



OVERVIEWS

OPINION 2/15: SUSTAINABLE IS THE NEW TRADE. RETHINKING COHERENCE FOR THE NEW COMMON COMMERCIAL POLICY

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I. Opinion 2/15 of 16 May 2017 on the EU-Singapore Free Trade Agreement¹ raises a variety of legal issues that are key to the global trade model the EU wants to develop with its partners in the future.² It has triggered immediate commentaries online, focusing on the scope of the common commercial policy and the consequences of Opinion 2/15 on both *Brexit* and future EU free trade agreements.³

Opinion 2/15 is a clear illustration of the new balance to be struck between the general objectives of EU external action, EU policies and the underlying powers at stake. Taking ground on the "fair trade" and "sustainable development" objectives in the new treaties, the Court of Justice (the Court) continues its classically broad interpretation of the scope of the common commercial policy. Is there anything new under the sun? Arguably, Opinion 2/15 might announce the emergence of a recurrent issue in the law of EU external action: *where does the use of general objectives end, and where does mixity start?*

Needless to recall, that guaranteeing the material coherence of the European Union external action is an evolving challenge. A crucial step was taken with the introduction

¹ Court of Justice, opinion 2/15 of 16 May 2017.

² Communication COM(2015) 497 final of 14 October 2015 from the Commission, *Trade for all – towards a more responsible trade and investment policy*.

³ R. BISMUTH, *3 questions à Régis Bismuth sur l'avis 2/15 rendu par la CJUE sur le traité commercial conclu entre l'UE et Singapour*, in *Le Club des Juristes*, 19 May 2017, www.blog.leclubdesjuristes.com; S. GÁSPÁR-SZILÁGYI, *Opinion 2/15: Maybe it is Time for the EU to Conclude Separate Trade and Investment Agreements*, in *European Law Blog*, 20 June 2017, www.europeanlawblog.eu; L. GROZDANOVSKI, *L'avis 2/15: les accords de libre-échange 'nouvelle génération' sont désormais des accords mixtes*, in *Centre d'études Juridiques Européennes*, 29 May 2017, www.ceje.ch; J. LARIK, *Trade and Sustainable Development: Opinion 2/15 and the EU's Foreign Policy Objectives*, in *Europe and the World – a law review blog*, 30 May 2017, blogs.ucl.ac.uk; S. GARBEN, *Opinion 2/15: Competence Creep through International Trade?*, in *Europe and the World – a law review blog*, 1 June 2017, blogs.ucl.ac.uk; F. MARTUCCI, E. DUBOUT, E. CASTELLARIN, A. DE NANTEUIL, *L'avis 2/15 de la Cour de Justice de l'Union européenne: quelles conséquences pour le CETA et le Brexit?*, Conférence-débat du 19 juin 2017, Université Paris-Panthéon-Assas, in *Blog droit européen*, July 2017, blogdroiteuropeen.files.wordpress.com.

into primary law of a set of general objectives guiding the EU external action, which was considered a key answer to the fragmentation of EU action amongst different policies.⁴ Listed in Arts 3, para. 5, and 21, para. 2, TEU, these general objectives must also be read in combination with the policy-specific objectives that eventually remain in force throughout the treaties.⁵ As some have quickly noticed,⁶ the material harmonisation deriving from this new set of transversal objectives of the EU external action might also have the inconvenience of making it more difficult to distinguish between the different EU policies and legal bases at stake. An illustration of this can be found in the 2016 *EU-Tanzania Agreement* case,⁷ where the Parliament argued that the EU-Tanzania Agreement should have been concluded under the Area of Freedom, Security and Justice (AFSJ) instead of the Common Foreign and Security Policy (CFSP), because of the presence of human rights provisions in the Agreement. The Court recalled that:

“[...] the fact that certain provisions of such an agreement, taken individually, have an affinity with rules that might be adopted within a European Union policy area is not, in itself, sufficient to determine the appropriate legal basis of the contested decision. As regards, in particular, provisions of the EU-Tanzania Agreement *concerning compliance with the principles of the rule of law and human rights, as well as respect for human dignity*, it must be stated that such compliance is required of all actions of the European Union, including those in the area of the CFSP, as is clear from the provisions, read together, set out in the first subparagraph of Article 21(1), Article 21(2)(b) and (3) TEU, and Article 23 TEU. That being the case, the Court must also assess that agreement in the light of its aim”.⁸

The same difficulty to identify the policy under which a specific external action must be undertaken, may arise from the ancillary pursuit of any objective listed in Art. 21, para. 2, TEU which includes amongst others: support to the rule of law,⁹ to international security,¹⁰ to sustainable development,¹¹ or to the abolition of international trade restrictions.¹²

⁴ See, amongst others: M. CREMONA, *Coherence in European Union Foreign Relations Law*, in P. KOURAKOS (ed.), *European Foreign Policy: Legal and Political Perspectives*, Cheltenham: Edward Elgar Publishing, 2011, p. 55 *et seq.*

⁵ *E.g.* the progressive elimination of restrictions to international trade is a specific objective of the common commercial policy (Art. 206 TFEU), or the eradication of poverty is a specific objective of the development cooperation policy (Art. 208 TFEU).

⁶ C. HILLION, *Cohérence et action extérieure de l'Union*, in E. NEFRAMI (dir.), *Objectifs et compétences dans l'Union européenne*, Bruxelles: Bruylants, 2013, p. 229 *et seq.*

⁷ Court of Justice, judgment of 14 June 2016, case C-263/14, *European Parliament v. Council of the European Union* [GC].

⁸ *Ibidem*, para. 47. Emphasis added.

⁹ Art. 21, para. 5, let. b), TEU.

¹⁰ Art. 21, para. 2, let. c), TEU.

¹¹ Art. 21, para. 2, let. d) and let. f), TEU.

¹² Art. 21, para. 2, let. e), TEU.

Going back to Opinion 2/15, the question was whether Chapter 13 of the Agreement, entitled "Sustainable Development", could be concluded under the EU exclusive competences governing the Common Commercial Policy (CCP). At first sight, the method followed by the Court seems rather classical. First, it demonstrated that sustainable development is an objective that the EU can pursue through the CCP.¹³ Second, it examined the content of the Agreement Chapter at stake and stressed that it "essentially"¹⁴ refers to pre-existing international obligations of the Parties.¹⁵ Third, it concluded that the provisions of Chapter 13 of the Agreement "affect" and have a "special link" with the CCP.¹⁶ Fourth, it confirmed its reasoning in stating that the substance of Chapter 13 does not affect the distribution of powers between the EU and its Member States, considering that the EU and Singapore did not intend to harmonise their social and environmental legislations.¹⁷ This fourfold reasoning illustrates the mindset of the Court when examining the scope of the CCP: it leans towards a broad interpretation aiming at guaranteeing the exclusivity of EU competences in the conduct of the policy. This corresponds to the spirit¹⁸ and the letter¹⁹ of new Art. 207 TEU, and has been clearly stated in the 2013 *Daiichi Sankyo and Sanofi Adventis* case.²⁰

This raises a number of issues that will be discussed below. First, there is no denying the fact that the effectiveness of the set of general objectives guiding EU external action largely depends on their interpretation by the CJEU, which focuses on both their binding nature and their concrete scope (section II). Second, Opinion 2/15 illustrates that a broad interpretation of the ancillary objectives of the CCP may be combined with a similarly broad examination of the "specific link" and "effects" criteria. Hence, paving the way for another policy stretch (section III). Third, the Court based its reasoning on the consideration that the agreement Chapter at stake has a weak normative content and therefore does not encroach on the repartition of powers between the EU and its Member States. It is not clear yet whether Opinion 2/15 will be a precedent for the appreciation of future free trade agreements, which may have different normative contents. However, one can already wonder to what extent could material coherence be achievable without addressing the substance of the ancillary objectives pursued through the CCP (section IV).

¹³ Opinion 2/15, cit., paras 139-147.

¹⁴ *Ibidem*, para. 152.

¹⁵ *Ibidem*, paras 148-154.

¹⁶ *Ibidem*, paras 155-163.

¹⁷ *Ibidem*, paras 164-167.

¹⁸ In contradistinction, see the situation before the Lisbon revision as illustrated by Court of Justice, opinion 1/08 of 30 November 2009.

¹⁹ Art. 207 TFEU, esp. paras 1 and 4.

²⁰ Court of Justice, judgment of 18 July 2013, case C-414/11, *Daiichi Sankyo and Sanofi Adventis Deutschland*[GC]. Emphasis added.

II. As recalled above, the reasoning of the Court in Opinion 2/15 begins with the interpretation of sustainable development as a transversal objective guiding EU external action. This interpretation is twofold, and can be dealt with in terms of both normative nature and material scope considerations.

On the normative nature of the general objectives guiding EU external action, the Court has taken a clear stance:

“One of the features of that [CCP] development is the rule laid down in the second sentence of Article 207(1) TFEU that ‘the common commercial policy shall be conducted *in the context of the principles and objectives of the Union’s external action!*. [...]’

The *obligation* on the European Union to integrate those objectives and principles into the conduct of its common commercial policy is apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU. [...]

It follows that *the objective of sustainable development* henceforth forms *an integral part of the common commercial policy*”.²¹

This is perhaps the clearest judicial recognition of the normative nature of the objectives guiding EU external action, the pursuit of which is therefore compulsory for the Union.

This finding rests on a voluntarily rigorous demonstration. The Court indeed gave a significant importance to the cross-references in Arts 205 and 207 TFEU to Art. 21 TEU (and *vice versa*), in order to justify the obligation of the EU to integrate Art. 21, para. 2, TEU objectives into the conduct of the CCP.

One could wonder whether such an obligation to pursue Art. 21, para. 2, TEU objectives while implementing another external policy could be confirmed in the future, in case one of the elements of this threefold equation would be missing. For instance, the specific policy provision (here Art. 207 TFEU) could lack the express statement that it “shall be conducted in the context of the principles and objectives of the Union’s external action”. Similarly, the policy at stake may not be part of Part V TFEU and would therefore not be covered by the broad reference of Art. 205 TFEU to Art. 21 TEU. Denying any effect to Art. 21 TEU in these instances would deprive the provision of its *raison d'être*. Indeed, Art. 21, para. 3, TEU clearly states that “the Union shall respect” these objectives “in the development and the implementation of” Title V of the TEU and Part V of the TFEU, as well as the “external aspects” of other EU policies. Considering Art. 21 TEU opens the general chapter of the TEU governing the Union’s external action,²² single cross-references to it by other TEU and TFEU articles are complementary and do not condition its effectiveness. The Court’s prudent enumeration in this case relating to the CCP should therefore be considered more pedagogical than restrictive of the future ju-

²¹ Opinion 2/15, cit., paras 142, 143 and 147. Emphasis added.

²² Chapter 1, Title V, TEU.

riskprudence concerning the Union's obligation to pursue the general objectives guiding its external action when implementing a specific policy.

On the material scope of the sustainable development objective, the Court opted for a rather dynamic interpretation. Following the letter of Art. 21, para. 2, TEU, sustainable development is either envisaged in the perspective of the cooperation with developing countries,²³ or in the perspective of the sustainable management of natural resources and environment.²⁴ Given Singapore clearly does not fit the first case, the Court went for the second option. More precisely, Art. 21, para. 2, let. f), TFEU states that the Union will "help to develop 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". The social obligations at stake in Chapter 13 of the EU-Singapore Agreement, however, are not covered by this objective as it stands. This is probably why the Court has consolidated the construction of the notion of sustainable development with the addition of both the transversal Arts 9 and 11 TEU relating to social and environmental protection, and the general objective to engage into "free and fair trade" stated in Art. 3, para. 5, TEU.²⁵ From this perspective, Opinion 2/15 exemplifies the interpretation issues arising from the concrete operation of general objectives of EU external action. In this case, up to four treaty articles were needed to encompass the notion of sustainable development as it was defined in the EU-Singapore Free Trade Agreement. It stems from the above, that the Court's interpretation of the scope of Union objectives will reveal crucial and might lead to some unforeseen combinations of articles, depending on the complexity of the external action at stake.

Another interpretation issue that the Court will have to address in the future touches upon the legal nature of the Union's obligation to support the objectives set up in Art. 21, para. 2, TEU. In the present case, it is debatable whether "developing international measures", which is the action foreseen in Art. 21, para. 2, let. f), TEU dealing with sustainable development, could require taking a more active role in the further development of international law, than merely referring to the state of the art between the Parties to a Free Trade Agreement in a Chapter that the Court has considered normatively weak. We will go back to this point later.²⁶

III. Once accepted that sustainable development is fully part of the CCP as one of the objectives of EU external action, the concrete question at stake in Opinion 2/15 remains to determine to what extent the provisions of Chapter 13 of the EU-Singapore Free Trade Agreement are contributing to the development of the CCP. To this end, the

²³ Art. 21, para. 2, let. d), TEU.

²⁴ Art. 21, para. 2, let. f), TEU.

²⁵ Opinion 2/15, cit., para. 146.

²⁶ See *infra*, section IV.

Court engages into a classical examination based on two criteria: the *effects on* and the *special link with* the CCP. Developed in earlier case law on the scope of the CCP,²⁷ this test illustrates the underlying intertwinement of objectives and competences at the stage of the examination of a concrete action of the Union.

To the Court, the effects that Chapter 13 on sustainable development may have on the CCP are threefold. First, they condition the conduct of the policy insofar as the Parties agree both not to encourage trade through the diminution of social and environmental protection under an internationally agreed threshold, and not to use the latter for protectionist purposes.²⁸ Second, insofar as it reduces the risk of divergent production costs between the Parties and promotes equality between both Parties entrepreneurs, Chapter 13 favours free trade.²⁹ Third, the commitment to introduce documentation, verification and certification systems to fight against the illicit trade of wood and halieutic resources, will affect the trade in these products between the Parties.³⁰ It stems from the above that the Court was satisfied with broadly appreciated effects on the policy, which can either be sector-oriented or, on the contrary, rather transversal.

The specific link of Chapter 13 with the EU-Singapore trade relationship was twofold in the Court's reasoning. First, it derives from the reciprocal commitment of the Parties that they will not take advantage of their international social and environmental obligations to introduce arbitrary discriminations or disguised restrictions into their trade relations.³¹ Second, the Court argued that a specific link would result from the fact that the Parties could suspend the execution of other provisions of the Free Trade Agreement, in the event of a violation of Chapter 13.³² This argument seems to be based on an excessively broad appreciation of the customary rule of *exceptio non adimpleti contractus*. The Court based its reasoning on Art. 60, para. 1, of the 1969 Vienna Convention on the Law of Treaties, which states that: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part".

This paragraph must be read in combination with paras 3, let. b), and 4 of the same provision:

"3. A material breach of a treaty, for the purposes of this article, consists in: (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

²⁷ [...] a European Union 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*: *Daiichi Sankyo and Sanofi Adventis Deutschland*, cit., para. 51. Emphasis added.

²⁸ Opinion 2/15, cit., para. 158.

²⁹ *Ibidem*, para. 159.

³⁰ *Ibidem*, para. 160.

³¹ *Ibidem*, para. 156.

³² *Ibidem*, para. 161.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach".

This being recalled, there is no denying the fact that the EU and Singapore have agreed on specific treaty provisions applicable in the event of a breach. *Lex specialia generalibus derogat*: the EU-Singapore treaty provisions derogate from customary international law.³³

First, in the EU-Singapore relations, the definition of what is an essential element, the violation of which can trigger the partial suspension of the Free Trade Agreement, is governed by the "human rights clause" of Art. 1, para. 1, and the "weapons of mass destruction clause" of Art. 7, para. 2, of the 2014 EU-Singapore Partnership and Cooperation Agreement. Indeed, the Partnership and Cooperation Agreement plays the role of a framework agreement between the EU and Singapore: it is foreseen in its "linkage clause" that the Free Trade Agreement at stake in Opinion 2/15 is fully part of the general bilateral relations it governs.³⁴

Second, it derives from the above that the provisions of Chapter 13 of the EU-Singapore Free Trade Agreement are not part of the "essential elements" defined conventionally by the Parties, the violation of which can trigger the immediate partial suspension of the agreement in case of execution.³⁵

Third, it furthermore results from Chapter 13 of the EU-Singapore Free Trade Agreement, that would a dispute arise on its execution, the Parties would be bound to solve their different through procedurally pre-organised Government Consultations³⁶ and, when necessary, the constitution of a Panel of Experts.³⁷ Given these provisions, it is only in case those specific procedures would fail to extinguish the different, that the Parties might envisage adopting partial suspension measures.³⁸

To say the least, the Court has not chosen the most unequivocal formulation possible when concluding that Chapter 13 "plays an *essential* role in the envisaged Agreement".³⁹ This case exemplifies the interpretation and execution problems that the EU

³³ For an analysis of the EU treaty practice in respect of the inclusion and activation of essential elements clauses, see: C. BEAUCILLON, *Les mesures restrictives de l'Union européenne*, Bruxelles: Bruylants, 2014, esp. the section on cases where restrictive measures are linked to the prior violation of an EU agreement, pp. 265-301.

³⁴ Arts 9, para. 2, and 43, para. 3, of the EU-Singapore Partnership and Cooperation Agreement; see also, *vice versa*, Art. 17.17 of the EU-Singapore Free Trade Agreement. On recent treaty practice, see: European Parliament, Directorate General for External Policies of the Union, Policy Department, *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements*, Study, Belgium: European Union, 2014, www.europarl.europa.eu.

³⁵ Art. 44, para. 4, let. b), of the EU-Singapore Partnership and Cooperation Agreement.

³⁶ Art. 13, para. 16, of the EU-Singapore Partnership and Cooperation Agreement.

³⁷ Ibid., Art. 13, para. 17.

³⁸ In the sense of Art. 44, para. 4, let. b), of the EU-Singapore Partnership and Cooperation Agreement.

³⁹ Opinion 2/15, cit., para.162. Emphasis added.

bilateral relations with third countries may raise in the future, given they rest on multiple interconnected conventional instruments that must be construed together.

All in all, the articulation of objectives and policies in Opinion 2/15 sheds light on what might become the new balance for material coherence in EU external action. It shows the Court's will to give effect to Art. 21 TEU through a broad and constructive interpretation, combined with a low threshold as regards the effects and links of the examined provisions with the main policy at stake. As it stands, it seems that having recourse to general objectives of EU external action such as sustainable development may become a pragmatic tool to avoid mixity in the future developments of the common commercial policy.

IV. The core underlying condition to the reasoning of the Court in Opinion 2/15 is simple: Chapter 13 provisions do not encroach upon the shared competences governed by the social and environmental policies. Putting it differently, Chapter 13 of the EU-Singapore Agreement would have almost no normative scope. This is indeed what the Court demonstrated at the stage of the examination of the content of Chapter 13:⁴⁰

"By the above provisions of Chapter 13 of the envisaged agreement, the European Union and the Republic of Singapore undertake, *essentially*, to ensure that trade between them takes place in compliance with the obligations that stem from the international agreements concerning social protection of workers and environmental protection to which they are party".⁴¹

This approach is surprising, since the Court seems to simplify competence issues through their global and abstract appreciation. Indeed, the term "essentially" implies that minor parts of Chapter 13 might not be mere references to existing international law, but might consist in new social and environmental commitments by the Parties. It is not the place here to undertake this demonstration, which has already been made by AG Sharpston in her conclusions.⁴² Also, contrary to what the Court argued,⁴³ it is debatable whether the reference to specific international agreements and their interpretation by the corresponding international bodies in Chapter 13 would not create new obligations for the EU and Singapore in these environmental and social fields, which could materialise substantially in the future. Similarly, the systematic inclusion of references to international agreements binding on both the EU and a partner to a free trade

⁴⁰ *Ibidem*, paras 148-151.

⁴¹ *Ibidem*, para. 152, emphasis added.

⁴² Opinion of AG Sharpston delivered on 21 December 2016, opinion 2/15.

⁴³ Opinion 2/15, cit., paras 153-154.

agreement could be analysed as a way to fulfil another general objective of EU external action: the promotion of strong multilateralism.⁴⁴

These considerations must be read in combination with the last part of the reasoning of the Court, when it demonstrated that the conclusion of Chapter 13 under the CCP does not affect the repartition of the competences between the EU and its Member States.⁴⁵ To that end, the Court stressed that the purpose of Chapter 13 is not to harmonize the social and environmental legislations of the Parties, who remain free to establish their own protection levels and to change their policies accordingly.⁴⁶ To the Court, it is therefore clear that the object of Chapter 13 is limited to conditioning trade relations between the Parties to the necessary social and environmental requirements.⁴⁷

However, is material coherence achievable at all if the Court solves competence issues without entering the substance? On the one hand, it is not sure that the provisions of Chapter 13 will not have an impact on the Parties' social and environmental legislations, considering that their trade relations will in turn influence their common reading of their international obligations, including through the specific dispute resolution mechanisms described above.⁴⁸ On the other hand, should effective coherence mean synergy between the objectives and policies, one could expect that the conclusion of a free trade agreement could give the opportunity to discuss the merits of social and environmental issues with the partner, and eventually lead to new commitments in these ancillary fields. Such a reading would rest on a further interpretation by the Court of the nature of the Union's obligation to fulfil its external action objectives while implementing external policies.

Finally, one can wonder what precedent Opinion 2/15 might be in the perspective of the conclusion of future free trade agreements. Needless to recall, Opinion 2/15 only deals with the EU-Singapore Agreement and does not bind the EU institutions in the appreciation of future agreements which normative scope can vary. In theory, would other sustainable development chapters in other free trade agreements be more substantial on the Parties' commitments, the Court could consider they are no more ancillary to the conduct of the CCP and therefore necessitate a mixed legal basis.

In practice, the recent examination of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) by the French Constitutional Council calls for some attention. In its July 2017 decision,⁴⁹ the French Constitutional Council distinguished between the parts of CETA that are governed by exclusive competences, and those governed by shared competences. Following its established jurisprudence on EU-related laws and treaties, its constitutional control over the specific CETA provisions would vary accord-

⁴⁴ Art. 21, para. 2, let. h), TEU.

⁴⁵ Opinion 2/15, cit., para. 164.

⁴⁶ *Ibidem*, para.165.

⁴⁷ *Ibidem*, para.166.

⁴⁸ See *supra*, section III.

⁴⁹ French Constitutional Council, judgment of 31 July 2017, no. 2017-749 DC.

ingly. On the one hand, the constitutional control of provisions governed by exclusivity must be limited to the rare cases where the “French constitutional identity” would be at stake.⁵⁰ On the other hand, the constitutional control of provisions governed by shared competences ought to be full.⁵¹ Interestingly, instead of detailing its analysis of the CETA provisions, the French Constitutional Council has chosen to refer to the findings of the Court in Opinion 2/15 on the EU-Singapore Agreement. It subsequently concluded that Chapters 22, 23 and 24 of the CETA, respectively dealing with sustainable development, social and environmental issues, were falling within the exclusive competences of the Union.⁵² The constitutional control over these chapters was therefore strictly limited. This is yet another illustration of the underlying links between the interpretation of general objectives and the repartition of competences between the EU and its Member States. The direct consequence of this decision is that the sustainable development, environmental and social provisions of the CETA have neither been analysed by the CJEU, nor by the French Constitutional Council. One can wonder whether other Constitutional Courts of the Member States will follow the same logics, which would seal the impact of the general principles guiding EU external action on the repartition of powers between the EU and its member States. In turn, this would put a major responsibility on the CJEU, not only to flesh-out the material scope of these general principles guiding EU external action, but also to guarantee that EU external action effectively aims at their realisation. Hence, calling for a concrete examination by the Court of the substance of the objectives-related provisions of the future free trade agreements to be concluded by the European Union under the CCP.

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⁵⁰ *Ibidem*, para. 14.

⁵¹ *Ibidem*, para. 13.

⁵² *Ibidem*, para. 17.

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