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The EU's Competence to Conclude Trade Agreements

The EU–Singapore Opinion

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I External Competence at Times of Public Disquiet

It was observed some time ago that '[a]nything to do with the European Communities is complex, and this is particularly so for the law governing their external relations'.[1] The principles governing competence and exclusivity are among the most complex in European Union (EU) external relations law, and neither the considerable case law of the European Court of Justice ('the Court'), nor the efforts of the Lisbon Treaty to codify and clarify them have made them a model of clarity. These, and the ensuing issues about mixed agreements, used to attract the interest only of European Union (EU) external relations scholars and legal advisers, that is a rather small body of specialists.

And yet, the competence of the EU to negotiate trade agreements on its own or along with the Member States has attracted wider attention recently. This is partly because of the decentralised nature of mixed agreements: the latter are concluded by the Council and, typically, all Member States which ratify such agreements in accordance with their constitutional arrangements. This process may not be smooth, as it involves national and regional assemblies. This point was illustrated starkly in the case of the Comprehensive Economic and Trade Agreement (CETA) that the EU negotiated with Canada:[2] its signing and provisional application was nearly derailed by the Walloon Parliament in October 2016, and was by no means a foregone conclusion

[1] A. Aust, *Modern Treaty Law and Practice*, 2nd edn (Cambridge University Press 2000), 55.
[2] See Canada–EU Comprehensive Economic and Trade Agreement (CETA) [2017] OJ L11/23.

in Germany[3] and Austria either. The fate of the Association Agreement that the EU negotiated with Ukraine was similarly instructive: the Netherlands ratified it in May 2017 only after a drawn-out process following its rejection in a non-binding referendum and certain clarifications that the European Council was forced to make.[4]

The above episodes convey a growing sense of public disquiet about the treaty-making activities of the EU. This expresses a range of concerns. Some are policy related: in the case of CETA, for instance, concerns were raised about the impact on environmental and labour standards, and of investor-state dispute settlement (ISDS) mechanisms on regulatory autonomy; in the case of the EU–Ukraine Agreement, issues were raised about the movement of persons and financial support to Ukraine. The fate of international agreements negotiated by the EU is also affected by issues that are extraneous to the agreements themselves, such as domestic politics, concerns about immigration, wider concerns about the direction of the EU, and an increasingly vocal anti-globalisation rhetoric.

In the light of this politically charged environment, Opinion 2/15 of the Court of Justice on the signing and conclusion of the Free Trade Agreement between the European Union and Singapore[5] was anticipated eagerly. Finalised after 4.5 years of negotiations, the Agreement is a deep and comprehensive free trade agreement: its content goes beyond the traditional tariff and non-tariff barriers to trade in goods and services, and covers areas such as intellectual property rights, public procurement, competition, sustainable development and investment.[6]

Given the wide scope of the Agreement, the question that the Court was asked to address about the nature of the competence of the EU and the Member States is topical. First, it pertained to issues that are central to the conduct of the Union's external trade policy. Second, the Opinion was expected to shed light on the reforms that the Lisbon Treaty introduced regarding external relations in general and, in particular, trade policy. Third, the Opinion has implications for the form of trade

[3] BVerfGE 143, 65, 2 BvR 1368/16 (13 October 2016).

[4] European Council, Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the EU–Ukraine Association Agreement, annexed to European Council Conclusions on Ukraine, Press Release 785/16 (15 December 2016).

[5] Opinion 2/15, EU:C:2016:992.

[6] The negotiation of such agreements has become a priority for the EU's trade policy, see European Commission, 'Global Europe – Competing in the World – A Contribution to the EU's Growth and Jobs Strategy' COM(2006) 567 final.

agreements negotiated by the EU, given the emergence of domestic parliaments as powerful players in the process of the ratification of mixed agreements. The significance of these issues is illustrated by the fact that the Opinion was rendered by the Full Court, which is a composition that is rarely convened and only for the most important matters. It is also noteworthy that the governments of twenty-five Member States made submissions.

II A Richer Conception of the EU's Common Commercial Policy

The Common Commercial Policy (CCP) is the oldest external policy of the EU. It was introduced in the original Treaty of Rome and then gradually expanded, first at Amsterdam, then at Nice and finally at Lisbon in Article 207 TFEU. The CCP has been described as 'represent[ing] the [European Community, as it then was] at the height of its legal powers, control, and supremacy over the member states'.[7] This was due to two main factors: the EU's competence is exclusive[8] and is exercised, mainly, by qualified majority voting in the Council.[9]

In the light of the above characteristics, the definition of the scope of CCP has considerable legal and policy implications. After all, the long history of legal basis disputes in the area[10] illustrates the eagerness of the European Commission for the scope of the policy to be construed widely, and the concern of the Member States that their continuing role on the international trade arena should not be eroded.

In Opinion 2/15, the Court of Justice clarifies the scope of CCP in two ways. In terms of its overall approach, it confirms previous case law that an international agreement is covered by Article 207 TFEU if it is about trade with third states in a specific manner, that is if 'it is essentially intended to promote, facilitate or govern such trade and has direct and

[7] D. McGoldrick, *International Relations Law of the European Union* (Longman 1997), 70.
[8] Art. 3(1)(e) TFEU. This provision, introduced at Lisbon, formalised earlier case law: see Opinion 1/75, EU:C:1975:145 and 41/76 *Donckerwolcke*, EU:C:1976:182.
[9] Arts. 207(2) and (4) TFEU.
[10] See, for instance, on the delineation of CCP from environmental policy, Opinion 2/00, EU:C:2001:664; C-281/01 *Commission* v. *Council*, EU:C:2002:761; C-94/03 *Commission* v. *Council*, EU:C:2006:2; C-178/03 *Commission* v. *Parliament and Council*, EU:C:2006:4. On the various strands of CCP-related legal basis disputes, see P. Koutrakos, *EU International Relations Law*, 2nd edn (Hart 2015), 52.

immediate effects on it'.[11] As for the specific components of the EU–Singapore Agreement, the following were deemed to be covered by Article 207 TFEU:

- all commitments on market access for goods (including remedies, technical barriers to trade, sanitary and phytosanitary measures, customs and trade facilitation);
- most commitments on market access for services (including all four modes of supply corresponding to the WTO classification,[12] financial services and mutual qualifications, and transport services not inherently linked to the physical act of moving goods or persons from one place to another by means of transport);[13]
- provisions on non-tariff barriers to trade and investment in renewable energy generation, and government procurement in goods and services that fall within the scope of CCP;
- commitments on direct investment, that is investment enabling the person providing the capital to participate effectively in the management or control of the company to which the capital is made available;
- commitments on intellectual property protection (covering copyright and related rights, trademarks, geographical indications, designs, patents, pharmaceutical products and plant varieties);
- commitments on competition;
- commitments on sustainable development.

The Opinion brings clarity in a policy field that, while rationalised at Lisbon, was still surrounded by uncertainty regarding its scope. A case in point is foreign direct investment. The Court defines the term broadly by rejecting the distinction between the admission of foreign investment covering capital movements and the establishment of foreign investors (which were clearly covered by Article 207 TFEU) and the post-admission protection of investments (which the Council and certain Member States had argued fell beyond the scope of CCP).[14] This

[11] Opinion 2/15, paras. 35–6, with references, among others, to C-414/11 *Sankyo*, EU:C:2013:520 paras. 50–1; C-137/12 *Commission* v. *Council*, EU:C:2013:675, paras. 56–7; and Opinion 3/15, EU:C:2017:114, para. 61.

[12] With reference to Opinion 1/08, EU:C:2009:739, paras. 4, 118–89.

[13] These consist of aircraft report and maintenance services during which the aircraft is withdrawn from service, as well as selling and marketing of air transport services.

[14] See A. Dimopoulos, *EU Foreign Investment Law* (Oxford University Press 2011), 49–61. For the argument about a narrow construction of FDI under Art. 207 TFEU, see M. Krajewski, 'The Reform of the Common Commercial Policy', in A. Biondi and P. Eeckhout (eds.), *EU Law After Lisbon* (Oxford University Press 2012), 292, 303–4.

broad interpretation of foreign direct investment is consistent with the wording of Article 207 TFEU, which makes no reference to such distinction and provides no indication that it should be confined to the admission of foreign direct investment. It is also consistent with the objective of the relevant provisions of the Agreement: as they aim to contribute to the legal certainty of investors, they meet the general test set out by the Court at the outset, namely to promote, facilitate and govern, and to have a direct and immediate impact on trade between the EU and Singapore.

Another feature of the Opinion is the anchoring of CCP in the broader set of the Union's external action. This becomes apparent in relation to the provisions of the Agreement about sustainable development the objective of which is deemed to form 'an integral part' of the conduct of CCP.[15] In order to appreciate the implications of this development, we need to step back and consider the position of CCP within the broader framework of EU external relations.

It is recalled that one of the main innovations of the Lisbon Treaty in external relations was the articulation of a set of principles and objectives in Article 21 TEU which would apply to all strands of the Union's external action (CCP, development cooperation, economic, financial and technical cooperation with third countries, humanitarian aid, restrictive measures, international agreements, the Union's relations with international organisations and third countries and Union delegations).[16] These objectives are broad in their scope and include, among others, sustainable development through measures designed to preserve and improve the quality of the environment and the sustainable management of global natural resources (Article 21(2)(d) TEU). The introduction of a set of common principles and objectives aimed to improve the coherence of the EU's external policies. In doing so, it was about a problem that has been captured vividly as follows: 'Europe has a hundred left hands and none of them knows what the right hand is doing. Trade, development, aid, immigration policy, education, cultural exchange, classic diplomacy, organised crime: each European policy has an impact, but the effects are fragmented and often self-contradictory.'[17]

In this vein, the Lisbon Treaty introduced for the first time the term 'external action' to describe all aspects of the EU's external policies, including the CCP. Semantics matter, and the singular term chosen by

[15] Opinion 2/15, para. 147.
[16] See J. Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016).
[17] T. Garton-Ash, *Free World* (Penguin 2005), 218.

the drafters of the Treaties conveys an understanding of the different strands of the Union's external policies (trade, economic, development, social, political, security) as an integrated whole. This is translated in the requirement that whatever the EU does in the world should respect the common principles and pursue the common objectives set out in Article 21 TFEU. This point is brought home in different contexts in primary law, both in relation to external action in general (Articles 21(3) TEU and 205 TFEU), and in relation to the CCP in particular (Article 207(1) TFEU).

It was in the light of the above context that the Court brought the provisions of the EU–Singapore Agreement on sustainable development within the scope of CCP and, therefore, the EU's exclusive competence. In particular, it concluded that there is an 'obligation on the European Union to integrate those objectives and principles [set out in Article 21 TEU] into the conduct of its common commercial policy', of which 'the objective of sustainable development henceforth forms an integral part'.[18]

The implications of the above approach to the scope of CCP are twofold. On the one hand, Opinion 2/15 gives specific meaning to the reorganisation of the primary rules on external action introduced at Lisbon. Neither the provision of common principles and objectives in Article 21 TEU, nor the cross-references to them in other parts of the Treaties[19] are merely rhetoric. They have legal implications which the Court is prepared to monitor. On the other hand, a richer and more dynamic conception of CCP emerges, the trade aspects of which are understood within the context of a multidimensional and evolving international economic policy. The wording in Opinion 2/15 is noteworthy: rather than merely acknowledging the implications of trade policy for sustainable development, the Court construes the latter as 'an integral part' of the conduct of the former. This, in itself, is not novel in the history of EU external relations. After all, in its early case law on CCP in the 1970s, the Court had construed the scope of CCP sufficiently broadly to enable it to adjust to the developing patterns of international trade.[20] Opinion 2/15, however, goes farther, as its interpretation is embedded in, and gives teeth to, the revamped legal landscape set out in the Lisbon Treaty.

[18] Opinion 2/15, paras. 143, 147.

[19] Art. 205 TFEU in relation to external action in general, and Art. 207(1) TFEU in relation to CCP. See also Art. 23(1) TEU in relation to CFSP.

[20] See, for instance, the approach to commodity agreements in Opinion 1/78, EU:C:1979:224.

The above broad interpretation of the scope of CCP in the light of Article 21 TEU and Articles 205 and 207(1) TFEU raises two questions about the overall reach of the policy. The first is about competence: may the richer and more diverse content of CCP erode, for instance, the development cooperation policy of the EU (Article 208 TFEU)? Given the Union's exclusive competence over the former and its shared competence over the latter,[21] such an outcome would have serious repercussions for the powers of the Member States. Opinion 2/15, however, suggests that there is a substantive limit to the reach of CCP. This is based on the specific provisions of the Agreement on sustainable development. As the Court pointed out, the latter do not entail harmonisation of social and environmental protection in the contracting parties. Instead, they are about rendering trade between the EU and Singapore subject to compliance with the international obligations that both parties have assumed concerning social protection of workers and environmental protection. Put differently, had the relevant provisions introduced harmonisation in the EU, they would have fallen beyond the scope of CCP. This is because competence in social policy and environmental protection is shared, and Article 207(6) TFEU prevents the conduct of the CCP from affecting the delimitation of competences between the EU and its Member States. There is also another aspect of the Agreement's provisions on sustainable development that is noteworthy: their wording was carefully couched in such terms as to underline their links with the conduct of trade. These provisions read as if their drafters had an eye on protecting them from scrutiny that might question their trade-related credentials. All in all, there appears to be a substantive limitation on how far the Union's exclusive competence in CCP could take us where the exercise of other competences is at stake.[22]

The second question about the reach of CCP is policy related: does the duty of the EU to integrate all the objectives set out in Article 21 TEU in its CCP enable the Court to exercise judicial review of the substantive policy underpinning a given agreement? In other words, would it be possible for the Court to annul the conclusion of an international agreement concluded under Article 207 TFEU because its provisions do not give sufficient weight to the objective of sustainable development? The answer to this question must be negative. Primary law itself is

[21] Art. 4(2)(b) and (e) TFEU.

[22] In the words of Opinion 2/15, para. 164: 'Article 3(1)(e) TFEU does not prevail over these other provisions of the FEU Treaty [namely Art. 3(1)(d) and (2) and Article 4(2)(b) and (e) TFEU on the nature of the EU's competence]'.

couched in terms that grant the Union's institutions policy leeway. For instance, no absolute obligation of result is imposed in this area: the EU is to 'foster' the sustainable social development of developing countries, and to 'help' develop measures about the sustainable management of global natural resources.[23] The other objectives of external action are couched in similarly broad terms (for instance, the EU is to 'encourage' the integration of third countries into the world economy).[24]

Aside from the wording of Article 21 TEU, the Court has traditionally acknowledged the discretion that the EU institutions enjoy in policymaking on the international scene. The best-known example is the refusal to exercise direct judicial review of EU law in the light of WTO rules.[25] In the context of CCP in particular, the Court has declined to read into the objective of 'the progressive abolition of restrictions on international trade' laid down in Article 206 TFEU a general obligation on the EU institutions to liberalise trade with third countries 'where to do so would be contrary to the interests of the Community'.[26] It is the Union's interest that determines the specific substantive choices that EU makes on the international scene. As the determination of the Union's interest is a matter for the EU's decision-making institutions, the latter enjoy discretion that is inherent in the conduct of CCP.[27] Viewed from this angle, and in addition to the substantive limit set out above, there is, therefore, a policy-related limit on the broad interpretation of CCP and its anchoring in the common set of objectives that govern all strands of the EU's external action.

III A Broad Understanding of Implied Competence

The Union's exclusive competence to conclude international agreements is not confined to cases where it is expressly set out in primary or

[23] Art. 23(2)(d) and (f) Consolidated Version of the Treaty on European Union [2016] OJ C202/13.

[24] Art. 23(2)(e) TEU.

[25] See C-249/96 *Portugal* v. *Council*, EU:C:1999:574; C-377/02 *Van Parys*, EU:C:2005:121; C-120/06P; C-121/06P *FIAMM*, EU:C:2008:476.

[26] C-150/94 *UK* v. *Council*, EU:C:1998:547, para. 67.

[27] To that effect, see M. Cremona, 'A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon' (2017) *Swedish Institute for European Policy Studies* 2017: 2, 31–2. At 39, Cremona observes the emergence of a procedural obligation based on T-512/12 *Front Polisario*, EU:T:2015:953; and the Opinion of AG Wathelet in C-104/16P *Front Polisario*, EU:C:2016:677, even though this issue was not addressed by the ECJ in its judgment on appeal that dismissed the action as inadmissible (C-104/16P *Front Polisario*, EU:C:2016:973).

secondary law (as is the case regarding the CCP). According to Article 3(2) TFEU, such competence may also arise 'in so far as its conclusion may affect common rules or alter their scope'. This formulation seeks to convey the principle first introduced in the *AETR* judgment[28] in the early 1970s which has developed over the years in a long and at times complex line of cases.

In Opinion 2/15, the Court held that the Union's implied competence was exclusive in relation to commitments on transport services and public procurement on such services. This was because the Agreement established a set of rules which either differed from these set out in internal common rules[29] or overlapped to a large extent with such rules.[30] This approach is not novel: in earlier case law, the Court had already held that the provisions of an agreement need not coincide fully with internal common rules in order to risk affecting the latter or altering their scope;[31] it had also held that a contradiction between the agreement and internal common rules is not necessary for exclusivity to be triggered, as long as the meaning, scope and effectiveness of the latter might be affected.[32]

A broad approach, therefore, to implied exclusive competence had already emerged in the Court's case law. What Opinion 2/15 does is to illustrate it with considerable force. For instance, the references to the

[28] 22/70 *Commission* v. *Council*, EU:C:1971:32.

[29] This was the case in maritime transport and the impact of the Agreement on Council Regulation (EEC) 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries [1986] OJ L378/1.

[30] This was the case in rail transport (covered by Directive 2012/34/EU establishing a single European railway area [2012] OJ L343/32); road transport (covered by Regulation (EC) 1071/2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator [2009] OJ L300/51; Regulation (EC) 1072/2009 on common rules for access to the international road haulage market [2009] OJ L300/72; Regulation (EC) 1073/2009 on common rules for access to the international market for coach and bus services [2009] OJ L300/88); and public procurement in transport services (covered by Directive 2014/24/EU on public procurement [2014] OJ L94/65. As for internal waterways transport, the commitments introduced by the Agreement were held to be of such narrow scope as to be irrelevant for the assessment of the overall competence of the Union in the area of transport.

[31] See Opinion 1/03, EU:C:2006:81, para. 126; C-114/12 *Commission* v. *Council*, EU:C:2014:2151, paras. 69–70; Opinion 1/13, EU:C:2014:2303, paras. 72–3; Opinion 3/15, paras. 106–7.

[32] See Opinion 1/03, paras. 143, 151–3; Opinion 1/13, paras. 84–90; C-66/13 *Green Network*, EU:C:2014:2399, paras. 48–9 and, even earlier, Opinion 2/91, EU:C:1993:106, paras. 25–6; C-467/98 *Commission* v. *Denmark*, EU:C:2002:625, para. 82.

specific provisions of the Agreement and those of the internal secondary legislation are lacking in detail. This is noteworthy, given that, in Opinion 1/03, the Court had held that the assessment of the Union's implied external competence to conclude an agreement ought to rely upon a 'comprehensive and detailed analysis' of both its provisions and the internal common rules in the area.[33] Such analysis is not present in Opinion 2/15. While the Court takes the Chapters of the Agreement with Singapore in turn and examines them against EU secondary legislation, it examines them in only broad terms. This analytical sparseness is also reflected by the streamlined form of Opinion 2/15.[34] All in all, it becomes clear that the threshold to meet the *AETR* test and its codification in Article 3(2) TFEU is by no means high.

There are two areas which are deemed in Opinion 2/15 to fall beyond the EU's exclusive competence. The first is about indirect foreign investment (such as portfolio investment, which involves the movement of capital for personal gain without any intention to influence the management and control of the undertaking where the investment is made): the Agreement with Singapore could not affect Article 63 TFEU (on free movement of capital) in the meaning of Article 3(2) TFEU, because the latter applied to secondary legislation, rather than primary law. The second area where the EU shared competence with the Member States was about the establishment of an ISDS mechanism: the right of investors to bring an action against either party before an arbitral tribunal would deprive national courts of their jurisdiction, an outcome which would require the Member States' consent.

Opinion 2/15 makes two important constitutional points in relation to implied competence. The first is about the construction of exclusivity under Article 3(2) TFEU. In its approach to the competence on indirect foreign investment, the Court confirms that that provision is to be interpreted in the light of the previous case law on implied competence. This is an important point as the broad wording of Article 3(2) TFEU had failed to capture the subtleties of the *AETR* principle and its development over the years.[35] Viewed beyond its context, Article 3(2) TFEU could be

[33] Opinion 1/03, para. 133.

[34] The Opinion is much shorter than the detailed and in-depth analysis provided in Opinion of AG Sharpston in Opinion 2/15, EU:C:2016:992.

[35] As Dashwood puts it: 'Article 3(2) TFEU is an object lesson in the unwisdom of seeking to enshrine in a Treaty provision subtle concepts that have been developed, and are still developing, in the case law' (A. Dashwood, 'Mixity in the Era of the Treaty of Lisbon', in

interpreted so widely as to impinge on the principle of conferral (Article 5(1) TEU). Such an interpretation is rightly rejected in Opinion 2/15.

The second constitutional point is about the existence of implied competence. Once it has ruled out exclusivity for foreign indirect investment, the Court does not stop there. Instead, it goes on to examine the existence of the EU's competence under Article 216(1) TFEU. It is recalled that the Lisbon Treaty introduced for the first time in primary law the distinction between the existence of the Union's competence to conclude international agreements (Article 216(1) TFEU) and the exclusive competence to do so (Article 3(2) TFEU). Having held that the latter was inapplicable, the Court focused on the former: the conclusion of international agreements is 'necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties' (Article 216(1) TFEU), the latter being free movement of capital (Article 63 TFEU); free movement of capital relates to the internal market (Article 4(2)(a) TFEU) over which the EU had shared competence (Article 4(1) TFEU); the EU, therefore, also has shared competence to conclude an agreement on capital movements. This line of reasoning is clear and takes seriously both the new provision of Article 216 TFEU and the distinction between the existence and nature of implied external competence.[36]

While, however, it seeks to clarify the primary rules on the constitutional characteristics of implied external competence, Opinion 2/15 appears to obscure the constitutional implications of shared competence. Having held that the provisions of the Agreement on most transport services and ISDS fell within shared competence, the Court concludes that the relevant Chapters 'cannot be approved by the European Union alone'.[37] This formulation (repeated three times in the Opinion) appeared to suggest that the existence of shared competence in these areas would necessarily give rise to mixity. No argument was provided to that effect. Such a conclusion would have been problematic in so far as Opinion 2/15 did not describe the national competence related to the jurisdiction of national courts on investors' claims against

C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010), 362).

[36] While far from clear in earlier case law, this distinction became more prominent later, see Opinion 1/03.

[37] Opinion of AG Sharpston in Opinion 2/15, para. 244 (regarding transport services) and para. 304 (regarding ISDS). The same point was made in relation to the provisions on transparency, in so far as they related to indirect foreign investment (para. 282).

either party as exclusive. After all, such jurisdiction would flow directly from the conclusion of the EU–Singapore Agreement, which would, therefore, become 'an integral part' of the EU legal order and binding on Member States under Article 216(2) TFEU). Neither was the competence of Member States on indirect foreign investment described in the Opinion as exclusive.

What would the alternative view be? As there is no power reserved for the Member States, there is nothing to prevent the EU from concluding on its own an agreement covering an area of shared competence, provided that the Council has adopted a decision to that effect in accordance with the treaty-making procedures laid down in Article 218 TFEU. Put differently, while the Agreement with Singapore could be adopted as a mixed agreement, there was no legal requirement to that effect, the issue being ultimately for the Council to decide.[38] The type of mixity pertaining to the Agreement is, therefore, optional, in contrast to the obligatory mixity which would arise in cases of agreements covering areas reserved exclusively for the Member States.[39] In other words, there is a policy choice for the exercise of the Union's shared competence, and it is for the Council to make it.[40]

In a subsequent judgment, the Court made it clear that Opinion 2/15 should not be read as ruling out facultative mixity. In Case C-600/14 *Germany* v. *Council*, the Grand Chamber held that the reference in Opinion 2/15 to joint participation should be understood in the specific factual and legal context of the case.[41] This clarification is welcome. After all, to ignore the above function of mixity would not necessarily follow

[38] EU–Kosovo Stabilisation and Association Agreement [2016] OJ L71/3 was concluded by the EU alone for reasons of political expediency, even though it included areas not covered by the EU's exclusive competence (hence the qualifications in Recital 5 Council Decision 2016/342 on the EU–Kosovo Stabilisation and Association Agreement [2016] OJ L71/1).

[39] Allan Rosas has described it as 'facultative mixity' (A. Rosas, 'The European Union and Mixed Agreements', in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (Sweet & Maxwell 2000), 205–6).

[40] See Opinion of AG Wahl in Opinion 3/15, EU:C:2016:657, paras. 119–22 where he argues that '[t]he choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence (or of parallel competence), is generally a matter for the discretion of the EU legislature' (para. 119). See also Opinion of AG Sharpston in Opinion 2/15, paras. 73ff.

[41] EU:C:2017:935, para. 67 ('in making that finding, the Court did no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area').

from the very primary provisions on the basis of which the Court substantiated the Union's shared competence, namely Article 216 TFEU (on international agreements) and Articles 4(2)(a) and 4(1) TFEU (on the internal market competence). If it were not for the clarification in Case C-600/14 *Germany* v. *Council*, a conceptual inconsistency could also have arisen: if taken literally, a narrow approach to mixity would have sat uncomfortably with the broad approach to exclusivity that the Court had endorsed. Introducing further constitutional mystery almost five decades after the introduction of the *AETR* principle, and given its development in case law and codification in primary law at Lisbon, would have been disconcerting.

IV The Implications of Opinion 2/15

As the Court sanctioned the participation of the Member States in the conclusion of the EU–Singapore Agreement, Opinion 2/15 may appear to suggest a victory for them. Appearances, however, are deceptive. The arguments of all the intervening Member States about a narrower reading of exclusivity were largely rejected, and the Court went farther than Advocate General Sharpston who, in her Opinion, had suggested a narrower approach to exclusivity.[42] Overall, the exclusive competence of the Union in international trade has been bolstered.

In substantive terms, the Opinion did not address the issue of the compatibility of the ISDS mechanism with EU law, in general, and the principle of autonomy, in particular. As this was not part of the Commission's request, the Opinion was confined to ascertaining the nature of the Union's competence.[43] At the time of writing, these questions are examined by the Court of Justice in the request for an Opinion that Belgium has made under Article 218(11) TFEU on the ISDS system laid down in CETA.[44]

At policy level, the broad approach to CCP and excusive implied competence in Opinion 2/15 makes it easier for the EU to negotiate and conclude trade agreements. It also raises two policy questions for the EU institutions to address. The first is narrow and is about the role of investment protection in trade agreements. The removal of the investment chapter and the ISDS mechanism from a trade agreement would

[42] Opinion 2/15.
[43] Opinion 2/15, para. 30.
[44] Opinion 1/17 (pending).

render the latter wholly within the Union's exclusive competence, hence dispensing with the uncertainty and delays associated with the ratification process of mixed agreements in domestic legal orders. In fact, this is what the Commission proposed, namely splitting the Agreement with Canada into two separate agreements, a free trade (concluded by the EU alone) and an investment protection one (by the EU and the Member States). [45]

The second policy question is broader and is related to the political costs that would ensue if the EU institutions adjusted the content of trade agreements in order to avoid mixity. Would such a policy choice be construed as an effort to remove treaty-making at EU level from national accountability mechanisms? Might this not fuel the public disquiet that was outlined in the introduction of this chapter?

Whether the public disquiet about the EU's trade deals could be sated by legal ingenuity depends, among others, on the extent to which it would be instrumentalised by domestic politics or populist rhetoric. National concerns, nonetheless, raise fundamental questions about the joint participation of the Union and the Member States and the extent to which the latter may participate in what the former does in the world. These questions require that decision-makers in the Union and the Member States reflect on the political, practical and legal implications.[46] To that effect, a number of factors are worth considering. In terms of trade politics, the Union's appetite for negotiating bilateral agreements has not diminished. For instance, at the time of writing, an ambitious Economic Partnership Agreement with Japan has been finalised, and there is confidence about the progress of negotiations with Mercosur and Mexico. In substantive policy terms, the EU has been active in reaching political compromises that would address public concerns and would also pave the way to the smooth application of trade agreements. On the one hand, clarifications and assurances are given internally, for instance in relation to the Agreement with Ukraine.[47] On the other hand, on the international scene, the EU has become an advocate of reform of

[45] COM(2018) 194–7 final.

[46] Two groups of academics have intervened, expressing differing views on the intensity and scope of national participation in the Union's international treaty-making: for a more rigorous and direct involvement of national authorities, see I. Dreyer, '"Namur Declaration" Calls for More National Involvement in EU Trade Deals', *Borderlex* (5 December 2016); for a more streamlined EU approach, see 'For Strong and Democratically Legitimized EU International Agreements', *Trading Together* (25 January 2017).

[47] Decision of the Heads of State or Government, meeting within the European Council, annexed to the European Council Conclusions on Ukraine, 15 December 2016.

the existing ISDS system and the introduction of a multilateral investment court.[48]

In addition to the climate of public disquiet that has dominated EU politics recently, Opinion 2/15 was rendered at a time of uncertainty marked by Brexit. The Opinion was eagerly anticipated in the United Kingdom, as its conclusions were considered relevant to the agreement that would govern the post-Brexit relations between the EU and the UK. The negotiation of such agreement is bound to be complex, and, therefore, it is in the UK's interest to reduce the number of legal obstacles that may derail this process. Viewed from this angle, a UK–EU-only agreement, that is without the participation of the Member States, is the most attractive formula for the British negotiators: there would be fewer constituencies to satisfy, the unpredictable role of national parliaments and regional assemblies would be avoided, and the whole process would take less time to complete. It is ironic that the UK should seek such a solution, as the British government has been one of the staunchest supporters of the continuing role of Member States in international trade negotiations. In fact, it made submissions to that effect in Opinion 2/15. It is, therefore, the rejection of most of its arguments that might make it easier for it to negotiate its post-Brexit relationship with the EU.

It by no means follows, of course, that the content of a UK–EU agreement would mirror the EU–Singapore Agreement. After all, while comprehensive, the latter may not provide a model for the former, given the unique circumstances in which the post-Brexit UK–EU arrangement would be negotiated. Furthermore, the broader the scope and the deeper the content of a UK–EU Agreement, the more complex its conclusion. If, for instance, such an agreement were an association agreement, its conclusion would require unanimity in the Council in accordance with Article 218(8) paragraph 2 TFEU. The UK government has suggested that this type of agreement would be of no interest, and that it would negotiate, instead, for a 'big, very ambitious free trade agreement'.[49] While the shape of the post-Brexit arrangement is unclear, ruling out

[48] See European Commission, 'Commission Concept Paper, Investment in TTIP and beyond – the Path for Reform – Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court' (5 May 2015). This initiative is now being promoted jointly with Canada: see joint paper with the Canadian government presented at an informal ministerial meeting at the World Economic Forum in Davos: Government of Canada, 'The Case for Creating a Multilateral Investment Dispute Settlement Mechanism' (20 January 2017).

[49] D. Davis, 'Secretary of State for Exiting the European Union', *The Times* (15 May 2017), 10.

the participation of Member States would have an impact on the scope and, therefore, ambition of the EU–UK trade agreement.[50]

V Conclusion

This chapter argued that the main implications of Opinion 2/15 are threefold. First, it bolsters the Union's excusive competence to negotiate and conclude trade agreements. It construes the scope of the CCP broadly and places the policy firmly within the reconfigured framework of external action set out in the Lisbon Treaty. It also approaches the Union's exclusive implied competence broadly and confirms the low threshold for the exclusivity test to be met.

Second, in terms of specific external policies, it brings some much-needed clarity on the nature of the Union's competence. This is helpful, given the considerable disputes among the EU institutions and between them and the Member States about the division of powers in EU external relations. The practical implications of this development are all the more significant given the Union's current policy choice to negotiate comprehensive trade agreements.[51]

Third, the practical implications of Opinion 2/15 for treaty-making by the EU alone or with its Member States depend on the political will of the Union's decision-makers. It is for the Council, and ultimately the Member States, to decide on the content of the agreements that the EU negotiates and, therefore, the ensuing procedures for their conclusion. In other words, the locus of power for choosing mixity has not changed. It is the context within which mixity is relied upon that is shifting, as Opinion 2/15, in legal terms, and the public disquiet in Member States, in political terms, highlight the parameters within which the Union may exercise its competence to conclude trade agreements.

[50] See also M. Cremona, 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017', (2018) 14 *EuConst*. 231 at 258.

[51] For instance, a trade and sustainable development chapter is also included in the Agreements with South Korea, Vietnam, Colombia and Peru and Japan.