

## *Editorial*



### **A Game of Powers**

*Kirsten Schmalenbach*

University of Salzburg

*kirsten.schmalenbach@sbg.ac.at*

A character on a currently popular television series once noted that “when you play the game of thrones, you either win or you die; there is no middle ground”. Perhaps unsurprisingly, this piece of rather Machiavellian wisdom has not rung true with one current power struggle within the EU. On 10 July 2015, the Commission of the European Union played a high-stake gambit: it requested an Opinion (2/15)<sup>1</sup> from the Court of Justice regarding whether or not the Union has the required portfolio of competences to independently conclude the *Free Trade Agreement* with Singapore. For the Commission, this specific agreement was to be the test case for a much-needed judicial clarification of the Union’s exclusive powers to conclude a new generation of far-ranging free trade and investment agreements without the need to seek approval from its 28 member states. The Commission’s patience with hammering out so called ‘mixed agreements’ ratified by both the Union and its member states on the one hand and the trading partner on the other hand was for a variety of reasons at an end: The tumultuous start to the ‘mixed’ free trade agreement with Canada (‘CETA’) and the ‘mixed’ association agreement with Ukraine were harbingers of the increasingly unpredictable haggling of individual national and regional parliaments designed to block or delay the member state’s ratification process for reasons not necessarily linked to the agreement itself. As if that was not enough, threats of popular votes in place of national parliamentary approval as

---

\* Professor of Public International Law.

1 *Opinion 2/15 of the Court (Full Court)* (Court of Justice of the European Union, Case No. ECLI:EU:C:2017:376, 16 May 2017) (Full Court) (*‘Opinion 2/15’*).

well as judicial constitutional review were instruments in member states' tool-boxes that effectively spoiled the Commission's strategy of a close-knit global network of similarly structured bilateral trade and investment agreements.

The Commission's power play before the Court of Justice ('ECJ') was bold and pushed the envelope with creative legal reasoning, trying to use to its advantage the chaotic system and the vague wording of the EU treaty provisions on the Union's competences. These provisions were newly introduced by the *Lisbon Treaty* in 2009 and poorly reflect the, at times, enigmatic jurisprudence of the Court of Justice on the matter. It is not the object here to go into the technical details of the Commission's arguments; rather it suffices to observe that at an institutional level the Commission's allies and foes during the proceeding were quite informative. The European Parliament unconditionally supported the Commission's exclusivity claim, even though both institutions have been for decades locked in a power struggle between themselves. This time however, the European Parliament saw its own position being reinforced by the Commission's arguments: in the event of a legal victory, the European Parliament would be the only player who directly safeguards the democratic legitimacy of future trade and investment agreements; individual regional and national parliaments would be barred from claiming such, particularly as they only speak for a small fraction of EU citizens. Arrayed against the Commission were the Council and 25 member states, who were united in their rejection of what they saw as an egregious ploy. For member states the issue was all the more pressing as the common trade policy allows for a qualified majority vote in the Council when negotiating and concluding trade agreements with third states. Consequently, the preservation of the 'mixed agreements' secured through the back door the need for a measure of unanimity. For one particular member state, the implications of this game of powers are even more far-reaching, but intriguingly from the perspective of a future non-member state role: The United Kingdom's hope for a comprehensive EU-UK free trade agreement after BREXIT would profit from the Union having an all-embracing exclusive competence to conclude such an agreement because the possible negative sentiments of national parliaments about the way their nationals' interests were handled during the BREXIT process would have no impact on future EU trade relations which Britain so badly needs. However, the United Kingdom's long standing fight to preserve member states' sovereignty (and the appalling impression it would give to make a BREXIT driven reversal in the middle of the court proceedings) remained the driving force for its consistent opposition against any power grab by the Union.

The Union's perpetual struggle with its member states over every miniscule division of executive and legislative powers is without doubt peculiar to the