206 TFEU. In particular, the objective of 'the progressive abolition of the restrictions on ... foreign direct investment' refers to the abolition of restrictions resulting both from barriers to the initial admission of an investment and obstacles to its subsequent operation and enjoyment. In that context, the Commission draws analogies with the European Union's exclusive competence in the area of trade in goods and services, which is also not limited to market access.

273. The Commission adds that the common commercial policy already covers GATS standards applicable to post-admission treatment of mode 3 supply of services (that is to say, through commercial presence²¹⁵). Similar standards are found in Chapter Eight of the EUSFTA. It would be illogical to conclude that the European Union lacks exclusive competence over the standards laid down in Chapter Nine but has exclusive competence over analogous standards included in Chapter Eight of the EUSFTA or in the GATS.

274. The Commission considers that Article 345 TFEU does not limit the European Union's exclusive competence over Chapter Nine in so far as that chapter concerns expropriation. Article 9.6 of the EUSFTA subjects the exercise of the right to expropriate to conditions that are similar to those imposed by Articles 49 and 63 TFEU. That provision does not prejudice the rules governing the system of property ownership in each Member State: it neither prohibits a Member State from expropriating nor does it require that a Member State expropriate any assets owned by investors from Singapore.

275. The Commission also rejects the argument that the first part of Article 207(6) TFEU excludes expropriation clauses from the scope of the common commercial policy because no comparable EU policy exists within the internal market. That argument fails to recognise the distinction between express and implied exclusive external competences. Nor does the second part of Article 207(6) TFEU alter the Commission's position: Article 345 TFEU does not as such exclude harmonisation of property rights. In any event, Article 9.6 of the EUSFTA does not harmonise legislative or regulatory provisions of the Member States within the meaning of Article 207(6) TFEU.

276. The Commission accepts that, in so far as Chapter Nine applies to portfolio investment, that chapter does not fall within the common commercial policy. It argues that the European Union nonetheless enjoys exclusive competence because portfolio investment is a capital movement within the meaning of Article 63 TFEU and the standards of treatment for which Chapter Nine provides are at least largely covered by the common rules laid down in that Treaty provision. In particular, the core standards of national treatment, fair and equitable treatment and protection against expropriation are covered by the prohibition in Article 63(1) TFEU. Whilst Article 63(1) TFEU is subject to the exception provided in Article 64(1) TFEU, the restrictions 'grandfathered' by the latter provision (that is to say, existing restrictions that are permitted to remain in place) do not include restrictions on portfolio investment. As a result, the conditions of the third ground under Article 3(2) TFEU are satisfied.

215 — Article I:2(c) of the GATS.

277. The Commission submits that its interpretation of ‘common rules’ in the third ground under Article 3(2) TFEU as covering Treaty provisions as well as rules of secondary law respects the rationale behind the *ERTA* case-law. That rationale is the protection of the unity of the common market and the uniform application of EU law and the need to ensure the uniform and consistent application of EU rules and the proper functioning of the system which they establish.²¹⁶ The Commission also maintains that the Treaty rules on the free movement of capital are unique because they have an external dimension. Furthermore, and subject to the exception in Article 64(1) TFEU, Article 63(1) TFEU itself achieves the full liberalisation of capital movements between the European Union and third countries. Thus, there is no need to enact secondary legislation in order to extend free movement of capital to capital movements between the Member States and third countries or to achieve full liberalisation. The fact that, with the exception of *Pringle*,²¹⁷ most cases concerning the application of the *ERTA* principle involve common rules contained in secondary law is because the Treaties often limit themselves to setting out policy objectives and conferring powers to legislate upon the institutions. Finally, unless the European Union has exclusive competence, it will not be possible to ensure that the common rules in Article 63(1) TFEU are applied uniformly and consistently.

278. Should the Court decide that the European Union does not have exclusive competence over portfolio investment on the basis of Article 3(2) TFEU read together with Article 63(1) TFEU, the Commission submits that the European Union nonetheless enjoys shared competence. For this, it relies on Article 216(1) TFEU which provides for the European Union’s right to conclude international agreements with third countries where that is ‘... necessary in order to achieve, within the framework of the European Union’s policies, one of the objectives referred to in the Treaties ...’. In the present case, the objective is to achieve the free movement of capital, including portfolio investment between the European Union and third countries. The liberalisation of extra-EU capital movements cannot be effective unless third countries remove their own restrictions on capital movements between the European Union and their territories. For them to do so usually requires the conclusion of international agreements, based on reciprocity, with those countries. The Commission insists that it is not arguing that, because Chapter Nine is necessary to enable the European Union to exercise its external competences, the European Union enjoys exclusive competence.

279. The *Parliament* also argues in favour of EU exclusive competence as regards Section A of Chapter Nine of the EUSFTA. In particular, it submits that the European Union enjoys exclusive competence as regards portfolio investment because, on the one hand, coverage of portfolio investment by Chapter Nine is incidental to the main or dominant purpose of that chapter (ensuring protection for foreign direct investment), and, on the other hand, Article 3(2) TFEU may also apply where primary EU law may be affected. The Parliament subscribes specifically to the Commission’s position that the prohibition of expropriation in Article 9.6 of the EUSFTA is neither an interference with the Member States’ different property regimes and methods of registering and structuring property relations in different legal traditions, nor a harmonisation of the Member States’ laws.

280. The *Council* accepts that, from an economic perspective, trade and foreign direct investment are interlinked and that some aspects of the treatment of foreign direct investment relate to standard issues of common commercial policy (that is to say, market access such as the access of a foreign investor to import or export licences). However, it submits that the regulation of foreign direct investment does not necessarily pursue trade objectives. According to the Council, rule-making with regard to the admission, treatment and protection of foreign direct investment forms an independent area of international economic relations that is not automatically part of trade policy. The Council distinguishes between: (i) the admission of foreign direct investment (that is to say, market access: the

216 — The Commission refers to judgment of 31 March 1971, *Commission v Council*, 22/70, EU:C:1971:32, paragraph 31, and Opinion 1/03 (New Lugano Convention) of 7 February 2006, EU:C:2006:81, paragraphs 122 and 133.

217 — Judgment of 27 November 2012, C-370/12, EU:C:2012:756.

decision whether a direct investor is allowed to invest in a host State and what (if any) restrictions or conditions apply); (ii) the movement of capital in relation to foreign direct investment (even if an investor can also raise funds in the host State and foreign direct investment thus does not always necessarily involve a cross-border movement of capital); and (iii) investment treatment.

281. According to the Council, Chapter Nine is a self-standing chapter that deals only with investment protection and uses a very broad asset-based definition of investments. That chapter concerns neither the admission nor the promotion of investment. Rules on the admission of investments are found in Chapter Eight of the EUSFTA.

282. The Council accepts that the European Union has exclusive competence over foreign direct investment that is related to the common commercial policy but proposes a narrower interpretation of the scope of Article 207(1) TFEU than that advanced by the Commission and the European Parliament. In that regard, the Council considers that it is not necessary for the Court to decide on the precise limits of the competence over foreign direct investment under the EUSFTA. Essentially, the Council alleges that the Commission has not shown that all standards set out in Section A refer to provisions that fall under the European Union's exclusive competence over foreign direct investment or for any other type of investment covered by Chapter Nine.

283. As regards the national treatment clause in Article 9.3 of the EUSFTA, the Council focuses on the situations laid down in Article 9.3.3 in which the Parties may set aside the obligation of national treatment. According to the Council, the European Union cannot have exclusive competence to sign and conclude the EUSFTA in so far as it relates to measures taken by the Member States discharging their responsibility for national security. Nor does the European Union enjoy exclusive competence over the protection of national treasures or legislative competence to adopt measures in the field of direct taxation.

284. As regards the fair and equitable treatment clause and the full protection and security clause in Article 9.4 of the EUSFTA, the Council argues that the Commission has not demonstrated that the European Union has exclusive competence over either clause.

285. As regards the regime for compensation of losses to investments (covered by Chapter Nine) for which Article 9.5 of the EUSFTA provides, the Council submits that the European Union does not enjoy competence over the part of that provision that relates to Member States' armed forces. It is also doubtful whether the European Union may sign and conclude, alone, an agreement that deals with the implications of war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the Member States.

286. With respect to the arrangements concerning expropriation contained in Article 9.6 of the EUSFTA, the Council submits that the Court's case-law does not support the argument that all measures relating to expropriation in the EUSFTA fall entirely within the European Union's exclusive competence. As a result of Article 345 TFEU, the European Union cannot have exclusive competence to sign and conclude Article 9.6 of the EUSFTA.

287. The Council also submits that the Commission has not argued, let alone demonstrated, that certain matters covered by Article 9.7.2 of the EUSFTA, in particular criminal or penal offences, social security, public retirement or compulsory saving schemes and taxation, fall within the European Union's exclusive competence.

288. The Council disagrees with the Commission's reliance on the third ground under Article 3(2) TFEU to claim exclusive competence with regard to the European Union in respect of portfolio investment.

289. First, whilst portfolio investment may involve a movement of capital, that type of investment cannot be equated with the free movement of capital under the Treaties. Article 63(1) TFEU does not deal with protecting investments. Nor does it deal with portfolio investment or direct investment as such. Article 63(1) TFEU applies only in so far as the movement of capital is involved. That is not necessarily always the case for foreign direct investment and portfolio investment. The Council further notes the importance of ensuring that third country operators do not circumvent permissible restrictions on the freedom of establishment (justified under Article 65(2) TFEU) by seeking to rely directly on Article 63 TFEU. The Court has distinguished between freedom of establishment and free movement of capital by adopting a centre of gravity approach in which it looks at which particular aspect of a situation is primarily affected by the alleged restriction.

290. Second, no provision in the Treaties confers a specific competence on the European Union to act in relation to portfolio investments or (a fortiori) the protection of portfolio investment. The Member States are therefore entitled, in the light of Articles 4(1) and 5(2) TFEU, to act in this area.

291. Third, should the Court nonetheless accept that portfolio investment is a capital movement within the meaning of Article 63(1) TFEU and that that provision confers on the European Union a specific power to act in relation to protecting that type of investment, the Council argues that the European Union has adopted no legislation under Article 63(1) TFEU relating to the protection of portfolio investment. The Council acknowledges that there is secondary law relating to, for example, the admission of securities to stock exchanges and to markets in financial instruments. Whilst those rules involve aspects of portfolio investment, none were adopted using the legal bases relating to free movement of capital.

292. Fourth, there can in any event be no implied exclusive EU external competence over portfolio investment because Article 63(1) TFEU is not a ‘common rule’ under Article 3(2) TFEU. Even assuming that there is primary law achieving full liberalisation of capital movements between Member States and third countries, the Council submits that the Commission’s novel reading of ‘common rules’ in Article 3(2) TFEU is flawed. The Court’s case-law shows that the European Union has to have exercised internal competence by adopting secondary legislation. That requirement is inherent in the notion of implied powers. The Commission is wrong to rely on *Pringle* and Opinion 1/92.²¹⁸ In *Pringle*,²¹⁹ the Court held that the European Stability Mechanism (‘ESM’) Treaty fell as a whole outside the European Union’s claimed exclusive competence set out in Article 3(1)(c) TFEU. There was no need for the Court to examine the further question whether the ESM Treaty could nevertheless be held to affect ‘common rules or alter their scope’ within the meaning of Article 3(2) TFEU. In any event, it is clear that the objective in *Pringle* related to the European Union’s exercise of the powers which had been expressly conferred on it. The Council accepts that the Court did, in Opinion 1/92,²²⁰ refer to Treaty provisions on competition. The cases to which the Court referred in that Opinion nonetheless emphasised that internal competences must be exercised before an implied competence to conclude an international agreement arises or that the existence of such an implied competence is tied to a competence that is expressly conferred by the Treaties.

293. Should the Court accept that Article 63(1) TFEU is capable of constituting a ‘common rule’, the Council argues that the Commission has not shown how the area of portfolio investment has been ‘largely covered’ by the alleged ‘common rules’. Nor has the Commission shown that Chapter Nine, in so far as it relates to the protection of portfolio investment, would affect such common rules or alter their scope.

218 — Opinion 1/92 (Second Opinion on the EEA Agreement) of 10 April 1992, EU:C:1992:189.

219 — Judgment of 27 November 2012, C-370/12, EU:C:2012:756.

220 — Opinion 1/92 (Second Opinion on the EEA Agreement) of 10 April 1992, EU:C:1992:189.

294. The Council is also concerned about the reasoning underpinning the Commission's alternative argument that there is a shared competence over portfolio investment based on Article 216(1) TFEU. The need to attain a specific Treaty objective requires showing that competences have been conferred internally on the European Union to achieve that objective. That precludes the Commission from relying on Article 216(1) TFEU with regard to portfolio investment. Should the Court find that the European Union does have the required competence to regulate the protection of portfolio investment, the Council notes that the Commission does not argue that the European Union would be able to exercise that internal competence only through concluding an international agreement and that the exercise of internal and external competences over the protection of foreign portfolio investment has therefore to be concomitant. Furthermore, should the Commission be correct, there would be no need to conclude an international agreement: Article 63(1) TFEU would by itself achieve the full liberalisation of capital movement between the European Union and third countries.

295. The Council agrees that the European Union and the Member States share competence over Chapter Nine. However, since competence to protect portfolio investment is not conferred on the European Union, it is not possible for the European Union to exercise that competence without the participation of the Member States. In the alternative, the Council submits that, should the Court accept that the European Union does have shared competence over portfolio investment, whether that competence should be exercised through concluding the EUSFTA remains a political decision.

296. Most of the intervening *Member States* have taken a position on Section A. The arguments they put forward broadly correspond with the different aspects of the Council's position.

297. Thus, they argue that the meaning of 'direct investment' in Article 64 TFEU and 'foreign direct investment' in Article 207(1) TFEU must be the same. In that regard, the case-law regarding the scope of Article 64 TFEU is relevant, as well as the definition of direct investment (and of portfolio investment) in Regulation (EC) No 184/2005²²¹ and Directive 88/361/EEC.²²²

298. The European Union's exclusive competence as regards foreign direct investment is limited to the elimination of restrictions on that type of investment. In so far as the EUSFTA also guarantees other forms of protection, such rules do not fall within the European Union's exclusive competence pursuant to Article 207(1) TFEU. That is the case for provisions regarding the promotion and protection of foreign direct investment (such as those relating to expropriation, the armed forces, direct taxation, criminal law and procedure).

299. Article 9.6 of the EUSFTA (expropriation) lays down general principles according to which the Parties are to apply their property laws. Such matters fall within the Member States' competence which is to be exercised in accordance with EU law. Article 345 TFEU imposes a limitation on the European Union's exercise of its competences under the Treaties.

300. It follows from Article 207(6) TFEU that the European Union may not exercise an exclusive competence to negotiate and conclude international trade agreements in areas in which it does not enjoy legislative competence to adopt internal legislation. That provision also precludes the European Union from enjoying exclusive competence, pursuant to Article 207(1) TFEU, for investments other than foreign direct investment.

301. The Commission's novel interpretation of Article 3(2) TFEU would entail the European Union enjoying, pursuant to Articles 3(2) and 63 TFEU, exclusive competence over portfolio investment. It would also imply that every agreement liable to restrict investment, irrespective of whether it is part of the common commercial policy, could fall within the European Union's implied exclusive

221 — Regulation of the European Parliament and of the Council of 12 January 2005 on Community statistics concerning balance of payments, international trade in services and foreign direct investment (OJ 2005 L 35, p. 23).

222 — Directive of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

competence. However, the Treaties make it clear that (express) exclusive competence exists only as regards foreign direct investment. Common rules within the meaning of Article 3(2) TFEU are rules of secondary law, not primary law. The existence of internal competence is not sufficient. The historical background to Article 3(2) TFEU confirms that interpretation. In any event, Article 63 TFEU is not a legal basis for exercising competence. The legal basis to act is found in Article 64(2) TFEU and is subject to limitations.

302. Furthermore, the conditions of Article 3(2) TFEU are not satisfied. The scope of Section A of Chapter Nine is much wider than that of Article 63 TFEU. Expropriation is not a restriction on the free movement of capital for which the Treaties provide. In so far as Article 63 TFEU applies, that would only guarantee the application of the principle of non-discrimination. No common rules have been adopted relating to expropriation.

303. The European Union may not, by agreeing to Article 9.10.1 of the EUSFTA, decide alone on the termination of agreements concluded by the Member States with Singapore. That provision does not respect the general principle, expressed in Article 59(1)(a) of the 1969 Vienna Convention, according to which international agreements may be terminated only by parties to them. Nor has the Commission put forward a basis in international law for its position. Furthermore, the European Union itself has recognised, in Regulation (EU) No 1219/2012,²²³ that bilateral agreements of the Member States signed before 1 December 2009 may remain in force or enter into force, in accordance with that regulation.

304. Finally, none of the grounds under Article 216 TFEU are satisfied. Therefore, the European Union does not enjoy shared competence as regards portfolio investment.

Analysis

Introduction

305. There are two routes by which the European Union could enjoy exclusive competence as regards the substantive rules governing investment found in Section A of Chapter Nine. Do those rules fall within the common commercial policy as described in Article 207(1) TFEU? If not, do they nevertheless form part of an area within which there are common rules (coinciding with that area or largely covering it) that may be affected or whose scope might be altered should the EUSFTA be concluded (third ground under Article 3(2) TFEU)? I shall address those possibilities in turn.

306. A further distinct issue arises with regard to Chapter Nine in so far as Article 9.10.1 of the EUSFTA states that, as a result of the entry into force of the EUSFTA, certain bilateral investment agreements between the Member States and Singapore (listed in an annex to Chapter Nine) will cease to exist. I shall discuss that matter separately.²²⁴

²²³ — Regulation of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (OJ 2012 L 351, p. 40).

²²⁴ — See points 371 to 398 below.

Exclusive competence on the basis of Article 207(1) TFEU, read together with Article 3(1) TFEU

– The meaning of ‘foreign direct investment’ in Article 207(1) TFEU

307. Chapter Nine defines the investments and investors that it covers. Unlike the Treaties, it does not distinguish between foreign direct investment and other forms of investment.²²⁵ Neither the EUSFTA nor the Treaties refer to ‘portfolio investment’.

308. The Commission’s request offers the Court a first opportunity to interpret the concept of ‘foreign direct investment’ in Article 207(1) TFEU and to decide on the degree to which the common commercial policy covers the regulation of ‘foreign direct investment’. That type of investment was already included in Article III-315(1) of the Treaty Establishing a Constitution for Europe.²²⁶ The content of that provision was identical to that of Article 207(1) TFEU.²²⁷

309. By virtue of Article 207(1) TFEU, coupled with Article 3(1)(e) TFEU, the European Union has exclusive competence over foreign direct investment. That competence applies together with competence over other matters falling within the common commercial policy (such as services) but which might also relate to investment (such as investment in the services sector).²²⁸

310. The Treaties do not define ‘foreign direct investment’. However, a number of provisions of the Treaties, Protocols and Declarations²²⁹ use the term ‘investment’.

311. At a general level, I understand ‘investment’ to mean placing money or another asset into a commercial activity with the objective of making a profit.

312. Article 207(1) TFEU refers to one particular type of investment, that is to say, investment that is both ‘foreign’ and ‘direct’.

313. A foreign investment is an investment made by an EU natural or legal person in a third State or by a natural or legal person of a third State in the European Union. Foreign direct investment is thus a direct investment that contains a non-EU component.

314. The term ‘direct investment’ also appears in other Treaty provisions, in particular in Article 64(1) and (2) TFEU which is part of Chapter Four (‘Capital and payments’) of Title IV (‘Free movement of persons, services and capital’). Subject to Article 64(1) and (2) TFEU, Article 63 TFEU prohibits all restrictions on the movement of capital and on payments between Member States and between Member States and third countries. That prohibition is broad in scope. It applies, for example, to restrictions on the movement of capital which discourage non-residents from making investments in a Member State or which discourage that Member State’s residents from investing in other States.²³⁰

225 — Article 9.1.1 and 9.1.2 of the EUSFTA.

226 — OJ 2004 C 310, p. 1.

227 — Discussions on Article III-315(1) coincided with debates within the WTO on whether to negotiate WTO provisions on foreign direct investment. The WTO Ministerial Declaration adopted on 14 November 2001, launching the Doha Development Round, had recognised ‘... the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade ...’ (emphasis added) (WTO Ministerial Declaration adopted on 14 November 2001, WT/MIN(01)/DEC/1 (20 November 2001), paragraph 20; see also paragraph 22). Just when foreign direct investment was becoming part of the common commercial policy, WTO Members (meeting within the WTO General Council) decided that no work towards negotiations on investments would take place within the WTO during the Doha Round (WTO, General Council, Decision Adopted by the General Council on 1 August 2004, WT/L/579 (2 August 2004), paragraph 1(g)).

228 — See point 344 below.

229 — See, for example, Articles 101(1)(b), 126(3), 199(3) and (4) and 309 TFEU; Protocol No 5 on the Statute of the European Investment Bank; Protocol No 10 on Permanent Structured Cooperation established by Article 42 TEU; and Declaration No 30 on Article 126 of the Treaty on the Functioning of the European Union.

230 — See judgments of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 39 and the case-law cited, and of 10 February 2011, *Haribo*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 50 and the case-law cited.

315. Article 64(1) TFEU is defined by reference to the categories of capital movements that are capable of being subject to restrictions.²³¹ It circumscribes the prohibition in Article 63 TFEU with respect to the movement of capital to or from third countries involving direct investment (including in real estate), establishment, the provision of financial services or the admission of securities to capital markets. Article 64(2) TFEU offers a legal basis for the Parliament and the Council to adopt measures as regards those forms of movement of capital. Under the conditions laid down in Article 64(3) TFEU, the Council may adopt also measures which constitute ‘a step backwards’ in EU law as regards the liberalisation of the movement of capital to or from third countries.

316. Whatever the precise scope of Articles 63 and 64 TFEU, it seems to me that those provisions clearly apply to the movement of capital and payment to and from third countries involving direct investment, including foreign direct investment. Therefore, both those provisions and the case-law interpreting them are relevant when defining the scope of ‘foreign direct investment’ in Article 207(1) TFEU.

317. In interpreting ‘direct investment’ in Article 64(1) TFEU, the Court has relied on the definition of that term in Council Directive 88/361 implementing Article 67 of the EEC Treaty.²³² Article 1(1) of that directive provides that capital movements are to be classified in accordance with the Nomenclature in Annex I (which the Court has accepted has indicative value²³³).

318. The Nomenclature under Annex I lists under ‘direct investments’: ‘(1) establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings; (2) participation in new or existing undertakings with a view to establishing or maintaining lasting economic links; (3) long-term loans with a view to establishing or maintaining lasting economic links; and (4) reinvestment of profits with a view to maintaining lasting economic links’. That part of the annex also refers to the explanatory notes which define certain terms solely for the purpose of the Nomenclature and Directive 88/361. Those notes define ‘direct investments’ as ‘investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity’. The notes add that the concept ‘must therefore be understood in its widest sense’.

319. Against that background, the Court has found that the concept of ‘direct investment’ covers ‘investments by natural or legal persons which serve to establish or maintain lasting and direct links between the person providing the capital and the company to which that capital is made available in order to carry out an economic activity’.²³⁴ In *Test Claimants in the FII Group Litigation*, the Court held that Article 63 TFEU covers, in principle, capital movements involving establishment or direct investment and found those latter terms to ‘relate to a form of participation in an undertaking

231 — Judgment of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraph 39.

232 — For definitions in other secondary legislation, see, for example, Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union (OJ 2013 L 174, p. 1), item 4.65 in Annex A and Annex 7.1 — Summary of each asset category; and Annex II to Regulation No 184/2005. See also, for example, the Guideline of the European Central Bank of 9 December 2011 on the statistical reporting requirements of the European Central Bank in the field of external statistics (ECB/2011/23) (OJ 2012 L 65, p. 1), Annex III, item 6.1.

233 — See judgment of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraph 23 and the case-law cited; see also judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraphs 179 and 180 and the case-law cited.

234 — Judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 32 and the case-law cited.

through the holding of shares which confers the possibility of effectively participating in its management and control’.²³⁵ In *Haribo*, the Court applied that test to conclude that a holding did not fall within the scope of Article 64(1) TFEU (by implication, therefore, that it was not a direct investment) where it involved less than 10% of the share capital of a company.²³⁶

320. That case-law appears to reflect definitions used elsewhere. For example, the Organisation for Economic Co-operation and Development (‘the OECD’) defines ‘direct investment’ as ‘... a category of cross-border investment made by a resident in one economy ... with the object of establishing a lasting interest [evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise] in an enterprise ... that is resident in an economy other than that of the direct investor’. The interest of the direct investor is in ‘... a strategic long-term relationship with the direct investment enterprise to ensure a significant degree of influence by the direct investor in the management of the direct investment enterprise’.²³⁷ The International Monetary Fund (‘IMF’) defines a ‘direct investment’ as ‘... the category of international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another economy’. According to the IMF, the ‘lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise’.²³⁸ The United Nations Conference on Trade and Development (‘Unctad’) refers to the definitions used by the OECD and the IMF.

321. The case-law regarding the scope of Article 63 TFEU also helps to understand what is excluded from the notion of ‘direct investment’. Thus, the Court has distinguished that type of investment from ‘portfolio investments’, that is to say, ‘the acquisition of securities on the capital market solely *with the intention of making a financial investment without any intention to influence the management and control of the undertaking*’.²³⁹ That interpretation also corresponds with definitions of portfolio investment used elsewhere.²⁴⁰

322. Against that background, I interpret the term ‘foreign direct investment’ in Article 207(1) TFEU to mean investments made by natural or legal persons of a third State in the European Union and investments made by EU natural or legal persons in a third State which serve to establish or maintain lasting and direct links, in the form of effective participation in the company’s management and control, between the person providing the investment and the company to which that investment is made available in order to carry out an economic activity. In applying that definition, I consider that the fact that the direct investor owns at least 10% of the voting power of the direct investment enterprise may offer evidentiary guidance but is certainly not determinative.

235 — Judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paragraph 102 and the case-law cited.

236 — Judgment of 10 February 2011, *Haribo*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 137. That 10% threshold is also used in, for example, the definition of ‘foreign direct investment’ in Regulation No 549/2013, Annex 7.1, and Guideline of the European Central Bank (ECB/2011/23), Annex III, item 6.1.

237 — See, for example, *OECD Benchmark Definition of Foreign Direct Investment*, fourth edition, OECD, 2008, paragraph 11; see also paragraphs 29, 117 and 122 to 147.

238 — See, for example, *Balance of Payments Manual*, sixth edition, IMF, 2009, paragraph 359.

239 — Judgment of 21 October 2010, *Idryma Typou*, C-81/09, EU:C:2010:622, paragraph 48 (emphasis added). See also judgment of 10 November 2011, *Commission v Portugal*, C-212/09, EU:C:2011:717, paragraph 47 and the case-law cited; and, for example, the definition of ‘portfolio investment’ in Guideline of the European Central Bank (ECB/2011/23), item 6.2.

240 — See, for example, *OECD Benchmark Definition of Foreign Direct Investment*, fourth edition (‘... portfolio investment whereby investors do not generally expect to influence the management of the enterprise’), paragraph 11; see also paragraph 29.

– The regulation of ‘foreign direct investment’ as part of the common commercial policy

323. The Parties disagree on what forms of regulation of ‘foreign direct investment’ fall within the European Union’s common commercial policy. It is common ground that that policy covers market access (that is to say, conditions of entry and establishment) and promotion of investment. Thus, a provision such as Article 9.7 of the EUSFTA (‘Transfer’), which requires Parties to permit all transfers relating to an investment to be made in a freely convertible currency without restriction or delay and thus applies to market access, falls within the common commercial policy.

324. Does the common commercial policy also cover the protection of investors (and their investments) after they have accessed the foreign market?

325. In my opinion, it does.

326. It is clear that the common commercial policy covers, at least to some extent, the protection of certain foreign investments. That is because that policy covers trade in services, understood as the four modes of services covered by the GATS.²⁴¹ The GATS lays down obligations regarding, *inter alia*, both market access and national treatment, the most favoured nation principle and domestic regulation, in particular, with respect to the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member (the so-called mode 3 supply of services, corresponding generally with ‘establishment’).²⁴² Commercial presence under that agreement means ‘any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service’.²⁴³ Where foreign direct investment serves to establish a commercial presence for the purposes of supplying a service, it is covered by trade in services and therefore falls within the common commercial policy. Taking into account the types of obligation assumed under the GATS and the Court’s conclusion in Opinion 1/08,²⁴⁴ it is also clear that the common commercial policy covers market access *and* treatment to be accorded after a commercial presence has been established. At least some form of post-admission protection of foreign direct investment is therefore covered by the common commercial policy in so far as it encompasses trade in services.

327. Furthermore, the question whether the common commercial policy covers regulation that protects, through the application of the principle of national treatment, investment measures related to trade in goods has already been settled. The Court has held that the European Union has exclusive competence to conclude the Agreement on Trade-Related Investment Measures (‘the TRIMs Agreement’),²⁴⁵ which applies to investment measures related to trade in goods²⁴⁶ and lays down, *inter alia*, a national treatment obligation.²⁴⁷

241 — See points 196 and 197 above.

242 — See Articles I:2(c), X and XVI of the GATS. Some of those rules concern, in particular, the conditions under which investments can be made. In that regard, the GATS (at least) partly complements investment agreements that often focus largely on the subsequent treatment of an investment.

243 — See Article XXVIII(d) of the GATS.

244 — Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739.

245 — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 34. See also point 145 above. The TRIMs Agreement is an agreement included in Annex 1A to the WTO Agreement (‘Multilateral Agreements on Trade in Goods’).

246 — Article 1 of the TRIMs Agreement.

247 — Article 2(1) of the TRIMs Agreement. The Annex to that agreement, to which Article 2(2) refers, contains a non-exhaustive list of trade-related investment measures that are inconsistent with the obligation of national treatment under Article III:4 of the GATT 1994 (that is to say, national treatment in respect of all laws, regulations and requirements affecting the internal sale, offering sale, purchase, transportation, distribution or use of products).

328. It is also settled case-law that an EU act falls within the common commercial policy ‘... if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade’.²⁴⁸ The same test should therefore be applied to foreign direct investment. Thus, EU measures that are essentially intended to promote, facilitate or govern foreign direct investment and have direct and immediate effects on foreign direct investment and investors fall within the EU common commercial policy.

329. I would add that the specific context in which the phrase ‘foreign direct investment’ appears in Articles 206 and 207(1) TFEU corresponds with that in which the same expression was used in the Draft Articles on external action in the Constitutional Treaty proposed by the Praesidium to the Convention. In connection with (what became) Articles 206 and 207(1) TFEU, the Praesidium commented that a reference to foreign direct investment was added ‘... in recognition of the fact that financial flows supplement trade in goods and today represent a significant share of commercial exchanges’.²⁴⁹ That suggests that investment and trade are essential components of an effective and unified common commercial policy. In an increasingly globalised economy, it must be assumed that decisions on export and import markets and on where to produce depend both on trade and on investment policies and regulation.

330. The common commercial policy therefore comprises, apart from measures that enable and improve the entry of a foreign direct investment in the host country, measures that protect such investments in so far as the availability of that protection has a direct and immediate effect on whether to carry out the foreign direct investment and on the enjoyment of the benefits of that investment.

331. That reading of Article 207 TFEU enables the European Union to achieve the objectives of the common commercial policy. In accordance with Article 206 TFEU, in pursuing that policy, the European Union is to contribute to, inter alia, ‘... the progressive abolition of restrictions on international trade and on foreign direct investment ...’. In my opinion, that phrase cannot be read as meaning that the common commercial policy is limited to the elimination of restrictions on market access for foreign direct investment. The objective of the progressive abolition of restrictions is not limited to whether goods or services can access a market or whether a foreign direct investment can enter a market. Border measures and entry limitations are merely one type of restriction. Many other types of measure (or the lack thereof) may also prevent, make more expensive or otherwise render more burdensome putting a product or service onto the market or making an investment so as to profit thereby. Such restrictions might result from, for example, discriminatory treatment; the lack of security, predictability and transparency in the regulation of international trade and foreign direct investment;²⁵⁰ or the existence of unfair trade practices.

332. Consistent with that reading, the Court has accepted that the provisions on trade in goods and services (with the exception of transport) laid down in the GATT 1994 and the GATS fall within the common commercial policy.²⁵¹ Those agreements are not limited to rules on market access. Other types of rules relating to, in particular, domestic instruments are also needed because otherwise the benefits of market access could be rendered nugatory by, inter alia, discriminatory domestic measures.

248 — See, for example, judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520, paragraph 51 and the case-law cited.

249 — See Note from the Praesidium to the Convention, Draft Articles on external action in the Constitutional Treaty, CONV 685/03 (23 April 2003), pages 52 and 54. Or, as the European Union and the Member States put it in the context of the WTO discussions on the relationship between trade and investment, trade and foreign direct investment are inter-dependent and complement each other and foreign direct investment is an important generator of trade (WTO, Working Group on the Relationship between Trade and Investment, Communication from the European Community and its Member States, Concept Paper on the Definition of Investment, WT/WGTI/W/115 (16 April 2002), paragraph 2).

250 — See also points 510 to 512 below.

251 — See, in particular, points 145, 196 and 197 above.

333. The same reasoning must, in my view, apply to the regulation of foreign direct investment. After all, the effectiveness of rules permitting that type of investment could be entirely undermined if, once the investment has been made, the investor is left with no protection against, for example, discriminatory treatment (see Article 9.3 of the EUSFTA on ‘National treatment’, read together with Understanding 5, and Article 9.5.1 of the EUSFTA on ‘Compensation for Losses’), expropriation (see Article 9.6 of the EUSFTA on ‘Expropriation’), or restrictions on transfers (see Article 9.7 of the EUSFTA on ‘Transfer’). For example, if an investment has been allowed to access the market but the economic activity in which the investment was made is then expropriated without compensation, the outcome for the investor might be worse than if access had simply been refused. The same applies where an investor suffers losses in the host State as a result of its investment being requisitioned or unnecessarily destroyed by that State’s armed forces or authorities (see Article 9.5.2 of the EUSFTA on ‘Compensation for Losses’).

334. Similarly, if investors are denied fair and equitable treatment for their investments because they lack access to judicial proceedings, because they are faced with a fundamental breach of due process or because there is bad faith on the part of the host State, that may undermine the decision to make an investment in that State and to enjoy the benefits thereof (see Article 9.4 of the EUSFTA on ‘Standard of Treatment’). The same consequence may result from the lack of protection of the physical security of investors and investments (see again Article 9.4 of the EUSFTA on ‘Standard of Treatment’).

335. I see no reason to take a different view because provisions laying down exceptions to some of those standards, such as Article 9.3.3 of the EUSFTA, refer to objectives whose pursuit may lie within the Member States’ competences. The function of such provisions is to prescribe the conditions within which the Parties may adopt or enforce measures that are otherwise inconsistent with those standards in order to achieve legitimate objectives, such as the protection of public security or the maintenance of public order. Those are measures that fall within the scope of the European Union’s common commercial policy because of their specific relation to foreign direct investment. Thus, the conditions under which such measures may exceptionally be applied come equally within that policy.

336. I therefore conclude that the common commercial policy also covers the regulation of the protection of foreign direct investment in so far as the availability of that protection has a direct and immediate effect on whether to carry out the foreign direct investment and on the enjoyment of the benefits of that investment.

337. That means that Chapter Nine, Section A, of the EUSFTA falls within the Union’s exclusive competence in so far as the provisions in that section concern the liberalisation and protection of foreign direct investment within the meaning of Article 207(1) TFEU.

338. A number of Member States object, however, that the common commercial policy cannot cover standards of protection against expropriation of foreign direct investment. They argue that, in accordance with Article 345 TFEU, that matter falls within the Member States’ competence. According to that provision, the Treaties must in no way prejudice the rules in Member States governing the system of property ownership. When read in conjunction with Article 207(6) TFEU, that means (they argue) that the common commercial policy does not extend to expropriation of foreign direct investment.

339. I do not read Articles 207(6) and 345 TFEU in that way.

340. Article 345 TFEU expresses the principle that the Treaties are neutral in relation to Member States' system of property ownership: the Treaties do not preclude, as a general rule, either nationalisation of undertakings or their privatisation.²⁵² However, the Court has held that Article 345 TFEU '... does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the TFEU, which rules include, inter alia, the prohibition of discrimination, freedom of establishment and the free movement of capital'.²⁵³ In my opinion, it follows that, whilst the Member States may indeed choose their system of property ownership, the consequences resulting from that choice and the conditions under which property is held are not removed from the scope of applicable rules of EU law. Put another way, Article 345 TFEU cannot be read as meaning that Member States may regulate property ownership 'to the exclusion of any EU action in the matter'.²⁵⁴

341. Should the European Union conclude an international agreement (irrespective of the legal basis for doing so) that deprived the Member States of their right to expropriate property, that might indeed trespass upon the right guaranteed by Article 345 TFEU. That is not so, however, where the European Union agrees with a third State that neither Party to the agreement may nationalise or expropriate the investments made by investors of the other Party unless certain conditions are met. Such an agreement does not infringe the Member States' prerogative (that is, the exclusive competence) to choose their system of property ownership. It merely limits the circumstances in which they may choose to nationalise or expropriate investments. In so far as such an agreement also covers foreign direct investment, Article 345 TFEU does not limit the European Union's exclusive competence under Article 207(1) TFEU to agree with a third State to subject the exercise of that right to conditions. Nor does such an agreement harmonise within the European Union the conditions of expropriation.

342. I therefore consider that Article 345 TFEU, read in conjunction with Article 207(6) TFEU, does not restrict the exercise of the European Union's exclusive competences under Article 207(1) TFEU.²⁵⁵

343. Accordingly, I conclude that Section A of Chapter Nine ('Investment Protection'), in so far as it applies to foreign direct investment, falls entirely within the European Union's exclusive competence under Article 207(1) TFEU.

344. Finally, I would add that, whilst 'foreign direct investment' is now clearly a matter falling within the common commercial policy, parts of Section A of Chapter Nine of the EUSFTA could very well fall within that policy by virtue of other aspects of Article 207(1) TFEU. I have already referred to the interaction between trade in services and investment.²⁵⁶ Commercial aspects of intellectual property law and investment may similarly interact in so far as, under the EUSFTA, intellectual property rights and goodwill are a form of investment covered by that chapter.²⁵⁷

345. For the purposes of the present proceedings, however, it suffices that the content of Chapter Nine relates to at least one of the matters in Article 207(1) TFEU and thus falls within the common commercial policy.

252 — Judgment of 22 October 2013, *Essent and Others*, C-105/12 to C-107/12, EU:C:2013:677, paragraphs 29 and 30 and the case-law cited.

253 — Judgment of 22 October 2013, *Essent and Others*, C-105/12 to C-107/12, EU:C:2013:677, paragraph 36 and the case-law cited. See also, for example, judgment of 4 June 2002, *Commission v Portugal*, C-367/98, EU:C:2002:326, paragraph 48.

254 — See judgment of 13 July 1995, *Spain v Council*, C-350/92, EU:C:1995:237, paragraph 22.

255 — On Article 207(6) TFEU, see also points 106 to 110 above.

256 — See point 326 above. In that regard, I also note that footnote 8 to Article 8.8(d) of the EUSFTA (definition of 'establishment') states that the terms 'constitution' and 'acquisition' of a juridical person is to be understood as including 'capital participation in a juridical person with a view to establishing or maintaining lasting economic links'.

257 — See Article 9.1.1 and 9.1.1(g) of the EUSFTA.

The European Union's competence on the basis of Article 63 TFEU, read together with Article 3(2) TFEU

346. It is common ground that Article 207(1) TFEU does not as such cover types of investment other than foreign direct investment. The Parties have mostly used the term 'portfolio investment' to describe those investments.

347. Unless (parts of) the EUSFTA rules governing those other types of investment are covered by the commitments on services,²⁵⁸ the legal basis of the European Union's action as regards such investment and the European Union's exclusive competence must therefore be sought elsewhere.

348. It is not suggested that the European Union needs exclusive competence to conclude the EUSFTA in order to exercise its internal competence. Thus, the second ground under Article 3(2) TFEU does not apply.

349. However, the Parties disagree as to whether the European Union could derive exclusive competence over Chapter Nine, Section A, from the third ground under Article 3(2) TFEU, in so far as it concerns types of investment other than foreign direct investment.

350. I cannot subscribe to the Commission's wide interpretation of Article 3(2) TFEU according to which 'common rules' includes Treaty provisions.

351. It is true that the text of Article 3(2) TFEU itself does not offer decisive guidance. Whilst the TFEU uses the concept of 'common rules' specifically in relation to the adoption of EU secondary legislation,²⁵⁹ Title VII of Part Three of the TFEU is entitled 'Common rules on competition, taxation and approximation of laws'. Thus, it categorises the Treaty provisions which it contains as 'common rules'.

352. However, the third ground under Article 3(2) TFEU should be interpreted in the light of the judgment in *ERTA* and subsequent case-law applying the *ERTA* principle.²⁶⁰ Viewed in that context, it is clear that the Commission's broad interpretation of 'common rules' cannot be accepted.

353. Article 3(2) TFEU lays down additional grounds for the European Union to have exclusive competence to conclude an international agreement where the European Union does not enjoy express exclusive competence under Article 3(1) TFEU. That competence must therefore stem from some *other basis* than the Treaties themselves. For the third ground under Article 3(2) TFEU, that other basis is the impact which international agreements concluded by the Member States might have on 'common rules', that is to say rules adopted by the European Union in the exercise of its internal competence (to pursue a common policy) in certain areas. Thus, as the Court made clear in Opinion 2/92, only the *exercise* of an internal competence (as distinct from its mere existence) can give rise to an (implied) exclusive external competence.²⁶¹ In Opinion 1/94, the Court emphasised that '... exclusive external competence *does not automatically* flow from the European Union's power to lay down rules at internal level'.²⁶²

258 — See point 326 above. In that context, I note that the GATS, which falls within the common commercial policy (subject to the exception for transport in Article 207(5) TFEU), could possibly also apply to certain types of investment other than foreign direct investment. For example, the first sentence of footnote 8 to Article XVI:1 of the GATS ('Market Access') states that 'if a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital'.

259 — For example, Article 91(1)(a) TFEU concerns 'common rules' applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States.

260 — Judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 67.

261 — Opinion 2/92 (Third Revised Decision of the OECD on National Treatment) of 24 March 1995, EU:C:1995:83, paragraphs 33 (which refers to the need for 'internal legislation') and 36.

262 — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 77 (emphasis added).

354. The Commission's argument would mean that Article 3(2) TFEU recognises the right of the European Union to conclude an agreement that affects the Treaties or alters their scope. However, the primary function of Article 3(2) TFEU is, as its wording makes clear, to delineate the nature of EU external competence. Its purpose cannot be to entitle the European Union to 'affect' rules of primary EU law or to 'alter their scope' by concluding an international agreement.²⁶³ Primary law can be changed only by amending the Treaties in accordance with Article 48 TEU.²⁶⁴ Contrary to the Commission's submission, the risk of affecting EU primary law cannot establish exclusive external competence within the meaning of the third ground under Article 3(2) TFEU.²⁶⁵ Nor can Article 3(2) TFEU be read as meaning that the European Union enjoys exclusive external competence on the sole basis that it has competence to adopt rules at internal level.²⁶⁶

355. The Commission has relied here on *Pringle*, where the Court examined whether the ESM Treaty (concluded by the Member States whose currency is the euro) affected the power of the European Union to grant, on the basis of Article 122(2) TFEU, ad hoc financial assistance to a Member State in difficulties or seriously threatened with severe difficulties by natural disasters or exceptional occurrences beyond its control. The Court there recorded that the establishment of the ESM did not affect the power of the European Union to grant, on the basis of Article 122(2) TFEU, ad hoc financial assistance to a Member State when it is found that the Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or circumstances beyond its control. However, it went to add that, since neither Article 122(2) TFEU nor any other provision of the TEU or the TFEU conferred a specific power on the European Union to establish a permanent stability mechanism such as the ESM, the Member States are entitled, in the light of Articles 4(1) and 5(2) TEU, to act in that area.²⁶⁷ In verifying whether Article 3(2) TFEU precluded the Member States whose currency is the euro from concluding the ESM Treaty, the Court examined both Council Regulation (EU) No 407/2010,²⁶⁸ and the Treaty provision empowering the European Union to adopt secondary legislation. The Court concluded that Article 3(2) TFEU did not prevent a subset of the Member States concluding the ESM Treaty.

356. After describing the main purpose of Article 3(2) TFEU, the Court held in *Pringle* that 'it follows also from [Article 3(2) TFEU] that Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope'.²⁶⁹ That statement merely expresses the principle of primacy of EU law over national law, which operates in relation to both EU primary and secondary law. That part of the Court's reasoning in *Pringle* does not support the proposition that EU exclusive competence to conclude an international agreement on the basis of the third ground under Article 3(2) TFEU may result from 'common rules' contained in EU primary law.

263 — For an illustration of the fact that international agreements to which the European Union is a party are *subject* to primary law, see judgment of 10 March 1998, *Germany v Council*, C-122/95, EU:C:1998:94.

264 — The second sentence of Article 218(11) TFEU expressly envisages the possibility of amending the Treaties in order to overcome an 'adverse' opinion based on that provision.

265 — Indeed, such a proposition might potentially raise an issue as to whether the EUSFTA is materially compatible with the Treaties. That is however clearly outwith the scope of the Commission's request for an opinion. See point 85 above.

266 — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 77.

267 — Judgment of 27 November 2012, C-370/12, EU:C:2012:756, paragraphs 104 and 105.

268 — Regulation of 11 May 2010 establishing a European financial stabilisation mechanism (OJ 2010 L 118, p. 1).

269 — Judgment of 27 November 2012, C-370/12, EU:C:2012:756, paragraph 101 (original emphasis). In her View in that case, Advocate General Kokott appeared to suggest that the question regarding Article 3(2) TFEU was ill-conceived: 'It must in that regard be observed that Article 3(2) TFEU, as is clear when read with Article 216 TFEU, solely governs the exclusive competence of the Union for agreements with third countries and international organisations. Accordingly Member States are, under that provision, read together with Article 2(1) TFEU, prohibited only from concluding such agreements with third countries. The parties to the ESM Treaty are however exclusively Member States.' See View of Advocate General Kokott in *Pringle*, C-370/12, EU:C:2012:675, point 98.

357. The Commission's argument would also imply that exclusive external competence can be established on the basis of the third ground under Article 3(2) TFEU even where the internal competence underlying the Treaty provision on which it relies has not been exercised. If that were correct, the distinction between the second ground, which specifically covers the situation where an internal competence has not been exercised, and the third ground under Article 3(2) TFEU would partly disappear.

358. Furthermore, if the third ground under Article 3(2) TFEU were read as meaning that exclusive competence is a necessary consequence of the fact that an international agreement may affect Treaty provisions or alter their scope, the mere existence of a Treaty provision might be sufficient to conclude that the European Union had such a competence. If that were correct, why did the Treaty draftsmen not simply confirm the existence of that exclusive external competence explicitly?

359. I therefore take the view that 'common rules' in the third ground under Article 3(2) TFEU cannot be read so as to include 'Treaty provisions'.

360. It is common ground that there is no EU secondary legislation under Articles 63(1) and 64(2) TFEU relating to types of investment other than foreign direct investment.

361. I therefore conclude that, in the absence of common rules, the conditions of the third ground under Article 3(2) TFEU are not satisfied. It follows that the European Union does not have exclusive competence on that basis. Nor has the Commission argued that it enjoys such competence on another basis.

362. Does the European Union have shared competence with the Member States?

The European Union's shared competences with the Member States

363. The Commission argues, in the alternative, that there is shared competence for the European Union to conclude an international agreement concerning types of investment other than foreign direct investment on the basis of the second ground under Article 216(1) TFEU.

364. At the hearing, the Court asked both the Council and the Commission on what basis the European Union enjoyed internal competence over types of investment other than foreign direct investment. The Council said there was no legal basis in the Treaties for adopting secondary law governing types of investment other than foreign direct investment that could be considered to be 'common rules' within the meaning of the third ground under Article 3(2) TFEU. It nevertheless accepted that certain aspects of types of investment other than foreign direct investment might be made subject to legislative acts adopted on the basis of Treaty provisions (other than Articles 63 and 64 TFEU) governing the internal market. The Commission responded that, given the prohibition already contained in Article 63(1) TFEU, the Treaties (obviously) did not provide a legal basis for adopting secondary law in order to achieve *liberalisation* (as distinct from harmonisation) of capital movements, including portfolio investment. However, both Articles 114 and 352 TFEU offered a basis for eliminating restrictions on portfolio investments. That said, in so far as the EUSFTA did not seek to harmonise, Article 114 TFEU would not be an appropriate legal basis. The Commission argued that, in any event, it is not necessary to identify a legal basis for exercising internal competence before the Union can rely on Article 216(1) TFEU.

365. In my opinion, the second ground under Article 216(1) TFEU is relevant only if the European Union enjoys internal competence. For those purposes, a matter must fall within the scope of EU law and thus its competence.²⁷⁰ It is not necessary that the European Union be competent to adopt secondary law.

366. It seems to me that all the conditions for applying the second ground under Article 216(1) TFEU are satisfied here.

367. Pursuant to Article 63 TFEU, the European Union clearly has competence over the liberalisation and protection of types of investment other than foreign direct investment in so far as such investments represent movements of capital between Member States and between Member States and third countries. Whilst the Treaties do not define ‘movements of capital’, the Court has interpreted that term by relying on the (non-exhaustive) nomenclature annexed to Directive 88/361.²⁷¹ Movements of capital are classified according to the economic nature of the assets and liabilities they concern. The definition is very broad. Thus, movements of capital cover, inter alia, real estate, securities, other instruments on the money market, units of collective investment undertakings, current and deposit accounts with financial institutions, credits related to commercial transactions or to the provision of services, financial loans and credits, sureties, other guarantees, rights of pledge, transfers in performance of insurance contracts, personal capital movements, physical import and export of financial assets, patents, designs, trade marks and inventions.

368. Other forms of regulation of those types of investment might be based on Article 114 TFEU in so far as they approximate laws governing the establishment and functioning of the internal market. Additional powers might also be derived from Article 352 TFEU.

369. The free movement of capital aspect of the internal market has both an internal and external component. An agreement seeking to achieve reciprocal liberalisation between the European Union and a third country, such as the EUSFTA, falls within the framework of that policy. Since such reciprocal commitments cannot be obtained without that third country’s consent, it may be necessary, within the meaning of the first ground under Article 216(1) TFEU, to conclude an international agreement to achieve that objective.

370. I therefore conclude that Section A of Chapter Nine, in so far as it applies to types of investment other than foreign direct investment, falls within the shared competences of the European Union and the Member States, on the basis of Article 4(2)(a) TFEU and the first ground under Article 216(1) TFEU, in conjunction with Article 63 TFEU.

270 — Where a matter is covered by Treaty rules, that matter falls within the competence of the European Union. Thus, Article 4(2)(a) TFEU provides that the European Union has ‘shared competence’ in the principal area of the internal market.

271 — See, for example, judgment of 22 October 2013, *Essent and Others*, C-105/12 to C-107/12, EU:C:2013:677, paragraph 40 and the case-law cited. See also points 317 and 318 above (as regards the definition of ‘Direct Investment’).

Whether the EUSFTA may terminate bilateral agreements concluded between the Member States and Singapore

371. A separate question is whether the European Union has competence to agree to Article 9.10.1 of Chapter Nine, Section A, of the EUSFTA. That provision states that, as a result of the entry into force of the EUSFTA, the bilateral investment agreements between the Member States and Singapore listed in Annex 9-D²⁷² will cease to exist. Those agreements will be annulled, replaced and superseded by the EUSFTA. Footnote 19 to that provision²⁷³ states that ‘for greater certainty, those agreements shall be considered as terminated by the EUSFTA, within the meaning of subparagraph 1(a) of Article 59 of the Vienna Convention on the Law of Treaties’.

372. In its request, the Commission argues that Article 9.10 (‘Relationship with other Agreements’), together with Articles 9.8 (‘Subrogation’) and 9.9 (‘Termination’), are clearly dependent on, and therefore ancillary to, the other substantive provisions on investment in Chapter Nine, Section A. At the hearing, the Commission submitted that, when the European Union concludes an international agreement in an area falling within its competence (at least when that competence is exclusive), the European Union succeeds the Member States in respect of their bilateral agreements with third States and can therefore act for the Member States, including by terminating such bilateral agreements.

373. The Council and a significant number of Member States argued that the European Union cannot, acting alone, agree with a third State to terminate and replace international agreements concluded by that State with the Member States and to which the European Union itself is not a party.

374. As I see it, it is necessary to rule definitively on that question only if the Court finds that the European Union enjoys exclusive competence over all other parts of the EUSFTA. Should the Court decide that the European Union’s competence is shared with the Member States and should the EUSFTA therefore need to be concluded by both the European Union and the Member States, the Member States (concerned) could themselves decide, by expressing their consent to be bound by the EUSFTA, whether or not to terminate their existing agreements with Singapore.

375. For the reasons which I have already given, I consider that the European Union does *not* enjoy exclusive competence over all of Chapter Nine, Section A (or, for that matter, all of the EUSFTA).²⁷⁴

376. For the sake of completeness, I shall nevertheless briefly consider whether the European Union, without being a party to the agreements concluded between the Member States and Singapore that are included in Annex 9-D, can agree with Singapore to terminate those agreements without the Member States’ consent.

377. That is a novel question.²⁷⁵

272 — All of those agreements provide that they are concluded for a limited period of time but may be renewed provided that (subject to certain conditions) either Party does not express its intention to terminate the agreement. Investments made prior to the date when the expiry or termination of the agreement becomes effective, remain subject to the agreement during a defined period of time.

273 — This may appear as footnote 51 in certain language versions.

274 — See points 307 to 361 above.

275 — Although there are other instances where the European Union has decided to terminate or denounce international agreements to which it was not a party. See, for example, Council Decision 92/530/EEC of 12 November 1992 denouncing the Fisheries Agreement between the former German Democratic Republic and Sweden (OJ 1992 L 334, p. 33).

378. Where the European Union acquires exclusive (internal or external) competence in a particular area, it acts in an area over which Member States were previously competent. Whether or not the European Union decides to undo past actions of Member States will depend on how the European Union exercises that competence and on whether that creates some incompatibility with Member States' earlier action. The conditions under which the European Union can exercise internal competences depend on EU law. In any event, EU action must be consistent with international law.²⁷⁶

379. Where the European Union assumes the powers previously exercised by the Member States in an area governed by an international agreement, the provisions of that agreement become, as a matter of EU law, binding on the European Union.²⁷⁷ That was the Court's position, as regards the GATT 1947 (to which all of the Member States (at the time) were a party but not the European Union), in *International Fruit Company*.²⁷⁸ The binding effect of the GATT 1947 was a condition for establishing whether it affected the validity of EEC secondary law. The Court did not consider (nor did it need to) how that finding affected the Member States' obligations under the GATT 1947 or their status as Contracting Parties to that agreement. As I see it, the implication of *International Fruit Company* is that, as a matter of EU law, the European Union had become exclusively competent for matters covered by the GATT 1947 and, as a matter of international law, the European Union had replaced the Member States as being the party responsible for compliance with the obligations they had assumed under the GATT 1947.

380. However, *International Fruit Company* did not address the question whether, where the European Union assumes the powers previously exercised by the Member States in an area that becomes part of the European Union's exclusive competences, those powers include the right to terminate existing agreements concluded by the Member States with third countries. Indeed, the Member States continued to be Contracting Parties to the GATT 1947 which henceforth applied, as a matter of EU law, both to those Member States and to the EEC.

381. The Court has also held that, in principle, the application of the EU Treaties may not affect the Member States' duty to respect the rights of third States under a prior agreement and to perform their obligations thereunder.²⁷⁹ Thus, even if the Treaties transfer competence over a particular area entirely to the European Union, the Member States must continue to perform their obligations under international agreements with third States. That is consistent with the well-established principle under international law that internal law cannot justify failure to perform an international agreement or affect the validity of that agreement.²⁸⁰ That also means that changes to the Treaties cannot result in the European Union substituting itself for the Member States in agreements which they have previously concluded with third States. Thus, a third State continues to be bound by an agreement with the Member State concerned and in principle full performance of that agreement is, in accordance with the principle of *pacta sunt servanda*,²⁸¹ due from both parties to the agreement.

276 — See, generally, judgment of 24 November 1992, *Poulsen and Diva Navigation*, C-286/90, EU:C:1992:453, paragraph 9.

277 — See also, for example, judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 71 (where the Court stated that since the powers previously exercised by the Member States in the field of application of an international agreement had not to date been assumed in their entirety by the European Union, the latter was not bound by that agreement).

278 — Judgment of 12 December 1972, *International Fruit Company and Others*, 21/72 to 24/72, EU:C:1972:115, paragraph 18. As regards other international agreements, see also, for example, judgments of 19 November 1975, *Douaneagent der Nederlandse Spoorwegen*, 38/75, EU:C:1975:154, paragraphs 16 and 21, and of 14 July 1976, *Kramer and Others*, 3/76, 4/76 and 6/76, EU:C:1976:114, paragraphs 44 and 45.

279 — See judgment of 4 July 2000, *Commission v Portugal*, C-84/98, EU:C:2000:359, paragraph 53.

280 — See Articles 27 and 46 of the 1969 and 1986 Vienna Conventions.

281 — According to Article 26 of the 1969 and 1986 Vienna Conventions, 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. The Court has previously held that that principle 'constitutes a fundamental principle of any legal order and, in particular, the international legal order': see judgment of 16 June 1998, *Racke*, C-162/96, EU:C:1998:293, paragraph 49.

382. The Member States are however required to perform their obligations under those agreements in a manner consistent with EU law and with the European Union's exercise of its newly acquired exclusive competences. Where it is not possible to do so without infringing EU law, the *Member States* must take the necessary action to bring those agreements into line with EU law. That obligation results both from the primacy of EU law and from the duty of sincere cooperation laid down in Article 4(3) TEU.

383. Article 351 TFEU, which concerns the relationship between agreements concluded by the Member States before 1 January 1958 (or before a particular Member State's accession) between one or more Member States and one or more third countries, on the one hand, and the provisions of the Treaties, on the other hand, confirms that reasoning.

384. The purpose of the first paragraph of Article 351 TFEU is '... to make it clear, in accordance with the principles of international law, that application of the Treaty is not to affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder ...'.²⁸²

385. The second paragraph of that provision states that, to the extent that such agreements are not compatible with the Treaties, the Member State(s) concerned must take all appropriate steps to eliminate the incompatibilities established. Those steps might require them to terminate the agreement. Where there is no incompatibility between the prior agreement and the Treaties, no obligation to take remedial action arises.

386. Article 351 TFEU applies to the relationship between, on the one hand, the bilateral agreements concluded between Singapore and various individual Member States prior to their accession to the European Union (Bulgaria, the Czech Republic, Hungary, Lithuania, Poland, the Slovak Republic and Slovenia: that is, certain of the agreements listed in Annex 9-D),²⁸³ and the Treaties, on the other hand. However, Article 351(1) TFEU does not as such govern the relationship between that first category of agreements and agreements subsequently concluded by Singapore and the European Union. Nor is it relevant to agreements concluded by other Member States.

387. So, instead of helping to advance the Commission's case, Article 351 TFEU clearly confirms that a Member State remains a party to international agreements which it has previously concluded and that it bears responsibility for eliminating any incompatibilities between those agreements and the Treaties. Article 351 TFEU applies irrespective of whether the European Union enjoys exclusive or shared competences over the area covered by those agreements.

388. There is no Treaty provision that catalogues the obligations of Member States that conclude international agreements with third States (or with international organisations) after their accession to the European Union. Their obligations result both from the primacy of EU law and from the duty of sincere cooperation laid down in Article 4(3) TEU. Thus, the Treaties do affect Member States' right to conclude such agreements after their accession to the European Union. They may do so only in areas falling within their competences and provided they comply with EU law.

282 — See, for example, judgments of 3 March 2009, *Commission v Austria*, C-205/06, EU:C:2009:118, paragraph 33 and the case-law cited; of 19 November 2009, *Commission v Finland*, C-118/07, EU:C:2009:715, paragraph 27 and the case-law cited; and of 3 March 2009, *Commission v Sweden*, C-249/06, EU:C:2009:119, paragraph 34 and the case-law cited.

283 — The other agreements listed in Annex 9-D were concluded between Singapore and the Belgo-Luxembourg Economic Union, France, Germany, the Netherlands and the United Kingdom and post-date either 1 January 1958 or (for the United Kingdom) the date of accession to the European Economic Community.

389. If the allocation of competences between the European Union and the Member States subsequently changes and the European Union acquires additional competences that are exclusive in nature, I see no reason why the rules laid down in Article 351 TFEU should cease to apply. Member States must still take the appropriate steps to ensure that existing agreements in the area concerned, which are now also binding on the European Union,²⁸⁴ are consistent with that new allocation of competences and whatever action the European Union subsequently takes in the exercise of its competences.

390. It seems to me that that conclusion is also fully consistent with international law.

391. The European Union and Singapore expressly refer, in footnote 19²⁸⁵ to Article 9.10.1 of the EUSFTA, to Article 59 of the 1969 Vienna Convention. That provision is binding, as a matter of treaty law, on all the Member States and Singapore. The European Union itself is not and cannot be bound by the 1969 Vienna Convention because it is not a State. The Court has nonetheless relied on this provision in resolving questions regarding successive agreements.²⁸⁶

392. Article 59 of the 1969 Vienna Convention deals with the (implied) abrogation of a treaty between parties resulting from the conclusion by all of those parties of a later treaty. According to that provision, '(1). A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty ...'. The Commission concludes from this that the European Union should now be considered to be a party to the earlier bilateral agreements.

393. Article 59 in no way departs from the basic principle that termination of a treaty (in the same way as its conclusion) requires the consent of the parties to that treaty.²⁸⁷ It primarily serves as a conflict rule for determining which treaty applies where there are successive agreements and all the parties to the earlier treaty are also parties to the later treaty but the earlier treaty is not terminated.²⁸⁸ Where the European Union decides to exercise its newly acquired competences and concludes an agreement with a third State, that third State is bound by that new agreement as well as by any other agreements that it previously concluded with Member States covering the same subject matter. That may obviously result in legal uncertainty for the third State. Where Article 59 of the 1969 Vienna Convention applies, that conflict is resolved in favour of the later agreement between the European Union and the third State. Where it does not apply, the third State must in principle comply with both agreements.

394. However, Article 59 of the 1969 Vienna Convention applies only if it is accepted that (as a matter of international law) the European Union has succeeded the individual Member States as regards the bilateral agreements listed in Annex 9-D. It does not offer general guidance on succession as regards treaties. The 1969 Vienna Convention does not prejudice any question arising, as regards a treaty,

284 — See point 379 above.

285 — This may appear as footnote 51 in certain language versions.

286 — See judgment of 2 August 1993, *Levy*, C-158/91, EU:C:1993:332, paragraph 19. There appears to be support in judicial decisions and academic writing for the proposition that Article 59 of the 1969 Vienna Convention is now part of customary international law. For a discussion of the relevant sources, see, for example, Dubuisson, F., 'Article 59 — Termination or suspension of the operation of a treaty implied by conclusion of a later treaty', in Corten, O., and Klein, P. (eds), *The Vienna Conventions on the Law of Treaties – A Commentary – Volume II* (Oxford University Press, 2011), p. 1325, at pp. 1329-1330.

287 — See, in that regard, Article 54 of the 1969 Vienna Convention. The 1969 Vienna Convention lays down exceptions (under certain conditions): in case of a material breach (Article 60); supervening impossibility of performance (Article 61); a fundamental change of circumstances (Article 62); the severance of diplomatic or consular relations (Article 63); and the emergence of a new peremptory norm of general international law (Article 64).

288 — This results clearly from Article 30 of the 1969 Vienna Convention on the application of successive treaties relating to the same subject matter.

from a succession of States.²⁸⁹ Nor does the 1978 Vienna Convention on Succession of States in respect of Treaties²⁹⁰ appear to address the specific situation at issue. (I would add that, whilst that convention has entered into force, only a few Member States are amongst the (limited) number of signatories.)

395. At the hearing, the Commission referred to what it described as a practice that is ‘well established’ and ‘accepted by a large number of third countries’. However, the few examples which it put forward all concerned what the European Union itself has done. The Commission offered no assistance as to whether other States consider such a practice to amount to a rule of international law.

396. Against that background, I can find no basis in international law (as it currently stands) for concluding that the European Union may automatically succeed to an international agreement concluded by the Member States, to which it is not a party, and then terminate that agreement. Such a rule would constitute an exception to the fundamental rule of consent in international law-making. Accepting the Commission’s position would mean that, as a result of changes in EU law and (possibly) the European Union’s exercise of its external competences, a Member State might cease to be a party to an international agreement, even though it was a State which had consented to be bound by that agreement and for which that agreement was in force.²⁹¹ The Member State’s rights and obligations under that agreement would become extinguished and, should the European Union decide to exercise its new competences, be replaced by rights and obligations assumed by the European Union with the third State, without the Member State having expressed its consent to those (fundamental) changes.

397. Finally, I note that the European Union has adopted secondary legislation (Regulation No 1219/2012) establishing transitional arrangements for bilateral investment agreements between Member States and third countries. However, that regulation is expressly stated to be without prejudice to the allocation of competences between the European Union and the Member States under the TFEU.²⁹² It is based on the assumption that the European Union has exclusive competence over all matters covered by those earlier bilateral agreements and offers a basis under EU law for the Member States to act as regards existing and (possibly) new agreements. That regulation does not, however, contemplate that the European Union itself may (together with the third State bound by the bilateral agreement) terminate those earlier agreements.

398. I therefore conclude that the Member States enjoy exclusive competence to terminate bilateral investment agreements which they previously concluded with third States. As a result, the European Union has no competence to agree to Article 9.10 of the EUSFTA.

289 — Article 73 of the 1969 Vienna Convention. In any event, where both the 1969 and 1986 Vienna Conventions may apply (for example, in the context, of the relationship between a bilateral agreement between two States and an agreement between a State and an international organisation), the 1969 Vienna Convention prevails (see Article 7 of the 1986 Vienna Convention).

290 — *United Nations Treaty Series*, vol. 1946, p. 3.

291 — See Article 2(1)(g) of the 1969 Vienna Convention.

292 — Article 1(1) and recital 3 of Regulation No 1219/2012.

Government procurement (Chapter Ten of the EUSFTA²⁹³)

Arguments

399. The *Commission* submits that the Court has already accepted, in Case C-360/93,²⁹⁴ that in principle the common commercial policy covers the conclusion of agreements on the reciprocal opening of public procurement markets for goods and for cross-border services. Since other modes of supply of services are now included within the scope of the common commercial policy, the same argument applies by extension to those other modes of supply. At a more general level, the Commission argues that international agreements governing access by, on the one hand, third country goods and services to the European Union's public procurement markets and, on the other hand, EU goods and services to third country public procurement markets relate specifically to international trade and thus have direct and immediate effects on international trade. The Commission adds that the (recent) Protocol amending the WTO Agreement on Government Procurement was concluded by the European Union acting on the basis of its exclusive competence over the common commercial policy.

400. The *other parties* have made no specific arguments in relation to Chapter Ten.

Analysis

401. Unlike the Commission, I do not consider that Case C-360/93²⁹⁵ is relevant to deciding whether Chapter Ten falls within the common commercial policy. In that case, the Court annulled two Council decisions, respectively (i) concluding an agreement between the (now) European Union and the United States of America on government procurement, and (ii) extending the benefit of the provisions of a Council directive on procurement procedures so as to cover the United States of America.²⁹⁶ It held that Article 113 EC was an inadequate legal basis for those decisions because at the time only the supply of cross-border services fell within the scope of the common commercial policy. However, both decisions also covered other modes of supply of services (the commercial presence or the presence of natural persons on the territory of the other Contracting Party).²⁹⁷ The Court therefore did not take a position on whether government procurement as such falls within the common commercial policy.

402. I nonetheless agree with the Commission that the objective of Chapter Ten is primarily to facilitate the reciprocal opening of the government procurement markets of the European Union and Singapore, within the limits laid down in the market access Schedule of Commitments for each Party. That chapter also seeks to enhance competition in government purchasing of goods, services and construction work and to guarantee transparency and procedural fairness in that area. It does so by expanding on the commitments already assumed by both Parties under the (revised) WTO Agreement on Government Procurement.²⁹⁸ In fact, large parts of that chapter correspond (word for word) to that WTO agreement.

293 — See points 69 to 76 of the Annex to this Opinion.

294 — Judgment of 7 March 1996, *Parliament v Council*, C-360/93, EU:C:1996:84.

295 — Judgment of 7 March 1996, *Parliament v Council*, C-360/93, EU:C:1996:84.

296 — Namely Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1).

297 — Judgment of 7 March 1996, *Parliament v Council*, C-360/93, EU:C:1996:84, paragraph 30.

298 — Singapore, the European Union and the 28 Member States are parties to the Agreement on Government Procurement. That agreement is included in Annex 4 to the WTO Agreement, which comprises a list of the plurilateral trade agreements. As a result, it forms part of the WTO Agreement only for those WTO Members that have accepted it (and is binding only on those Members) (Article II:3 of the WTO Agreement). Singapore, the European Union and the 28 Member States are also parties to the revised WTO Government Procurement Agreement that entered into force on 6 April 2014.

403. The conclusion that trade in goods and services — and therefore rules relating to market access for, and domestic regulations governing, such goods and services — are covered by the common commercial policy is not affected by the fact that those goods and services are purchased by public authorities rather than private entities.

404. However, under Chapter Ten, certain commitments specific to the transport sector also apply. Annex 10.E, Part 2 ('Union's commitments'), which sets out the services with respect to which the Union accepts commitments, expressly confirms that different forms of transport services are covered by that chapter. Furthermore, note 2 to that part of the annex states that the Union's commitments regarding services are subject to the limitations and conditions in the European Union's commitments under Chapter Eight.

405. To the extent that Chapter Ten applies to transport services and services inherently linked to those services, it follows from Article 207(5) TFEU that the European Union's competence over that chapter cannot be based on the common commercial policy.²⁹⁹

406. The Commission has not shown on what other basis the Union might enjoy exclusive competence over Chapter Ten.

407. As I see it, the European Union has shared competence over that chapter in so far as it applies to transport services and services inherently linked to those services. Chapter Ten ensures that procurements covered by that chapter are awarded in accordance with the principles of equal treatment, non-discrimination and transparency, and thus guarantees the opening-up of public procurement to competition in the European Union and in Singapore.³⁰⁰ That chapter thus contributes to establishing or ensuring the functioning of the internal market which, as Protocol No 27 on the internal market and competition makes clear, 'includes a system ensuring that competition is not distorted'.³⁰¹ In that sense, Chapter Ten can be regarded as necessary to achieving the objective of establishing the internal market set out in Article 26(1) TFEU, within the meaning of the second ground under Article 216(1) TFEU.³⁰² That external competence is, however, shared between the European Union and its Member States, in accordance with Article 4(2)(a) TFEU.

408. I therefore conclude that the provisions of Chapter Ten on government procurement fall within the scope of the European Union's exclusive competence under Article 207(1) TFEU, except in so far as they apply to procurement of transport services and services inherently linked to those services. To the extent that they apply to the latter categories of services, the provisions of Chapter Ten fall within the shared competence of the European Union.

Intellectual property (Chapter Eleven of the EUSFTA³⁰³)

Arguments

409. The *Commission* argues that all of Chapter Eleven falls within the scope of the common commercial policy because it concerns commercial aspects of intellectual property within the meaning of Article 207(1) TFEU. The European Union therefore enjoys, pursuant to Article 3(1) TFEU, exclusive competence with regard to that chapter.

²⁹⁹ — See also point 402 above.

³⁰⁰ — See Article 10.4 of the EUSFTA.

³⁰¹ — OJ 2012 C 326, p. 309.

³⁰² — That objective is also reflected in Article 3(3) TEU.

³⁰³ — See points 77 to 91 of the Annex to my Opinion.

410. The Commission finds support for its position in *Daiichi*,³⁰⁴ where the Court held that only those rules adopted by the European Union in the field of intellectual property ‘with a specific link to international trade are capable of falling within the concept of “commercial aspects of intellectual property”’;³⁰⁵ but that the TRIPS Agreement in its entirety is covered by that concept.³⁰⁶ The same is true for international agreements relating to intellectual property concluded outside the WTO that show a specific link to international trade. The Commission relies here on *Regione autonoma Friuli-Venezia Giulia and ERSA*.³⁰⁷

411. First, the Commission submits that most of the provisions of Chapter Eleven are based on the TRIPS Agreement. Second, Article 11.2.1 states that that chapter ‘aims to complement the rights and obligations of the Parties under the TRIPS Agreement and other international treaties in the field of intellectual property to which they both are Parties’. Third, Chapter Eleven is part of a broader trade agreement between the European Union and Singapore. That is reflected in Article 11.1.1. The objectives there set out show that setting common standards to protect intellectual property is not, as such, the EUSFTA’s goal. Rather, the aims are to reduce trade distortions and increase access to the market for products protected by intellectual property rights. Moreover, in the same way as the TRIPS Agreement, Chapter Eleven is subject to the dispute settlement provisions in Chapters Fifteen and Sixteen of the EUSFTA. Breaches of obligations under Chapter Eleven can therefore lead to trade sanctions.

412. As regards the references in Chapter Eleven to other international agreements relating to intellectual property, the Commission argues that the use of that (common) drafting technique is reasonable and justified, given that the overall objective is progressively to abolish obstacles to international trade and investment. Furthermore, most of the references are merely declaratory or in the form of ‘best-endavours commitments’, which do not produce any legal effects that might undermine the European Union’s competence as regards Chapter Eleven.

413. The *Parliament’s* position on Chapter Eleven corresponds with that of the Commission. It adds that there is no reference in Chapter Eleven to Article 61 of the TRIPS Agreement (which concerns criminal procedures and penalties).³⁰⁸

414. None of the *Council’s* arguments relate specifically to Chapter Eleven.

415. Many *Member States* submit that the European Union does not enjoy exclusive competence with respect to Chapter Eleven, which has no specific link to international trade and therefore cannot fall within the concept of ‘commercial aspects of intellectual property’. The judgment in *Daiichi*³⁰⁹ essentially concerned Article 27 of the TRIPS Agreement, rather than the whole of that agreement. Therefore, Article 207 TFEU cannot be interpreted as conferring exclusive competence on the European Union to conclude agreements covering all provisions in the TRIPS Agreement. If, contrary

304 — Judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520 (*‘Daiichi’*).

305 — The Commission refers to paragraph 52 of the judgment.

306 — The Commission refers to paragraph 53 of the judgment.

307 — Judgment of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia and ERSA*, C-347/03, EU:C:2005:285.

308 — Article 61 of the TRIPS Agreement states: ‘Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale’.

309 — Judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520.

to that submission, the Court's judgment did concern all provisions of the TRIPS Agreement, the Court's reasoning was based specifically on features of the WTO legal order that are absent from the EUSFTA. Even reading *Daiichi*³¹⁰ broadly, that judgment cannot extend to matters that are not directly regulated by the TRIPS Agreement.

416. Chapter Eleven of the EUSFTA and the TRIPS Agreement do not entirely overlap. In any event, the mere fact that a matter is governed by the WTO Agreement (of which the TRIPS Agreement is an integral part) does not mean that that matter is necessarily also covered by the common commercial policy. Article 207(1) TFEU should not be read as implying that all international agreements relating to intellectual property rights now fall within the common commercial policy.

417. Chapter Eleven incorporates both certain provisions of the TRIPS Agreement and provisions of other intellectual property agreements (negotiated outside the context of the WTO) for which the European Union cannot enjoy exclusive competence. Unlike the TRIPS Agreement, those agreements (primarily international agreements administered by the World Intellectual Property Organisation) were not concluded as part of trade agreements. Nor can they be classified as trade agreements within the meaning of *Regione autonoma Friuli-Venezia Giulia and ERSA*.³¹¹ Any relationship between those agreements and international trade is only indirect. The European Union may not affirm international commitments that concern only the Member States. Nor may the European Union require the Member States to apply the international agreements which they have concluded.

418. Furthermore, provisions relating to the application of protected rights, such as Articles 42 to 50 of the TRIPS Agreement (that is to say, the provisions of Section 2 of Part III on 'Civil and Administrative Procedures and Remedies') are not part of the common commercial policy. Those provisions concern judicial organisation and civil procedure. They have no specific connection to international trade.

419. The European Union also cannot enjoy exclusive competence because Chapter Eleven incorporates Article 61 of the TRIPS Agreement, which concerns criminal penalties. Criminal matters do not form part of commercial aspects of intellectual property.

420. Nor is the European Union competent to accept the obligations laid down in Article 11.4 of the EUSFTA in so far as that provision incorporates the Berne Convention for the Protection of Literary and Artistic Works,³¹² the WIPO Copyright Treaty,³¹³ and the WIPO Performances and Phonograms Treaty³¹⁴ which apply to moral rights. The European Union has no competence as regards moral rights; nor has there been any harmonisation in that area.

421. Articles 11.2 (which refers to the TRIPS Agreement and the Paris Convention for the Protection of Industrial Property³¹⁵) and 11.29 of the EUSFTA (which invokes the Patent Cooperation Treaty³¹⁶ and requires the Parties, where appropriate, to make all reasonable efforts to comply with Articles 1 to 16 of the Patent Law Treaty³¹⁷) will have effects on patents, which are a matter of shared competence (see, in particular, Article 118 TFEU and Regulations Nos 1257/2012 and 1260/2012).³¹⁸ Patent protection is a matter subject to enhanced cooperation between the Member States (with the

310 — Judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520.

311 — Judgment of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia and ERSA*, C-347/03, EU:C:2005:285.

312 — 1161 UNTS 30.

313 — 36 ILM 65.

314 — 36 ILM 76.

315 — 828 UNTS 305.

316 — 9 ILM 978.

317 — 39 ILM 1047.

318 — Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ 2012 L 361, p. 1), and Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (OJ 2012 L 361, p. 89).

exception of Spain, Italy and Croatia). Such a matter cannot be the subject of exclusive competence: the notion of enhanced cooperation is irreconcilable with the notion of exclusive competence. Another Member State also argues that the Commission has failed to explain how the European Union could comply with Article 11.29 of the EUSFTA³¹⁹ if the European Union were to be the sole signatory to the EUSFTA. Matters covered by the Patent Cooperation Treaty and the Patent Law Treaty are distinct from the substantive patent matters covered by the TRIPS Agreement.

422. Article 11.35 (on plant varieties) also does not fall within the common commercial policy. The International Convention for the Protection of New Varieties of Plants is not specifically linked to international trade. That convention provides for a *sui generis* form of intellectual property protection. The legal basis for the Council decision concluding that convention was Article 43 TFEU, which concerns agriculture.

423. Finally, there needs to be (near) uniformity between internal competence and external competence. Thus, because certain matters covered by Chapter Eleven are not harmonised, the European Union does not enjoy exclusive competence pursuant to Article 3(2) TFEU.

Analysis

The meaning of ‘commercial aspects of intellectual property’ in Article 207(1) TFEU

424. Following the entry into force of the Treaty of Lisbon, Article 207(1) TFEU now provides that the common commercial policy is to be based on uniform principles with regard also to ‘the commercial aspects of intellectual property’. The starting point for interpreting that expression is *Daiichi*.³²⁰

425. In its judgment in that case, the Court began by noting that, since EU primary law had evolved significantly, its past case-law on the TRIPS Agreement, including Opinion 1/94,³²¹ was no longer relevant for determining to what extent the TRIPS Agreement fell within the common commercial policy.

426. First, the Court found that, although the TRIPS Agreement did not deal with the detailed operation of international trade as such, it was an integral part of the WTO system and was one of the principal multilateral agreements on which that system is based.³²²

427. Second, the Court held that the specific character of the link between the TRIPS Agreement and international trade was illustrated by the fact that, under the rules governing the WTO dispute settlement mechanism, it was possible for one Member to use cross-suspension of concessions between the TRIPS Agreement and the other principal multilateral agreements of which the WTO Agreement consisted.³²³ In that regard, the Court relied on Article 22(3) of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. That provision identifies what concessions or other obligations may be suspended.

319 — In that provision, the Parties reaffirm their obligations under the Patent Cooperation Treaty and agree to make all reasonable efforts to comply with Articles 1 to 16 of the Patent Law Treaty in a manner consistent with their domestic laws and procedures.

320 — Judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520.

321 — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraphs 55 to 71. With the exception of specific measures aimed at avoiding the release into free circulation of counterfeit goods, the TRIPS Agreement fell outside the common commercial policy. The Court justified that position by the fact that intellectual property rights affect internal trade ‘as much as, if not more than, international trade’. However, at the time, the Treaty provision on the common commercial policy did not refer to the commercial aspects of intellectual property rights.

322 — Judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520, paragraph 53.

323 — See, to that effect, judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520, paragraph 54.

428. Third, the Court reasoned that the Treaty draftsmen could not have been unaware, when they included the phrase ‘commercial aspects of intellectual property’ in Article 207(1) TFEU, that the terms used corresponded almost literally to the actual title of the TRIPS Agreement.³²⁴

429. Fourth, the Court emphasised that the primary objective of the TRIPS Agreement was to strengthen and harmonise the protection of intellectual property on a worldwide scale. Thus, the preamble states that the objective of the agreement is to reduce distortions of international trade by ensuring, in the territory of each WTO Member, the effective and adequate protection of intellectual property rights.³²⁵ The context of the substantive rules is trade liberalisation, not harmonising the laws of the Member States.

430. I therefore consider that in *Daiichi* the Court held the entire TRIPS Agreement to fall within the common commercial policy. Its analysis was not limited to Article 27 of the TRIPS Agreement.

431. That said, I am not convinced that the reasoning in *Daiichi* can and should be transposed wholesale to the examination of the EUSFTA.

432. The fact that the terminology used in Article 207(1) TFEU (‘commercial aspects of intellectual property’) corresponds with the title of the TRIPS Agreement (‘trade-related aspects of intellectual property rights’) appears to be specific to that WTO agreement.

433. The inclusion of provisions on intellectual property in a particular trade agreement might indicate a specific connection between those provisions and international trade. However, the common commercial policy might also cover intellectual property provisions or agreements negotiated and concluded in a non-trade context.³²⁶ If the mere inclusion of a matter in such an agreement were to suffice to bring it within the common commercial policy, however, Member States would indeed be at serious risk of losing existing competences.³²⁷

434. The scope of the common commercial policy should also not, in my view, be defined by reference to the type of remedy for which dispute settlement rules provide.³²⁸

435. In my opinion, what matters for the purposes of Article 207(1) TFEU is whether an agreement containing provisions on intellectual property protection relates specifically to international trade. That should be determined by examining whether the agreement is essentially intended to promote, facilitate or govern trade (rather than harmonising the laws of the Member States);³²⁹ whether it has direct and immediate effects on such trade; and whether its objective is to reduce distortions of international trade by ensuring, in the territory of each Party, that the economic interests in the monopolies which intellectual property rights create are effectively and adequately protected. That is the essence of *Daiichi*.

324 — Judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520, paragraph 55.

325 — Judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520, paragraph 58.

326 — See, for example, Opinion of Advocate General Wahl in Opinion procedure 3/15 (Marrakesh Treaty on Access to Published Works), EU:C:2016:657, points 64 to 66; see also judgment of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia and ERSA*, C-347/03, EU:C:2005:285, paragraphs 81 to 83.

327 — See also point 102 above.

328 — Where the content of the obligation breached determines the content of the remedy (as with the retaliatory suspension of concessions or obligations), that might suggest a substantive connection between both types of obligation. However, the characteristic feature of cross-retaliation, to which the Court referred in *Daiichi*, appears to be that there is *not* necessarily such a connection. For the sake of completeness, I note that Article 15.12 of the EUSFTA provides for the possibility of a Party being entitled to suspend obligations arising from *any* provisions to which Chapter Fifteen (‘Dispute Settlement’) applies.

329 — See judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520, paragraph 51.

436. Here, I agree with Advocate General Wahl that intellectual property rights are, by their nature, mostly trade-related in that they are in essence exclusive rights that create monopolies which may limit the free circulation of goods or services.³³⁰ In a market economy, the primary relevance of those rights consists in their economic value. Where their exercise is essential to the commercial exploitation of the protected intellectual property in a cross-border market, such rights fall within the ‘commercial aspects of intellectual property’.³³¹ From that perspective, interests relating to the protection of those rights essentially become commercial interests.

437. That is not to say that all forms of protection of intellectual property rights are always and necessarily related to international trade. For example, the Court has described the specific subject matter of rights for the protection of literary and artistic property as being to ensure that both the moral and economic rights of the right holders are protected.³³² Moral rights complement economic rights in that they give an author ‘the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation’.³³³ They seek to protect the relationship of an author to his work. That relationship is essentially independent from the economic rights which the author may possess over that work. That also means that, where an agreement, such as the EUSFTA, covers the creation and protection of moral rights, the legal basis for concluding that agreement cannot be only Article 207(1) TFEU. Provisions on such rights are not ancillary to those regarding economic rights. To conclude otherwise would mean striking out the words ‘commercial aspects’ from Article 207(1) TFEU so that both commercial and non-commercial aspects of intellectual property fall within the common commercial policy.

438. A number of Member States ask the Court to limit its conclusion in *Daiichi* by excluding certain provisions of the TRIPS Agreement, such as Articles 42 to 50 and Article 61 of that agreement, from the scope of the common commercial policy. They argue that those provisions relate to judicial organisation, civil procedures and criminal matters. It would then follow that, since those provisions are nevertheless part of the EUSFTA, the European Union does not have exclusive competence over Chapter Eleven.

439. That argument, if right, would imply that each and every provision of an international agreement must satisfy the condition of a specific connection with international trade in order to be included in the common commercial policy. However, deciding whether the European Union has exclusive competence and thus identifying the proper legal basis for the action at issue must be based on objective factors, including the aim and the content of the action.³³⁴ The legal basis of a decision to conclude an international agreement is not the sum of the legal bases for each and every provision of that agreement. Thus, for example, in Case C-137/12,³³⁵ the fact that the international agreement there at issue included provisions relating to seizure and confiscation measures did not alter the Court’s

330 — Opinion of Advocate General Wahl in Opinion procedure 3/15 (Marrakesh Treaty on Access to Published Works), EU:C:2016:657, point 56.

331 — The 1986 Punta del Este Declaration, launching the Uruguay Round of trade negotiations which resulted in the establishment of the WTO, set out that connection as follows: ‘In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.’

332 — See judgments of 20 October 1993, *Phil Collins and Others*, C-92/92 and C-326/92, EU:C:1993:847, paragraph 20, and of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 107 and the case-law cited.

333 — Article 6bis (1) of the Berne Convention for the Protection of Literary and Artistic Works, as revised and amended. That moral right is *not* incorporated into the TRIPS Agreement (see Article 9(1) of the TRIPS Agreement). See also judgment of 20 October 1993, *Phil Collins and Others*, C-92/92 and C-326/92, EU:C:1993:847, paragraph 20.

334 — See point 93 above.

335 — See judgment of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675.

conclusion that the agreement fell within the scope of the common commercial policy. Those provisions were ‘... intended generally to ensure effective legal protection for conditional access services throughout the territories of the contracting parties’ and accordingly ‘... help[ed] to achieve the primary objective of the contested decision, read in conjunction with the Convention ...’.³³⁶

440. Finally, I do not consider that the European Union enjoys exclusive competence over the common commercial policy *only* where it has the corresponding competences in the internal market and has exercised those internal competences (resulting in harmonisation). That would imply reading a type of *ERTA*-based conditionality into Articles 3(1)(e) and 207(1) TFEU. However, the common commercial policy has both an internal and external component. Exercise of the European Union’s competence over the common commercial policy does not depend on whether the Union enjoys internal competence on some other basis and has exercised that competence. Under Article 3(1) TFEU, the European Union’s exclusive competence over that policy is not dependent on the conditions laid down in Article 3(2) TFEU.³³⁷

The European Union’s competence over Chapter Eleven of the EUSFTA

441. In my opinion, Chapter Eleven addresses both commercial and non-commercial aspects of intellectual property.

442. Examination of Article 11.1.1 and 11.1.2 of the EUSFTA shows that adequate and effective protection of intellectual property rights is seen as an instrument towards increasing the benefits of trade and investment. To that end, Chapter Eleven essentially sets out minimum standards for domestic regulation of intellectual property and obligations regarding the effective enforcement of those standards.

443. Thus, Chapter Eleven defines the scope of protection for each intellectual property right covered, lays down the term of protection and the means to obtain it, specifies forms of cooperation and sets out a range of obligations aimed at ensuring adequate legal protection for, and enforcement of, the rights covered by that chapter through appropriate remedies. In so doing, Chapter Eleven partly relies on the technique (also employed in the TRIPS Agreement³³⁸) of incorporating substantive intellectual property standards found in international agreements concluded outside the context of the EUSFTA.

444. As I see it, the fact that Chapter Eleven incorporates parts of the TRIPS Agreement as well as other international agreements concluded outside the context of the WTO subsequent to the entry into force of the TRIPS Agreement together with WTO decisions, instead of carrying over that language verbatim,³³⁹ cannot affect the allocation of competences. Either way, the source of the rights and obligations for the Parties to the EUSFTA is the EUSFTA itself. Indeed, I note that the use of incorporation in the TRIPS Agreement did not prevent the Court in *Daichi* concluding that the European Union was competent to conclude that agreement.

445. Unlike the Commission, I do not therefore distinguish between provisions of Chapter Eleven that incorporate other international agreements (or parts thereof) and those that refer to such agreements without making their provisions binding under the EUSFTA. The European Union’s competence under Article 207 TFEU is to define and implement the common commercial policy. The European Union may do so through the negotiation and conclusion of international agreements. The objectives of the

336 — See judgment of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675, paragraph 70; see also paragraph 72.

337 — See, in particular, point 109 above.

338 — See, for example, Article 2.1 of the TRIPS Agreement.

339 — As the draftsmen of the EUSFTA did, for example, for a significant part of Chapter Ten on government procurement: see point 402 above.

common commercial policy and external action in general may be achieved through many means, not all of which necessarily result in legally binding obligations. As the Court put it in Case C-660/13, in the context of a memorandum of understanding, ‘a decision concerning the signature of a non-binding agreement ... is one of the measures by which the Union’s policy is made ...’³⁴⁰

446. In my opinion, the conclusions the Court reached in *Daiichi*³⁴¹ also apply to Chapter Eleven in so far as it incorporates the content of the TRIPS Agreement with respect to the intellectual property rights covered by that chapter (meaning copyright and related rights; patents; trademarks; designs; layout-designs of integrated circuits; geographical indications; and protection of undisclosed information).

447. I see in principle no reason for reaching a different conclusion in respect of the other provisions regarding the minimum level of protection of intellectual property provided that they relate to the protection and effective enforcement of economic interests resulting from an intellectual property right. The policy pursued uses minimum standards of protection for the economic interests embedded in intellectual property to promote investment, reduce trade barriers, facilitate international trade and guarantee some equality of competitive conditions. That all forms part of a commercial policy.

448. Whilst plant variety rights are not covered by the TRIPS Agreement, it seems to me that that sub-section of Chapter Eleven (Article 11.35 of the EUSFTA, reaffirming the Parties’ obligations under the International Convention for the Protection of New Varieties of Plants³⁴²) should be examined in the same manner. That is because plant variety rights are economic rights: rights for a breeder to authorise, as regards a protected variety, inter alia, production or reproduction, conditions for propagation, offering for sale, selling or other marketing, exporting, importing and stocking.³⁴³

449. I can understand the objections to the European Union’s exclusive competence as regards Article 61 of the TRIPS Agreement. However, it seems to me that Chapter Eleven does not in fact incorporate Article 61 of the TRIPS Agreement. The text of Chapter Eleven does not expressly refer to that provision. Nor does it contain a section on criminal measures. Where that chapter incorporates the TRIPS Agreement, as regards certain intellectual property rights, I understand that cross-reference to relate to the ‘Standards concerning the availability, scope and use of intellectual property rights’ in Part II of the TRIPS Agreement, rather than to the provisions on ‘Enforcement of intellectual property rights’ in Part III of the TRIPS Agreement. Indeed, Chapter Eleven contains its own separate section on (civil) enforcement of intellectual property rights.

450. Provisions regarding transparency, effective protection of the rights guaranteed and enforcement of obligations form an integral part of the European Union’s common commercial policy. For that reason, I consider that the parts of Chapter Eleven regarding the civil enforcement of intellectual property rights and border measures also fall within the common commercial policy.³⁴⁴ The same applies with respect to provisions such as Article 11.52, which provides for forms of international cooperation.³⁴⁵

451. However, Chapter Eleven of the EUSFTA also appears to cover *non*-commercial aspects of intellectual property.

340 — Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paragraph 40. See also points 102 and 111 (and the case-law cited there) of my Opinion in that case (EU:C:2015:787).

341 — Judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520.

342 — 815 UNTS 89.

343 — Article 14 of the International Convention for the Protection of New Varieties of Plants.

344 — It has been argued that Article 11.36.3 of the EUSFTA makes it clear that Chapter Eleven does not preclude the Parties from applying their domestic laws or require them to change their domestic laws in order to apply intellectual property rights. However, I read that provision as meaning simply that compliance with Chapter Eleven does not necessarily require existing laws relating to the enforcement of intellectual property rights to be amended.

345 — See judgment of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675.

452. Unlike the TRIPS Agreement,³⁴⁶ Article 11.4 of the EUSFTA (regarding the protection granted for copyright and related rights) incorporates all of the rights and obligations set out in the Berne Convention. It thus includes Article 6bis of that convention, which protects moral rights. Article 6bis itself distinguishes moral rights from an author's economic rights.

453. Article 11.4 likewise incorporates into the EUSFTA the whole of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Article 3 of the former requires the Contracting Parties to apply the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in the WIPO Copyright Treaty. Article 5(1) of the latter identifies certain moral rights that a performer enjoys.

454. I have already emphasised the separate, and important, role played by moral rights.³⁴⁷ That role is clearly recognised in the EUSFTA. However, such rights are equally clearly non-commercial. I therefore conclude that, in so far as Chapter Eleven applies to non-commercial aspects of intellectual property, the competence of the European Union for concluding those parts of that chapter cannot be based on Article 207(1) TFEU.

455. The Commission has not sought to argue that the European Union nevertheless enjoys exclusive external competence on the basis of one of the grounds under Article 3(2) TFEU.

456. Since moral rights are independent from (and apply together with) economic intellectual property rights,³⁴⁸ I consider that provisions such as those contained in Chapter Eleven of the EUSFTA, in so far as they apply to non-commercial aspects of intellectual property rights, can be regarded as necessary to achieve the objectives of the internal market. The fact that there might not (yet) be harmonisation of moral rights does not undermine that conclusion.³⁴⁹ Those aspects of Chapter Eleven of the EUSFTA therefore fall within shared competence of the European Union and the Member States on the basis of Articles 4(2)(a), 26(1) and the second ground under Article 216(1) TFEU.

Competition and related matters (Chapter Twelve of the EUSFTA³⁵⁰)

Arguments

457. The *Commission* submits that Chapter Twelve essentially promotes and facilitates trade in goods and services between the European Union and Singapore. That chapter aims to prohibit anticompetitive practices with transnational dimensions, which are liable to impede effective market access or reduce the economic benefits of trade liberalisation that the EUSFTA intends to achieve. Furthermore, Chapter Twelve does not result in harmonisation and expressly refers to the relationship between anticompetitive behaviour and international trade. It therefore has direct and immediate effects on trade and falls entirely within the scope of the European Union's exclusive competence under Article 207(1) TFEU. The Commission also refers to several WTO agreements which incorporate elements of competition policy.

458. The *other parties* have made no specific arguments in relation to Chapter Twelve.

346 — The first sentence of Article 9.1 of the TRIPS Agreement provides that WTO Members must comply with Articles 1 to 21 of the Berne Convention and the Appendix thereto. However, the second sentence adds that WTO Members shall not have rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6bis of the Berne Convention or of the rights derived therefrom.

347 — See point 437 above.

348 — See point 437 above.

349 — See point 109 above.

350 — See points 92 to 97 of the Annex to my Opinion.

Analysis

459. I agree with the Commission that the link between international trade and competition policy already appears from certain provisions in WTO agreements.³⁵¹ That said, no comprehensive WTO policy on competition and trade has yet been adopted.³⁵²

460. By contrast, Chapter Twelve of the EUSFTA seeks to address comprehensively the harmful effects on trade between the European Union and Singapore which might result from public or private anticompetitive conduct or practices. Thus, it requires each party to maintain and enforce in its respective territories comprehensive legislation governing agreements between undertakings, abuses of a dominant position and concentrations between undertakings which result in a substantial lessening of competition or which significantly impede competition, provided they affect trade between the European Union and Singapore.³⁵³ Those types of anticompetitive conduct are considered to be liable to undermine the benefits of trade liberalisation which the EUSFTA aims to achieve, either by rendering rules on market access nugatory or by reducing the economic benefits which undertakings of one Party may hope to obtain by trading their goods or services in the territory of the other Party.³⁵⁴

461. Chapter Twelve is also directly connected to the regulation of trade in so far as it seeks to limit distortions of competition resulting from the possibility for each Party to establish or maintain public undertakings, or entrust undertakings with special or exclusive rights,³⁵⁵ and regulates prohibited subsidies and other subsidies.³⁵⁶

462. Article 12.7.2 of the EUSFTA illustrates that relationship between Chapter Twelve and international trade. That provision, which also incorporates Article 3 of the SCM Agreement (on prohibited subsidies),³⁵⁷ prohibits the granting of certain categories of subsidies ‘unless the subsidising Party upon request of the other Party has demonstrated that the subsidy in question does not affect trade of the other Party nor will be likely to do so’.³⁵⁸ Similarly, Article 12.8.1 of the EUSFTA requires the Parties to ‘use their best endeavours’ to address distortions of competition caused by other specific subsidies related to trade in goods and services ‘in so far as they affect or are likely to affect trade of either Party’ and to prevent such distortions.

463. The fact that Chapter Twelve results in some degree of harmonisation of competition rules does not mean that its objective is to approximate the laws of the Member States in that area in order to improve the functioning of the internal market. Rather, Chapter Twelve extends some of the core rules and principles of EU competition law to Singapore in order to regulate trade in goods and services with that third country.³⁵⁹ Those rules include Articles 101 and 102 TFEU, which govern agreements or concerted practices between undertakings and abuses by undertakings of their dominant position on a market, together with Council Regulation (EC) No 139/2004 on the control of

351 — A clear illustration is the SCM Agreement, which is included in Annex 1A to the WTO Agreement and supplements Article XVI of the GATT (according to Articles 12.5 and 12.7 of the EUSFTA, the EUSFTA provisions on subsidies build upon the SCM Agreement). The SCM Agreement’s purpose is to prohibit and regulate the granting of subsidies to undertakings in a manner liable to distort competition in favour of domestic production and to regulate actions which WTO Members may adopt to counter the effects of subsidies.

352 — Early WTO initiatives on the need for a multilateral framework to enhance the contribution of competition policy to international trade and development and for enhanced technical assistance and capacity-building in this area have not resulted in negotiations on competition law in the WTO. See ‘Working Group on the Interaction between Trade and Competition Policy (WGTC) — History, Mandates and Decisions’, available at: www.wto.org/english/tratop_e/comp_e/history_e.htm#cancun; and ‘The July 2004 package’, available at: www.wto.org/english/tratop_e/dda_e/dda_package_july04_e.htm.

353 — Articles 12.1.2 and 12.2 of the EUSFTA.

354 — See the last sentence of Article 12.1.1 of the EUSFTA.

355 — Article 12.3 of the EUSFTA.

356 — Articles 12.5 to 12.8 of the EUSFTA and Annex 12-A to the EUSFTA.

357 — See Article 12.7.1 of the EUSFTA.

358 — Article 12.7.2, second subparagraph, of the EUSFTA.

359 — See, by analogy, judgment of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675, paragraphs 66 and 67.

concentrations between undertakings.³⁶⁰ Similarly, the EUSFTA provisions reflect Article 106 TFEU (which concerns public undertakings, undertakings to which Member States grant special or exclusive rights and undertakings entrusted with the operation of services of general economic interest) and Articles 107 to 109 TFEU (which are aimed at avoiding distortions of competition arising from State aid).

464. It is true that Chapter Twelve also contains provisions concerning cooperation and coordination in law enforcement, the protection of business secrets and other confidential information, consultation between the Parties on competition and the exclusion of the application of Chapters Fifteen ('Dispute Settlement') and Sixteen ('Mediation') to matters arising under Chapter Twelve (except for Article 12.7 of the EUSFTA, on prohibited subsidies). Those provisions are all ancillary to the main substantive obligations set out in Chapter Twelve. They do not therefore undermine my conclusion that Chapter Twelve is aimed at promoting, facilitating or governing trade and thus has direct and immediate effects on trade in goods and services.

465. As regards the provision on transparency in the area of subsidies related to trade in goods and the supply of services (Article 12.9 of the EUSFTA), I refer to my analysis of Chapter Fourteen and of transparency-related provisions in other chapters.³⁶¹

466. I therefore conclude that Chapter Twelve falls entirely within the scope of the European Union's exclusive competence under Article 207(1) TFEU.

Non-tariff barriers to trade and investment in renewable energy generation (Chapter Seven of the EUSFTA³⁶²) and trade and sustainable development (Chapter Thirteen of the EUSFTA³⁶³)

Arguments

Non-tariff barriers to trade and investment in renewable energy generation

467. The *Commission* claims that the European Union has exclusive competence over Chapter Seven on the basis of Article 207(1) TFEU. On the one hand, that chapter requires the removal or reduction of barriers to trade (both tariffs and non-trade barriers) and investments and requires regulatory convergence in order to facilitate trade. On the other hand, it also has links with foreign direct investment: it precludes the Parties from requiring the formation of partnerships with local companies.

468. The *Parliament* and the *Council* have made no specific arguments in relation to Chapter Seven.

469. Some *Member States* submit that the objective of Chapter Seven is to reduce greenhouse gas emissions by promoting the production of renewable energy and that it therefore relates to environmental policy (Article 191 TFEU) rather than the common commercial policy.

360 — Regulation of 20 January 2004 (the EC Merger Regulation) (OJ 2004 L 24, p. 1).

361 — See points 508 to 513 below.

362 — See points 13 to 18 of the Annex to my Opinion.

363 — See points 98 to 112 of the Annex to my Opinion.

Trade and sustainable development

470. The *Commission* submits that, pursuant to Articles 3(1)(e) and 207(1) TFEU, Chapter Thirteen falls entirely within the European Union's exclusive competence. Competence over the common commercial policy is not limited to adopting instruments that have an effect only on the traditional aspects of external trade. Discrepancies in the levels of environmental and labour protection between States can have direct and immediate effects on international trade and investment. Lower standards of protection in one of the Parties can enhance trade and investment in its territory. Conversely, environmental and labour standards can become disguised trade barriers. As is apparent from, inter alia, Article 13.1.1 of the EUSFTA, the EUSFTA is aimed at developing and promoting international trade in such a way as to contribute to sustainable development, which comprises economic development, social development and environmental protection.

471. The Commission argues that Chapter Thirteen does not aim to create new substantive obligations concerning labour and environmental protection, but merely reaffirms certain existing international commitments. Its purpose is to ensure that conditions for trade and investment are not adversely affected as a result of different levels of protection.

472. The Commission sees no conflict between, on the one hand, Chapter Thirteen and, on the other hand, Article 3(5) TEU and Article 21(2) TEU. Article 3(5) TEU requires the European Union to incorporate concerns relating to 'sustainable development of the Earth' and 'free and fair trade' in its common commercial policy. Article 21(2) TEU also includes several objectives related to sustainable development.

473. As regards specific provisions of Chapter Thirteen, the Commission argues, in particular, that the fact that Article 13.3.3 of the EUSFTA contains a commitment to implement effectively certain principles concerning fundamental rights at work does not justify concluding that the Member States should participate in the conclusion of the EUSFTA. That provision does not prescribe the specific manner in which Singapore and the Member States have to ensure effective implementation of the International Labour Organisation ('ILO') Conventions that they have ratified. Furthermore, Articles 13.6.2 and 13.8(a) of the EUSFTA merely reaffirm commitments already made. Other provisions (such as Article 13.8(b) to (d)) aim to avoid distorting effects on international trade and are therefore inextricably linked with international trade.

474. The *Parliament* agrees in essence with the Commission.

475. The *Council* and several *Member States* take the view that, although Chapter Thirteen has a link with trade, it also regulates non-trade related aspects of labour, environmental protection and fishing, and aims to promote labour and environmental protection, as well as the conservation of marine biological resources under the common fisheries policy. Those provisions of Chapter Thirteen therefore cannot be based on Article 207 TFEU. The Council also submits that Article 13.3.3 and 13.3.4 of the EUSFTA entails minimum harmonisation of Member States' legislation in areas where the Treaties exclude it. Should those provisions be part of the common commercial policy, they would be incompatible with Article 207(6) TFEU.

476. Furthermore, the Council and several Member States maintain that Chapter Thirteen is clearly separate from the rest of the agreement. That is evidenced, in particular, by the specific dispute settlement system which applies to that chapter.³⁶⁴

³⁶⁴ — Article 13.17 of the EUSFTA.

477. Finally, the Council argues that the European Union's exclusive competence to enter into the commitments concerning trade in fish products in Article 13.8 of the EUSFTA results from Article 3(1)(d) TFEU (conservation of marine biological resources under the common fisheries policy) rather than Article 3(1)(e) TFEU (common commercial policy). The primary purpose of Article 13.8 is to ensure the conservation and management of fish stocks in a sustainable manner, and not to facilitate, regulate or govern trade.

Analysis

Trade and non-trade related objectives: general principles

478. The common commercial policy must be conducted having regard to the principles and objectives of the European Union's external action,³⁶⁵ which include the development of 'international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'.³⁶⁶ I therefore agree with the Commission that levels of environmental protection demonstrate links with international trade. Significant disparities may distort competition and trade; low standards in one market may result in competitive advantages for domestic undertakings and hence attract foreign investment, to the disadvantage of markets where standards are higher. Conversely, environmental protection standards may be manipulated to achieve protectionist goals.³⁶⁷ For those reasons, the promotion of sustainable development is among the objectives set out in the preamble to the WTO Agreement.³⁶⁸ Similar reasoning may be applied to the relationship between labour protection and international trade.

479. However, the fact that the common commercial policy may also pursue non-trade objectives does not mean that Chapters Seven and Thirteen automatically fall within the scope of Article 207(1) TFEU.

480. The Court has already offered some guidance on how to distinguish between measures coming within the scope of the common commercial policy (in that they are essentially intended to promote, facilitate or govern trade and thus have direct and immediate effects on trade),³⁶⁹ and measures relating to the European Union's environmental or social policies.

481. Thus, the Court has accepted that EU acts that also pursue objectives that are not purely economic (for example, social, environmental or humanitarian objectives) may fall within the scope of the common commercial policy.³⁷⁰ However, in every case, the international agreements at issue involved instruments of commercial policy: commercial arrangements for stock-piling in Opinion 1/78; the grant of tariff preferences in Case 45/86; the (conditional) importation of agricultural products in Case C-62/88; and labelling requirements (that is, technical barriers to trade) in Case C-281/01. Those are all instruments having direct and immediate effects on trade in the products or services concerned.

365 — Final sentence of Article 207(1) TFEU.

366 — Article 21(2)(f) TEU. See also Article 3(5) TEU and Article 11 TFEU; the latter provision states that environmental protection requirements must be 'integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'.

367 — Both possibilities are reflected in Article 13.1.3 of the EUSFTA.

368 — That objective has also been relevant to the Appellate Body's interpretation of, in particular, the general exceptions clause in Article XX of the GATT 1994. See, for example, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755, paragraphs 129 to 131 and 152 to 155, and Appellate Body Report, *India – Certain Measures relating to Solar Cells and Solar Modules*, WT/DS456/AB/R, adopted on 14 October 2016, not yet reported, paragraph 5.72.

369 — See judgment of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675, paragraph 57 and the case-law cited.

370 — See, in particular, Opinion 1/78 (International agreement on natural rubber) of 4 October 1979, EU:C:1979:224; and judgments of 26 March 1987, *Commission v Council*, 45/86, EU:C:1987:163; of 29 March 1990, *Greece v Council*, C-62/88, EU:C:1990:153; and of 12 December 2002, *Commission v Council*, C-281/01, EU:C:2002:761.

482. By contrast, international agreements not specifically related to trade fall outside the common commercial policy, even if they have an indirect connection with trade. Thus, in Opinion 2/00, the Court took into account the fact that the rules concerning transboundary movements of living modified organisms contained in the Cartagena Protocol on biosafety, annexed to the Convention on Biological Diversity, were not limited to movements for commercial purposes. It therefore concluded that the main purpose or component of that Protocol was environmental protection rather than the common commercial policy.³⁷¹ Likewise, the Court confirmed in Case C-411/06³⁷² that the aim of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste³⁷³ was not to define those characteristics of waste which would enable it to circulate freely within the internal market or as part of commercial trade with third countries, but more generally to provide a harmonised set of procedures whereby movements of waste could be limited in order to protect the environment.³⁷⁴ That regulation was therefore validly based on Treaty provisions concerning environmental protection.

483. Against that background, I shall examine whether Chapters Seven and Thirteen fall as a whole within the common commercial policy.

Non-tariff barriers to trade and investment in renewable energy generation

484. Chapter Seven of the EUSFTA aims to protect the environment (and incidentally human health) by ‘promoting, developing and increasing the generation of energy from renewable and sustainable non-fossil sources’, and thus reducing greenhouse gas emissions.³⁷⁵ However, its scope of application is limited to measures which ‘may affect trade and investment between the parties’ related to the generation of green energy.³⁷⁶ Whether the European Union enjoys exclusive competence over that chapter on the basis of Article 207(1) TFEU depends on whether it essentially aims to promote, facilitate or govern trade and thus has direct and immediate effects on trade.³⁷⁷

485. In my opinion, it does.

486. The provisions found in Chapter Seven are primarily concerned with regulating commercial policy instruments and eliminating trade and investment barriers. Thus, Article 7.4 is about removing barriers to trade and investment liable to hamper the generation of green energy, for example by prohibiting ‘local content requirements’ and compulsory formation of partnerships with local companies.³⁷⁸ Likewise, Article 7.5 of the EUSFTA seeks to remove technical barriers to trade in products for the generation of green energy. It is well established that international commitments aimed at ensuring that technical regulations and standards and conformity assessment procedures do not create unnecessary obstacles to international trade fall within the ambit of the common commercial policy.³⁷⁹ Articles 7.6 and 7.7 of the EUSFTA (concerning, respectively, exceptions and implementation and cooperation) are ancillary to the other commitments resulting from Chapter Seven and are therefore not decisive when ascertaining whether that chapter falls within the common commercial policy.

371 — Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraph 40.

372 — Judgment of 8 September 2009, *Commission v Parliament and Council*, C-411/06, EU:C:2009:518.

373 — OJ 2006 L 190, p. 1.

374 — Judgment of 8 September 2009, *Commission v Parliament and Council*, C-411/06, EU:C:2009:518, paragraph 72.

375 — Article 7.1 of the EUSFTA.

376 — Article 7.3 of the EUSFTA.

377 — See, in particular, point 103 above.

378 — Article 7.4(a) and (b) of the EUSFTA.

379 — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 33. The Court made that statement as regards the TBT Agreement which applies to, in particular, technical regulations and standards and procedures for assessing conformity with technical regulations and standards.

487. It follows that Chapter Seven aims to regulate and facilitate trade related to the generation of green energy, and thus has direct and immediate effects on trade. That chapter therefore falls entirely within the European Union's exclusive competence under Article 207(1) TFEU.

488. That conclusion is not called into question by the submission by a Member State that Chapter Seven is liable to undermine the right of each Member State, under the second subparagraph of Article 194(2) TFEU, to determine the conditions for exploiting its energy sources, its choice between different energy sources and the general structure of its energy supply. As is apparent from its wording, the sole purpose of Article 194(2) TFEU is to clarify the scope of the European Union's competence to adopt legislative acts for the purposes of implementing an energy policy. It cannot therefore limit the autonomous scope of the common commercial policy as laid down in Article 207(1) TFEU.

Trade and sustainable development

489. Some provisions in Chapter Thirteen clearly have a direct and immediate link with the regulation of trade. Thus, Article 13.6.4 of the EUSFTA specifically addresses the issue of disguised restrictions on trade which may result from measures implementing multilateral environmental agreements. Likewise, the purpose of Article 13.12 of the EUSFTA is, in essence, to prevent a Party affecting trade or investment by waiving or otherwise derogating from its environmental and labour laws, or not applying those laws effectively. Other examples are Article 13.11.1 of the EUSFTA, which aims specifically to facilitate and promote trade and investment in environment-friendly goods and services, and Article 13.11.2, whereby the Parties agree to pay special attention to facilitating the removal of obstacles to trade or investment concerning climate-friendly goods and services.

490. However, despite the Parties' stated intention not to harmonise labour or environmental standards (Article 13.1.4 of the EUSFTA), a significant number of provisions in Chapter Thirteen neither *impose a form of trade conditionality* (by enabling the other Party to adopt trade sanctions in case of non-compliance or by making a specific trade benefit dependent on compliance with labour and environmental standards) nor *otherwise regulate the use of commercial policy instruments* as a means to promote sustainable development.

491. Thus, Articles 13.3.1, 13.3.3, 13.4, 13.6.2 and 13.6.3 of the EUSFTA essentially seek to achieve in the European Union and Singapore minimum standards of (respectively) labour protection and environmental protection, *in isolation* from their possible effects on trade. Those provisions therefore clearly fall outside the common commercial policy. Unlike the 'essential elements' clauses found in some EU international trade agreements,³⁸⁰ which impose an obligation to respect democratic principles and human rights, breach of the labour and environmental standards to which those provisions of the EUSFTA refer does not give the other Party the right to suspend trade benefits resulting from the EUSFTA. Articles 13.16 and 13.17 of the EUSFTA do not authorise a Party to suspend trade concessions granted to the other Party if the latter does not comply with commitments under Chapter Thirteen.³⁸¹ Furthermore, unlike the special incentive arrangement for sustainable development and good governance under the so-called GSP+ scheme,³⁸² those provisions are also not aimed at granting Singapore trade concessions provided it meets those standards.

380 — See, for example, Article 1 of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part (OJ 2012 L 354, p. 3).

381 — The terms of reference of the Panel of Experts, to which Article 13.17 of the EUSFTA refers, were only to 'issue a report ... making recommendations'. See also points 523 to 535 below.

382 — Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ 2012 L 303, p. 1), Articles 9 to 16.

492. Article 13.8 of the EUSFTA concerns ‘Trade in Fish Products’. I accept that the obligation in Article 13.8(b) to introduce effective measures to combat illegal, unreported and unregulated fishing may result, inter alia, in the adoption of commercial policy instruments or include action aimed at eliminating the use of such instruments (such as subsidies that contribute to overfishing and overcapacity and are linked to illegal, unreported and unregulated fishing). That provision also mentions examples of such measures.

493. By contrast, the other points in Article 13.8 of the EUSFTA aim essentially to contribute to sustainable conservation and management of fish stocks by the Parties. For example, Article 13.8(a) of the EUSFTA requires the Parties, in general terms, to comply with long-term conservation measures and sustainable exploitation of fish stocks as defined in the international instruments that they have ratified and to uphold the principles of the UN Food and Agriculture Organisation and relevant UN instruments relating to these issues. Compliance with those standards is not a prerequisite for obtaining trade benefits. Nor can the infringement of those commitments result in the suspension of trade concessions under the EUSFTA.³⁸³ Article 13.8(c) and (d) of the EUSFTA likewise does not have direct and immediate links with international trade. It therefore does not fall within the common commercial policy.

494. What are the implications for the issue of competence?

495. In my opinion, Articles 3(5) and 21 TEU and Articles 9 and 11 TFEU, to which the Commission refers, are not relevant to resolving the issue of competence. The purpose of those provisions is to require the European Union to contribute to certain objectives in its policies and activities. They cannot affect the scope of the common commercial policy laid down in Article 207 TFEU. For the same reason, it is immaterial whether, as the Commission submits, the fundamental rights to which Article 13.3.3 of the EUSFTA refers are compatible with universal labour standards as protected by the Charter of Fundamental Rights of the European Union. That submission goes to the substantive compatibility of the EUSFTA with fundamental rights. It cannot modify the scope of the European Union’s competence.³⁸⁴

496. Nor do I accept the Commission’s submission that, in essence, Articles 13.3.3 and 13.6.2 of the EUSFTA are not ‘sufficiently prescriptive’ to be taken into account when examining the allocation of competence between the European Union and the Member States as regards Chapter Thirteen. The Commission relies here on Case C-377/12,³⁸⁵ in which the Court held that the provisions relating to readmission, transport and the environment in the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part,³⁸⁶ did not ‘contain obligations so extensive that they [could] be considered to constitute objectives distinct from those of development cooperation that are neither secondary nor indirect in relation to the latter objectives’.³⁸⁷ Since migration, transport and the environment *form an integral part of the European Union’s development policy*, to require a development cooperation agreement including those matters to be based on parts of the Treaties other than the provision concerning development policy would in practice render devoid of substance the competence and procedure prescribed in that provision.³⁸⁸ By contrast, neither fundamental rights at work nor standards of environmental protection form an integral part of the common commercial policy. Case C-377/12 does not therefore assist when examining Chapter Thirteen of the EUSFTA.

383 — See Articles 13.16 and 13.17 of the EUSFTA and point 490 above.

384 — That position is reinforced by Article 51(2) of the Charter, which provides that the Charter does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties.

385 — Judgment of 11 June 2014, *Commission v Council*, C-377/12, EU:C:2014:1903.

386 — The Union is a party to that agreement as a result of Council Decision 2012/272/EU of 14 May 2012 (OJ 2012 L 134, p. 3).

387 — Judgment of 11 June 2014, *Commission v Council*, C-377/12, EU:C:2014:1903, paragraph 59.

388 — Judgment of 11 June 2014, *Commission v Council*, C-377/12, EU:C:2014:1903, paragraphs 38 and 49 and the case-law cited.

497. In my opinion, Chapter Thirteen has four components. The first component comprises the provisions falling under the common commercial policy. The second and third components comprise the provisions concerning, respectively, labour protection standards and environmental protection standards. The fourth component concerns sustainable conservation and management of fish stocks.

498. None of those components can be regarded merely as a necessary adjunct to ensure the effectiveness of the other components of the EUSFTA or of Chapter Thirteen, nor can they be regarded as being extremely limited in scope. In particular, I cannot accept the Commission's argument that Article 13.6.2 of the EUSFTA (which requires effective implementation of the multilateral environmental agreements to which the European Union and Singapore are party) involves no new international obligation for the Parties. It is true that that provision merely refers to pre-existing multilateral commitments of the Parties concerning environmental protection. However, its effect is to incorporate those commitments into the EUSFTA and therefore make them applicable between the European Union and Singapore *on the basis of the EUSFTA*. Article 13.6.2 thus clearly results in a new obligation for the Parties, enforceable in accordance with the EUSFTA.

499. It follows that the European Union's decision to enter into commitments under each of the four components must be founded on a distinct legal basis.

500. As regards the first component, the European Union's exclusive competence results from Articles 3(1)(e) and 207(1) TFEU. In accordance with Articles 3(1)(d) and 43(2) TFEU,³⁸⁹ the fourth component falls within the European Union's exclusive competence over the conservation of marine biological resources under the common fisheries policy.

501. By contrast, the second and third components in principle fall within the shared competence of the European Union.

502. The provisions concerning labour protection standards (second component) can be regarded as necessary in order to achieve the social policy objectives set out in Article 151 TFEU relating to, in particular, those listed in Article 153(1)(a), (b) and (c) TFEU (improvement of the working environment to protect workers' health and safety; working conditions; and social security and social protection of workers). The European Union therefore has shared competence over that component as a result of Articles 4(2)(b), 151 and 153(1) TFEU and the second ground under Article 216(1) TFEU.

503. As regards the provisions concerning standards of environmental protection (third component), it suffices to note that the European Union is competent, pursuant to Article 191(1) TFEU, to pursue an environmental policy aimed at preserving, protecting and improving the quality of the environment. The European Union's external competence to pursue environmental policies, which results both from Article 191(4) TFEU³⁹⁰ and the first ground under Article 216(1) TFEU, is shared with the Member States in accordance with Article 4(2)(e) TFEU.

504. The Commission has not argued that the European Union enjoys exclusive external competence over the second and third components on the basis of Article 3(2) TFEU. It is therefore not for the Court to explore whether the third ground under that provision might conceivably apply to those components.³⁹¹

389 — Article 43(2) TFEU constitutes the legal basis for adopting the provisions necessary for the pursuit of, in particular, the common fisheries policy, to which Article 3(1)(d) TFEU refers.

390 — Article 191(4) TFEU confers upon the European Union competence to enter into agreements with third countries governing environmental cooperation in the areas for which it enjoys competence.

391 — See, to that effect, the judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 75.

Transparency and administrative and judicial review of measures having general application (Chapter Fourteen of the EUSFTA³⁹² and related provisions of other chapters³⁹³)

Arguments

505. The *Commission* submits that Chapter Fourteen falls within the European Union's exclusive competence over the common commercial policy because: (i) the objective of that chapter is to facilitate trade and investment; (ii) the provisions apply only with respect to measures relating to matters that are covered by other chapters of the EUSFTA; and (iii) the provisions seek to clarify and improve existing provisions in the WTO agreements, in particular Article X of the GATT 1994. Furthermore, those provisions also reflect basic due process considerations that are part of the general principles of EU law.

506. Neither the *Parliament* nor the *Council* has made specific arguments in relation to Chapter Fourteen.

507. Few *Member States* have taken a position on Chapter Fourteen. The arguments put forward are that, on the one hand, Chapter Fourteen concerns the exercise of national administration, recourse to administrative procedures and judicial protection as regards administrative measures and, on the other hand, that the Commission's argument presupposes that the European Union enjoys exclusive competence as regards all other parts of the EUSFTA. In so far as Chapter Fourteen is aimed at giving effect to other parts of the EUSFTA for which the European Union's competence is not exclusive, however, it cannot fall within the European Union's exclusive competence. Nor do the provisions of Chapter Fourteen themselves specifically relate to international trade. Finally, matters related to justice in Articles 14.5 and 14.6 of the EUSFTA do not fall within either the exclusive or the shared competences of the European Union: they fall outside the scope of Article 81(2) TFEU (concerning judicial cooperation in civil matters).

Analysis

508. Chapter Fourteen sets out transparency, consultation and better administration obligations that apply to laws, regulations, judicial decisions, procedures and administrative rulings that may have an impact on any matter covered by the EUSFTA (so-called 'measures of general application').³⁹⁴ That chapter is included in particular because of the impact of regulatory environments on trade and investment between the Parties.³⁹⁵ The obligations in Chapter Fourteen apply together with similar obligations, having similar objectives, found in other chapters of the EUSFTA.³⁹⁶

509. Thus, Chapter Fourteen applies horizontally to all chapters of the EUSFTA and *only* as regards matters covered by those chapters. I therefore consider that the main thrust of Chapter Fourteen is *not* to regulate administrative procedures and judicial protection as such. The obligations in that chapter are triggered solely where measures of general application have an impact on matters covered by the EUSFTA. Their objective and function are to render the regulation of the substantive matters

392 — See points 113 to 118 of the Annex to my Opinion.

393 — See points 7, 8, 10, 12, 15, 35, 37, 41, 42, 58, 72 to 75, 82, 88, 89, 95 and 96 of the Annex to my Opinion.

394 — Article 14.1(a) of the EUSFTA.

395 — See Article 14.2.1 of the EUSFTA.

396 — See footnote 393 above. To the extent that those chapter-specific obligations regarding transparency and administrative and judicial review differ from the provisions in Chapter Fourteen, those more specific rules in other chapters are to prevail (Article 14.8 of the EUSFTA).

covered by the EUSFTA effective, operational and enforceable.³⁹⁷ The provisions of Chapter Fourteen (and more specific provisions regarding the same subject matter in other chapters) do not apply independently. They are by their nature ancillary; at the same time, however, they are essential to the smooth functioning of the EUSFTA.

510. Furthermore, transparency, consultation and administration of measures of general application regarding matters falling within the common commercial policy are essential to reduce or avoid obstacles to trade. Indeed, a lack of transparency, fairness and legal certainty can in itself constitute an obstacle to trade.³⁹⁸ If due process is not accorded to traders and investors and no guarantees are in place to ensure that those traders and investors, as well as governments become acquainted with and adapt to measures of general application relating to trade and investment, the benefits of trade liberalisation obtained from the substantive rules in the EUSFTA might be lost. In addition, conditions of competition may be affected if those measures are not in fact applied or, in the absence of sufficient safeguards, when specific transactions cannot in practice be given effect to. Traders might abandon trading or investing or their transactions might be delayed or rendered more expensive.

511. Against that background, it seems to me that the common commercial policy covers rules and decisions on publication, administration and administrative and judicial review of measures of general application that have an impact on matters covered by the EUSFTA that are specifically connected to international trade or investment. Whilst obligations in that regard do not apply to the substantive content of those measures, they are, in the same way as substantive obligations, essential to achieving the objective of promoting and facilitating trade and investment and they have direct and immediate effects on trade.

512. In my opinion, those obligations perform a similar function in the context of external policies other than the common commercial policy that are relevant to the matters covered by the EUSFTA. In concluding agreements with third States as regards other matters falling within the shared or exclusive competence of the European Union (such as transport, environmental protection or the promotion of portfolio investment), the European Union's competence must include power to decide on provisions that are aimed at ensuring the effectiveness of the commitments to which the European Union agrees. Thus, for example, substantive commitments regarding environmental protection might be undermined if a third country were to deny EU nationals access to judicial review as regards environmental measures of general application where such judicial review is available to its own nationals in comparable circumstances.

513. I therefore consider that the allocation of competences over provisions regarding transparency and administrative and judicial review of measures of general application (in Chapter Fourteen or in other chapters) must follow the allocation of substantive competences.

397 — See, for example, judgment of 22 October 2013, *Commission v Council*, C-137/12, EU:C:2013:675.

398 — It is for that reason that the WTO agreements contain a broad set of obligations aimed at guaranteeing protection against such obstacles as regards preparation, adoption, entry into force, publication, implementation, notification and administration and (administrative and judicial) review of measures. See, for example, Article X of the GATT 1994.

Dispute settlement and mediation (Chapters Nine, Section B,³⁹⁹ and Chapters Thirteen, Fifteen and Sixteen of the EUSFTA⁴⁰⁰)

Arguments

514. The *Commission* contends that the European Union has exclusive competence with regard to all the ISDS provisions in Section B of Chapter Nine. That competence follows necessarily from competence concerning substantive provisions of the agreement which are applied and interpreted when the dispute settlement mechanism is activated. That also means that, in principle, the European Union is solely responsible, as a matter of international law, for any breach of those provisions. The European Union may decide, as a matter of EU law, to apportion the financial responsibility linked to the ISDS mechanism between the European Union and the Member States and to empower the Member States to act as respondents (and thus possibly bear financial responsibility) where they are responsible for the contested treatment, unless that treatment is required by EU law. That is precisely the purpose of Regulation (EC) No 912/2014,⁴⁰¹ which applies to all agreements to which the European Union is a party and that provide for an ISDS mechanism. The rules on apportionment contained in that regulation would apply when the European Union determines, in accordance with Article 9.15.2 of the EUSFTA, the respondent in an investor-to-State dispute.

515. The Commission has advanced no specific arguments in relation to Articles 13.16 ('Government Consultations') and 13.17 ('Panel of Experts') of the EUSFTA.

516. As regards Chapters Fifteen ('Dispute Settlement') and Sixteen ('Mediation'), the Commission submits that those chapters are necessary to ensure the effective enforcement of rights and obligations under the EUSFTA and follow settled international practice. Because the European Union enjoys exclusive competence over the parts of the EUSFTA to which Chapters Fifteen and Sixteen apply, it also enjoys exclusive competence over those chapters.

517. The *Parliament* in essence shares the Commission's position.

518. The *Council* argues that, since the European Union has no competence to legislate in relation to diplomatic protection (Article 9.28 of the EUSFTA), the European Union cannot in any event have exclusive competence to sign and conclude the EUSFTA. Notwithstanding Article 23(1) TFEU, the decision whether or not to give diplomatic protection in a particular case belongs to the Member States. In the alternative, the Council submits that the European Union's competence as regards Article 9.28 of the EUSFTA is limited to disputes involving foreign direct investment.

519. The Council has made no specific arguments in relation to Chapters Fifteen and Sixteen.

520. Whilst most of the *Member States* having filed written observations have addressed Section B of Chapter Nine (extensively), their observations on Chapters Fifteen and Sixteen are much more limited. At the hearing, some Member States focused on the provisions of Article 9.28 of the EUSFTA, which concern diplomatic protection.

399 — See points 61 to 67 of the Annex to my Opinion.

400 — See points 111, 112 and 119 to 123 of the Annex to my Opinion.

401 — Regulation of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-State dispute settlement tribunals established by international agreements to which the European Union is party (OJ 2014 L 257, p. 121).

521. As regards Section B of Chapter Nine, they first argue that, since the European Union has no exclusive competence over types of investment other than foreign direct investment, it cannot enjoy exclusive competence as regards that section, which applies to both foreign direct investment and other types of investment. Furthermore, since the EUSFTA provides for a dispute settlement mechanism in which Member States may be designated as respondents, the constitutional laws of certain Member States may require them to participate in the conclusion of that agreement.

522. The Council and the Member States have made no specific arguments in relation to Articles 13.16 and 13.17 of the EUSFTA, other than to rely on Article 13.17 in support of their position on the European Union's competence over the substantive provisions of Chapter Thirteen.

Analysis

523. In my view, the allocation of competences as regards mechanisms for resolving disputes concerning the interpretation and application of various provisions of the EUSFTA is accessory to the allocation of substantive competences. That is true both of Chapters Fifteen and Sixteen, which apply on a horizontal basis, and of other chapters which provide for specific forms of dispute settlement (such as Section B of Chapter Nine on investment and Chapter Thirteen on trade and sustainable development).

524. That allocation of competences between the European Union and the Member States is governed by the Treaties only. Internal rules of law, even of a constitutional nature, cannot alter that allocation.⁴⁰²

525. It follows from Opinions 1/91, 1/09 and 2/13 that, where the European Union has competence as regards the substantive provisions of an international agreement, it also enjoys competence as regards the dispute settlement mechanisms, which aim to ensure that those provisions are effectively enforced. Such mechanisms merely help to achieve the primary objectives of the agreement and are thus accessory to the (substantive) rules to which they relate.⁴⁰³

526. That conclusion applies both to the horizontal dispute settlement mechanism in Chapter Fifteen and to the subject-specific mechanisms for resolving disputes laid down in Section B of Chapter Nine and in Chapter Thirteen.⁴⁰⁴ Unlike some Member States, I consider that the fact that the ISDS mechanism gives an investor of one Party the right to initiate arbitration proceedings against the other Party has *in itself* no bearing on the allocation of competences between the European Union and the Member States. That feature reflects the fact that the Parties have chosen to opt for that type of dispute settlement as regards investment, instead of (or together with) inter-State dispute settlement. It therefore concerns the *manner* in which external competence is exercised rather than the existence and nature of that external competence.

527. The same reasoning applies to mediation mechanisms such as those laid down in Annex 9-E (specifically in relation to investor-State disputes) and in Chapter Sixteen. These also seek to ensure effective implementation of the provisions of the EUSFTA to which they apply.

402 — Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 20.

403 — See Opinions 1/91 (First Opinion on the EEA Agreement) of 14 December 1991, EU:C:1991:490, paragraphs 40 and 70; 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011, EU:C:2011:123, paragraph 74; and 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 182.

404 — It also applies, by analogy, to the specific provisions concerning dispute settlement in Articles 13.16 and 13.17 of the EUSFTA.

528. My conclusion is not undermined by the argument (raised by one Member State) that, whilst Article 9.16 of the EUSFTA provides for an arbitration procedure under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), the European Union cannot become a party to the Convention for the Settlement of Disputes concerning investments between States and nationals of other States, signed on 18 March 1965. It is true that only States can become parties to that convention.⁴⁰⁵ However, the Court has already held that an obstacle under international law to the capacity of the European Union to enter into an international agreement does not concern the scope of the European Union's external competence, which is to be judged solely by reference to EU law. Such an obstacle does not preclude the European Union from exercising its external competence through its Member States acting jointly in its interest.⁴⁰⁶ In any event, ICSID arbitration is only one of the dispute settlement mechanisms mentioned in Article 9.16 of the EUSFTA.

529. Because dispute settlement and mediation mechanisms are ancillary in nature, the allocation of competences between the European Union and the Member States for such mechanisms is necessarily the same as for the substantive provisions to which they relate. In other words, those mechanisms are not in themselves capable of altering the allocation of competences between the European Union and its Member States.

530. I am therefore not convinced by the argument that, because the Member States may find that they are respondents in a dispute concerning investment and thus possibly bear the financial burdens resulting from a decision in such a dispute,⁴⁰⁷ the European Union cannot have exclusive competence for agreeing to Section B of Chapter Nine of the EUSFTA.

531. Moreover, the rules on the apportionment of financial responsibility between the European Union and its Member States as set out in Regulation No 912/2014 do not affect the allocation of competences under the Treaties. The introductory part of Article 1(1) of Regulation No 912/2014 expressly states that that regulation is 'without prejudice to the allocation of competences established by the TFEU';⁴⁰⁸ and that regulation itself must comply with the Treaty rules on competence.⁴⁰⁹

532. In any event, the Court has already held that it is of little importance, as regards the allocation of competences between the European Union and its Member States for concluding an international agreement, that the obligations and financial burdens inherent in the execution of the agreement are borne directly by the Member States.⁴¹⁰ Internal or external EU action within the sphere of the European Union's competences does not necessarily involve a transfer to the EU institutions of the obligations and financial burdens which such action may involve; those rules are designed merely to substitute for the unilateral action of the Member States a common action based upon uniform principles on behalf of the whole European Union.⁴¹¹

533. As I see it, that reasoning applies a fortiori to financial burdens imposed on a Member State as a result of the adoption by an arbitral tribunal of a final award concluding that that Member State has applied measures incompatible with the rules of the EUSFTA on investment protection.

405 — Article 67 of that convention.

406 — See, to that effect, Opinion 2/91 (ILO Convention No 170) of 19 March 1993, EU:C:1993:106, paragraphs 3 to 5. In that case, the ILO Constitution precluded the (then) European Community from itself concluding Convention No 170.

407 — That results from Articles 9.11.2 and 9.15.2 of the EUSFTA, in conjunction with Article 9.24, under which the tribunal may award monetary damages and any applicable interest, and restitution of property.

408 — See also the Joint declaration by the European Parliament, the Council and the Commission annexed to Regulation No 912/2014.

409 — In any event, Article 9.15.2 of the EUSFTA, under which the European Union is to determine the respondent within two months from the date of receipt of the notice of intent to arbitrate, does not refer (either expressly or by implication) to that regulation.

410 — Opinion 1/75 (OECD Understanding on a Local Cost Standard) of 11 November 1975, EU:C:1975:145, p. 1364. See also Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 21.

411 — See, to that effect, Opinion 1/75 (OECD Understanding on a Local Cost Standard) of 11 November 1975, EU:C:1975:145, p. 1364.

534. For the sake of completeness, I should add that, in Opinion 1/78, the Court held in essence that, where an international agreement lays down a financing mechanism which constitutes ‘an essential feature’ of the agreement, that fact was in itself capable of justifying participation by the Member States in its conclusion, in so far as the ensuing financial burdens were directly charged to the budgets of the Member States.⁴¹² I do not consider that that reasoning applies to the financial burdens that may result for the Member States from the ISDS mechanism under the EUSFTA. Such financial burdens, should they arise, would result from a Member State’s improper performance of obligations under the EUSFTA. They cannot therefore be compared to those examined by the Court in Opinion 1/78.

535. I therefore conclude that the European Union has competence to agree to the dispute settlement and mediation mechanisms laid down in Chapter Nine, Section B, and Chapters Thirteen, Fifteen and Sixteen of the EUSFTA. As a result of the European Union’s shared competence over certain provisions of the EUSFTA to which those chapters apply, the European Union shares that competence with the Member States. In so far as the European Union enjoys exclusive competence as regards certain provisions of the EUSFTA, it alone can agree to Chapter Nine, Section B, Articles 13.16 and 13.17, and Chapters Fifteen and Sixteen of the EUSFTA.

536. I would emphasise that my conclusion concerns competence alone. I have not examined, and express no view on the material compatibility of Section B of Chapter Nine with the substantive rules of the Treaties. That issue falls outwith the scope of the Commission’s request for an Opinion.⁴¹³

537. Finally, I am not convinced by the argument that the European Union *cannot* enjoy exclusive competence over Section B of Chapter Nine because of Article 9.28 of the EUSFTA. The main objection to that provision is that the European Union has no competence as regards diplomatic protection.

538. Since the point is of fundamental relevance only if the Court should hold that the European Union enjoys exclusive competence over all other parts of the EUSFTA, I shall assume, for the purpose of the discussion which follows, that to be the case.

539. Diplomatic protection concerns the processes through which the State of nationality of an injured person invokes the responsibility of another State for injury to one of its nationals caused by the latter’s wrongful action or omission so as to secure protection of that national and obtain reparation.⁴¹⁴ Or, as the Permanent Court of International Justice has put it, ‘by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law’.⁴¹⁵ It is a rule of customary international law that, before a State gives diplomatic protection to its injured nationals, those nationals must first have exhausted local remedies.⁴¹⁶

412 — Opinion 1/78 (International agreement on natural rubber) of 4 October 1979, EU:C:1979:224, paragraph 60. See also Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 21.

413 — See point 85 above.

414 — The main features of diplomatic protection have been described by the United Nations International Law Commission as consisting of ‘... the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility’. United Nations International Law Commission, Draft Articles on Diplomatic Protection with commentaries (2006), adopted by the International Law Commission at its fifty-eighth session and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10), *Yearbook of the International Law Commission*, 2006, vol. II, Part Two (‘UN ILC Draft Articles on Diplomatic Protection’), Article 1 and Commentary on Article 1, paragraph 2.

415 — Permanent Court of International Justice, *Mavrommatis Palestine Concessions (Greece v. UK)*, P.C.I.J. Reports, 1924, Series A, No 2, p. 12. See also International Court of Justice, *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, Second Phase, judgment of 5 February 1970, I.C.J. Reports 1970, p. 3, at paragraph 78.

416 — International Court of Justice, *Interhandel case (Switzerland v. United States of America)*, Preliminary objections, judgment of 21 March 1959, I.C.J. Reports 1959, p. 6, at p. 27. See also UN ILC Draft Articles on Diplomatic Protection, Article 14 and the commentary on that provision.

540. Individuals have gradually obtained more individual rights under international law, including rights to invoke protection clauses against their own State and host States, and diplomatic protection therefore now co-exists with means that enable individuals to enforce their own rights directly (such as ISDS mechanisms).⁴¹⁷ According to the International Law Commission, ‘the dispute settlement procedures provided for by bilateral investment agreements and the ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection’.⁴¹⁸

541. The Commission has confirmed that Article 9.28 of the EUSFTA is based on the ICSID Convention.⁴¹⁹

542. As I see it, Article 9.28 of the EUSFTA concerns the relationship between, on the one hand, the jurisdiction of arbitral tribunals within the meaning of Section B of Chapter Nine (‘an EUSFTA Chapter Nine arbitral tribunal’) and, on the other hand, other (national or international) courts and tribunals and other processes for invoking the responsibility of another Party (Article 9.28.1) and arbitration panels within the meaning of Chapter Fifteen of the EUSFTA (‘an EUSFTA Chapter Fifteen arbitration panel’) (Article 9.28.2). Where a Party and an investor of another Party have consented to submit their dispute to arbitration under Section B of Chapter Nine, that dispute may (in principle) not be submitted to the jurisdiction of another court or tribunal through either diplomatic protection or an international claim. Two exceptions apply: first, where the Party has failed to abide by or comply with the award rendered by an EUSFTA Chapter Nine arbitral tribunal (Article 9.28.1) and, second, where an EUSFTA Chapter Fifteen arbitration panel has jurisdiction to hear a dispute with respect to a measure of general application (Article 9.28.2).

543. In my opinion, where mechanisms for resolving disputes relate to the interpretation and application of provisions of an international agreement falling within the European Union’s exclusive competence, the European Union may also decide on clauses that circumscribe the (exclusive) jurisdiction of those mechanisms.

544. Finally, pursuant to the first paragraph of Article 23 TFEU, diplomatic or consular authorities of a Member State may be required, in certain circumstances, to offer protection to nationals of another Member State as well as their own. Thus, EU law widens the category of persons that may benefit from diplomatic protection by a Member State. The Member States otherwise enjoy competence to decide on diplomatic protection. However, that competence is to be exercised in accordance with the competence which the Treaties confer on the European Union to accept the jurisdiction of mechanisms for resolving disputes relating to provisions of an international agreement that falls (on this hypothesis) within its exclusive competence.

417 — For a historical account of that development, see, for example, Parlett, K., *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press, 2011), pp. 47 to 123 (on ‘The individual and international claims’).

418 — UN ILC Draft Articles on Diplomatic Protection, Commentary on Article 17, paragraph 2.

419 — Article 27(1) of the ICSID Convention states that: ‘no Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute’.

Institutional, general and final provisions (Chapter Seventeen of the EUSFTA⁴²⁰)

Arguments

545. The *Commission* submits that the purpose of Chapter Seventeen is to establish an institutional and procedural framework ensuring that the EUSFTA is effective. Since the provisions in Chapter Seventeen are therefore ancillary to the rest of the EUSFTA, the European Union also enjoys exclusive competence over that chapter. That conclusion also applies to the provisions setting out exceptions concerning taxation (Article 17.6), current account and capital movements (Article 17.7), sovereign wealth funds (Article 17.8), safeguard measures as regards balance-of-payments (Article 17.9), security (Article 17.10) and the disclosure of information (Article 17.11).

546. Neither the *Parliament* nor the *Council* has taken a position on Chapter Seventeen.

547. Only one *Member State* has addressed that chapter, arguing that the Commission has put forward nothing to demonstrate that Article 17.6 of the EUSFTA relates specifically to international trade and that, in any event, that provision goes beyond the scope of competences attributed to the European Union by the Treaties in tax matters.

Analysis

548. The provisions in Chapter Seventeen of the EUSFTA that have a purely procedural or institutional dimension are commonly found in international (trade) agreements. Those provisions set up bodies entrusted with specific tasks under the agreement and regulate their operation (Articles 17.1, 17.2 and 17.3); govern the relationship between the agreement and other international commitments of the Parties (Articles 17.3 and 17.17); and lay down rules on amendment (Article 17.5), entry into force (Article 17.12), duration (Article 17.13), fulfilment of obligations (Article 17.14), the effect of the agreement in the legal orders of the Parties (Article 17.15), the agreement's coverage and authentic versions (Articles 17.16 and 17.20), future accessions to the European Union and the territorial scope of application of the agreement (Articles 17.18 and 17.19). Because those provisions are purely accessory in nature, they are not such as to alter the allocation of competences between the European Union and the Member States as regards the other provisions of the EUSFTA.

549. The other provisions in Chapter Seventeen are of a more substantive character.

550. The purpose of Article 17.6 of the EUSFTA ('Taxation') (read together with Understanding 1) is to clarify the extent to which the EUSFTA applies to taxation measures and to preserve the competence of both Singapore and the European Union or its Member States to conduct their tax policies. As a result, that provision is accessory to the rest of the EUSFTA; it does not constitute a distinct component.

551. The same is true of Article 17.9 of the EUSFTA ('Restrictions to Safeguard the Balance-of-payments'). That provision enables each Party, if it finds itself in serious balance-of-payments and external financial difficulties, to restrict benefits granted under the EUSFTA in relation to trade in goods, services and establishment and payments and transfers related to investments. It is thus relevant only in relation to other provisions of the EUSFTA, to which it constitutes an exception. That provision therefore does not form a distinct component of that agreement. Likewise, Articles 17.10 ('Security Exceptions') and 17.11 ('Disclosure of Information') are both purely accessory to the rest of the EUSFTA.

⁴²⁰ — See points 124 to 130 of the Annex to my Opinion.

552. Finally, Articles 17.7 ('Current Account and Capital Movements') and 17.8 ('Sovereign Wealth Funds') contain rules which are autonomous in relation to the other provisions of the EUSFTA. However, those provisions are very limited in scope and therefore cannot be regarded as a distinct component of the EUSFTA.

553. I therefore conclude that the provisions of Chapter Seventeen of the EUSFTA are either purely accessory to the other provisions of that agreement or very limited in scope, and that, for those reasons, they are not capable of altering the allocation of competences between the European Union and the Member States as regards the various components of the EUSFTA.

Assessment of the European Union's external competence to conclude the EUSFTA

554. It follows from all the foregoing that, for the purpose of assessing the allocation of competences between the European Union and the Member States, the EUSFTA falls to be divided into several discrete parts. Those parts are: the provisions falling within the common commercial policy; the provisions liberalising transport services between the European Union and Singapore and therefore falling within the scope of transport policy; the provisions governing types of investment other than foreign direct investment, which are subject to the rules relating to the free movement of capital; the provisions governing the non-commercial aspects of intellectual property rights, which are necessary to achieve the objectives of the internal market; the provisions concerning the convergence of fundamental labour standards and environmental standards between the European Union and Singapore and which thus fall, respectively, within the scope of social policy and environmental protection policy; and the provisions concerning the conservation of marine biological resources, which fall under the fisheries policy.

555. None of those parts can be identified as either the main or predominant component of the EUSFTA or as being 'merely incidental' or 'extremely limited in scope'.

556. Since not all of those parts fall within the scope of the European Union's exclusive external competences, the EUSFTA cannot, on the basis of the European Union's exclusive competences, be concluded without the participation of the Member States.

557. My detailed view on the allocation of competences between the European Union and the Member States with respect to the various parts of the EUSFTA is as set out below.

558. The European Union enjoys exclusive external competence, pursuant to Articles 3(1)(e) and 207(1) TFEU, as regards the parts of the EUSFTA which comprise the provisions falling within the common commercial policy. Those provisions relate to:

- objectives and general definitions (Chapter One);
- trade in goods (Chapters Two to Six);
- trade and investment in renewable energy generation (Chapter Seven);
- trade in services and government procurement (Chapters Eight and Ten), under exception of those parts of the EUSFTA applying to transport services and services inherently linked to transport services;
- foreign direct investment (Chapter Nine, Section A);
- the commercial aspects of intellectual property rights (Chapter Eleven, under exclusion of the provisions relating to the non-commercial aspects of those rights);

- competition and related matters (Chapter Twelve); and
- trade and sustainable development in so far as the provisions in question primarily relate to commercial policy instruments (Chapter Thirteen, under exclusion of the provisions referred to in points 559 and 562 below).

559. The European Union also enjoys exclusive external competence, pursuant to Articles 3(1)(d) and 43(2) TFEU, as regards the parts of the EUSFTA relating to the conservation of marine biological resources (Article 13.8(a), (c) and (d) of the EUSFTA).

560. Furthermore, the European Union enjoys exclusive external competence, pursuant to Articles 91 and 100(1) TFEU in conjunction with the third ground under Article 3(2) TFEU and the fourth ground under Article 216(1) TFEU, as regards the provisions of the EUSFTA concerning trade in rail and road transport services (Chapter Eight of the EUSFTA).

561. Finally, the European Union also enjoys exclusive external competence in respect of the matters covered by Section B of Chapter Nine, Articles 13.16 and 13.17, and Chapters Fourteen to Seventeen of the EUSFTA in so far as those provisions apply to (and are therefore ancillary to) the parts of the EUSFTA for which the European Union enjoys exclusive external competence.

562. The European Union's external competence is shared with the Member States with respect to the following components of the EUSFTA:

- the provisions on trade in air transport services, maritime transport services, and transport by inland waterway, including services inherently linked to those transport services (Chapter Eight), on the basis of Articles 4(2)(g), 91, 100, and the second ground under Article 216(1) TFEU;
- the provisions on types of investment other than foreign direct investment (Chapter Nine, Section A), on the basis of Articles 4(2)(a) and 63 and the second ground under Article 216(1) TFEU;
- the provisions on government procurement in so far as they apply to transport services and services inherently linked to transport services (Chapter Ten), on the basis of Articles 4(2)(a) and 26(1), and the second ground under Article 216(1) TFEU;
- the provisions relating to the non-commercial aspects of intellectual property rights (Chapter Eleven), on the basis of Articles 4(2)(a) and 26(1) and the second ground under Article 216(1) TFEU;
- the provisions laying down fundamental labour and environmental standards and thus falling within the scope of either social policy or environmental protection policy (Chapter Thirteen), on the basis of, respectively, Articles 4(2)(b), 151 and 153(1) TFEU and the second ground under Article 216(1) TFEU, and Articles 4(2)(e) and 191(4) and the first ground under Article 216(1) TFEU; and
- the matters covered by Section B of Chapter Nine, Articles 13.16 and 13.17, and Chapters Fourteen to Seventeen of the EUSFTA in so far as those provisions apply to (and are therefore ancillary to) the parts of the EUSFTA for which the European Union enjoys shared external competence.

563. Finally, the European Union has no external competence to agree to be bound by Article 9.10.1 of the EUSFTA (Chapter Nine, Section A), terminating bilateral agreements concluded between certain Member States and Singapore. That competence belongs exclusively to those Member States.

564. It follows from those conclusions that, as it stands, the EUSFTA can be concluded only by the European Union and the Member States acting jointly.

565. A ratification process involving all the Member States alongside the European Union is of necessity likely to be both cumbersome and complex. It may also involve the risk that the outcome of lengthy negotiations may be blocked by a few Member States or even by a single Member State. That might undermine the efficiency of EU external action and have negative consequences for the European Union's relations with the third State(s) concerned.

566. However, the need for unity and rapidity of EU external action and the difficulties which might arise if the European Union and the Member States have to participate jointly in the conclusion and implementation of an international agreement cannot affect the question who has competence to conclude it. That question is to be resolved exclusively on the basis of the Treaties.⁴²¹ It follows that practical concerns as regards the negotiation and conclusion of the EUSFTA and its implementation are not capable of eliminating the divergences which I have identified in my Opinion between the wide range of matters governed by that agreement and the scope of the common commercial policy as it results from the Treaty of Lisbon. In other words, the fact that there is not a complete overlap between what is to be regarded as 'trade policy' or 'investment policy' in international relations (and is therefore covered by an agreement such as the EUSFTA) and what constitutes the common commercial policy as a matter of EU law is not relevant when determining whether the European Union has exclusive competence to conclude such an agreement.

567. One option could of course be to split the EUSFTA into several agreements, depending on the competence(s) involved. However, that is a political decision which requires (in particular) the agreement of the third State concerned.

568. The Court has held that, when an agreement requiring the participation of both the European Union and its constituent Member States is negotiated and concluded, both the European Union and the Member States must act *within the framework of the competences which they have while respecting the competences of any other contracting party*.⁴²² It is true that, in principle, each party (including the Member States) must — as matters stand — choose between either consenting to or rejecting the *entire* agreement. However, that choice must be made in accordance with the Treaty rules on the allocation of competences. Were a Member State to refuse to conclude an international agreement for reasons relating to aspects of that agreement for which the European Union enjoys exclusive external competence, that Member State would be acting in breach of those Treaty rules.

569. Finally, the Court has held on various occasions that, where the subject matter of an agreement falls partly within the competence of the European Union and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That flows from the requirement of unity in the international representation of the European Union,⁴²³ as well as from the principle of sincere cooperation expressed in Article 4(3) TEU. For the reasons that I have explained in this Opinion, that obligation to cooperate fully applies to the negotiation, conclusion and implementation of the EUSFTA.

421 — See, to that effect, Opinions 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 107, and 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraph 127.

422 — Judgment of 28 April 2015, *Commission v Council*, C-28/12, EU:C:2015:282, paragraph 47.

423 — See, inter alia, Opinions 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 108, and 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraph 18; and judgments of 20 April 2010, *Commission v Sweden*, C-246/07, EU:C:2010:203, paragraph 73, and of 28 April 2015, *Commission v Council*, C-28/12, EU:C:2015:282, paragraph 54.

Conclusion

570. On the basis of the above considerations, I propose that the Court answer the Commission's request for an Opinion as follows:

- (1) The Free Trade Agreement envisaged between the European Union and the Republic of Singapore ('the EUSFTA') can be concluded only by the European Union and the Member States acting jointly.
- (2) The European Union enjoys exclusive external competence as regards the parts of the EUSFTA which comprise the provisions falling within the common commercial policy, namely:
 - objectives and general definitions (Chapter One);
 - trade in goods (Chapters Two to Six);
 - trade and investment in renewable energy generation (Chapter Seven);
 - trade in services and government procurement (Chapters Eight and Ten), under exclusion of those parts of the EUSFTA applying to transport services and services inherently linked to transport services;
 - foreign direct investment (Chapter Nine, Section A);
 - the commercial aspects of intellectual property rights (Chapter Eleven under exclusion of the provisions relating to the non-commercial aspects of those rights);
 - competition and related matters (Chapter Twelve); and
 - trade and sustainable development in so far as the provisions in question primarily relate to commercial policy instruments (Chapter Thirteen, under exclusion of the provisions relating to the conservation of marine biological resources and the provisions laying down fundamental labour and environmental standards and thus falling within the scope of either social policy or environmental protection policy).

The European Union also enjoys exclusive external competence as regards the parts of the EUSFTA (Chapter Thirteen) relating to the conservation of marine biological resources.

The European Union also enjoys exclusive external competence as regards the provisions of the EUSFTA (Chapter Eight) concerning trade in rail and road transport services.

The European Union also enjoys exclusive external competence in respect of the matters covered by Section B in Chapter Nine, Articles 13.16 and 13.17, Chapters Fourteen to Seventeen of the EUSFTA in so far as those provisions apply to (and are therefore ancillary to) the parts of the EUSFTA for which the European Union enjoys exclusive external competence.

- (3) The European Union's external competence is shared with the Member States with respect to the following components of the EUSFTA:
 - the provisions on trade in air transport services, maritime transport services, and transport by inland waterway, including services inherently linked to those transport services (Chapter Eight);

- the provisions on types of investment other than foreign direct investment (Chapter Nine, Section A);
 - the provisions on government procurement in so far as they apply to transport services and services inherently linked to transport services (Chapter Ten);
 - the provisions relating to the non-commercial aspects of intellectual property rights (Chapter Eleven);
 - the provisions laying down fundamental labour and environmental standards and thus falling within the scope of either social policy or environmental protection policy (Chapter Thirteen); and
 - the matters covered by Section B of Chapter Nine, Articles 13.16 and 13.17, and Chapters Fourteen to Seventeen of the EUSFTA in so far as those provisions apply to (and are therefore ancillary to) the parts of the EUSFTA for which the European Union enjoys shared external competence.
- (4) The European Union has no external competence to agree to be bound by Article 9.10.1 of the EUSFTA (Chapter Nine, Section A), terminating bilateral agreements concluded between certain Member States and Singapore. That competence belongs exclusively to those Member States.

Annex — Summary description of the EUSFTA

1. The first and second recitals of the EUSFTA refer to the Partnership and Cooperation Agreement between the European Union and Singapore. The second and fifth recitals state that the same Parties desire to strengthen further their relationship and to raise living standards, promote economic growth and stability, create new employment opportunities and improve the general welfare, and to this end, reaffirm their commitment to promoting trade and investment liberalisation. The fourth recital records that the Parties are also determined to strengthen their economic, trade and investment relations in accordance with the objective of sustainable development and to promote trade and investment in a manner that takes account of high levels of environmental and labour protection and relevant internationally recognised standards and agreements to which they are parties. The Parties further recognise, in the eighth recital, the importance of transparency in international trade for the benefit of all stakeholders. The ninth recital states that the Parties seek to establish clear and mutually advantageous rules governing their trade and investment and to reduce or eliminate the barriers to mutual trade and investment. The 10th recital explains that the Parties are resolved to contribute to the harmonious development and expansion of international trade by removing obstacles to trade through the EUSFTA and to avoid creating new barriers to trade or investment between the Parties that could reduce the benefits of the EUSFTA. In the 11th recital, the Parties state that they are building on their respective rights and obligations under the WTO Agreement and other multilateral, regional and bilateral agreements and arrangements to which they are parties.

2. Chapter One ('Objectives and General Definitions') provides that, through the EUSFTA, the Parties are establishing a free trade area consistent with Article XXIV of the GATT 1994 and Article V of the GATS (Article 1.1). Article 1.2 defines the objectives of the EUSFTA as being to liberalise and facilitate trade and investment between the Parties.

3. Chapter Two ('National Treatment and Market Access for Goods') applies to trade in goods between the Parties (Article 2.2). The objective laid down in Article 2.1 is progressively and reciprocally to liberalise trade in goods over a transitional period starting from the entry into force of the agreement in accordance with its terms and in conformity with Article XXIV of the GATT 1994. Article 2.3 lays down the obligation to accord national treatment to the goods of the other party in

accordance with Article III of the GATT 1994 (which is thereby incorporated into the EUFSTA). Chapter Two also covers the classification of goods (Article 2.5); requires the reduction or elimination of customs duties on imports (Article 2.6); and prohibits maintaining or instituting customs duties and taxes on exports (Article 2.7). It goes on to set out obligations regarding non-tariff measures, in particular import and export restrictions (Article 2.9); fees and formalities connected with importation and exportation (Article 2.10); import and export licensing procedures (Article 2.11); State trading enterprises (Article 2.12); and the elimination of the sectoral non-tariff measures set out in Annex 2-B and Annex 2-C (Article 2.13). Article 2.14 provides for a general exceptions clause and refers, in particular, to Article XX of the GATT 1994 (which is the general exceptions clause in that agreement). Article 2.15 establishes a Committee on Trade in Goods whose principal responsibilities are to monitor implementation, promote trade in goods between the Parties regarding matters covered by the chapter and its annexes and address tariff and non-tariff measures applied to trade in goods between the Parties.

4. Annex 2-A addresses the elimination of customs duties. It comprises two appendices: Appendix 2-A-1 (the customs duties elimination schedule for Singapore) and Appendix 2-A-2 (the customs duties elimination schedule for the European Union). Annex 2-B, applicable to all forms of motor vehicles and parts thereof, contains a number of obligations covering, inter alia, the use of international standards, regulatory convergence, products with new technologies or new features, import licensing and other measures restricting trade. Annex 2-C, relating to pharmaceutical products and medical devices, addresses international standards, transparency and regulatory cooperation.

5. Chapter Three is entitled ‘Trade Remedies’.

6. As regards anti-dumping and countervailing measures, Article 3.1 states that the Parties confirm their rights and obligations under Article VI of the GATT 1994 (which deals with anti-dumping and countervailing duties), the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures. The chapter lays down procedural rules for handling applications for anti-dumping and countervailing duties (Article 3.2); sets out the lesser duty rule as regards each type of duty (Article 3.3); records the need to take into account the public interest (Article 3.4); and excludes the provisions in the section on anti-dumping and countervailing measures from the scope of Chapters Fifteen (‘Dispute Settlement’) and Sixteen (‘Mediation Mechanism’) (Article 3.5).

7. Chapter Three also contains specific rules on safeguard measures. In particular, the Parties confirm their rights and obligations under Article XIX of the GATT 1994 (which deals with emergency action on imports of particular products), the Agreement on Safeguards and Article 5 of the Agreement on Agriculture (Article 3.6). It further provides for procedural and transparency rules (Article 3.7) and excludes the provisions in the section on global safeguards measures from the scope of Chapters Fifteen (‘Dispute Settlement’) and Sixteen (‘Mediation Mechanism’) (Article 3.8). Articles 3.9 to 3.13 provide for the application (if necessary on a provisional basis) of specific bilateral safeguard measures and appropriate compensation if such a measure is imposed.

8. Chapter Four (‘Technical Barriers to Trade’) aims essentially to facilitate and increase trade in goods between the Parties by providing a framework to prevent, identify and eliminate unnecessary barriers to trade falling within the scope of the Agreement on Technical Barriers to Trade (Article 4.1), which is incorporated into and made part of the EUSFTA (Article 4.3). Chapter Four applies to the preparation, adoption and application of all standards, technical regulations and conformity assessment procedures, as defined in Annex 1 of the Agreement on Technical Barriers to Trade, which may affect trade in goods between the Parties, regardless of the origin of those goods (Article 4.2.1). Chapter Four also contains provisions on, inter alia, different forms of joint cooperation (Article 4.4), the nature of standardising bodies and the Parties’ involvement in them (Article 4.5), the basis for technical regulations (Article 4.6), means to facilitate the acceptance of conformity assessment results

(Article 4.7), transparency (Article 4.8) and (mandatory) marking or labelling requirements (Article 4.10). Other provisions relate to the exchange of information (such as Article 4.9) or to the making information available for defined purposes (through, for example, contact points designated in accordance with Article 14.4) (Article 4.11).

9. Chapter Five ('Sanitary and Phytosanitary Measures') aims (a) to protect human, animal or plant life or health in the respective territories of the Parties while facilitating trade between the Parties in the area of sanitary and phytosanitary measures ('SPS measures'); (b) to collaborate on the further implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures; and (c) to improve communication, cooperation and resolution of issues related to the implementation of SPS measures affecting trade between the Parties (Article 5.1). The Parties reaffirm their rights and obligations under the SPS Agreement (Article 5.4; see also Article 5.6(a)).

10. Article 5.6 ('General Principles') concerns the means to achieve harmonisation of SPS measures and limitations on the use of SPS measures so as to prevent unjustified barriers to trade and to avoid unnecessary restrictions and arbitrary or unjustifiable discrimination and delay in access to the Parties' markets. Other substantive obligations relate to import requirements (Article 5.7); verifications (Article 5.8); the procedure to apply in the case of on-the-spot verification to authorise imports of a certain category or categories of products of animal origin from the exporting Party (Article 5.9, see also Annex 5-B); the determination and recognition of pest- or disease-free areas (Article 5.10); emergency measures in case of serious human, animal or plant life or health risks (Article 5.13) and (the procedure for) recognition of equivalence of an individual measure or groups of measures (Article 5.14). General obligations regarding transparency and the exchange of information are found in Article 5.11.

11. Chapter Six ('Customs and Trade Facilitation') aims to recognise the importance of customs and trade facilitation matters in the evolving global trading environment and to reinforce cooperation in that area with a view to ensuring that the relevant legislation and procedures, as well as the administrative capacity of the relevant administrations, fulfil the objectives of promoting trade facilitation while ensuring effective customs control (Article 6.1.1). Article 6.2 sets out the principles upon which the customs provisions and procedures of the Parties are to be based (Article 6.2.1). The Parties must also simplify requirements and formalities wherever possible to promote the rapid release and clearance of goods and work towards the further simplification and standardisation of data and documentation required by customs and other agencies (Article 6.2.2). Articles 6.3 to 6.14 lay down specific obligations regarding customs cooperation; transit and transshipment; advance rulings; simplified customs procedures; the release of goods; fees and charges; customs brokers; pre-shipment inspections; customs valuation; risk management; a single-window system (facilitating a single, electronic submission of all required information); and making available effective, prompt, non-discriminatory and easily accessible appeal procedures. Article 6.16 addresses the Parties' relationship with the business community.

12. Article 6.15 lays down a general obligation to publish or otherwise make available legislation, regulations, and administrative procedures and other requirements relating to customs and trade facilitation (Article 6.15.1), and to designate or maintain one or more inquiry or information points (Article 6.15.2). Throughout Chapter Six, various provisions concern the need to exchange information and make information available (for example, Articles 6.3.2, 6.8.2 and 6.16(b)).

13. Chapter Seven ('Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation') seeks to promote, develop and increase the generation of energy from renewable and sustainable non-fossil sources, particularly through facilitating trade and investment. The Parties therefore undertake to cooperate towards removing or reducing tariffs and non-tariff barriers and fostering regulatory convergence with or towards regional and international standards (Article 7.1).

14. Chapter Seven applies to measures which may affect trade and investment between the Parties related to generating energy from renewable and sustainable non-fossil sources, but not to the products from which energy is generated (Article 7.3.1).

15. Article 7.4 requires the Parties to (a) refrain from adopting measures providing for local content requirements or any other offset (any condition that encourages local development) affecting the other Party's products, service suppliers, investors or investments; (b) refrain from adopting measures requiring partnerships to be formed with local companies (subject to an exception relating to technical reasons); (c) ensure that any rules applied concerning authorisation, certification and licensing are objective, transparent and non-arbitrary and do not discriminate against applicants from the other Party; (d) ensure that the administrative charges imposed on or in connection with importation and use of goods originating in the other Party, or affecting the provisions of goods by the other Party's suppliers, are subject to Article 2.10 and that the administrative charges imposed on or in connection with the provision of services by the other Party's suppliers are subject to Articles 8.18 to 8.20; and (e) ensure that the terms, conditions and procedures for connecting and accessing electricity transmission grids are transparent and do not discriminate against suppliers of the other Party.

16. Article 7.5 concerns the use of international or regional standards with respect to products for generating energy from renewable and sustainable non-fossil sources, the need to specify technical regulations based on product requirements and the acceptance of declarations of conformity from the other Party.

17. Article 7.6.1 states that the provisions of Chapter Seven are subject to the general exception clauses in Articles 2.14 and 8.62, the clause on security and general exceptions in Article 10.3 and the relevant provisions of Chapter Seventeen. According to Article 7.6.2, nothing in Chapter Seven is to be construed so as to prevent the adoption or enforcement by either Party of measures necessary for operating the energy networks concerned safely or for the safety of energy supply.

18. Article 7.7 sets out the role of the Trade Committee as regards cooperation and implementing Chapter Seven and specifies what that cooperation may involve.

19. Chapter Eight ('Services, Establishment and Electronic Commerce') is divided into seven sections.

20. In Section A, the Parties reaffirm their respective commitments under the WTO Agreement and agree that the chapter lays down the necessary arrangements for progressive reciprocal liberalisation of trade in services, establishment and electronic commerce (Article 8.1.1).

21. Article 8.1.2 states that, except as otherwise provided, Chapter Eight is not to (a) apply to subsidies granted or grants provided by a Party; (b) apply to services supplied in the exercise of governmental authority within the respective territories of the Parties; (c) require the privatisation of public undertakings; or (d) apply to laws, regulations or requirements governing procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale. Article 8.1.4 adds that Chapter Eight does not apply to measures affecting natural persons seeking access to the employment market of a Party, or to measures regarding citizenship, residence or employment on a permanent basis.

22. Article 8.1.3 safeguards each Party's right to regulate and introduce new regulations to meet legitimate policy objectives in a manner consistent with Chapter Eight.

23. Article 8.2(d) states that the EUSFTA covers shipping companies established outside the Union and controlled by nationals of a Member State, if their vessels are registered in accordance with legislation of that Member State and fly the flag of a Member State.

24. Article 8.2(m) defines ‘trade in services’ as meaning the supply of a service: (i) from the territory of a Party into the territory of the other Party (‘cross-border’); (ii) in the territory of a Party to a service consumer of the other Party (‘consumption abroad’); (iii) by a service supplier of a Party, through commercial presence, in the territory of the other Party (‘commercial presence’); and (iv) by a service supplier of a Party, through the presence of natural persons of that Party, in the territory of the other Party (‘presence of natural persons’).

25. Section B (‘Cross-border Supply of Services’) applies to measures of the Parties affecting the cross-border supply of all service sectors except (a) audio-visual services; (b) national maritime cabotage (covering transportation of passengers or goods between a port or point located in a Member State and another port or point located in the same Member State and traffic originating and terminating in the same port or point located in a Member State of the European Union); and (c) domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of (air) traffic rights (Article 8.3). The following are however covered: (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service; (ii) the selling and marketing of air transport services; and (iii) computer reservation system services (Article 8.3(c)). Article 8.4 defines, for the purposes of Section B, a ‘cross-border supply of services’ as the supply of a service: (a) from the territory of a Party into the territory of the other Party and (b) in the territory of a Party to a service consumer of the other Party.

26. Article 8.5 concerns market access. Each Party must accord services and service suppliers of the other Party treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule of Specific Commitments (Article 8.5.1). With respect to sectors where market access commitments are undertaken, Article 8.5.2 specifies the measures which a Party may not adopt or maintain either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule of Specific Commitments.

27. Article 8.6 lays down the national treatment obligation. In the sectors inscribed in its Schedule of Specific Commitments and subject to any conditions and qualifications set out therein, each Party is to accord to services and service suppliers of the other Party, in respect of all measures affecting the cross-border supply of services, treatment no less favourable than that it accords to its own like services and service suppliers (Article 8.6.1).

28. Article 8.7.1 provides that the sectors liberalised by a Party pursuant to Section B and the market access and national treatment limitations applicable to services and service suppliers of the other Party in those sectors are set out in its Schedule of Specific Commitments.

29. Section C concerns ‘Establishment’, defined in Article 8.8(d) as ‘(i) the constitution, acquisition or maintenance of a juridical person; or (ii) the creation or maintenance of a branch or representative office within the territory of a Party for the purpose of performing an economic activity including, but not limited to, supplying a service’. The constitution and acquisition of a juridical person is to be understood as including capital participation in a juridical person with a view to establishing or maintaining lasting economic links (footnote 8 to Article 8.8(d)⁴²⁴). Section C applies to measures adopted or maintained by the Parties affecting establishment in all economic activities with the exception of (a) mining, manufacturing and processing of nuclear materials; (b) production of, or trade in, arms, munitions and war material; (c) audio-visual services; (d) national maritime cabotage; and (e) domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of (air) traffic rights (Article 8.9). However, Section C does not apply to measures affecting establishment in the economic activities of (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service; (ii) the selling and marketing of air transport services; and (iii) computer reservation system services (Article 8.9(e)).

424 — This may appear as footnote 10 in certain language versions.

30. Articles 8.10, 8.11 and 8.12 relating to, respectively, market access, national treatment and schedules of specific commitments mirror to a large extent Articles 8.5, 8.6 and 8.7 in respect of establishment (the provisions concerning, respectively, market access, national treatment and schedules of specific commitments regarding the cross-border supply of services (Section B)).

31. Section D ('Temporary Presence of Natural Persons for Business Purposes') applies to measures of the Parties concerning the entry into, and temporary stay in, their respective territories of key personnel, graduate trainees and business service sellers in accordance with Article 8.1.4 (Article 8.13.1). 'Key personnel' means natural persons employed within a juridical person of one Party other than a non-profit organisation and who are responsible for the setting up or the proper control, administration and operation of an establishment (Article 8.13.2(a)). That category comprises 'business visitors for establishment purposes' and 'intra-corporate transferees'. 'Business visitors for establishment purposes' are natural persons working in a senior position who are responsible for setting up an establishment and who neither engage in direct transactions with the general public nor receive remuneration from a source located within the host Party (Article 8.13.2(a)(i)). 'Intra-corporate transferees' are natural persons who have been employed by a juridical person of one Party or, in the case of professionals providing business services, have been partners in it for at least one year and who are temporarily transferred to an establishment in the territory of the other Party. They may be executives, managers or specialists (Article 8.13.2(a)(ii)).

32. As regards key personnel and graduate trainees, Article 8.14 provides that, for every sector liberalised in accordance with Section C and subject to the reservations listed in the Schedule thereto, each Party must allow entrepreneurs (sic) of the other Party temporarily to employ in their establishment natural persons of that other Party provided that such employees are key personnel or graduate trainees as defined in Article 8.13. That provision also sets out different maximum periods of the temporary entry and stay for intra-corporate transferees, business visitors for establishment purposes and graduate trainees. Measures that involve limitations on the total number of natural persons that an entrepreneur (sic) may transfer as key personnel or graduate trainees in a specific sector (in the form of numerical quotas or a requirement to satisfy an economic needs test) or discriminatory limitations are prohibited (Article 8.14.2).

33. Pursuant to Article 8.15, each Party must in principle allow the temporary entry and stay of business service sellers for a period of up to 90 days in any 12-month period (Article 8.15).

34. Section E ('Regulatory Framework') is divided into sub-sections containing provisions of general application; domestic regulation; computer services; postal services; telecommunications services; financial services; and international maritime transport services.

35. Sub-section 1 contains provisions of general application. It sets out obligations with respect to the mutual recognition of professional qualifications (Article 8.16) and transparency (Article 8.17). Nothing in Article 8.16 is to prevent a Party from requiring natural persons to possess the necessary qualifications or professional experience specified in the territory where the service is supplied for the sector of activity concerned (Article 8.16.1). Each Party is to respond promptly to requests by the other Party for specific information on any of its measures of general application or international agreements pertaining to or affecting Chapter Eight. Each Party must, pursuant to Article 14.4, also establish one or more enquiry points (Article 8.17).

36. Sub-section 2 concerns domestic regulation. It applies to measures relating to licensing and qualification requirements and procedures that affect the cross-border supply of services; establishment in the Parties' territory of juridical and natural persons; and the temporary stay of natural persons in the Parties' territory (Article 8.18.1), subject to the specific commitments made by the Parties (Article 8.18.2).

37. Articles 8.19 and 8.20 set out obligations relating to licensing and qualification requirements and procedures, the process for obtaining a licence and for ensuring prompt review and, where justified, appropriate remedies for administrative decisions affecting establishment, the cross-border supply of services or the temporary stay of natural persons for business purposes.

38. Sub-section 3 deals with computer services. Article 8.21.1 provides that the Parties subscribe to the understanding set out in the other paragraphs of Article 8.21 in respect of computer services liberalised in accordance with Sections B to D. That understanding pertains mostly to the meaning of computer and related services.

39. Sub-section 4 concerns postal services. In accordance with Article 8.22, each Party is to introduce or maintain appropriate measures to prevent suppliers of postal services who, alone or together, are a major supplier in the relevant market for postal services from engaging in or continuing anticompetitive practices. Pursuant to Article 8.23, regulatory bodies must be separate from, and not accountable to, any supplier of postal services. Their decisions and procedures must be impartial with respect to all market participants.

40. Sub-section 5 applies to measures affecting trade in telecommunications services. It sets out the principles of the regulatory framework for telecommunications services, liberalised pursuant to Sections B to D (that is, the cross-border supply of services, establishment and the temporary presence of natural persons for business purposes) (Article 8.24.1). Articles 8.26 to 8.38 contain substantive obligations concerning, inter alia, access to and use of public telecommunications networks and services, interconnection, facility sharing and number portability. Articles 8.41 and 8.42 lay down obligations regarding, on the one hand, procedures for obtaining an authorisation to provide telecommunications services and, on the other hand, procedures for allocating and using scarce resources.

41. A general transparency obligation is laid down in Article 8.45. Specific obligations regarding making information available are set out in, for example, Articles 8.29.3 and 8.41.2.

42. Sub-section 6 sets out the principles governing the regulatory framework for all financial services liberalised pursuant to Sections B to D (Article 8.49.1). Article 8.50.1 and 8.50.2 authorises each Party to adopt or maintain measures for prudential reasons and sets out the conditions under which that may be done. In accordance with Article 8.50.4, each Party is to use its best endeavours to ensure implementation and application in its territory of a series of listed standards regarding banking supervision, insurance supervision, securities regulation, transparency and the exchange of information for tax purposes. Pursuant to Article 8.50.5, each Party may require, subject to certain conditions, the registration or authorisation of cross-border financial service suppliers of the other Party and of financial instruments.

43. Article 8.52 requires each Party to grant to financial service suppliers of the other Party, subject to conditions, access to payment and clearance systems operated by public entities and to official funding and refinancing facilities available in the normal course of ordinary business.

44. Article 8.53 relates to new financial services. It obliges each Party to permit a financial service supplier of the other Party to supply any new financial service that the first Party would permit its own financial service suppliers to supply without additional legislative action being required by the first Party.

45. Article 8.54 concerns in particular the transfer of information in electronic or other form into and out of the territory of a Party for data processing, where such processing is required in the ordinary course of business of a financial service supplier.

46. Sub-section 7 sets out the principles regarding the liberalisation of international maritime transport services pursuant to Sections B to D. Article 8.56.3 sets out the Parties' agreement to ensure the effective application of the principles of unrestricted access to cargoes on a commercial basis and the freedom to supply international maritime transport services, as well as national treatment in the context of the supply of those services. The Parties must apply the principle of unrestricted access to the international maritime transport markets and trade on a commercial and non-discriminatory basis (Article 8.56.3(a)). Each Party must grant to ships flying the flag of the other Party or operated by service suppliers of the other Party treatment no less favourable than that accorded to its own ships or those of any third country, whichever is the better, with regard to, *inter alia*, access to ports, the use of infrastructure and auxiliary maritime services of the ports, as well as related fees and charges, customs facilities and access to berths and facilities for loading and unloading. Article 8.56.5 provides that each Party must permit international maritime transport service suppliers of the other Party to have an establishment in its territory under conditions of establishment and operation in accordance with the conditions inscribed in its Schedule of Specific Commitments. In accordance with Article 8.56.6, the Parties are to make available to international maritime transport suppliers of the other Party on reasonable and non-discriminatory terms and conditions the use of the following services at the port: (a) pilotage; (b) towing and tug assistance; (c) provisioning; (d) fuelling and watering; (e) garbage collecting and ballast waste disposal; (f) port captain's services; (g) navigation aids; and (h) shore-based operational services essential to ship operations.

47. In Section F ('Electronic Commerce'), the Parties agree on the importance of facilitating the use and development of electronic commerce and the applicability of WTO rules to electronic commerce; and commit themselves to promoting the development of electronic commerce between them, in particular by cooperating on the issues raised by electronic commerce under the provisions of Chapter Eight (Article 8.57.1 and 8.57.2). They also agree that the development of electronic commerce must be fully compatible with international standards of data protection, in order to ensure the confidence of those who use it (Article 8.57.4).

48. Pursuant to Article 8.58, the Parties may not impose customs duties on electronic transmissions. In Article 8.59, the Parties confirm that measures related to the supply of a service using electronic means fall within the scope of the obligations contained in the relevant provisions of Chapter Eight, subject to any applicable exceptions.

49. Section G is entitled 'Exceptions'. Article 8.62 sets out a general exceptions clause. In Article 8.63, the Parties commit to reviewing Chapter Eight and their respective Schedules of Specific Commitments no later than three years after the EUSFTA enters into force and at regular intervals thereafter.

50. The sole article of Annex 8-A provides that the European Union's Schedule of Specific Commitments is set out in Appendices 8-A-1 to 8-A-3. These deal, respectively, with the European Union's Schedule of Specific Commitments in relation to Article 8.7 (cross-border supply of services), Article 8.12 (establishment) and Articles 8.14 and 8.15 (key personnel and graduate trainees and business services sellers).

51. Annex 8-B provides that Singapore's Schedule of Specific Commitments is set out in Appendices 8-B-1 (specific commitments) and 8-B-2 (financial services).

52. Chapter Nine ('Investment') consists of two parts. Section A contains the substantive provisions on protection of investors and their investments. Section B provides for an Investor-State Dispute Settlement ('ISDS') mechanism in order to enforce those provisions.

53. For the purposes of Chapter Nine, a 'covered investment' means an investment which is owned, directly or indirectly, or controlled, directly or indirectly, by a covered investor of one Party in the territory of the other Party (Article 9.1.1). A 'covered investor' is a natural person or a juridical person of one Party that has made an investment in the territory of the other Party (Article 9.2). An

‘investment’ is defined as every kind of asset which has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, or a certain duration (Article 9.1.1). Article 9.1.1(a) to (h) lists the various forms that an investment may take.

54. Chapter Nine applies irrespective of whether such investments were made before or after the EUSFTA enters into force (Article 9.2.1).

55. Article 9.3.1 sets out the requirement of national treatment: each Party must accord to covered investors of the other Party and to their covered investments treatment in its territory no less favourable than the treatment it accords, in like situations, to its own investors and their investments with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of their investments. Article 9.3.3 lays down certain exceptions and sets out the conditions under which each Party may adopt or enforce measures that accord less favourable treatment.

56. Article 9.4 requires each Party to accord to covered investments of the other Party in its territory fair and equitable treatment and full protection and security (Article 9.4.1) — the latter refers only to a Party’s obligation relating to physical security of covered investors and investments (Article 9.4.4). In order to comply with that obligation, Article 9.4.2 provides that neither Party shall adopt measures that constitute: (a) a denial of justice in criminal, civil and administrative proceedings; (b) a fundamental breach of due process; (c) manifestly arbitrary conduct; (d) harassment, coercion, abuse of power or similar bad faith conduct; or (e) a breach of the legitimate expectations of a covered investor arising from specific or unambiguous representations from a Party so as to induce the investment and which are reasonably relied upon by the covered investor.

57. Article 9.5.1 provides that covered investors of one Party suffering losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the other Party shall be accorded by that Party, as regards restitution, indemnification, compensation or other settlement, treatment no less favourable than that accorded by that Party to its own investors or to the investors of any third country, whichever is more favourable to the covered investor concerned. Article 9.5.2 requires a Party to grant restitution or compensation if a covered investment is requisitioned or destroyed.

58. By virtue of Article 9.6.1, neither Party is directly or indirectly to nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation the covered investments of covered investors of the other Party except: (a) for a public purpose; (b) in accordance with due process of law; (c) on a non-discriminatory basis; and (d) against payment of prompt, adequate and effective compensation in accordance with Article 9.6.2. Article 9.6.2 sets out how to determine the amount of compensation. Article 9.6 does not apply to the issue of compulsory licenses granted in relation to intellectual property rights consistently with the TRIPS Agreement (Article 9.6.3). Article 9.6.4 concerns review of any measure of expropriation or valuation by a judicial or other independent authority of the Party taking that measure.

59. Article 9.7 provides that each Party must permit transfers relating to a covered investment to be made in a freely convertible currency without restriction or delay (Article 9.7.1). However, nothing in Article 9.7 is to be construed as preventing a Party from applying in an equitable and non-discriminatory manner its laws relating to the matters included in items (a) to (g) of Article 9.7.2 (Article 9.7.2).

60. The remaining provisions of Section A relate to subrogation (Article 9.8), termination (Article 9.9) and the relationship of the EUSFTA to other agreements (Article 9.10). In particular, Article 9.9 provides that, should the EUSFTA be terminated pursuant to Article 17.13, Chapter Nine shall continue to be effective for a further period of 20 years from that date in respect of covered investments made before the date of termination of the EUSFTA. Article 9.10.1 states that, when the

EUSFTA enters into force, the agreements between the Member States and Singapore listed in Annex 9-D (including the rights and obligations derived therefrom), are to cease to have effect and to be replaced and superseded by the EUSFTA. Footnote 19⁴²⁵ adds that those agreements shall be considered to be terminated by the EUSFTA within the meaning of Article 59(1)(a) of the Vienna Convention on the Law of Treaties. The remaining paragraphs of Article 9.10 mostly deal with the effect of the provisional application of the EUSFTA on the application of the provisions of the agreements listed in Annex 9-D.

61. Section B of Chapter Nine applies to a dispute between a claimant of one Party and the other Party concerning treatment (including a failure to act) alleged to breach the provisions of Section A, where the breach in question allegedly causes loss or damage to the claimant or its locally established company (Article 9.11.1).

62. Article 9.12 states that the preferred form of dispute resolution is the amicable resolution of a dispute by way of negotiation. Article 9.14 provides that parties in dispute may agree at any time to have recourse to mediation or other forms of alternative dispute resolution. Where a dispute cannot be resolved by amicable means, a claimant of a Party is to submit a request for consultations to the other Party within a specified period (Article 9.13). Where the dispute cannot be settled within three months of submitting the request for consultations, the claimant may deliver a notice of intent to arbitrate (Article 9.15). Where that notice has been sent to the European Union, the European Union must determine who is going to act as the respondent (that is to say, the defendant) within a specified time frame and inform the claimant of its decision immediately (Article 9.15.2). If no such decision is made, Article 9.15.3 provides in essence that the respondent shall be determined in accordance with the notice of intent to arbitrate.

63. No earlier than three months from the date of the notice of intent, the claimant may submit, in accordance with the conditions set out in Article 9.17 and subject to other applicable jurisdictional requirements (Article 9.17.5), the claim to arbitrate to one of the dispute settlement mechanisms listed in Article 9.16.1. Those mechanisms comprise arbitration under the auspices of the International Centre for Settlement of Investment Disputes, by an arbitral tribunal established in accordance with the arbitration rules of the United Nations Commission on International Trade Law or any other arbitral institution or under any other arbitration rules if the disputing parties so agree.

64. Articles 9.18 to 9.21 concern, respectively, the constitution of the arbitral tribunal; applicable law and rules of interpretation; and claims that are manifestly without legal merit or unfounded as a matter of law.

65. Where there is a final award finding a breach of the provisions of Chapter Nine, the tribunal may award, separately or in combination, only (a) monetary damages (subject to the limits in Article 9.24.2) and any applicable interest and (b) restitution of property, provided that the respondent may pay monetary damages and any applicable interest in lieu of restitution (Article 9.24.1). Punitive damages may not be awarded (Article 9.24.2). Articles 9.25 and 9.26 concern, respectively, indemnification or other compensation and costs.

66. Article 9.27 concerns the binding effect of the award and compliance with it.

67. In accordance with Article 9.28.1, neither Party is to give diplomatic protection or bring an international claim, in respect of a dispute which one of its investors and the other Party have consented to submit or have submitted to arbitration under Section B, unless that other Party has failed to abide by and comply with the award rendered in such dispute. For the purposes of Article 9.28.1, diplomatic protection shall not include informal diplomatic exchanges for the sole

425 — This may appear as footnote 51 in certain language versions.

purpose of facilitating settlement of the dispute. However, Article 9.28.1 does not exclude the possibility for a Party to have recourse to dispute settlement procedures under Chapter Fifteen with respect to a measure of general application, even if that measure is alleged to have breached the EUSFTA as regards a specific investment in respect of which a claim to arbitration has been submitted.

68. The annexes to Chapter Nine concern expropriation (Annexes 9-A to 9-C); a list of existing agreements between the Member States and Singapore (Annex 9-D); a mediation mechanism for investor-state disputes (Annex 9-E); the code of conduct for arbitrators and mediators (Annex 9-F); and rules on public access to documents, hearings and the possibility for third persons to make submissions (Annex 9-G).

69. Chapter Ten ('Government Procurement') and its nine annexes provide a framework for government procurement carried out by the Parties. For the purposes of Chapter Ten, a 'covered procurement' means procurement (i) for governmental purposes, of goods, services or a combination thereof, by any contractual means, for which the value as estimated equals or exceeds the thresholds specified in Annexes 10-A to 10-G; (ii) by a procuring entity that is (iii) not otherwise excluded (Article 10.2.2). Article 10.2.3 sets out the situations in which Chapter Ten does not apply (except where provided otherwise in Annexes 10-A to 10-G).

70. Article 10.3 lays down security and general exceptions.

71. Article 10.4 sets out the general principles governing government procurement. In particular, Article 10.4.1 and 10.4.2 lays down the obligations of national treatment and other forms of non-discrimination obligations. Pursuant to Article 10.4.7, those provisions shall not apply to measures that are not specific to procurement.

72. Article 10.5 sets out rules on information to be published by each Party on its procurement system.

73. For each covered procurement, a procuring entity is to publish a notice of intended procurement (Article 10.6.1) that must include the information listed in Article 10.6.2. In addition, a summary notice must be published for each intended procurement (Article 10.6.3). Article 10.7 sets out obligations regarding the type of condition that a procuring entity may (or may not) impose for participating in a procurement procedure; how to assess whether a supplier has satisfied those conditions; and the grounds on which a Party may exclude a supplier. Article 10.8 concerns suppliers' qualifications. Article 10.9 sets out requirements regarding technical specifications and tender documentation. Article 10.10 concerns the need to provide sufficient time for suppliers to prepare and submit requests for participation and tenders. Article 10.11 applies to the conduct of negotiations. Article 10.12 sets out the conditions under which a procuring entity may use a limited tendering procedure and choose not to apply some of the guarantees set out in Chapter Ten. Article 10.14 contains rules for the treatment of tenders and the award of contracts. Article 10.15 lays down obligations regarding the information which a procuring entity must either provide to participating suppliers or publish.

74. Article 10.16.1 requires each Party, upon request by the other Party, to provide promptly any information necessary for determining whether a procurement was conducted fairly, impartially and in accordance with Chapter Fifteen. In defined circumstances, information is not to be disclosed (Article 10.16.2).

75. Article 10.17 sets out requirements regarding the type of administrative or judicial review for which each Party must provide, the conditions under which that review is to be conducted and the procedure that shall apply.

76. The annexes to Chapter Ten concern: central entities which procure in accordance with the provisions of the EUSFTA (Annex 10-A); sub-central entities which procure in accordance with the provisions of the EUSFTA (Annex 10-B); utilities and other entities which procure in accordance with the provisions of the EUSFTA (Annex 10-C); the covered goods (Annex 10-D); the covered services (Annex 10-E); the covered construction services and works concessions (Annex 10-F); general notes and derogations from the provisions of Article 10.4 (general principles) (Annex 10-G); means of publication (Annex 10-H); and public-private partnerships (Annex 10-I).

77. Chapter Eleven ('Intellectual Property') aims to facilitate the production and commercialisation of innovative and creative products and the provision of services between the Parties as well as to increase the benefits from trade and investment through effective protection of intellectual property rights and the provision of measures for effective enforcement of such rights (Article 11.1.1). The objectives and principles contained in Part I of the TRIPS Agreement (particularly Articles 7 and 8) apply to Chapter Eleven, *mutatis mutandis* (Article 11.1.2).

78. Section A addresses the scope of Chapter Eleven, relevant definitions and the exhaustion of intellectual property rights. Article 11.2.1 states that Chapter Eleven complements the rights and obligations of the Parties under the TRIPS Agreement and other international treaties on intellectual property to which they both are Parties. For the purposes of Chapter Eleven, 'intellectual property rights' means all categories of intellectual property that are the subject of Sections 1 to 7 of Part II of the TRIPS Agreement, namely: copyright and related rights; patents; trademarks; designs; layout-designs (topographies) of integrated circuits; geographical indications; and the protection of undisclosed information (Article 11.2.2(a)(i) to (vii), respectively), as well as plant variety rights (Article 11.2.2(b)). In accordance with Article 11.3, each Party is to be free to establish its own regime covering the exhaustion of intellectual property rights, subject to the relevant provisions of the TRIPS Agreement.

79. Each sub-section of Section B addresses a specific intellectual property right (or set of intellectual property rights).

80. Sub-section A is entitled 'Copyright and Related Rights'. Pursuant to Article 11.4 ('Protection Granted'), the Parties must comply with the rights and obligations set out in other international agreements, namely: the Berne Convention for the Protection of Literary and Artistic Works; the WIPO Copyright Treaty; the WIPO Performances and Phonograms Treaty; and the TRIPS Agreement. Article 11.5 defines the terms of protection for covered copyright and related rights.

81. The remainder of Sub-section A concerns the right to a single equitable remuneration of producers of phonograms (Article 11.6), practices and policies with regard to the resale rights of artists (Article 11.7), the availability of adequate legal protection and effective legal remedies against the circumvention of technological measures that are used in connection with rightholders' exercise of their rights in, and that restrict acts in respect of, their works, performances and phonograms which are not authorised by the rightholders or permitted by domestic law (Article 11.9) and the protection of electronic rights management information (Article 11.10).

82. Sub-section B is entitled 'Trademarks'. In accordance with Article 11.12, each Party must make all reasonable efforts to comply with the Trademark Law Treaty (done at Geneva on 27 October 1994) and the Singapore Treaty on the Law of Trademarks (adopted in Singapore on 27 March 2006). Each Party must provide for a system for registering trademarks in which the relevant trademark administration shall give reasons in writing for a refusal to register a trademark. An applicant must have the opportunity to appeal against a refusal before a judicial authority; third parties must be able to oppose trademark applications and each Party must provide a publicly available electronic database of trademark applications and registrations (Article 11.13). The Parties must protect well-known trademarks in accordance with the TRIPS Agreement (Article 11.14). Article 11.15 provides for exceptions to the rights conferred by a trademark.

83. Sub-section C ('Geographical Indications') applies to the recognition and protection of geographical indications for wines, spirits, agricultural products and foodstuffs which originate in the territories of the Parties (Article 11.16.1). Once the EUSFTA enters into force, the Parties must establish systems for registering and protecting geographical indications in their territories for such categories of goods as they deem appropriate (Article 11.17). Other provisions concern matters such as the scope of protection of geographical indications (Article 11.19) or the persons who may use a protected geographical indication (Article 11.20).

84. Sub-section D is entitled 'Designs'. The Parties are to provide for the protection of independently created designs that are new or original. That protection must be provided through registration and confer exclusive rights upon the holder (Article 11.24.1). Article 11.25 sets out the scope of the rights conferred by registration on the owner of a protected design. The available term of protection must be at least 10 years from the date of application (Article 11.26). Article 11.27 concerns limited exceptions to the protection of designs. Article 11.28 addresses the relationship between protected designs and copyright.

85. Sub-section E is entitled 'Patents'. By Article 11.29, the Parties reaffirm their obligations under the Patent Cooperation Treaty and, where appropriate, commit to make all reasonable efforts to comply with Articles 1 to 16 of the Patent Law Treaty in a manner consistent with their domestic law and procedures. The Parties also commit to respect the WTO General Council Decision of 30 August 2003 on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, together with the WTO General Council Decision of 6 December 2005 on the Amendment of the TRIPS Agreement. Article 11.31 lays down the circumstances in which the Parties must make available an extension of the duration of the rights conferred by patent protection.

86. Sub-section F ('Protection of Test Data') concerns the protection of test data submitted to obtain an administrative marketing approval to put, respectively, a pharmaceutical product or an agricultural chemical product on the market (Articles 11.33 and 11.34).

87. The single provision of Sub-section G ('Plant Varieties') states that the Parties reaffirm their obligations under the International Convention for the Protection of New Varieties of Plants, including their right to implement the optional exception to the breeder's right as referred to in Article 15, paragraph 2, of that convention (Article 11.35).

88. Section C is entitled 'Civil Enforcement of Intellectual Property Rights'. In Article 11.36, the Parties reaffirm their commitments under Articles 41 to 50 of the TRIPS Agreement. They agree to establish measures, procedures and remedies under their respective domestic law against infringements of intellectual property rights covered by Chapter Eleven, in compliance with such commitments (Article 11.36.1). Those measures, procedures and remedies must satisfy the requirements laid down in Article 11.36.2. Article 11.36.3 provides that nothing in Chapter Eleven affects the capacity of either Party to enforce its domestic law in general or creates any obligation on either Party to amend its existing laws as they relate to the enforcement of intellectual property rights. Furthermore, nothing in that chapter creates any obligation on either Party to put in place a distinct judicial system to enforce intellectual property rights or affecting the distribution of resources as between the enforcement of intellectual property rights and the enforcement of law in general.

89. The remaining part of Section C addresses, in particular, the obligation to take appropriate measures to publish or make available to the public information on final judicial decisions in civil judicial proceedings concerning the infringement of an intellectual property right (Article 11.37); the obligation to make available the civil measures, procedures and remedies referred to in Section C for all categories of intellectual property that are the subject of Sections 1 to 6 of Part II of the TRIPS Agreement (Article 11.38); measures for preserving evidence (Article 11.39); injunctions (Article 11.42); alternative measures (Article 11.43); and damages (Article 11.44).

90. Section D is entitled ‘Border Measures’. Article 11.49 sets out the scope of such measures, specifically in relation to procedures with respect to goods under customs control. Article 11.50 requires the customs authorities to adopt a range of approaches to identify shipments containing counterfeit trademark goods, pirated copyright goods, pirated design goods, and counterfeit geographical indication goods. Article 11.51 identifies the areas in respect of which the Parties agree to cooperate.

91. The single provision in Section E (‘Cooperation’) records the Parties’ agreement to cooperate with a view to implementing the commitments and obligations undertaken under Chapter Eleven and identifies what activities are to be included in the areas of cooperation (Article 11.52).

92. Chapter Twelve (‘Competition and Related Matters’) addresses antitrust and mergers, public undertakings, undertakings entrusted with special or exclusive rights and State monopolies.

93. Section A concerns ‘Antitrust and Mergers’. In Article 12.1.1, the Parties recognise the importance of free and undistorted competition in their trade relations and acknowledge that anticompetitive business conduct or anti-competitive transactions may potentially distort the proper functioning of the Parties’ markets and undermine the benefits of trade liberalisation. Article 12.1.2 states that, in order to promote free and undistorted competition in all sectors of their economy, the Parties must each maintain comprehensive legislation which effectively addresses three issues which affect trade between them, namely: (a) horizontal and vertical agreements; (b) abuses of a dominant position; and (c) concentrations between undertakings which result in a substantial lessening of competition or which significantly impede effective competition.

94. Section B concerns ‘Public Undertakings, Undertakings Entrusted with Special or Exclusive Rights and State Monopolies’. Article 12.3.1 states that the provisions of Chapter Twelve are not to prevent either Party, in accordance with its law, from establishing or maintaining public undertakings and undertakings entrusted with special or exclusive rights. The remaining part of Article 12.3 lays down obligations as regards the conditions that apply to such undertakings. Article 12.4 states that the Parties may continue to designate or maintain State monopolies. However, they must adjust State monopolies of a commercial character in order to ensure that such monopolies do not discriminate when they procure and market goods and services.

95. Section C concerns ‘Subsidies’. Article 12.5.1 and 12.5.2 defines a subsidy for the purposes of the EUSFTA and states what types of subsidy are subject to Chapter Twelve. Article 12.5.3 provides that Articles 12.7 (‘Prohibited Subsidies’), 12.8 (‘Other Subsidies’) and 12.10 (‘Review Clause’) together with Annex 12-A do not apply to various fisheries and agriculture subsidies. The provisions of Section C are without prejudice to the Parties’ rights and obligations under the WTO Agreement (Article 12.6). Article 12.7 sets out what types of subsidies, related to goods and services, are prohibited and provides for exceptions. Article 12.8.2 concerns the exchange of information as regards such subsidies. Article 12.9 lays down transparency obligations. Article 12.10.1 requires the Parties to keep under constant review the matters to which Section C refers.

96. Section D (‘General Matters’) lays down obligations regarding cooperation and coordination in law enforcement (Article 12.11), confidentiality (Article 12.12) and consultation (Article 12.13). Article 12.14 excludes any matter arising under Chapter Twelve, save for Article 12.7 (‘Prohibited Subsidies’), from the scope of application of Chapters Fifteen (‘Dispute Settlement’) and Sixteen (‘Mediation Mechanism’).

97. Annex 12-A sets out principles applicable to other types of subsidy.

98. Chapter Thirteen is entitled ‘Trade and Sustainable Development’.

99. Section A contains ‘Introductory Provisions’. Article 13.1 refers to a number of international instruments and reaffirms the Parties’ commitment to developing and promoting international trade and their bilateral trade and economic relationship in such a way as to contribute to sustainable development (Article 13.1.1). The Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development and emphasise the benefit of cooperation on trade-related social and environmental issues as part of a global approach to trade and sustainable development (Article 13.1.2). The Parties also recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded under domestic labour and environmental laws but stress that environmental and labour standards should not be used for protectionist trade purposes (Article 13.1.3). In addition, the Parties indicate that their aim is to strengthen trade relations and cooperation in ways that promote sustainable development in the context of Article 13.1.1 and 13.1.2 and state that it is not their intention to harmonise their labour or environmental standards (Article 13.1.4).

100. Each Party maintains the right to establish its own levels of labour and environmental protection, and to adopt or modify its relevant laws and policies accordingly, consistently with the principles of internationally recognised standards or agreements, referred to in Articles 13.3 and 13.6, to which it is a Party (Article 13.2.1). The Parties must continue to improve their laws and policies and strive towards providing and encouraging high levels of labour and environmental protection (Article 13.2.2).

101. Section B concerns ‘Trade and Sustainable Development — Labour Aspects’. The Parties recognise the value of international cooperation and agreements on employment and labour affairs as the international community’s response to economic, employment and social challenges and opportunities resulting from globalisation; and commit to consulting and cooperating as appropriate on trade-related labour and employment issues of mutual interest (Article 13.3.1). They also reaffirm their commitments to recognising full and productive employment and decent work for all as key elements of sustainable development for all countries and as a priority objective of international cooperation; and resolve to promote the development of international trade in a way that is conducive to full and productive employment and decent work for all (Article 13.3.2). In accordance with the ILO obligations assumed by the Parties and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, the Parties commit to respecting, promoting and effectively implementing the principles concerning fundamental rights at work, namely: (a) freedom of association and effective recognition of the right to collective bargaining; (b) elimination of all forms of forced or compulsory labour; (c) effective abolition of child labour; and (d) elimination of discrimination in respect of employment and occupation. The Parties also reaffirm their respective commitments to implementing effectively the ILO Conventions that Singapore and the Member States of the Union have ratified (Article 13.3). The Parties undertake to make continued and sustained efforts towards ratifying and effectively implementing the fundamental ILO conventions; to consider ratifying and implementing other ILO conventions, taking into account domestic circumstances; and to exchange relevant information (Article 13.3.4). Article 13.3.5 states that the Parties recognise that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage.

102. In Article 13.4, the Parties recognise the importance of working together on trade-related aspects of labour policies in order to achieve the EUSFTA’s objectives. That provision also contains a (non-exhaustive) list of areas in which the Parties may initiate cooperative activities of mutual benefit.

103. Article 13.5 states that each Party shall take account of relevant scientific and technical information and related international standards, guidelines or recommendations, including the precautionary principle, when preparing and implementing measures aimed at health and safety at work which may affect trade or investment between the Parties.

104. Section C concerns ‘Trade and Sustainable Development — Environmental Aspects’. The Parties recognise the value of international environmental governance and agreements; stress the need to enhance the mutual supportiveness (sic) between trade and environment policies, rules and measures; and state that they will consult and cooperate as appropriate with respect to negotiations on trade-related environmental issues of mutual interest (Article 13.6.1). Furthermore, the Parties undertake to implement effectively, through laws, regulations or other measures and practices in their respective territories, the multilateral environmental agreements to which they are a party (Article 13.6.2). The Parties reaffirm their commitment to reaching the ultimate objective of the UN Framework Convention on Climate Change (‘UNFCCC’) and of its Kyoto Protocol; and agree to work together to strengthen the multilateral, rules-based regime under the UNFCCC building on the UNFCCC’s agreed decisions and to support efforts to develop a post-2020 international climate change agreement under the UNFCCC applicable to all parties (Article 13.6.3). Nothing in the EUSFTA is to prevent either Party from adopting or maintaining measures to implement the multilateral environmental agreements to which it is a party, provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade (Article 13.6.4).

105. Article 13.7 deals with trade in timber and timber products. The Parties recognise the importance of global conservation and sustainable management of forests. They undertake to: (a) exchange information on approaches to promote the trade in, and consumption of, timber and timber products from legally and sustainably managed forests and to promote the awareness of such approaches; (b) promote global forest law enforcement and governance and address trade in illegally harvested timber and timber products; (c) cooperate to promote the effectiveness of measures or policies aimed at addressing the trade in illegally harvested timber and timber products; and (d) promote the effective use of the Convention on International Trade in Endangered Species of Wild Fauna and Flora with regard to timber species that are at risk.

106. Article 13.8 concerns trade in fish products. The Parties recognise the importance of ensuring the sustainable conservation and management of fish stocks and undertake to: (a) comply with long-term conservation measures and sustainable exploitation of fish stocks as defined in the international instruments ratified by the respective Parties and uphold the principles of the Food and Agriculture Organisation (‘FAO’) and relevant UN instruments relating to these issues; (b) introduce and implement effective measures to combat illegal, unreported and unregulated (‘IUU’) fishing, facilitate keeping IUU products out of trade flows and exchange information on IUU activities; (c) adopt effective monitoring and control measures to ensure compliance with conservation measures; and (d) uphold the principles of the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas and respect the relevant provisions of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing.

107. Article 13.9 is drafted in nearly identical terms to those of Article 13.5, save for the fact that it refers and applies to ‘measures aimed at environmental protection’ rather than to health and safety at work.

108. In Article 13.10, the Parties recognise the importance of working together on trade-related aspects of environmental policies in order to achieve the EUSFTA’s objectives. That provision contains a (non-exhaustive) list of areas in which the Parties may initiate cooperative activities of mutual benefit.

109. Section D contains ‘General Provisions’. Article 13.11 records the Parties’ resolve to make continuing special efforts to facilitate and promote trade and investment in environmental goods and services (Article 13.11.1), the obligation to pay special attention to facilitating removing obstacles to trade or investment concerning climate-friendly goods and services (Article 13.11.2), the need to reduce greenhouse gas emissions and to limit distortions of trade as much as possible (Article 13.11.3) and to promote corporate social responsibility (Article 13.11.4).

110. Pursuant to Article 13.12, a Party may not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental and labour laws in a manner affecting trade or investment between the Parties (Article 13.12.1); or fail to enforce effectively its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties (Article 13.12.2).

111. Article 13.13 sets out transparency obligations as regards any measure of general application aimed at protecting the environment or labour conditions which may affect trade and investment between the Parties. Articles 13.14 and 13.15 deal with reviewing the impact of implementing the EUSFTA on sustainable development and institutional mechanisms for monitoring compliance with Chapter Thirteen.

112. If they disagree on any matter arising under Chapter Thirteen, the Parties are to have recourse only to the procedures provided for in Article 13.16 ('Government Consultations') and Article 13.17 ('Panel of Experts'). Chapters Fifteen ('Dispute Settlement') and Sixteen ('Mediation Mechanism') do not apply to Chapter Thirteen (Article 13.16.1). Article 13.16.2 to 13.16.6 sets out the procedures for, and objectives of, government consultations. Article 13.17 sets out, inter alia, the mechanisms and procedures for establishing a panel of experts to consider any matter that has not been satisfactorily addressed by the Board provided for by Article 13.16.4.

113. Chapter Fourteen ('Transparency') aims to pursue a transparent and predictable regulatory environment for economic operators (Article 14.2.1), to reaffirm commitments under the WTO Agreement and lay down clarifications and improved arrangements for transparency, consultation and better administration of measures of general application (Article 14.2.2). A 'measure of general application' means a law, regulation, judicial decision, procedure or administrative ruling that may have an impact on any matter covered by the EUSFTA. It does not include a ruling that applies to a particular person (Article 14.1(a)).

114. Article 14.3 sets out the publication obligations for each Party in respect of both measures of general application (Article 14.3.1) and any proposal to adopt or to amend a measure of general application (Article 14.3.2). Article 14.4.1 requires each Party to designate a contact point to facilitate the effective implementation of the EUSFTA and communication between the Parties on any matter that it covers. Further details relating to that contact point, its functioning and the enquiries made to it are set out at Article 14.4.2 to 14.4.8.

115. Article 14.5 sets out obligations to be respected so as to administer all measures of general application in a consistent, impartial and reasonable manner. In particular, each Party must (a) endeavour to provide interested persons of the other Party who are directly affected by proceedings with reasonable notice, in accordance with its procedures, when such proceedings are initiated; (b) afford interested persons a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action; and (c) ensure that its procedures are based on and in accordance with its law.

116. Article 14.6.1 requires each Party to establish and maintain judicial, quasi-judicial or administrative tribunals or procedures to ensure prompt review and, where warranted, correction of administrative actions relating to matters covered by the EUSFTA. The tribunals must be impartial and independent of the office or authority entrusted with administrative enforcement and must not have any substantial interest in the outcome (Article 14.6.1). Each Party must also ensure that, in any tribunals or procedures referred to in Article 14.6.1, the parties to the proceedings are guaranteed the right to: (a) a reasonable opportunity to support or defend their positions; and (b) a decision based on the evidence and submissions of record or, where so required by law, the record compiled by the administrative authority (Article 14.6.2). Article 14.6.3 deals with implementing those decisions.

117. The Parties agree to cooperate in promoting regulatory quality and performance (Article 14.7.1) and promoting the principles of good administrative behaviour (Article 14.7.2).

118. Article 14.8 provides that, where there are specific and different rules in other chapters of the EUSFTA regarding matters covered by Chapter Fourteen, those rules are to prevail.

119. Chapter Fifteen ('Dispute Settlement') seeks to avoid or resolve any difference between the Parties concerning the interpretation and application of the EUSFTA with a view to arriving at, where possible, a mutually acceptable solution (Article 15.1). Chapter Fifteen applies to any difference concerning the interpretation and application of the EUSFTA, except as otherwise expressly provided (Article 15.2).

120. The procedures laid down in Articles 15.3 to 15.13 provide for the following steps in the dispute settlement mechanism: consultations in good faith with the aim of reaching a mutually agreed solution (Article 15.3.1 to 15.3.4); a request to establish an arbitration panel in accordance with Article 15.4 if consultations have been concluded and no mutually agreed solution has been reached (Article 15.3.5); arbitration (Articles 15.4 to 15.8); compliance proceedings (Articles 15.9 to 15.11); the application of remedies in case of non-compliance (Article 15.12); and review of any measure taken to comply after the suspension of obligations (Article 15.13).

121. Articles 15.14 to 15.19 contain various rules concerning arbitration procedures, which are supplemented by Annex 15-A. The general provisions in Section D deal with the list of arbitrators (Article 15.20); the relationship between the dispute settlement mechanism in Chapter Fifteen and the WTO dispute settlement mechanism (Article 15.21); time limits (Article 15.22); and the review and modification of Chapter Fifteen (Article 15.23).

122. Chapter Sixteen ('Mediation Mechanism') seeks to facilitate finding a mutually agreed solution through a comprehensive and expeditious mediation procedure (Article 16.1). Chapter Sixteen applies to any measure within the scope of the EUSFTA that adversely affects trade or investment between the Parties, except as otherwise provided (Article 16.2).

123. Before initiating the mediation procedure, a Party may at any time request in writing information regarding such a measure (Article 16.2). The procedure laid down in Articles 16.3 to 16.6 provides for the following steps in the mediation mechanism: the request to enter into mediation (Article 16.3); selection of the mediator (Article 16.4); the mediation itself (Article 16.5); and implementation of a mutually agreed solution (Article 16.6). Article 16.7 concerns the relationship between mediation and dispute settlement. Other provisions address time limits (Article 16.8), costs (Article 16.9), and review (Article 16.10).

124. Chapter Seventeen is entitled 'Institutional, General and Final Provisions'. Articles 17.1 and 17.2 establish an institutional structure consisting of different committees in which the Parties are to meet to supervise and facilitate the implementation and application of the EUSFTA. Article 17.3 provides that, if any provision of the WTO Agreement that the Parties have incorporated into the EUSFTA is amended, the Parties are, as necessary, to consult each other with a view to finding a mutually satisfactory solution. Article 17.4 deals with decision-making in the different committees. Article 17.5 concerns amendments to the EUSFTA.

125. Article 17.6.1 states that the EUSFTA is to apply to taxation measures only in so far as that is necessary to give effect to the provisions of the EUSFTA. In accordance with Article 17.6.2, nothing in the EUSFTA is to affect the rights and obligations of either Singapore or the European Union or one of its Member States under any tax agreement between Singapore and any Member State or States of the European Union. Article 17.6.3 and 17.6.4 states that nothing in the EUSFTA is to

prevent the adoption or retention of certain types of tax measures and measures aimed at preventing tax avoidance or tax evasion. Article 17.6.5 concerns Singapore's right to adopt or maintain taxation measures which are needed to protect overriding public policy interests arising out of its specific space constraints.

126. The Parties are to authorise, in freely convertible currency and in accordance with the provisions of Article VIII of the Articles of Agreement of the International Monetary Fund, any payments and transfers on the current account of the balance-of-payments between them. In that context, the Parties are to consult each other (Article 17.7).

127. Each Party is to encourage its sovereign wealth funds to respect the Generally Accepted Principles and Practices — Santiago Principles (Article 17.8).

128. Article 17.9 concerns the conditions and procedures allowing a Party which is in serious balance-of-payments and external financial difficulties, or under threat thereof, to adopt or maintain restrictive measures with regard to trade in goods, services and establishment and payments and transfers related to investments.

129. Article 17.10 sets out a security exceptions clause, permitting the Parties to act in order to protect their essential security interests.

130. The remaining provisions of Chapter Seventeen concern the disclosure of information and protection of confidential information (Article 17.11); the entry into force of the EUSFTA (Article 17.12); its duration and termination (Article 17.13); the fulfilment of obligations under the EUSFTA (Article 17.14); the absence of direct effect (Article 17.15); annexes, appendices, joint declarations, protocols and understandings forming an integral part of the EUSFTA (Article 17.16); the relationship between the EUSFTA and the Partnership and Cooperation Agreement and the WTO Agreement (Article 17.17); future accessions to the European Union (Article 17.18); the territorial application of the EUSFTA (Article 17.19); and the authentic versions of the EUSFTA, that is to say the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish versions (Article 17.20).

131. Protocol 1 concerns the definition of the concept of 'originating products' and methods of administrative cooperation. Understandings 1 to 5 address, respectively, Article 17.6 (taxation); the remuneration of arbitrators; additional customs-related provisions; the mutual recognition of authorised economic operator programmes; and Singapore's specific constraints of space and access to natural resources.