

## Our position

# The Path Forward for EU Trade Policy

Reflections following CJEU Opinion 2/15



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2016, directly supports more than 4.5 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

## Executive summary

The value of rules-based trade to Europe and to the world remains unprecedented. Today, the EU is the world's largest trading partner, a success-story that has been predicated on a commitment by the EU to smart, fair and free trade and investment with partners around the world. However, EU trade policy faces challenges that are both political and legal in nature. AmCham EU welcomes the recent CJEU ruling on the EU-Singapore FTA, clarifying the EU and national competences as regards its ratification process. However, moving forward, the EU needs to establish a new tradition of seeking political and legal acceptance of EU trade policy. In this paper, AmCham EU outlines a number of recommendations, to help ensure the full potential of EU trade policy is recognised and fulfilled.

### 1. Overview

1. Trade policies globally are facing major challenges in 2017. The EU is directly concerned as both internal and external events are raising questions about how the EU can maintain a leading role in global trade and economic development. EU trade policy – traditionally led by the EU institutions – is today under more scrutiny than ever before in the national capitals and subject to criticism from sections of civil society. The role of trade liberalisation as a vehicle for growth and enhanced economic welfare is being questioned as key parts of Europe still seek effective responses to low growth and high unemployment. Global attitudes to trade are also in flux as protectionist and nationalist sentiments query the value of multilateralism and related rule-making institutions.
2. The value of trade to Europe and to the world, however, remains unprecedented. Today, the EU is the world's largest trading partner, the world's largest exporter of manufactured goods and services, and the biggest export market for some 80 countries around the world.<sup>1</sup> This success has been predicated on a commitment by European countries to smart, fair and open trade and investment with partners around the world. At a time of global uncertainty, an ambitious EU trade and investment policy is perhaps more important than ever before. EU leaders have agreed that trade remains fundamental to the success of Europe in the future, and indeed they have consistently reaffirmed the EU's ambition to be a global leader promoting free and fair trade for all.<sup>2</sup> However, the path to success may need to be adapted and reinforced with appropriate supporting measures.
3. Fulfilling the EU's significant trade policy agenda in the current economic and political environment will not be straight-forward, but certain steps can be taken to facilitate a more stable policy-making environment in the years to come. To implement an effective trade policy going forward, the EU should:
  - Look to shape global trade to free, fair and values-based objectives, and to communicate effectively the broad and diverse benefits of this trade;
  - Reinforce respect for rules-based trade and multilateral agreements whenever possible;
  - Ensure transparency and efficacy in its decision-making and processes;
  - Forge new bridges with citizens and stakeholders across Europe to build consensus; and

<sup>1</sup> European Commission, "EU position in world trade," (<http://ec.europa.eu/trade/policy/eu-position-in-world-trade/>, updated 2 October 2014).

<sup>2</sup> European leaders have vocally affirmed their commitment to free trade in 2017. Notably, EU Commission President Juncker in his State of the Union speech noted that, "Being European...means being open and trading with our neighbours...It means being the world's biggest trading bloc." ([http://europa.eu/rapid/press-release\\_SPEECH-16-3043\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm)).

- Strengthen EU policymaking and cooperation, allowing for uninterrupted implementation of the EU's trade policy agenda outlined in the Commission's "[Trade for All](#)" initiative.
4. One issue that needs to be addressed directly is Opinion 2/15 of the Court of Justice of the European Union (CJEU). The CJEU on 16 May 2017 has ruled that the EU's free trade agreement with Singapore, as drafted, cannot be concluded by the EU exclusively, but rather must be concluded by the EU and the Member States acting together with shared competences. AmCham EU welcomes this ruling, which provides clarity on the breadth and limits of EU and national competences and provides constructive guidance for the future handling of EU trade policy.
  5. Moving forward, the ruling nonetheless raises crucial questions not only on the way forward for the EU-Singapore FTA but also regarding the ambition, content and structuring of similarly modeled FTAs currently being negotiated or planned for the future. More generally, the EU should also consider reviewing the mandate and trade negotiation processes and how these preliminaries to trade agreements could better contribute to the EU's overall trade ambitions. Making these processes more transparent and reflective of the broad EU interests in trade-related growth could provide greater confidence to business, reduce if not eliminate recent public suspicion of these agreements, and generally enhance the EU's credibility as a reliable trade partner.
  6. A strong and effective EU trade policy ultimately requires smart leadership and broad endorsement from EU and Member State leaders as well as businesses, consumers and other European stakeholders. This policy paper provides recommendations to the EU to help facilitate these important goals.

## 2. The Path Ahead for EU Free Trade Agreements

7. Of the several challenges to the EU's trade agenda, the first was internal and manifested itself in 2016 with the public backlash against key elements of the Transatlantic Trade and Investment Partnership (TTIP) agreement then being negotiated with the US. Some of those concerns spilled over to also affect the EU's negotiations with Canada, necessitating amendments to investment and other provisions that had already been agreed for the Comprehensive Economic and Trade Agreement (CETA). Notwithstanding the last-minute changes, the CETA signature process was disrupted in late 2016 when objections were voiced by Belgium's Wallonian regional parliament<sup>3</sup>.
8. In the new, politicized debate concerning EU FTAs, it has become apparent that the EU Treaties allow for an FTA structured as a "mixed" agreement to be potentially vetoed by any national parliament or, in some instances, also by a sub-national regional parliament. The rules have not changed, but the political possibility for a veto appears to have increased significantly since 2016. This raises serious political risks for the EU, internally and internationally, but also puts at direct risk the many economic and growth benefits that these agreements can bring. The new political risks associated with EU mixed agreements thus need to be addressed carefully.

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<sup>3</sup> Under Belgian law, regional approval was necessary to authorize the Federal Government to approve the signature of CETA. In fact, pursuant to the EU's decision to treat CETA as a "mixed" agreement, the Council has to approve it by unanimity. The European Parliament's consent was secured on 15 February and now all Member States' parliaments (in some cases even at regional level, for a total of 38 parliaments) will have to ratify the agreement.

9. The Opinion 2/15 of the CJEU on 16 May 2017 addresses the respective competences of the EU and Member States as regards each of the major provisions of the EU-Singapore FTA (EUSFTA)<sup>4</sup>, and concludes that the EUSFTA, as drafted, must be approved on the EU side as a “mixed” agreement requiring ratification jointly by all Member States alongside the EU institutions. This ruling has implications (the so-called “mixity effect”) not only for the EUSFTA but also for all similarly structured FTAs in future. There will be implications for FTAs currently in negotiation (e.g., EU-Japan), negotiated but not yet signed (e.g., EU-Vietnam), in preparation (e.g., EU-New Zealand, EU-Australia), as well as for existing FTAs expected to be updated/amended over the next years (e.g., EU-Mexico, EU-Chile, EU-Korea).
10. In particular, the Court in Opinion 2/15 concludes that a FTA which includes the subject area that has recently become most politicised in the EU – investor-state dispute settlement (ISDS) – must be deemed a “mixed” agreement and thus requires ratification also by all individual Member States (and by regional parliamentary bodies in certain instances). By implication, bilateral or multilateral investment courts as more recently alternatively proposed by the European Commission would apparently also require unanimous Member State approval. Given the significant public criticism of ISDS and more recent questioning of the court proposals, agreements which include these investor dispute settlement mechanisms are consequently at risk of being vetoed. The CETA signature process illustrates this risk. In our view, it now becomes crucial to review the EU’s current strategy for pursuing comprehensive FTAs, not with a view to ending broad-based trade arrangements but rather to identify procedures and processes which could help ensure that the EU can indeed continue to pursue, and conclude, agreements that can secure the many benefits of trade liberalisation in parallel with essential investment protection mechanisms.
11. AmCham EU believes that a high degree of transparency combined with the institutional procedures and principles already enshrined in the Lisbon Treaty can ensure strong democratic legitimacy for trade agreements approved at the EU level<sup>5</sup>. Conversely, a veto would preclude implementation of trade commitments that have typically been negotiated over a number of years under the surveillance of and pursuant to the political mandates given by the respective democratically elected Member State governments. It would further undermine the role of the directly-elected European Parliament.

### 3. AmCham EU Recommendations

#### *On-Going EU Negotiations/Ratification procedures<sup>6</sup>*

12. Pending FTAs structured similarly to the EUSFTA, such as the EU-Japan and EU-Vietnam FTAs, will be deemed mixed agreements in line with the Opinion 2/15 of the CJEU. AmCham EU is concerned that the remaining negotiations and/or ratification procedures may be disrupted and delayed if not derailed.

<sup>4</sup> The EUSFTA negotiations were concluded in 2014 and the text initialled by both parties in 2015, but signing and formal adoption procedures in the EU were postponed pending a CJEU Opinion requested by the Commission on whether the EU (Council with the consent of the Parliament) can approve the FTA alone or if all of the individual Member States must also formally approve the text due to its inclusion of provisions on which the Member States are deemed to share legal competence with the EU.

<sup>5</sup> See also “Trading Together Declaration”, at <http://www.trading-together-declaration.org/>.

<sup>6</sup> EU-Singapore FTA (negotiations concluded, text initialled); EU-Vietnam FTA (negotiations concluded); EU-Japan FTA (negotiations to be concluded in 2017); EU-China BIT (negotiations on-going); EU-Indonesia FTA, EU-Philippines FTA (negotiations started).

13. As a first priority, the EU needs to address how to deal with the agreements which are structured along the lines of the EUSFTA and which are either nearing conclusion or are already concluded but not yet ratified. The objective must be to ensure that these FTAs subject to the “mixture effect” can nonetheless be successfully concluded, in their entirety, and without substantial delay.
14. It is essential for the European Commission, Member States and the European Parliament to acknowledge the wider risks associated with any major delay in the conclusion of the FTAs. Not only would the delay undermine the credibility of EU trade policy generally but it could also undercut the motivation of the EU’s major trade partners to pursue trade deals with the EU.
15. AmCham EU recommends that the Commission, EU Member States and the European Parliament move swiftly and decisively to politically validate the broad, value-based objectives of these FTAs. A re-opening of concluded negotiations should be avoided, as it is likely to have detrimental effects on the credibility and future relationship between the EU and the third country. In the case of mixed agreements, this initiative should help secure their endorsement in the relevant national and regional parliaments and to allow these FTAs to be signed and provisionally applied as soon as possible. While provisional application of the parts falling within the EU’s exclusive competence is already foreseen, strengthening the predictability of the ratification process could significantly enhance the EU’s credibility on the international scene.
16. Further, AmCham EU recommends that the EU should take leadership in assessing the internal EU political sensitivities and, in that light, leaders on both sides of the agreement may want to consider the merits of engaging in early discussions with the relevant legislative or social bodies at the national level and/or preparing additional explanatory texts which may help assuage any local political concerns.

### *FTAs Not Yet Mandated*

17. In the run-up to the mandate, the EU Member States should commit to upgrade the national debate on trade in order to help ensure that potentially significant national concerns are addressed at that early stage, *before* the Council mandate is finalised and negotiations start. This multi-faceted approach could help to avoid major delays in the negotiations due to internal EU politics arising and requiring time-consuming mid-stream public consultations and policy revision. It should also facilitate a smoother ratification process at the end. Mutual trust is needed from the start of the negotiations such that the EU position being negotiated can also be accepted by the EU at the end of negotiations. It should be noted that this is of utmost importance regardless of whether the agreement is deemed to be “mixed” or “exclusive”.
18. Considering that the basis for EU trade negotiations starts with the mandate given by the European Council to the European Commission, AmCham EU recommends to ease the potential domestic concerns by drafting more detailed mandates. The mandate could highlight the motivation, objectives and desired content especially in those areas of the FTA where there is shared competence, taking account of known concerns of civil society<sup>7</sup>. Even earlier, feasibility analyses should devote effective coverage to areas of the potential negotiations that could give rise to

<sup>7</sup> For example, the Commission is presently finalising the subject areas to be covered and preparing a proposal for a Council negotiating mandate for an EU-New Zealand FTA. Now is the time for the institutions to carefully assess the risks of mixture and to adapt the mandate accordingly. See Commission press [statement](#) of 7 March 2017.

particular political sensitivities and attempt to defuse such sensitivities by transparent and factual treatment of these issues.

19. Beyond the above initiatives designed to better inform and build support before the negotiating mandate is finalised and negotiations start, AmCham EU recommends that the EU consider a restructuring of FTA negotiations. Such restructuring would not undercut the overall EU “values approach” for FTAs but might bring important efficiencies to the process in instances where political sensitivities and potential related delays can be expected to arise on the issues of mixed competence. To this end, the negotiations could initially focus only on those core commercial policy elements (notably the chapters on tariff reduction/elimination, goods and services market access, procurement and competition, protection of direct investment, intellectual property rights) that the CJEU has deemed to fall within the exclusive EU competence<sup>8</sup> and which are most likely to bring early commercial benefits and related economic growth.
20. These core chapters could be concluded with a view to early signature and provisional implementation as a package, while a second phase of negotiations would address the remaining chapters deemed subject to mixed competence. Whether or not the core chapters would be politically tied or not to subsequent agreement on the other chapters would have to be decided by the respective parties in the specific circumstances.
21. While a staged approach would not necessarily guarantee trouble-free EU adoption of the core trade chapters, such structuring in combination with effective political measures such as improved transparency and effective early public advocacy for the FTA at all levels of the EU, might substantially improve the chances of EU approval of the core FTA.
22. As regards the subject-matters deemed to be of shared EU-Member State competence<sup>9</sup> and notably regarding the politically charged investor protection provisions, AmCham EU recommends considering that these could be taken up in distinct negotiations, either in parallel or subsequent to the negotiations on the core trade agreement, and could either eventually be appended to the core FTA as and when finally agreed by all parties, or could be concluded in a separate agreement. For example, to the extent that investment protection issues might in future be taken up primarily in distinct EU bilateral investment agreements (as being negotiated with China currently), investor dispute settlement in particular might be associated uniquely to those investment agreements.
23. Conversely, as regards protection of indirect, or “portfolio” foreign investment which has been deemed by the CJEU to be subject to mixed competence, an assessment might conclude that these provisions could secure public support and would also desirably be included in the “core” trade agreement notwithstanding the effect on the EU approval procedures. In other words, AmCham EU recommends considering that it might reasonably be assessed that a mixed agreement based solely on inclusion of such politically non-controversial shared-competence provisions could be safely pursued by the EU as an integrated FTA. However, prior consultation (with the trade partner and EU domestic bodies) and careful political assessment would be essential before deciding to take this path.
24. In any event, dealing with the mixed competence provisions will likely require even greater transparency and effective advocacy measures by the respective public bodies during the process of mandating and negotiating the respective provisions. In addition, and to the extent that trade

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<sup>8</sup> See fn. 4.

<sup>9</sup> See fn. 4.

negotiations might eventually be split into separate streams, it should be noted that the quality of the outcome of the negotiations overall might be negatively impacted by such separate negotiations. To be avoided is that leverage normally secured from a concession in one regard could not be exerted effectively due to the corresponding subject being covered by the separate negotiations. Maintaining the ambition of the agreement therefore needs to be taken into account when assessing whether to separate negotiations into two or more streams.

#### 4. Foreign Investment and Market Access: Impact of Opinion 2/15 on scope and substance of EU investment agreements

25. Opinion 2/15 has limited the aspects of foreign investment protection that can be addressed by EU trade agreements concluded under exclusive EU competence, regardless of whether these investment provisions are part of a broader FTA or the subject of a focused bilateral investment treaty (BIT), as presently under negotiation between the EU and China. We note that upcoming negotiations may aim to amend the existing EU-Korea FTA in order to add a chapter on investment protection, so this important existing FTA could also be impacted.
26. In particular, Opinion 2/15 has concluded that the EU has exclusive competence over all elements of “foreign direct investment” as such, with regard to both initial market access and aspects of protection after the investment. However, pursuant to the Treaty (TFEU), the Member States share competence with the EU concerning other types of foreign investment such as indirect, “portfolio investment” (broadly defined), which subject-matter falls rather within the realms of EU internal market/free movement of capital.
27. To date, intended FTA provisions concerning issues of portfolio investment have not been the object of EU public challenges against FTAs. AmCham EU therefore recommends the EU to consider that portfolio investments could be pursued under an integrated strategy as suggested in paragraph 23 above. Again, prior consultation (with trade partner and domestic bodies) and acute political assessment will be essential before deciding to take this path.
28. Opinion 2/15 has also addressed and clearly relegated investor-state dispute settlement provisions to the realm of mixed EU/Member State competence.
29. Given that dispute settlement involving investor claims against the EU or Member States has been a focal point of EU public protests against recent FTA negotiations (notably TTIP and CETA), the CJEU’s determination on mixed competence must be strictly taken into account with a view to avoiding that public opposition on this specific issue will undercut securing the benefits of the rest of the trade agreement. AmCham EU therefore recommends the EU to consider dealing with investor disputes separately. However, to the extent that EU pursuit of a bilateral Investment Court System (ICS) or subsequent multilateral court system starts to gain international governmental support and public concerns can be attenuated via effective transparency and early consultations as noted earlier above, existing regimes for investment related dispute settlement can hopefully cease to be a flashpoint in these trade negotiations.
30. Opinion 2/15 has also addressed whether the EU has the competence to annul, via an agreement with a third country, that country’s existing bilateral investment treaty (BIT) with an EU Member State in the absence of that Member State’s express agreement. As the CJEU has ruled that the EU does have such competence, but only as regards issues of foreign direct investment, it appears that

some clarification and eventual amendment of the relevant provisions of the EUSFTA (and in similar other non-concluded FTA texts), is required. That said, a large number of existing Member State BITs continue in force and their future vis-à-vis an ICS or MCS must also be clearly addressed and resolved so as to provide legal certainty to investors on both sides of these investment agreements.

## 5. Conclusion

31. AmCham EU continues to support an ambitious EU trade policy that meets the needs of businesses, consumers and society. In light of the Opinion of the CJEU regarding the EU-Singapore FTA issued in 2017, and the debate on trade in Europe more broadly, clarity and consensus on the path forward for trade policy is more important than ever.
32. The US business community in Europe stands ready and willing to provide constructive and expert input to government, policymakers and all stakeholders to this effect, in order to facilitate an effective, adaptable and implementable EU trade policy that works for businesses and citizens.