46

EU Competence to Conclude Trade Agreements: Opinion of Advocate General Sharpston in *Opinion 2/15*

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I. Introduction

It was the European Court of Justice itself that laid the foundation for the law governing EU external relations in the early 1970s, in the seminal *ERTA* judgment.[1] The long and complex case law that has ensued notwithstanding,[2] significant questions about the Union's competence to conclude trade agreements have remained subject to legal controversy. These are about the scope of the EU's competence, the conditions under which this becomes exclusive, and the implications of the co-existence of the EU and the Member States on the international scene. Legal disputes about these issues keep arising despite the efforts of the drafters of the Treaty of Lisbon to codify and clarify the principles that govern the EU's external action. In fact, it is nothing short of staggering that the EU should have become an important international trade actor on the basis of internal rules and procedures, the precise scope and implications of which have been shrouded in ambiguity and clarified gradually following inter-institutional litigation and requests for an Opinion by the Court of Justice in accordance with Article 218(11) TFEU. It is in the light of this context that *Opinion 2/15* on the conclusion of the Free Trade Agreement between the European Union and Singapore (EUSFTA)[3] has shed light on a number of aspects of the EU's external competence, for which AG Sharpston offered her Opinion.

II. Background, Context, and Facts

[1] Case 22/70 *Commission v Council* ECLI:EU:C:1971:32 (*ERTA*).

[2] See further P Koutrakos, *EU International Relations Law*, 2nd edn (Oxford, Hart Publishing, 2015), chs 2-3.

[3] *Opinion 2/15* ECLI:EU:C:2017:376.

Negotiated for four and a half years, the EUSFTA (the Agreement) is a deep and comprehensive free trade agreement:[4] 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.[5]

The request for an Opinion under Article 218(11) TFEU was made by the Commission and was about the Union's competence to conclude the EUSFTA. In particular, the Court was asked to identify the provisions of the Agreement that fell within the Union's exclusive and shared competence, as well as those, if any, that fell within the exclusive competence of the Member States.

This request was made in a politically charged environment. Following the negotiation of the controversial and now doomed Transatlantic and Investment Partnership between the US and the EU (TTIP), the long and unpredictable process of the ratification of the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA)[6] had raised the profile of trade agreements amongst the citizens of the Member States who became absorbed by an increasingly vociferous debate of a wide scope that included the impact of trade agreements on environmental and labour standards, and the regulatory autonomy of states. The latter controversy also highlighted the significance of domestic parliaments and their power to derail the ratification process and prevent the application of trade agreements negotiated by the EU.[7]

However, it was not only the political climate about trade agreements that made *Opinion 2/15* highly anticipated. The question that the Court was asked to address about the nature of the competence of the EU and the Member States was important for two main reasons. First, the Opinion was expected to shed light on the reforms that the Treaty of Lisbon introduced regarding external relations in general and, in particular, trade policy. Secondly, it would have implications for the form of trade agreements negotiated by the EU, given the emergence of domestic parliaments as powerful players in the process of the ratification of mixed agreements. In fact, so significant were these issues that it

[4] Free trade Agreement between the European Union and the Republic of Singapore [2019] OJ L294/3.

[5] For the policy shift towards such agreements, see BA Melo Araujo, *The EU Deep Trade Agenda – Law and Policy* (Oxford, OUP, 2016).

[6] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23.

[7] See G Van Der Loo and RA Wessel, 'The non-ratification of mixed agreements: legal consequences and solutions' (2017) 54 *CMLRev* 735; R Quick and A Gerhäuser, 'The Ratification of CETA and other Trade Policy Challenges after Opinion 2/15' (2019) 22 *Zeitschrift für Europarechtliche Studien* 505.

was the Full Court that rendered the Opinion, a composition that is rarely convened and only for the most important matters, while the governments of 25 Member States made submissions.

III. The Opinion of AG Sharpston

In the past, when the Court dealt with a request for an Opinion under Article 218(11) TFEU, the practice was that the AGs did not deliver a View or an Opinion. Instead, they were heard collectively, within the Court, with no published output. This changed in subsequent years following amendments to the Court's Rules of Procedure.[8]

The Opinion by AG Sharpston in *Opinion 2/15* is long, detailed, and of wide scope.[9] In fact, it reads as if it were set out to provide a systematic and comprehensive overall analysis of the legal issues raised by the EU competence to negotiate and conclude international agreements.

AG Sharpston made three main points. First, she argued that a significant part of the EUSFTA fell within the EU's exclusive competence. This was, on the one hand, as part of the Common Commercial Policy (CCP), such as trade in goods, trade and investment in renewable energy generation, trade in services and public procurement, foreign direct investment, the commercial aspects of intellectual property rights, competition, and trade and sustainable development in so far as its provisions relate primarily to commercial policy instruments. It was also, on the other hand, in the context of the conservation of marine biological resources as well as trade in rail and road transport services. Secondly, a considerable number of provisions fell within the EU shared competence: these would include trade in air, maritime and inland waterway transport services, indirect investment, public procurement provisions applicable or inherently linked to transport services, non-commercial aspects of intellectual property rights, labour and environmental standards. Thirdly, she also argued that Member States which had concluded bilateral investment agreements with Singapore retained exclusive competence to terminate them.

IV. Analysis

[8] The first published 'View' of an AG was by AG Jääskinen, *Opinion 1/13* ECLI:EU:C:2014:2292.

[9] Opinion of AG Sharpston in Case *2/15* ECLI:EU:C:2016:992.

While both AG Sharpston and the Court concluded that the EUSFTA did not fall within the EU's exclusive competence in its entirety, their approach differed considerably.

This author has analysed the Opinion of the Court elsewhere.[10] The following analysis of the Opinion of AG Sharpston will focus on three main issues where the Court departed from her Opinion. These are about the EU's exclusive competence to conclude the EUSFTA trade and investment provisions in the context of CCP, the EU's implied exclusive competence under Article 3(2) TFEU, and whether the Member States retained their power to terminate their bilateral investment agreements with Singapore.

In order to capture the difference of views between the Court and its AG, it is worth underlying at the outset the different vantage point from which they assessed the EUSFTA: the Court viewed the Agreement as, essentially, about trade,[11] whereas AG Sharpston stressed its multifarious objectives and pointed out that it was not 'homogeneous'.[12] These two positions, articulated early on in both documents, inform the different stance that the Court and AG Sharpston would take on the central issues that this chapter will explore.

A. Trade and Sustainable Development: a More Granular Analysis

The Court held that the trade and sustainable provisions laid down in Chapter 13 EUSFTA were about ensuring that trade between the two parties would be in compliance with the obligations that they had undertaken in relation to social protection of workers and environmental protection.[13] AG Sharpston had taken a more nuanced approach. While some provisions had a direct and immediate link with trade regulation,[14] others were about setting standards '*in isolation* from their possible effects on trade'.[15]

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[10] P Koutrakos, 'The EU's Competence to Conclude Trade Agreements – The EU-Singapore Opinion' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration – Essays in Honour of Laurence W. Gormley* (Cambridge, CUP, 2019) 651.

[11] The Court focuses on the establishment of a free trade area and the liberalisation and facilitation of trade and investment between the parties as the main subject-matter and objectives of the Agreement under Articles 1.1 and 1.2 (para 32).

[12] Paras 3 and 123 of the Opinion of AG Sharpston.

[13] ibid, para 152.

[14] For instance Article 13.1.11 EUSFTA about trade and investment in environment-friendly goods and services.

[15] Para 491 of the Opinion of AG Sharpston (emphasis in the original).

These different conclusions may be explained on two grounds. The first is about legal reasoning. AG Sharpston carried out a granular analysis of Chapter 13 EUFSTA and engaged in a detailed interpretation of its specific provisions. The Court, instead, adopted a broader approach which appears somewhat untroubled by the need for detailed legal reasoning. For instance, the Court pointed out that a material breach of the sustainable development commitments could lead to a suspension of provisions about trade liberalisation. It made this point without referring to any specific EUSFTA provision,[16] and even though the dispute settlement procedure of the latter does not apply to Chapter 13.[17]

The second reason that may explain the different conclusion concerned context. The analysis in the Court's Opinion of the trade implications of the sustainable development provisions was preceded by an examination of the position of CCP within the broader set up of the EU's external action. Having referred to the common principles and objectives of the EU's external action set out in Article 21 TEU and their application to the CCP under Articles 21(3) TEU and 205 and 207(1) TFEU, the Court held 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] This constitutional approach was significant: it gave specific meaning to the reorganisation of the primary rules on external action introduced at the Treaty of Lisbon by signalling that neither the provision of common principles and objectives in Article 21 TEU, nor the cross-references to them in other parts of primary law[19] would be merely rhetoric. Instead, they had specific legal implications which the Court itself was prepared to monitor.

On the other hand, whilst referring to Article 21 TEU, along with other primary law provisions about sustainable development in EU's policies, such as Article 3(5) TEU and Articles 9 and 11 TFEU, AG Sharpston argued that they 'cannot affect the scope of the common commercial policy' and that the

[16] Para 161 of the Opinion of the Court, where reference is only made to Article 60(1) VCLT.

[17] Article 13.16(1) EUSFTA. For a criticism of this view, see G Marín Durán, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues' (2020) 57 *CMLRev* 1031, 1046–48. She considers the proposition 'simply wrong' (at p 1046) and the Court's overall conclusion regarding sustainable development 'flawed' (at p 1048).

[18] Paras 143, 147 of the Opinion of the Court.

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

compatibility of fundamental rights referred to in Article 13.3.3. EUSFTA with the EU's Charter is 'immaterial' as it 'cannot modify the scope of the European Union's competence'.[20]

The constitutional approach adopted by the Court may appear desirable in policy terms: it would make for a richer and more dynamic CCP which is therefore construed within the context of a multidimensional and evolving international economic policy that places increasing emphasis on sustainable development. It also appeared to strengthen the effect of sustainable development provisions in trade agreements. However, it highlights a degree of conceptual incoherence that emerged from the line of reasoning in the Opinion of the Court: as Cremona puts it, 'if the possibility of conditionality-based suspension is taken seriously then the Court's contention that chapter 13 does not affect the scope of the obligations under the international agreements it refers to, and therefore does not impose new obligations on the parties, becomes harder to maintain'.[21]

There is also another implication from the difference of approach between the Court and its AG. The Opinion of the Court entailed considerable discretion in construing the EU's CCP: the price to pay for flexibility in defining the scope of a dynamic CCP is a degree of uncertainty as to the outer limits of the policy and greater reliance on the role of the Court. The latter approach, on the other hand, was more firmly embedded on the specific function of the provisions of the Agreement, and put greater pressure on treaty negotiators to be more explicit about the role of sustainable development.

B. Implied Exclusive Competence: a More Balanced Approach

In a similar vein to her approach to CCP, AG Sharpston's analysis of the Union's exclusive implied competence under Article 3(2) TFEU was granular, detailed, and rich in substantiating its conclusions. For instance, in dealing with EUSFTA provisions on maritime transport services, her Opinion engaged in a forensic examination of the relevant secondary EU measures,[22] and observed that, while there was a degree of overlap between their provisions and Chapter 8 EUFSTA, the area of liberalisation of maritime transport services was not already largely covered by common rules.

[20] Para 496 of the Opinion of AG Sharpston.

[21] M Cremona, 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14 *EUConst* 231, 245.

[22] Council Regulation 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; Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L157/1.

Therefore, for her, the latter provisions did not fall within the EU's exclusive competence under the third limb of Article 3(2) TFEU.

The Court followed a different approach and reached the opposite conclusion. Its Opinion construed implied exclusivity in broad terms, and justified it on the basis of a line of reasoning that was characterised by analytical sparseness. For instance, in relation to commitments on transport services and public procurement on such services, it held that the Union's implied competence was exclusive because the Agreement established a set of rules which either differed from these set out in internal common rules,[23] or overlapped with them to a large extent.[24]

This approach is not novel: in earlier case law, the Court had already held that the provisions of an international agreement need not coincide fully with internal common rules in order to risk affecting the latter or altering their scope;[25] it had also held that a contradiction between an international 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.[26]

What *Opinion 2/15* did, however, was to apply it with considerable force, a feature that is highlighted further by the analytical sparseness of the Court's line of reasoning. For instance, the references to the specific provisions of the Agreement and those of the internal secondary legislation were 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

[23] 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.

[24] 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.

[25] See *Opinion 1/03* ECLI:EU:C:2006:81, para 126; Case C-114/12 *Commission v Council* ECLI:EU:C:2014:2151, paras 69–70; *Opinion 1/13* ECLI:EU:C:2014:2303, paras 72–73; *Opinion 3/15* ECLI:EU:C:2016:657, paras 106–107.

[26] Paras 143, 151–53 of Opinion 1/03; Paras 84–90 of *Opinion 1/13*; Case C-66/13 *Green Network* ECLI:EU:C:2014:2399, paras 48–49 and, even earlier, *Opinion 2/91* ECLI:EU:C:1993:106, paras 25–26; Case C-467/98 *Commission v Denmark* ECLI:EU:C:2002:625, para 82.

area.[27] Such analysis was not present in *Opinion 2/15*. While the Court took the Chapters of the Agreement with Singapore in turn, and examined them against EU secondary legislation, it did so in only broad terms. All in all, it becomes clear that the threshold to meet the *ERTA* test and its codification in Article 3(2) TFEU is by no means high, and neither is it subject to the detailed and extensive analysis of the kind we find in the Opinion of AG Sharpston.

C. The Power to Terminate Member States' Bilateral Investment Treaties: Acknowledging the Role of the Member States in International Treaty-making

Article 9(10) EUSFTA provided that, upon the entry into force of the Agreement, all bilateral investment treaties between Member States and Singapore would cease to have effect and would be replaced and superseded by EUSFTA.[28] In addressing the question whether that provision fell within the exclusive powers of the Member States, the Court and AG Sharpston reached different conclusions on the basis of fundamentally different approaches.

The latter focused on 'the fundamental rule of consent in international law-making',[29] and pointed out that the locus of the power to terminate an agreement concluded by a Member State with a third country remained with the Member State. In her view, this position was based on EU law, in particular the duty of sincere cooperation under Article 4(3) TEU, as well as Article 351 TFEU which applied specifically to treaties concluded by Member States prior to their accession to the EU. In her Opinion, she noted that, even in cases of incompatibility between such agreements and EU law, it is for the Member State in question to eliminate the incompatibility, even by terminating the agreements, 'irrespective of whether the European Union enjoys exclusive or shared competences over the area covered by those agreements'.[30]

However, what is striking about the Opinion of the AG is her emphasis on international law. She referred to Article 59 VCLT[31] and argues that there is 'no basis in international law (as it currently

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[27] Para 133 of *Opinion 1/03*.

[28] Such agreements had been concluded by Slovakia, Bulgaria, Slovenia, Latvia, Hungary, Czech Republic, Poland, Belgium-Luxembourg Economic Union, France, Germany, the Netherlands, as well as the UK.

[29] Para 396 of the Opinion of AG Sharpston.

[30] Para 387 of the Opinion of AG Sharpston.

[31] AG Sharpston to Article 59 VCLT dealing with the implied abrogation of a treaty between parties resulting from the conclusion by all of those parties of a later treaty and argues that it only applies if is accepted under international law that the EU has succeeded the individual Member states as regards their BITs referred to in Annex 9-D EUSFTA, a matter on

stands) for concluding that the European Union may automatically succeed to an international agreement concluded by the Member States, to which it is not a party, and then terminate that agreement. Such a rule would constitute an exception to the fundamental rule of consent in international law-making' and 'would mean that, as a result of changes in EU law and (possibly) the European Union's exercise of its external competences, a Member State might cease to be a party to an international agreement, even though it was a State which had consented to be bound by that agreement and for which that agreement was in force'.[32]

This international law focus was entirely lacking in the Court's Opinion. Instead, the latter was confined to EU law in order to conclude that Article 9.10 EUSFTA (now Article 4.12 of the EU-Singapore Investment Protection Agreement) did not fall within the exclusive competence of the Member States. This was because the subject matter of that provision was about an area over which the EU was exclusively competent. As the Treaty of Lisbon conferred upon the EU such competence under Article 207 TFEU, from 1 December 2009, the EU had the power to insert a clause about the termination of bilateral agreements between Member States and a third country in an international agreement that it would conclude.

The Court justified this conclusion by reference to what is known as the doctrine of functional succession: it held that '[i]t has been undisputed … that the European Union can succeed the Member states in their international commitments when the Member States have transferred to it, by one of its founding Treaties, their competences relating to those commitments and it exercises those competences'.[33] This conclusion was supported in the Opinion by reference to Joined Cases 21-24/72 *International Fruit* where the then European Economic Community (EEC) had been held to be bound by the General Agreement on Tariffs and Trade (GATT) 1947, given that all Member States had been bound by it, and that the latter had subsequently conferred on the EEC exclusive competence on trade.[34]

To argue that Member States should retain their right to terminate their investment treaties with Singapore even though all parties are in agreement that EUSFTA should replace those treaties may

which there is no practice that amounts to a rule of international law (paras 392–95 of the Opinion of Advocate General Sharpston).

[32] Para 396 of the Opinion of AG Sharpston.

[33] Para 248 of the Opinion of the Court.

[34] Joined Cases 21-24/72 *International Fruit* ECLI:EU:C:1972:115, paras 10–18.

appear to have a whiff of formalism. However, the line of reasoning in the Court's *Opinion 2/15* raises a number of issues about the relationship between EU law and the power of Member States to terminate pre-existing agreements. First, it ignores the specific context within which the judgment in *International Fruit* was rendered, that is the binding effect of an agreement which all Member States had concluded and over which the nature of the EU's competence was not in dispute. In the case of EUSFTA, while the Court referred to succession by reference to foreign direct investment (which is covered by the EU's exclusive competence), it appeared to consider the distinction between exclusive and implied competence irrelevant in this context.[35]

Secondly, it does not consider the objective of functional succession in *International Fruit*, namely to ensure that the implementation of an agreement concluded by Member States would not be disrupted by the conferment of exclusive competence on the EU and that compliance with that agreement's obligations by the Member States would become fully a matter of EU law.

Thirdly, the Court's Opinion ignored the narrow construction of the doctrine of functional succession in its own case law.[36] Finally, the absence of an international law analysis notwithstanding, the Court's dismissal of the power of Member State to terminate their international agreements relies upon a somewhat one-dimensional reading of Article 351 TFEU. As the bilateral investment treaties (BITs) to which Article 9.10 EUSFTA (now Article 4.12 EU-Singapore Investment Protection Agreement) referred had been concluded with Singapore, and the latter had given its consent to their termination by concluding EUSFTA, the protection that Article 351 TFEU granted Member States was deemed unnecessary.[37] And yet, Article 351 TFEU has been interpreted consistently as requiring Member States to eliminate any incompatibilities between their agreements and EU law by taking all appropriate measures, including renegotiating with the other contracting parties.[38] The conceptual obscurity that characterises this part of the Court's Opinion disguised the specific context within which functional succession and Article 351 TFEU apply and ignored their underlying common function, which is how to ensure that the dynamic nature of the EU's external competence and the

[35] Para 255 of the Opinion of the Court. See also Cremona (n 21) 253.

[36] See Case C-308/06 *Intertanko* ECLI:EU:C:2008:312, paras 47–52; Case C-301/08 *Bogiatzi* ECLI:EU:C:2009:649, paras 25–33; Case C-366/10 *Air Transport Association of America* ECLI:EU:C:2011:864; Case C-481/13 *Qurbani* ECLI:EU:C:2014:2101, para 24. For an analysis, see Koutrakos (n 2) 212–19.

[37] Para 254 of the Opinion of the Court.

[38] See, for instance, Case C-62/98 *Commission v Portugal* ECLI:EU:C:2000:358, para 25; Case C-84/98 *Commission v Portugal* ECLI:EU:C:2000:359, para 35; Case C-249/06 *Commission v Sweden* ECLI:EU:C:2009:119, para 44. For an analysis of the relevant issues, see Koutrakos (n 36) 321–50.

ensuing transfer of power from the Member States would not prevent the fulfilment of the international treaty obligations assumed by the latter.

The different conclusion reached by AG Sharpston and the Court on this matter did not have major practical implications in this specific context, given that they both agreed that not all EUSFTA provisions fell within the EU's exclusive competence. Their different approach, however, has implications for the role of the Member States as subjects of international law in the context of the EU's increasingly broad exclusive competence. The Opinion of the AG put emphasis on international law and acknowledged the continuing status of Member States, whereas the Court's Opinion relied on a bold reading of EU law in order to assert the Union's exclusive competence. The latter may end up depriving the Member States of their power to determine how to manage their international law obligations in a broader set of circumstances than those in *Opinion 2/15*. The former, on the other hand, was conceptually coherent in its interpretation of the relevant legal rules without dismissing practical arrangements that would facilitate EU action by enabling Member States to exercise their power to terminate their treaties by relying on the EU as the case may be.[39]

D. Effect on Future Case Law

Quite some time ago, this author pointed out the considerable complexity that underpins the exercise of the Union's competence to conclude international agreements and the choice of the appropriate legal basis, and called for greater clarity and pragmatism in the case law and institutional practice.[40] More recently, the request for *Opinion 2/15* was viewed as 'a unique yet challenging opportunity for the Court to refine its analytical standards and approaches with a view to generating legal certainty'.[41]

The Court's Opinion built on and developed the threads that had emerged in prior case law. The Opinion of AG Sharpston, and its contrast to the Court's subsequent stance, serves to highlight further the sharpness with which these threads are now apparent. In substantive terms, the strengthening of the Union's exclusive competence and its prevailing position in treaty-making appears inexorable. In terms of methodological approach, the centrality of contextual interpretation was further underlined

[39] See Cremona (n 21) 254.

[40] P Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations' in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford, Hart Publishing, 2008) 171.

[41] D Kleimann, 'Reading Opinion 2/15: Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General', EUI Working Paper RWCAS 2017/23 at 35.

by the distinctly constitutional approach that the Court has taken to the EU's principles and values as laid down in Article 21(3) TEU. As for judicial reasoning, the Court's *Opinion 2/15* has not rendered the quest for clarity any less relevant or urgent.