



## OVERVIEWS

# THE RECURRENT CRISIS OF THE EUROPEAN UNION'S COMMON COMMERCIAL POLICY: OPINION 2/15

TABLE OF CONTENTS: I. Introduction. – II. The Opinion of the Court. – III. Analysis of Opinion 2/15. – IV. Concluding remarks.

I. After the modification brought about by the Treaty of Lisbon, the CJEU has recently offered its most thorough interpretation on the scope of the Common Commercial Policy (CCP) through Opinion 2/15.<sup>1</sup> This *Overview* argues that Opinion 2/15 represents just the latest example of the persistent crisis that affects the CCP. The CCP has developed historically through periods of renewal and crisis, in what could be called a pendulum movement. Indeed, the first cases handed down after the entry into force of the Lisbon Treaty strengthened the view of those in favour of a CCP catalyzing all EU external economic relations. However, as was already the case with Opinion 1/94,<sup>2</sup> Opinion 2/15 is based on a friendly amalgamation of the interests of the stakeholders involved, that is, the Commission and the Member States. To be sure, the “arbitration” operated by the CJEU in Opinion 2/15 implies a partial victory for both parties. Still, in view of the Commission’s ultimate aim, which was to avoid a possible veto by individual Member States during the ratification process, the solution finally reached is more beneficial to the latter’s political interests. In determining that the EU-Singapore Free Trade Agreement (FTA)<sup>3</sup> incorporates a number of components that go beyond the material scope of the CCP set out in the TFEU, i.e., the protection of non-direct foreign investment and its investor-State dispute settlement system, the CJEU has chosen to impose the mixed nature of the EU-Singapore FTA and thus a rather conservative view of the CCP.

II. The Court develops its assessment of the EU’s competence to conclude the EU-Singapore FTA along three main lines. The first is devoted to the EU competence in the sphere of CCP. The second is focused on the competence derived from the implied

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

<sup>2</sup> Court of Justice, opinion 1/94 of 15 November 1994.

<sup>3</sup> Free Trade Agreement of May 2015 (authentic text) between the European Union, on the one part, and Singapore, on the other part (hereinafter FTA).

powers doctrine. A third section concerns the EU competence to adopt the institutional provisions included in the EU-Singapore FTA.

Applying the classical “centre of gravity” test,<sup>4</sup> the CJEU found that an EU act falls within the CCP if it relates specifically to trade with one or more third States in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it. According to this test, the Court has found that the criteria set out for the determination of the CCP’s material scope can be applied to all trade in goods provided for in the EU-Singapore FTA,<sup>5</sup> so that this component of the agreement falls within the exclusive competence of the EU.<sup>6</sup> Thus, the CJEU confirms in this Opinion the same broad concept of international trade in goods which it already maintained in Opinion 1/94, in line with recent developments in international trade policy, which now incorporates issues such as trade facilitation.

Regarding trade in services, the Court states that ch. 8 of the EU-Singapore FTA is also covered by the CCP, as it fulfils the two conditions mentioned above. Recalling that issues such as citizenship, residence, permanent employment and, in general, access to the labour market are excluded, the CJEU confirms that all provisions of this chapter form part of the CCP, including aspects relating to financial services and the mutual recognition of professional qualifications, in accordance with the position expressed by AG Sharpston and contrary to the position held by some Member States.<sup>7</sup> While the Court stated in Opinion 1/94 that trade in services regulated by the General Agreement on Trade in Services (GATS) was covered by the CCP solely as regards mode of supply 1, i.e. “cross-border provision of services”,<sup>8</sup> in Opinion 1/08 the CJEU found that the Community had acquired exclusive competence to conclude international agreements on trade in services also in modes of supply 2 to 4,<sup>9</sup> a result equally applicable regarding current Art. 207, para. 1, TFEU.<sup>10</sup>

However, the Court notes that the transport services for persons and goods, relating to international maritime transport, rail transport, road transport and inland waterway transport, provided for in ch. 8 of the EU-Singapore FTA, are excluded from the CCP under Art. 207, para. 5, TFEU. Conversely, the CJEU understands that aircraft repair and maintenance services and those services for the reservation and sale of air transport

<sup>4</sup> On this point, the Court quotes its recent case-law, i.e., Court of Justice: judgment of 18 July 2013, case C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland* [GC], para. 51, and judgment of 22 October 2013, case C-137/12, *Commission v. Council* [GC] (hereinafter, *Conditional Access Services* case), para. 57, together with opinion 3/15 of 14 February 2017, para. 61.

<sup>5</sup> EU and Singapore FTA, chs 2 to 6.

<sup>6</sup> Opinion 2/15, cit., paras 40-48.

<sup>7</sup> Opinion of AG Sharpston delivered on 21 December 2016, opinion 2/15, paras 204 and 205.

<sup>8</sup> Opinion 1/94, cit., para. 44.

<sup>9</sup> Court of Justice, opinion 1/08 of 30 November 2009, para. 119.

<sup>10</sup> *Ibid.*, para. 54.

services should not be considered as “ancillary” to transport services, and so they fall within the CCP as “business services”.<sup>11</sup>

Concerning investment, the Court needed to address two issues. The first one is the scope of the concept of foreign direct investment (FDI) set out in the new CCP following the Treaty of Lisbon. In this regard, and according to its previous case-law,<sup>12</sup> the CJEU states that the EU has exclusive competence relating to investments which enable effective participation in the management or control of a company carrying out an economic activity, whereas “other” foreign investment, i.e., portfolio investment, does not fall within this exclusive competence, as the terms used by Art. 207, para. 1, TFEU are unequivocal.<sup>13</sup> The second issue relates to the material scope of the EU competence in this field of FDI, that is, whether the CCP also covers the protection of direct investments and not only their admission. The Court answered in the positive, as “Article 207(1) TFEU refers generally to EU acts concerning ‘foreign direct investment’, without drawing a distinction according to whether the acts concern the admission or the protection of such investments”.<sup>14</sup> Moreover, the derogation and compensation clauses, including the provisions relating to property law, criminal law, tax law and social security, are not to be considered trade commitments but only limitations to the Member States’ own competence derived from the applicability of the non-discrimination principle provided for in the EU-Singapore FTA.<sup>15</sup>

With respect to intellectual property protection, the Court found that ch. 11 of the envisaged agreement relates to “commercial aspects of intellectual property” within the meaning of Art. 207, para. 1, TFEU, as it is intended to govern the liberalization of trade between the EU and Singapore, and in no way falls within the scope of harmonization of the laws of EU Member States.<sup>16</sup> In addition, the Court expressly rejects the idea that the referral made by the agreement to multilateral conventions protecting moral rights may be sufficient to consider that this matter constitutes a component of the EU-Singapore FTA for the purpose of determining the nature of the EU’s competence.<sup>17</sup>

After stating that the commitments concerning competition unequivocally form part of the liberalization of trade between the parties and so fall within the scope of the CCP, the Court started its analysis of the issue of sustainable development. Aware of the sensitivity of the issue, the Court of Justice devotes almost thirty paragraphs of its Opinion to it. The Court emphasizes that the TFEU differs significantly from the Treaty on the European

<sup>11</sup> Opinion 2/15, cit., paras 61-68.

<sup>12</sup> Court of Justice: judgment of 12 December 2006, case C-446/04, *Test Claimants in the FII Group Litigation* [GC], paras 181 and 182; judgment of 26 March 2009, case C-326/07, *Commission v. Italy*, para. 35; judgment of 24 November 2016, case C-464/14, *SECL*, paras 75 and 76.

<sup>13</sup> Opinion 2/15, cit., para. 83.

<sup>14</sup> *Ibid.*, para. 87.

<sup>15</sup> *Ibid.*, paras 101 and 107.

<sup>16</sup> *Ibid.*, para. 126.

<sup>17</sup> *Ibid.*, para. 129.

Community by including new aspects of contemporary international trade in what is now an enlarged CCP, which is a significant development of primary EU law, as it already held in *Daiichi Sankyo*.<sup>18</sup> First, taking into account the reference contained in the last sentence of Art. 207, para. 1, TFEU, in line with Art. 21, para. 3, TEU and Art. 205 TFEU, the Court found that the CCP must integrate the objectives and principles of the EU external action, as provided for by Art. 21, paras 1 and 2, TEU. Specifically, sustainable development is mentioned in Art. 21, para. 2, let. f), of the latter paragraph, where external action is expressly linked to the protection of the environment. In addition, Arts 9 TFEU and 11 TFEU provide that social protection and environmental protection must be integrated into the definition and implementation of Union policies and activities with a view to promoting sustainable development. Therefore, the Court concludes that sustainable development is included within the scope of the CCP, thus justifying the Commission's view on this point and against the opinion of AG Sharpston.<sup>19</sup>

As seen above, services commitments in the field of transport set up in ch. 8 of the EU-Singapore FTA do not fall within the CCP, but have to be approved in accordance with the division of competences between the EU and the Member States in the field of the common transport policy. In line with the *ERTA* judgment,<sup>20</sup> which gave rise to the implied powers doctrine, Art 216 TFEU grants the EU competence to conclude, inter alia, any international agreement which "is likely to affect common rules or alter their scope". Art. 3, para. 2, TFEU provides that the EU competence to conclude such an agreement is exclusive.

The CJEU then held that the commitments contained in ch. 8 of the envisaged agreement that relate to maritime, rail and road transport may affect common rules or alter their scope. Indeed, the Court recalled its case-law on this matter,<sup>21</sup> to the effect that Art. 3, para. 2, TFEU required an analysis in four stages. First, the Court considered that the risk of affecting the common rules or of altering their scope existed in so far as such "commitments fall within the *scope* of those rules" (emphasis added). Second, in the Court's view, finding that there is such a risk did not require a complete match between the scope of international commitments and that covered by Union law, so that it will suffice that "those commitments [...] fall within an area which is *already covered to a large extent* by those rules".<sup>22</sup> Third, Art. 3, para. 2, TFEU must be applicable "where an agreement between the European Union and a third State provides for the application, to the international relations covered by that agreement, of rules that *will overlap* to a large extent with the common EU rules applicable to intra-Community situations [without there

<sup>18</sup> *Ibid.*, para. 141.

<sup>19</sup> *Ibid.*, para. 147.

<sup>20</sup> Court of Justice, judgment of 31 March 1971, case 22/70, *Commission v. Council*, para. 32.

<sup>21</sup> Court of Justice: judgment of 4 September 2014, case C-114/12, *Commission v. Council* [GC], para. 68; opinion 1/13 of 14 October 2014, para. 71; judgment of 26 November 2014, case C-66/13, *Green Network*, para. 29; and opinion 3/15 of 14 February 2017, para. 105.

<sup>22</sup> Opinion 2/15, cit., para. 180 (emphasis added).

being any need for] *contradiction* with those common rules".<sup>23</sup> Finally, in the fourth stage, with regard to internal waterways transport services provided for in the EU-Singapore FTA, the Court considered that they are not liberalized or, at most, they are commitments of extremely limited scope. Quoting Opinion 1/08, the CJEU states that "when examining the nature of the competence to conclude an international agreement, there is no need to take account of the provisions of that agreement which are *extremely limited in scope*".<sup>24</sup>

With respect to portfolio investment, and on the basis of the *ERTA* case, the Commission argued that section A of ch. 9 of the EU-Singapore FTA may affect Art. 63 TFEU as the affected common rule, and it accordingly fell within the exclusive competence of the EU referred to in Art. 3, para. 2, TFEU. However, the CJEU held that "that case-law cannot be applied to a situation where the EU rule referred to is a provision of the FEU Treaty and not a rule adopted on the basis of the FEU Treaty".<sup>25</sup> According to the Court, the reasoning underlying the rule currently contained in Art. 3, para. 2, TFEU cannot be extended to a situation which does not concern rules of secondary law, but rather a rule of primary law. Moreover, the primacy of the provisions of the TEU and of the TFEU precludes international agreements from "affecting" their rules or "altering their scope". The Court concluded that the EU does not have exclusive competence regarding non-direct investment, but considered that Art. 216, para. 1, TFEU was applicable, and so portfolio investment commitments fall within a shared competence, which means that "Section A of ch. 9 of the envisaged agreement cannot be approved by the European Union alone".<sup>26</sup>

Conversely, regarding the final provision of the EU-Singapore FTA on the replacement of previous bilateral investment agreements concluded by Member States with the third country, the Court considers that this provision "cannot be regarded as encroaching upon a competence of the Member States". Recalling its *International Fruit Company* judgment, the CJEU states that the EU can succeed the Member States and has competence to approve, by itself, that kind of provision.<sup>27</sup> Moreover, Regulation (EU) 1219/2012 and Art. 351 TFEU do not affect this conclusion where "that third State expresses the wish that those bilateral agreements come to an end upon the entry into force of the envisaged agreement".<sup>28</sup>

Finally, the CJEU had to decide on a set of institutional arrangements of the EU-Singapore FTA that seek to guarantee substantive provisions by essentially establishing an organizational structure, channels of cooperation, information exchange obligations and certain decision-making powers. The Court recalled that EU's competence to conclude international agreements included contracting such institutional arrangements. These insti-

<sup>23</sup> *Ibid.*, para. 201 (emphasis added).

<sup>24</sup> *Ibid.*, para. 207 (emphasis added).

<sup>25</sup> *Ibid.*, para. 230.

<sup>26</sup> *Ibid.*, para. 244.

<sup>27</sup> *Ibid.*, paras. 248 and 249.

<sup>28</sup> *Ibid.*, para. 254.

tutional arrangements are of an ancillary nature and do not affect the character of the competence to conclude the agreement, in accordance with its case-law, and therefore they fall within the same exclusive or shared competence that corresponds to the substantive provisions which they accompany.<sup>29</sup> The same applies to the rules of transparency, which are also considered to be auxiliary. Respect for the principles of sound administration and effective judicial protection provided for in this agreement does not encroach upon the Member States' exclusive powers.<sup>30</sup>

Regarding the more relevant investor-State dispute settlement system, after recalling that its Opinion only relates to the nature of the EU competence and so does not judge whether the content of the agreement's provisions is compatible with EU law, the CJEU concluded that "such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature [...] and cannot, therefore, be established without the Member States' consent",<sup>31</sup> so that its approval falls within a competence shared between the EU and the Member States.

On the contrary, with regard to the settlement of disputes between the parties that may arise in connection with the interpretation and application of the EU-Singapore FTA through an arbitration panel, and after emphasizing that the WTO dispute settlement regime is established as an alternative, the Court recalled its case-law<sup>32</sup> which stated that "the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements".<sup>33</sup> Therefore, after insisting on the fact that the compatibility with and the autonomy of EU law are not under scrutiny here, the Court concluded that the dispute settlement system provided in ch. 15 is ancillary in nature but, in so far as it covers investments, cannot be approved exclusively by the Union.

III. The two requirements identified in Opinion 2/15 for an EU act to be included within the CCP, i.e. that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it, had been laid down by the CJEU case-law, even with an almost identical wording, at least since the *Regione autonoma Friuli-Venezia Giulia and ERSA* case.<sup>34</sup> However, these two requirements can even be traced

<sup>29</sup> *Ibid.*, para. 276.

<sup>30</sup> *Ibid.*, paras 282-284.

<sup>31</sup> *Ibid.*, para. 292.

<sup>32</sup> Court of Justice: opinion 1/91 of 14 December 1991, paras 40 and 70; opinion 1/09 of 8 March 2011, para. 74; and opinion 2/13 of 18 December 2014, para. 182.

<sup>33</sup> Opinion 2/15, cit., para. 298.

<sup>34</sup> Court of Justice, judgment of 12 May 2005, case C-347/03, *Regione autonoma Friuli-Venezia Giulia and ERSA*, para. 75. See also Court of Justice, judgment of 8 September 2009, case C-411/06, *Commission v. European Parliament and the Council*[GC], para. 71.

back in time to Opinion 1/94,<sup>35</sup> having been set out in a similar manner in Opinion 2/00<sup>36</sup> and in the *Energy Star* case.<sup>37</sup> In addition, since the *Daiichi Sankyo* and *Conditional Access Services* cases, the Court has used the same formula which warns that “the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy”.<sup>38</sup>

However, it is difficult to identify a clear criterion in the application of this centre of gravity test by the Court. Certainly, in Opinion 2/15 the CJEU had stated that ch. 11 of the EU-Singapore FTA on the protection of intellectual property rights falls within the CCP. However, this conclusion differed diametrically from the position upheld by the Court in its Opinion 1/94. In this Opinion, the Court maintained that the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) was not included within the scope of the CCP. Indeed, it said that although “there is a connection between intellectual property and trade in goods” and, although intellectual property rights may have effects on trade, “that is not enough to bring them within the scope of Article 113 [now 207 TFEU]. Intellectual property rights do not relate specifically to international trade; they affect internal trade just as much as, if not more than, international trade”.<sup>39</sup> These statements have been widely criticized by specialists since then.<sup>40</sup>

Nonetheless, this interpretation of the CJEU underwent what has been termed as a “radical change”.<sup>41</sup> Indeed, in the aforementioned cases *Daiichi Sankyo* and *Conditional Access Services*, the Court made an attempt to highlight the change brought about by the Lisbon Treaty with respect to Art. 133 of the Treaty of the European Community and, even more, with respect to the pre-Amsterdam version, former Art. 113, which was in force when the TRIPs agreement was concluded, a modification that it described as a “significant development of primary law”. In these cases, the Court was very concerned to develop a measured argument that would show that “the question of the distribution of the competences of the European Union and the Member States must be examined on the basis of the Treaty now in force”.<sup>42</sup> But it also expressly rejected the fact that the considerations made in Opinion 1/94 and in the *Merck Genéricos* case remained rele-

<sup>35</sup> Opinion 1/94, cit. See also Court of Justice: opinion 2/00 of 6 December 2001, para. 40; judgment of 12 December 2002, case C-281/01, *Commission v. Council*, paras 40-41.

<sup>36</sup> Opinion 2/00, cit., para. 40.

<sup>37</sup> *Commission v. Council*, case C-281/01, cit., paras 40 and 41.

<sup>38</sup> Opinion 2/15, cit., para. 36.

<sup>39</sup> Opinion 1/94, cit., para. 57.

<sup>40</sup> J.H.J. BOURGEOIS, *The EC in the WTO and Advisory Opinion 1/94: an Echternach Procession*, in *Common Market Law Review*, 1995, p. 763 *et seq.*; P. PESCATORE, *Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is There an Escape from a Programmed Disaster?*, in *Common Market Law Review*, 1999, p. 387 *et seq.*

<sup>41</sup> J. LARIK, *No Mixed Feelings: The post-Lisbon Common Commercial Policy in Daiichi Sankyo and Commission v. Council (Conditional Access Convention)*, in *Common Market Law Review*, 2015, p. 798.

<sup>42</sup> *Daiichi Sankyo* [GC], cit., para. 48.

vant, since they responded to a wording in the Treaty that was no longer in force. In this balanced line of argument, the CJEU stressed that the drafters of the Treaty could not be unaware that the terms “commercial aspects of intellectual and industrial property”, set out in Art. 207, para. 1, TFEU, corresponded almost literally with the title of the TRIPs agreement, or that the purpose of the latter agreement is not to harmonize the laws of the Member States, but rather to reduce distortions to international trade.

Therefore, the recent *Daiichi Sankyo* and *Conditional Access Services* cases have led the doctrine to announce a new orientation of the CJEU jurisprudence on the CCP, even qualified as a “renaissance”.<sup>43</sup> We will henceforward be facing a new era favourable to an expansive interpretation of the CCP after the Lisbon Treaty, in line with Opinions 1/75 and 1/78. In this way, the Court would be leaving behind definitively the jurisprudence derived from the aforementioned issues, in particular, Opinion 1/94 and *Merck Genéricos*, labelled as mistaken by some authors.<sup>44</sup>

But then we are left with an important conundrum. In Opinion 1/94, the application of the centre of gravity test determined that the TRIPs agreement should be considered as an agreement that pursues internal harmonization as a priority objective (or, at least, there were two non-dissociable objectives, internal harmonization and external harmonization). In contrast, in the *Daiichi Sankyo* case, the result of that examination has led to the conclusion that, if the TRIPs agreement priority is “to strengthen and harmonize the protection of intellectual property on a worldwide scale”, it is also “reducing distortions of international trade”,<sup>45</sup> and the Court ended up tilting the balance in favour of this second objective, concluding that “the context of those rules is the liberalization of international trade, not the harmonization of the laws of the Member States of the European Union”.<sup>46</sup> Finally, Opinion 2/15 has reinforced this reasoning by stating that ch. 11 of the EU-Singapore FTA “in no way falls within the scope of harmonization of the laws of the Member States of the European Union, but is intended to govern the liberalization of trade between the European Union and the Republic of Singapore”.<sup>47</sup> Therefore, what we see is an unquestionable evolution, although very poorly explained,<sup>48</sup> concerning the priority objective of the international agreement in question (be it the TRIPs agreement or the EU-Singapore FTA) with regard to intellectual and industrial property rights.

<sup>43</sup> F. CASTILLO DE LA TORRE, *The Court of Justice and External Competences After Lisbon: Some Reflections on the Latest Case Law*, in P. ECKHOUT, M. LÓPEZ-ESCUADERO (eds), *The European Union's External Action in Times of Crisis*, Oxford: Hart Publishing, 2016, p. 131.

<sup>44</sup> L. ANKERSMIT, *The Scope of the Common Commercial Policy after Lisbon: The Daiichi Sankyo and Conditional Access Services Grand Chamber Judgments*, in *Legal Issues of Economic Integration*, 2014, pp. 197 and 208.

<sup>45</sup> *Daiichi Sankyo* [GC], cit., para. 58.

<sup>46</sup> *Ibid.*, para. 60.

<sup>47</sup> Opinion 2/15, cit., para. 126.

<sup>48</sup> D. KLEIMANN, *Reading Opinion 2/15: Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General*, in *EUI Working Paper RSCAS*, no. 23, 2017, p. 10.



The same can be said about moral rights. The Court has understood that moral rights do not constitute a separate component of the EU-Singapore FTA that might call in question its essential objective, which is none other than international trade. However, the Court has not sufficiently reasoned this decision. The CJEU had, at least, two options which it could have resorted to.<sup>49</sup> The first was to consider moral rights, which in themselves do not have a commercial content, as covered by the CCP, insofar as they can have a direct effect on trade, such as restrictions on the commercial aspects of intellectual property rights. The second was to consider these moral rights as accessory and secondary in relation to the objective and main component of the EU-Singapore FTA, or its ch. 11, that is, international trade. This second option has finally been chosen, implicitly, but a more elaborate argument in this sense would have been desirable.

This wide margin of action, even discretion, on the part of the CJEU has been rightly criticized by the doctrine. Certainly, the determination of the legal basis must be made unequivocally on the basis of "objective factors amenable to judicial review".<sup>50</sup> However, it is not always clear that the methodological options chosen by the CJEU serve to reinforce the coherence of its legal reasoning and as a clear guide regarding its future decisions.

Regarding sustainable development, the CJEU has also disconnected the CCP from internal competences in the field of labour and environmental protection. Indeed, the Court has opted in the area of sustainable development for a type of argument very similar to that used in the field of intellectual property rights. As we have seen, without expressly rejecting the approach adopted in Opinion 1/94, namely that the TRIPs agreement aims to establish a certain harmonization of intellectual property protection on a world scale, since the *Daiichi Sankyo* case the Court considered, nonetheless, that the fundamental objective of the TRIPs agreement is trade. Therefore, implicitly using its centre of gravity test, the Court is nowadays considering the objective of international trade as a priority, leaving aside the other regarding standard-setting. Likewise, in this area of sustainable development, the CJEU seems to be determined to embrace the objective of international trade as the priority. The harmonization that ch. 13 of the EU-Singapore FTA can achieve through referral to multilateral conventions to which the EU and Singapore are parties is not considered by the Court as the priority objective of the agreement. The Court has chosen to anchor sustainable development in the CCP through giving prevalence to trade over harmonization, and not the possible absence of mandatory legal force of ch. 13. More to the point, as AG Sharpston saw no conditionality arising from ch. 13's provisions, the Court has made a significant effort, even resorting to Art. 60 of the Vienna Convention on the Law of Treaties, to grant legal force to those commitments and introduce a certain social and environmental conditionality to the EU-Singapore FTA.

<sup>49</sup> *Ibid.*, pp. 27-28.

<sup>50</sup> Court of Justice, judgment of 14 June 2016, case C-263/14, *Parliament v. Council* [GC], para. 43.

Another issue of special interest in this Opinion concerns the application of the *ERTA* doctrine, now codified in Art. 3, para. 2, TFEU, and, in almost identical terms, in Art. 216, para. 1, fourth sentence, TFEU. In Opinion 2/15, the application of the *ERTA* doctrine has been invoked in two specific areas, namely, in the area of the provision of services in the field of transport and in the area of the protection of portfolio investments. The first area is excluded from the CCP by Art. 207, para. 5, TFEU while the second is not included in the concept of foreign direct investment of Art. 207, para. 1, TFEU. The most interesting legal issue has been raised in relation to portfolio investment. In the absence of common rules, it was debatable whether the EU's competence could arise where the conclusion of an international agreement is "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties", as provided by the second sentence of Art. 216, para. 1, TFEU. It would also be necessary to determine whether that competence can be exclusive or shared, in accordance with the provisions of Art. 3, para. 2, second sentence, TFEU which, as is well known, codifies the case-law derived from Opinion 1/76.<sup>51</sup> The truth is that the link between Arts 3, para. 2, and 216, para. 1, TFEU is not clear. Indeed, on the one hand, we may infer that the former provision has a certain *vis attractiva* over the latter, meaning that exclusive competence can ultimately be imposed in most cases. On the other hand, Art. 216 TFEU implies a rupture of the *ERTA* doctrine in its traditional conception, since this provision does not entail the need to identify common rules as a requisite to claim EU's external competence.<sup>52</sup>

To this day, there is still a certain ambiguity regarding the *ERTA* doctrine and, specifically, the nature of the EU competence derived from its application. To be sure, the *ERTA* doctrine originally gave rise to an interpretation in which two different decisions adopted by the Court could be identified.<sup>53</sup> First, the CJEU affirmed the EU's implicit external competence to conclude an international agreement in cases where this possibility was not expressly provided for by the Treaty. Secondly, once the EU has adopted legislation internally in an area, it acquires exclusive competence on the external level, but it is a competence that must be interpreted as a pre-emption or field occupation (Member States can no longer conclude international agreements that may affect common rules or alter their scope). Although somewhat rare, it is possible to find case-law that can be explained on

<sup>51</sup> Court of Justice, opinion 1/76 of 26 April 1977. M. KRAJEWSKI, *The Reform of the Common Commercial Policy*, in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds), *EU Law After Lisbon*, Oxford: Oxford University Press, 2012, p. 299.

<sup>52</sup> M. CREMONA, *EU External Relations: Unity and Conferral of Powers*, in L. AZOULAI, (ed.), *The Question of Competence in the European Union*, Oxford: Oxford University Press, 2014, p. 73.

<sup>53</sup> P. EECKHOUT, *Exclusive External Competences: Constructing the EU as an International Actor*, in A. ROSAS, E. LEVITS, Y. BOT (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law*, Den Haag: T.M.C. Asser Press, 2013, p. 627.

the basis of the exercise of implied non-exclusive external competences.<sup>54</sup> In fact, in the most recent cases, one may observe how the Court distinguishes between the determination of the existence of EU competence, on the one hand, and the establishment of the nature of the said competence, on the other.<sup>55</sup> However, as mentioned above, some literature<sup>56</sup> has already pointed out that the differences between Arts 3, para. 2, and 216, para. 1, TFEU will probably lead to the affirmation of the exclusive nature of the EU implicit competences. This conclusion seems to be confirmed by Opinion 2/15 in relation to transport services, but it is not the case with respect to investments.

As stated above, one of the most interesting issues raised in Opinion 2/15 was the invocation, by the Commission, of the *ERTA* doctrine to support the EU's exclusive competence in portfolio investments, in which there are no common rules adopted by the Union. The Commission argued that Art. 63 TFEU could be considered as the "common rule" affected by the EU-Singapore FTA. However, the Court unequivocally decided against the Commission and in favour of the Council and the Member States, stating that the *ERTA* case-law cannot be applied to a situation where the EU rule referred to is a provision of the TFEU and not a rule adopted on the basis of the TFEU.

Therefore, the CJEU opted for a traditional vision of its *ERTA* case-law after the codification brought about by the Lisbon Treaty. Discarding a new or more advanced interpretation that could offer an alternative and more integrationist path to that codification, the Court largely sided with the expectations of Member States, which demanded a restrictive reading of the concept of investment set out in Art. 207 TFEU.<sup>57</sup> Certainly, the limits of the *ERTA* case-law are apparent, as it is difficult to argue that international agreements may jeopardize the supremacy of the EU Treaties as primary law. In this way, the CJEU has closed once and for all this venue as a path to extend EU external implicit competences.

The CJEU found in Opinion 2/15 that the EU-Singapore FTA needed to be concluded as a mixed agreement, as portfolio investments are not covered by the CCP, and the investor-State arbitration system could not be established without the Member States' consent.

Starting with the first aspect, as mentioned above, the CJEU has analysed the possibility that the inclusion of portfolio investments in the EU-Singapore FTA may be "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties", under the terms of Art. 216, para. 1, TFEU second sentence. Following the reasoning of AG Sharpston, and taking into account that the free movement of capital is one of these objectives, the Court has considered that the sentence of Art. 216,

<sup>54</sup> F. CASTILLO DE LA TORRE, *The Court of Justice*, cit., p. 139.

<sup>55</sup> *Ibid.*, p. 157.

<sup>56</sup> M. CREMONA, *Defining Competence in EU External Relations: Lessons from the Treaty Reform Process*, in A. DASHWOOD, M. MARESCAU (eds), *Law and Practice of EU External Relations*, Cambridge: Cambridge University Press, 2008, p. 62.

<sup>57</sup> P.J. KUIJPER, *From the Board. Litigation on External Relations Powers After Lisbon: The Member States Reject Their Own Treaty*, in *Legal Issues of Economic Integration*, 2016, pp. 2-3.

para. 1, TFEU is applicable to international agreements concluded by the EU with third States with a view to imposing reciprocity in relation to the liberalization commitment provided for in Art. 63 TFEU. It should be noted that this is an area of shared competence between the EU and the Member States in accordance with Art. 4, para. 2, let. a), TFEU, which concerns the internal market, as identified by the literature.<sup>58</sup> This latter circumstance means that the competence to conclude an international agreement via Art. 216 TFEU may only be a shared one as well and, therefore, ultimately excludes EU exclusive competence in relation to investments included in the EU-Singapore FTA.

One of the most intriguing issues that arises with this result is the persistent recourse to the characterization of an agreement as mixed where the absence of EU exclusive competence is verified. Indeed, even if the Court does not expressly say so, it follows from the absence of exclusivity of the EU's competence that the EU-Singapore FTA must be concluded as a mixed agreement by the EU and the Member States. This state of affairs, this custom assumed by the EU institutions, has been subject to criticism. As has been noted, Member States have traditionally favoured mixed agreements because this inevitably imposes unanimity.<sup>59</sup> Moreover, the Commission has generally accepted the mixed nature of the agreements to avoid institutional confrontation.<sup>60</sup> However, there is no definitive legal argument to support this standard practice. Indeed, as has been argued, when an agreement falls completely within the non-exclusive external competence of the EU, and the EU concludes the agreement, there is no justification of any kind to support the agreement's mixed character.<sup>61</sup> In our opinion this is what happened in the present case in relation to portfolio investments. If the EU has shared competence on the basis of Art. 63 TFEU in relation to Art. 4, para. 2, let. a), TFEU, then the EU may decide to exercise it alone, without necessarily imposing the mixed nature of the EU-Singapore FTA in this field. However, the Court did not even refer to this possibility, thus keeping to its case-law which offers Member States a non-restricted choice on the mixed character of the agreement.<sup>62</sup>

In our view, in the long run this interpretation will probably lead to a reform of the Treaty in relation to the CCP. Indeed, the situation that arises now recalls that provoked by Opinion 1/94. The restrictive interpretation of the CCP in relation to trade in services

<sup>58</sup> S. HINDELANG, N. MAYDELL, *The EU's Common Investment Policy: Connecting the Dots*, in M. BUNGENBERG, J. GRIEBEL, S. HINDELANG (eds), *International Investment Law and EU Law*, Berlin: Springer, 2011, p. 17; *contra*, F. ORTINO, P. EECKHOUT, *Towards an EU Policy on Foreign Direct Investment*, in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds), *EU Law after Lisbon*, cit., pp. 317-318.

<sup>59</sup> A. ROSAS, *The European Union and Mixed Agreements*, in A. DASHWOOD, C. HILLION (eds), *The General Law of EC External Relations*, London: Sweet & Maxwell, 2000, p. 202.

<sup>60</sup> C.D. EHLERMANN, *Mixed Agreements. A List of Problems*, in D. O'KEEFE, H.G. SCHERMERS (eds), *Mixed Agreements*, Deventer: Kluwer, 1983, p. 9.

<sup>61</sup> P. EECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 265.

<sup>62</sup> C.W.A. TIMMERMANN, *The Court of Justice and Mixed Agreements*, in A. ROSAS, E. LEVITS, Y. BOT (eds), *The Court of Justice*, cit., p. 663.

and intellectual property offered by the CJEU at that time gave way to a series of legal difficulties in order to manage the CCP according to the evolution of international trade, as attested by Opinion 1/08 and the *Daiichi Sankyo* and *Conditional Access Services* cases. After the partial reforms of Amsterdam and Nice, it is the Lisbon Treaty that has filled the gaps which resulted from Opinion 1/94. However, after Opinion 2/15, the situation is similar, but now with respect to portfolio investments. By remaining outside the CCP, and being inextricably linked to direct investments, the EU will be forced to resort to mixed agreements, which will again provoke inter-institutional tensions and difficulties for the EU's external relations. This situation will last until there is a new reform of the CCP that includes portfolio investments. There is of course an alternative that consists of adopting internal legislation on these portfolio investments that could then allow the application of the *ERTA* doctrine. However, this option appears unrealistic. Indeed, Member States will be careful not to activate this possibility unnecessarily when they have fought in order to ensure that the portfolio investments subject-matter inevitably leads to the mixed nature of trade agreements.

Regarding the investor-State arbitration mechanism, some uncertainties persist with respect to Opinion 2/15, a decision that leads once again to uphold a shared competence and, therefore, the mixed nature of EU-Singapore FTA. First of all, from a procedural point of view, the argument made by Member States that they may be sued in an investment dispute and even have to bear the economic burden arising from the award does not necessarily affect the distribution of powers, since, as the AG indicated, Art. 1, para. 1, of Regulation 912/2014 sets out that this Regulation is understood "without prejudice to the division of competences established by the TFEU".<sup>63</sup>

Secondly, from the point of view of the material competence, there are two different contentions that can be made. On the one hand, the Court does not claim that this is an area of Member State exclusive competence, but rather expressly supports the shared character of the competence. However, contrary to what it has ruled in the field of portfolio investments, here the Court does not specify the legal basis on which it relies to determine that this is a shared competence field. Therefore, there are two possibilities to fully interpret the result to which the Court's statement leads. First, one may understand that the CJEU is using the concept of shared competence in the same sense as it did in its case-law prior to the Lisbon Treaty, where by using this expression it simply meant that the international agreement should be concluded as mixed.<sup>64</sup> Secondly, it could be understood that, by pointing out that we are dealing with a shared competence, the Court is referring to a concurrent competence, that is, that the Court is

<sup>63</sup> Regulation (EU) 912/2014 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 by international agreements to which the European Union is party.

<sup>64</sup> Opinion 1/94, cit., paras 98-105; opinion 2/00, cit., para. 17.

not obligatorily determining the need to resort to the mixed nature of the EU-Singapore FTA. The exercise of this kind of concurrent competence by the EU would have the same effects relative to pre-emption as the adoption of internal secondary legislation.<sup>65</sup>

Obviously, the key to the exercise of shared or concurrent competence lies in the political discretion of the Council, which can decide to implement this EU competence alone or, on the contrary, impose the participation of the Member States by way of a mixed agreement. This is what the CJEU has understood and what has probably inspired its Opinion on this point. That is to say, the issue does not lie so much in a real competence problem, but in a problem of international political visibility of the Member States, which refuse to be left out by the EU in these important new generation FTAs.

IV. Opinion 2/15 is the latest chapter in the institutional confrontation between the Commission, on the one hand, and the Council and the Member States, on the other, regarding the scope of the exclusive competence within the CCP. The procedure for requesting an opinion from the CJEU through Art. 218, para. 11, TFEU has again been used, not so much to ensure that the EU-Singapore FTA falls within the competence of the EU and is adopted on a correct legal basis but rather the Commission has set it in motion to prove the absence of Member States' competence and to confirm EU's exclusive competence. However, in this particular case, as in previous cases, the results are again not entirely successful. Indeed, by stating that the EU-Singapore FTA has a mixed character, the Court has concluded, on the one hand, that the CCP deployed by the EU exceeds the competences established in the TFEU and that, therefore, the EU-Singapore FTA incorporates matters that do not fall within its exclusive competence. On the other hand, the Court implicitly holds that there is no shared external competence that can be exercised by the EU alone. Although AG Wahl, Sharpston and Szpunar are favourable to this latter possibility,<sup>66</sup> which is also supported by EU practice in at least one instance, the Stabilization and Association Agreement with Kosovo, the CJEU has held in this Opinion that the shared competence is equivalent to mixed agreement with no other option.

From the point of view of the CCP's scope of application, the CJEU has deployed a generous interpretation of the centre of gravity test, accepting that in this EU-Singapore FTA the predominant objective should prevail over the secondary one. This interpretation has allowed some novel areas, such as sustainable development, to be included within the scope of the CCP, which in turn will therefore embrace the provisions of the new FTAs that protect the environment or labour standards. In this way, the Court performs a disconnection between the scope of the CCP, on the one hand and, on the oth-

<sup>65</sup> F. CASTILLO DE LA TORRE, *The Court of Justice*, cit., p. 181.

<sup>66</sup> Opinion of AG Wahl delivered on 8 September 2016, opinion procedure 3/15, paras 119-123; opinion of AG Sharpston, opinion procedure 2/15, cit., para. 75; opinion of AG Szpunar delivered on 24 April 2017, C-600/14, *Germany v. Council*, paras 84 and 85.

er hand, the scope and nature of the internal powers as well as the requirements for the execution of the Union's international obligations.

With regard to investments, one of the fundamental downsides lies in the CJEU's consideration of portfolio investments as an area not included within the EU's exclusive competence. Indeed, as we have seen, the *ERTA* doctrine codified in Art. 3, para. 2, TFEU is not applicable to the provisions of primary law, as the Commission intended. In addition, the mixed nature of the agreement is automatically imposed when the shared external competence is affirmed. Moreover, the investor-State arbitration system has been granted a principal, not ancillary, nature, unlike other external dispute resolution mechanisms. All this makes the EU's exclusive competence in foreign direct investment unfeasible. Indeed, the technical-legal and economic link between direct and indirect investments, together with the attached arbitration system, makes it very difficult for these areas of regulation to be split in different international agreements. Accordingly, the options are basically two. The first alternative would be for the EU to pursue the conclusion of separate agreements, on the one hand, in relation to the CCP as the EU's exclusive competence, which would lead to a type of far-reaching trade agreement, and, on the other hand, in relation to all investments as a mixed agreement. The second alternative would be to pursue ambitious FTAs that include both trade as well as investment in general, as mixed agreements, as seems to be taking place in view of the ongoing negotiations and the conclusion of subsequent FTAs such as the CETA.

However, very recently, the Commission has adopted a document from which it is inferred that we are facing a still open question. Indeed, on the one hand, it is stated that the Commission will continue with the negotiations already started in the field of investment (Japan, China, Myanmar and other partners). However, its proposal to open negotiations with Australia and New Zealand does not include investment protection or the settlement of disputes in investment. In addition, it states that "the debate on the best architecture for EU trade agreements and investment protection agreements must be completed and the Commission stands ready to discuss this further with the Council and the European Parliament".<sup>67</sup>

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<sup>67</sup> Communication COM(2017) 492 final of 21 March 2017 from the Commission on a balanced and progressive trade policy to harness globalization, p. 6.

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