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THE ENLARGED SCOPE OF THE EU'S COMMON COMMERCIAL POLICY

1. Introduction

That the European Union (hereinafter EU) is not an intergovernmental organization but a more far-reaching integration community can already been seen from the fact that the EU, in some areas, has *exclusive competence*, meaning that there is, in principle, no parallel competence for its Member States in the specific area concerned.[1] According to Article 2(1) of the Treaty on the Functioning of the European Union (hereinafter TFEU), '[w]hen the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.'

As can be seen from Article 3 TFEU, Union exclusive competence is also relevant in the context of EU external relations, that is, the treaty and other relations of the Union with third States.[2] Article 3(1) provides for 'a priori exclusivity'[3] in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; and (e) common commercial policy. Especially in the context of EU external relations, the common commercial policy (hereinafter CCP), regulated, apart from Article 3(1) TFEU,

[1] On the differences in competence and powers between the EU and intergovernmental organisations in general, see A. Rosas and L. Armati, *EU Constitutional Law: An Introduction*, 3nd rev. ed., Oxford 2018, notably chapter 2.

[2] [2] On EU exclusive competence in general see, e.g. A. Rosas, *EU External Relations: Exclusive Competence Revisited*, "Fordham International Law Journal" 2016, vol. 38, p. 1073.

[3] A. Dashwood, *Mixity in the Era of the Treaty of Lisbon* [in:] *Mixed Agreements Revisited: The EU and Its Member States in the World*, eds C. Hillion, P. Koutrakos, Oxford 2010, pp. 351, 356.

in Article 207 TFEU in particular, stands out as the most important category of 'a priori exclusivity'. It can safely be said that it is because of the exclusive character of the EU's competence in this area that the Union is generally considered as an important trade actor on the world arena.

If an envisaged international agreement does not fall under the common commercial policy or any of the other grounds listed in Article 3(1) TFEU, it may still fall under the EU's exclusive competence by virtue of Article 3(2) TFEU, which provides for three general criteria for determining the existence of an exclusive competence. The most important of these criteria is the so-called AETR/ERTA principle (so branded after a famous judgment of the European Court of Justice (hereinafter ECJ) of 1971 dealing with the European Road Transport Agreement ERTA[4]), according to which the conclusion of an international agreement belongs exclusively to the Union 'in so far as its conclusion may affect common rules or alter their scope', in other words could affect Union legislative or other internal legal acts. Among such agreements may be agreements that have some relevance for international trade although they are not deemed to fall under the CCP, as defined in Article 207 TFEU. If an EU competence is not exclusive, it is in most cases shared with the Member States.[5] Agreements concluded under a shared competence usually become mixed, which means that they will be open for conclusion by not only the Union but also its Member States.[6] In addition, EU Member States continue to conclude some international agreements in their own names, without the participation of the EU as a contracting party. Whilst the agreements concluded by Member States without formal EU participation are, in principle, part of the national law of the Member States that have concluded them and are not part of Union law as such, such agreements may become relevant for Union law purposes as well, especially if the agreement in question concerns matters falling under an EU competence.[7]

The practical importance of the distinction between exclusive and shared competence should not be exaggerated.[8] Even in an area of exclusive competence, if

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

[5] A (non-exhaustive) list of areas of shared competence is contained in Article 4(2) TFEU.

[6] On the phenomenon of mixed agreements see, e.g. A. Rosas, *The European Union and Mixed Agreements* [in:] *The General Law of E.C. External Relations*, eds A. Dashwood and C. Hillion, London 2000, p. 200; J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague 2001; *Mixed Agreements Revisited: The EU and Its Member States in the World*, eds C. Hillion, P. Koutrakos, Oxford 2010.

[7] A. Rosas, *The Status in EU Law of International Agreements Concluded by EU Member States*, "Fordham International Law Journal" 2011, vol. 34, p. 1310. Despite the existence even of an exclusive competence, the EU may be barred from adhering to a given multilateral treaty, for instance because according to the agreement, only States may adhere to it.

[8] See A. Rosas, *Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?* [in:] *The European Union in the World: Essays in Honour of Marc Maresceau*, eds I. Govaere *et al.*, Leiden 2013, p. 17.

the EU is barred from becoming a party to an international convention or member of an international organisation, the EU may, as is envisaged in Article 2(1) TFEU, authorise the Member States to act in the interest of the Union. On the other hand, in areas of shared competence, the so-called duty of cooperation may require that the EU institutions and the Member States act jointly, preventing the Member States from acting alone.[9]

Yet, the question of whether the European Union should act alone, notably in concluding international agreements, or whether Member States' participation is allowed or called for, does have significance both in theory and in practice—not only for the relations between the EU and its Member States, but also for its relations with third States. The latter will normally prefer Union-only agreements to mixed agreements, wishing to avoid the complexities and uncertainties stemming from mixed agreements – when will the EU side be able to muster the 29 ratifications needed (the Union + 28 Member States) and who, on the EU side, is responsible for what?[10] Such problems were recently brought into sharp relief in the context of the conclusion of two mixed trade and cooperation agreements: In a Dutch referendum organised in 2016 the majority voted against the adoption of an Association Agreement with Ukraine, thus triggering the perspective of Dutch non-ratification of this Agreement, and with respect to the Comprehensive Economic and Trade Agreement (hereinafter CETA) with Canada, the Belgian Walloon region in particular threatened to block its signature and provisional application, which, only after some assurances could be obtained, was finally signed and made provisionally applicable in October 2016.[11]

This tribute to Krzysztof Drzewicki will focus on the CCP as a basis for EU exclusive competence. There will be a special emphasis on recent developments with regard to the *scope* of the CCP, as its scope has become enlarged both by modifications to what is today Article 207 TFEU and through the case law of the ECJ. Article 207(1) TFEU does spell out the basic parameters in referring to the conclusion of tariff and trade agreements relating to, inter alia, 'trade in goods

[9] See in particular Case C-246/07, *Commission v. Sweden*, EU:C:2010:203.

[10] See P. Olson, *Mixity from the Outside: The Perspective of a Treaty Partner* [in:] *Mixed Agreements Revisited*…, p. 331.

[11] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, [2014] OJ L161/3; 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. See more generally, e.g. G. Van der Loo and R.A. Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, "Common Market Law Review" 2017, vol. 54, p. 735. On the discussions surrounding CETA see A. Rosas, *The EU and International Dispute Settlement*, "Europe and the World: A Law Review" 2017, vol. 1, no. 7, pp. 24–26. As part of a political agreement to allow the signature and provisional application of CETA, Belgium has requested an Opinion from the ECJ on the compatibility of the investor-to-state dispute settlement (ISDS) mechanism contained in CETA with Union law, Opinion 1/17 pending (the oral hearing took place on 26 June 2018).

and services', the 'commercial aspects of intellectual property', and 'foreign direct investment'. But what is more specifically meant, for instance, by the conclusion of 'trade agreements' relating to the 'commercial aspects' of intellectual property? How, in other words, is the line to be drawn between the regulation of intellectual property (for instance, trademarks, copyrights and patents) as part of international trade and thus belonging to the exclusive competence of the Union, on the one hand, and the regulation of intellectual property rights in general, as part of EU internal market regulation and thus belonging to an area of shared competence, on the other?

Article 207 TFEU (formerly Article 133 of the Treaty establishing the European Community) obtained its present wording through the Treaty of Lisbon (which entered into force on 1 December 2009), which implied a specification of the entirely exclusive character of trade in services and the trade-related aspects of intellectual property and added the notion of foreign direct investment to the list.[12] It should have come as no surprise that there was a perceived need to test the precise scope of the new formulations by bringing cases before the ECJ and during recent years, the Court has had to deal with some important cases relating to the scope of the concept of CCP. This development can be seen in the broader context of a number of cases concerning the application of the AETR/ERTA principle as a basis for exclusive competence, as well as some other aspects of EU external relations law.[13] Before going into the post-Lisbon case law relating to the CCP, a few words will be said about its origins and earlier development.

2. Origins and Development

As the aims of the Treaty of Rome establishing the European Economic Community (1957) included the creation of a customs union as well as an internal market, it became almost inevitable that a common commercial policy would be provided for as well. What are today Articles 206–207 TFEU were included already in a different form in Articles 110–116 of the original Treaty of Rome. A common customs tariff was established during the 1960s while some import

[12] See, e.g. F. Hoffmeister, *Of Transferred Competence, Institutional Balance and Judicial Autonomy: Constitutional Developments in EU Trade Policy Seven Years after Lisbon* [in:] *The EU as a Global Actor Bridging Legal Theory and Practice: Liber Amicorum in Honour of Ricardo Gosalbo Bono*, eds J. Czuczai and F. Naert, Leiden 2017, pp. 309, 310–318

[13] Concerning both the CCP and the AETR/ERTA principle, see A. Rosas, *EU External Relations...*, p. 1073. There have also been a number of cases relating to Article 218 TFEU, which regulates the procedures to be applied in the conclusion of international agreements by the EU, A. Rosas, *Recent Case Law of the European Court of Justice relating to Article 218 TFEU* [in:] *The EU as a Global Actor Bridging Legal Theory and Practice...*, p. 365.

restrictions maintained by individual Member States were abolished only much later.[14]

In an Opinion of 1975, the ECJ for the first time explicitly confirmed that the CCP belonged to the area of exclusive competence.[15] After having considered that export credits are covered by the notion of export policy and more generally by the CCP, the Court held that in the field of export credits, accepting the concurrent competence of the Member States would distort competition between the undertakings of the various Member States and would, inter alia, prevent the Community 'from fulfilling its task in the defence of the common interest.' In subsequent case law, the Court, as far as the trade in *goods* is concerned, confirmed its fairly broad understanding of the concept of the CCP, including various sorts of restrictions or regulations such as technical, sanitary and other barriers to trade, export credits, and tariff preferences in favor of developing countries.[16]

In Opinion 1/94,[17] the Court confirmed that not only the General Agreement on Tarriffs and Trade (hereinafter GATT), but also all the multilateral agreements on trade in goods provided for in Annex 1A of the Marrakesh Agreement establishing the World Trade Organization (hereinafter WTO) of 1994, fall under the CCP and thus belong to the sphere of exclusive competence. There also appeared indications in the Court's case law that measures regulating international trade may belong to the sphere of exclusive competence even if they pursue other ultimate objectives (development, environment, political objectives, and so on).[18] On the other hand, some later decisions are based on the idea that measures affecting trade may escape the realm of the CCP if the predominant objectives and components of the agreement are to be seen elsewhere, notably in the protection of the environment.[19]

As to trade in services and the trade aspects of intellectual property rights, the ECJ, in Opinion 1/94, famously ruled that matters dealt with in the WTO

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[14] P. Eeckhout, *EU External Relations Law*, 2nd rev. ed., Oxford 2011, pp. 11–13. On the origins of the notion of the CCP as an exclusive competence see also M. Kaniel, *The Exclusive Treaty-Making Power of the European Community up to the Period of the Single European Act*, Leiden 1996, pp. 17–19, 67–79.

[15] Opinion 1/75 (Understanding on a Local Cost Standard), EU:C:1975:145.

[16] See, e.g. Opinion 1/78 (International Agreement on Natural Rubber), EU:C:1979:224 (which concluded, on the other hand, that Member States' participation in a financing scheme would imply a mixed agreement); Case C-45/86, *Commission v. Council*, EU:C:1987:163; Case C-62/88, *Greece v. Council* ('Chernobyl'), EU:C:1990:153.

[17] Opinion 1/94 (WTO Agreements), EU:C:1994:384.

[18] See, e.g. A. Rosas, *Les relations internationales commerciales de l'Union européenne – Un aperçu juridique et développements actuels* [in:] *Liber Amicorum Bengt Broms: Celebrating His 70th Birthday 16 October 1999*, Helsinki 1999, pp. 428, 430–433.

[19] See, e.g. Opinion 2/00 (Cartagena Protocol), EU:C:2001:664. Cf. Case C-94/03, *Commission v. Council*, EU:C:2006:2 (where the Court held the commercial policy objective was predominant and that the agreement in question fell under an exclusive competence).

General Agreement on Trade in Services (hereinafter GATS)[20] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS) fell, as a general rule, outside the realm of the CCP and thus of exclusive competence. While after this Opinion a pragmatic way of dealing with WTO matters was found, giving the Commission the task of representing the Community and its Member States also in GATS and TRIPS contexts—albeit based on previous coordination between the Commission and the Member States,[21] the formal distinction between exclusive (GATT) and shared competence (GATS and TRIPS) continued to be a source of uncertainty and concern,[22] and various initiatives were taken to bring the latter under the umbrella of the CCP.

One such effort was made in the context of the Treaty of Nice of 2001, which amended, inter alia, the Treaty establishing the European Community (hereinafter ECT), including its then Article 133 relating to the CCP. Whilst Article 133(5) ECT, as amended, provided that the conclusion of international agreements in the fields of trade in services and the trade-related aspects of intellectual property rights fell under the first four paragraphs of the same Article, in other words under the CCP, this was said to be 'without prejudice' to Article 133(6). The latter provision stated that trade in certain sensitive service sectors (cultural and audiovisual services, educational services, and social and human health services) continued to fall under a shared competence.

In Opinion 1/08, given the day before the entry into force of the Treaty of Lisbon, the ECJ refuted the thesis of the Commission and the European Parliament according to which the exception contained in Article 133(6) ECT only concerned agreements which exclusively or predominantly covered the services belonging to the sensitive sectors listed in Article 133(6). The Court also confirmed that the transport aspects of such an agreement were not covered by Article 133 ECT at all.[23] The conclusion of the agreements made in the context of GATS thus fell within the sphere of shared competence of the Community and its Member States.

[20] See also Case C-360/93, *Parliament v. Council*, EU:C:1996:84, where the Court, by referring to Opinion 1/94, observed that only services which are supplied across frontiers fell within the scope of the common commercial policy (para 29) and annulled the decision to conclude an agreement on public procurement as it had been based on Article 113 ECT (now Article 207 TFEU) alone.

[21] See, e.g. J. Heliskoski, *Joint Competence of the European Community and its Member States and the Dispute Settlement Practice of the World Trade Organization*, "Cambridge Yearbook of European Law" 1999, vol. 61, no. 2.

[22] As TRIPS was considered to fall under a shared competence, the ECJ was in many cases confronted with the question of the division of competence between the Community and the Member States in order to ascertain which parts of the Agreement formed part of Community law. See, e.g. Case C-431/05, *Merck Genéricos – Produtos Farmacêuticos*, EU:C:2007:496.

[23] Opinion 1/08, EU:C:2009:739, concerned the conclusion of agreements on the grant of compensation for modification and withdrawal of certain GATS commitments following the accession of new Member States to the EU.

3. *Daiichi Sankyo*

As already noted above, the entry into force of the Lisbon Treaty changed the legal landscape in a significant manner. That the new definition of the CCP contained in Article 207(1) TFEU did not settle all possible disagreements became clear in the context of a request for a preliminary ruling submitted to the ECJ in 2011. The national (Greek) judge wanted to know whether a provision of TRIPS (Article 27) setting out the framework for patent protection fell within an area for which the Member States continued to have primary competence—in which case they would have been free to decide on the possible direct effect of the provision in question—and also put some questions relating to the interpretation of this and another provision of TRIPS.[24] The Court answered the first question in the negative, concluding that Article 27 TRIPS 'falls within the field of the common commercial policy.'

This conclusion must be seen in the context of the arguments put before the Court by a number of Member States. They argued that the question should be approached in the context of the case law of the Court relating to mixed agreements, implying that there was an EU competence only to the extent that the European Union had exercised its powers and adopted provisions to implement the agreement. This was because the majority of the rules of TRIPS, such as those concerning patentability, should be considered as concerning international trade only indirectly, and hence as falling outside the field of the CCP. For these Member States, it was thus as if practically nothing had changed with the Treaty of Lisbon! Yet it had been the general understanding when the Lisbon Treaty was prepared that the Nice Treaty provision relating to the CCP did not go far enough and that the credibility, coherence and efficacy of the trade policy of the Union required a broader scope, and at the same time more streamlined wording, for the basic provision defining the scope of the CCP.

The Court could not agree with the reductionist approach proposed by some Member States, observing, inter alia, that TFEU Article 207 differed noticeably from Article 133 ECT. In this new situation, Opinions 1/94 and 1/08 were no longer relevant. As to Article 27 of TRIPS, the entire agreement, being as it is an integral part of the WTO system, has a specific link with international trade. This can be seen, inter alia, from the fact that under the WTO system, there may be 'cross-suspension' of concessions between TRIPS and the other WTO multilateral agreements (GATT and GATS), meaning that a violation of, say, a rule in GATT relating to trade in goods may be met with sanctions, that is suspension

[24] Case C-414/11, *Daiichi Sankyo*, EU:C:2013:520. See also A. Rosas, *EU External Relations*..., pp. 1081–1082.

of concessions, affecting the application of TRIPS, or vice versa.[25] The Court also observed that the terms used in Article 207(1) TFEU 'correspond almost literally' to the very title of TRIPS.[26]

Whilst this judgment should have settled the question of the status of TRIPS, some issues were left to be clarified in future case law. Examples include the status of other international agreements relating to the protection of intellectual property rights (such as those concluded under the auspices of the World Intellectual Property Organization (WIPO) and the scope of the notion of 'foreign direct investment' as referred to in Article 207(1) TFEU. Moreover, Article 207(5) TFEU repeats the exclusion of transport services from the scope of Article 207, which shall continue to be subject to the transport part of the TFEU (Title VI of Part Three). As we shall see below, some of these issues have now been clarified in subsequent case law, notably Opinion 2/15 relating to a trade agreement concluded with Singapore. Before embarking upon a discussion of this important Opinion, some words should be said about other ECJ decisions following *Daiichi Sankyo* and having a bearing on the scope of the CCP.

4. Some Other ECJ Decisions Relating to the CCP

First of all, a case brought by the European Commission against the EU Council decided by the ECJ in 2013 and relating to trade in services concerned more specifically the delimitation of acts having a specific link to international trade from acts relating to the EU internal market.[27] The parties agreed that the international trade in services falls under Article 207 TFEU but the Council and some Member States argued that the act in question related to the internal market rather than international trade. The Council, contrary to the proposal of the Commission, had decided that the legal basis of the decision to sign a Council of Europe Convention relating to the legal protection of radio, television and information society services based on conditional access (access subject to prior individual authorisation) should be Article 114 TFEU relating to the internal market and that the Convention should accordingly be signed both by the Union and its Member States.[28] Before the Court, the Council, together with some Member States, argued that the Convention was primarily intended to approximate the

[25] See para 54 of the judgment.

[26] *Ibidem*, para 55.

[27] Case C-137/12, *Commission v. Council*, EU:C:2013:675.

[28] Unlike the CCP, the internal market is in Article 4(2) TFEU listed among the areas of shared competence. See also Opinion 2/92 (Third Revised Decision of the OECD on National Treatment) EU:C:1995:83 (holding that the OECD rules in question were partly covered by the Unions internal market rules and not by the rules of its CCP).

legislation of the contracting parties and that it thus concerned the EU internal market and that the fact that the Convention, unlike EU internal legislation in this field,[29] also affected trade in services between the European Union and third countries, was of an indirect and secondary nature only. Some Member States added that the provisions of the Convention relating to seizure and confiscation were of a criminal law nature and already for this reason fell outside the CCP.

The Court rejected this line of argument and annulled the Council decision. After a detailed analysis of the different provisions of the Convention, the Court concluded that it was supposed to help extend the application of EU internal legislation beyond the borders of the EU in order to promote the supply of services to third countries, and that the aspects of the Convention which did not clearly relate to the international trade in services were of an incidental or ancillary nature. Hence the contested decision 'primarily' pursued an objective having a 'specific connection to the common commercial policy.' That meant that the decision should have been based on Article 207(4) TFEU instead of Article 114 and that the signing of the Convention fell within the exclusive competence of the European Union.[30] The judgment confirms earlier case law relating to 'ancillary' provisions, implying that it is sufficient for an act to fall under the CCP if its primary objective and content is to regulate trade with third countries.[31] This question of the 'centre of gravity' of a particular international agreement was to come up again in the context of Opinions 2/15 and 3/15, both delivered in 2017.

Opinion 3/15 came out first, in February 2017.[32] At issue was not a typical trade agreement but the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, which constitutes a development of the basic obligation contained in Article 30(1) of the United Nations Convention on the Rights of Persons with Disabilities[33] to grant persons with disabilities access to cultural materials in accessible format. The Marrakesh Treaty does have a commercial aspect to it as well, however, as it affects copyrights and was thus prepared and concluded under the auspices of the World Intellectual Property Organization.

The ECJ discussed at length the different substantive provisions of the Treaty and came to the conclusion that, whilst two of its provisions (Articles 5 and 6 in particular) did indeed apply to the exports and imports of accessible format copies for the benefit of print disabled persons as beneficiaries, these provisions, which had a limited scope, served the overall purpose of the Treaty, which was

[29] Council Directive 98/84, [1998] OJ L320/54.

[30] Case C-137/12, EU:C:2013:675, para 76.

[31] See, e.g. A. Rosas, *The European Union and Mixed Agreements*..., pp. 204–205.

[32] Opinion 3/15, EU:C:2017:114.

[33] This Convention was concluded by the EU by Council Decision 2010/48/EC of 26 November 2009, [2010] OJ L23/35.

not to promote, facilitate or govern international trade but to facilitate the access of beneficiary persons to published works, by providing for exceptions or limitations to certain copyrights. The facilitation of the cross-border exchange of accessible format copies thus appeared to be a 'means of achieving the non-commercial objective of the Marrakesh Treaty'[34] and so this Treaty did not fall within the CCP.

This ruling should be seen against the background of the Court's earlier case law, confirmed also in *Daiichi Sankyo*, according to which an EU act falls within the CCP if it 'relates specifically to international trade', which means 1) that 'it is essentially intended to promote, facilitate or govern trade' and 2) that it has 'direct and immediate effects on trade'.[35] The story of the Marrakesh treaty does not end here, however. As pointed out above, an EU exclusive competence may also follow from the fact that there are EU internal legislative or other legal acts ('common rules') which may be affected by the conclusion of an international agreement (the so-called AETR/ERTA principle, as expressed in Article 3(2) TFEU). On this point, the Court concluded that Directive 2001/29 on the harmonization of certain aspects of copyright and related rights in the information society[36] did indeed contain common rules which would be affected by the Marrakesh Treaty. The end result, that the conclusion of this Treaty falls within the exclusive competence of the Union, is in line with three decisions of the ECJ delivered during the autumn of 2014, in which the Court equally found that the existence of certain common rules implied an exclusive Union competence to conclude international agreements affecting those rules.[37]

Opinion 3/15 thus serves as an illustration of the fact that, as was already noted above (section 1), the AETR/ERTA principle may sometimes serve as a complement to Articles 3(1) and 207 TFEU, implying that agreements which have a trade component that is not sufficient to relate them 'specifically to international trade', under the test defined by the ECJ with respect to Article 207 TFEU, may fall under an exclusive competence by virtue of Article 3(2) TFEU.

[34] Opinion 3/15, EU:C:2017:114, para 90.

[35] Case C-414/11, *Daiichi Sankyo*, EU:C:2013:520, para 51; Opinion 3/2015, EU:C:2017:114, para 61.

[36] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, [2001] OJ L167/10.

[37] Case C-114/12, *Commission v. Council*, EU:C:2014:2151 (concerned negotiations on a Council of Europe draft convention relating to the protection of neighbouring rights of broadcasting organisations); Opinion 1/13 EU:C:2014:2303 (concerned the competence to accept the accession of third States to the 1980 Hague Convention on the Civil Aspects of International Child Abduction); Case C-66/13, *Green Network*, EU:C:2014:2399 (concerned the competence of a Member State to conclude a bilateral agreement with a third State relating to the import of 'green' electricity). See also A. Rosas, *EU External Relations*..., pp. 1084–1094.

The AETR/ERTA principle also became an important issue in the context of Opinion 2/15, to which we shall now turn.

5. Opinion 2/15

Opinion 2/15, relating to the competence to conclude a free trade agreement with Singapore,[38] is no doubt one of the most important decisions the ECJ has been asked to take in this field. It raises questions both relating to the scope of the CCP and to the application of the AETR/ERTA principle (in the latter case, concerning those parts of the agreements which, despite being parts of a comprehensive trade agreement, cannot be deemed to fall under the CCP).

Opinion 2/15 should be seen against the background of the vivid debate which has been going on in recent years on how EU trade policy should be conducted. On the one hand, concerns have been expressed as to the negative effects that the liberalization of trade and the protection of private investment may have on societal values such as health and the environment and these concerns are usually accompanied by a preference for mixed agreements, so as to guarantee that the national parliaments of each Member State have a full say in the conclusion of the agreement. On the other hand, there are also voices stressing the need for an effective EU trade policy to counter the other major trade actors (such as China, Japan, Mercosur and the United States) and this approach often leads to a preference for a Union exclusive competence, with a view to avoiding lengthy internal EU discussions and the risk of the conclusion of an agreement being held hostage to opposition expressed in one or two Member States only. As noted above (section 1), the recent difficulties surrounding the conclusion of a trade agreement with Canada (the Comprehensive Economic and Trade Agreement – CETA) were accentuated by the fact that at least in one Member State (Belgium) such a veto power belongs not to the federal Government or Parliament but to a sub-federal region.

Whilst the Commission, mainly out of political considerations, accepted that CETA be concluded as a mixed agreement,[39] it decided to fight the issue in the context of the draft agreement negotiated with Singapore and consequently brought the question of competence before the ECJ in the form of a request for an Opinion from the Court.[40] The Commission asked the Court to rule that

[38] Opinion 2/15 (Free Trade Agreement between the European Union and the Republic of Singapore), of 16 May 2017, EU:C:2017:376.

[39] G. Van der Loo and R.A. Wessel, *The Non-Ratification of Mixed Agreements*..., p. 737.

[40] According to Article 218(11) TFEU, a Member State and any of the three main political institutions of the Union may obtain the opinion of the Court as to whether an 'agreement envisaged' is 'compatible with the Treaties'. This formulation has been considered to cover also the question of

all the provisions of the envisaged agreement, with the sole exception of those concerning cross-border transport services and non-direct investment ('portfolio investment'), fall within the scope of the CCP. With respect to cross-border transport services and portfolio investment, the Commission argued in favour of an exclusive competence of the Union on the basis of the AETR/ERTA principle recognised in Article 3(2) TFEU. According to the Commission, the entire agreement thus belonged to the area of exclusive competence. In the following, the discussion will be limited primarily to the question of the scope of the CCP.

With respect to the provisions of the draft agreement which contain commitments relating to market access of goods and services, it suffices to note here that the Court, essentially basing itself on earlier case law, confirmed that they all, with the exception of transport services, belong to the sphere of the CCP.[41] The exclusion of transport services stems from Article 207(5) TFEU, according to which the negotiation and conclusion of international agreements 'in the field of transport' shall be subject to the part of the TFEU dealing with transport (Articles 90-100) rather than Article 207 itself. As to services in general, the Opinion confirms that Article 207(1) TFEU covers all four modes of services (that is, cross-border supply, supply in the Member State of the service provider, commercial presence (establishment) in another Member State and temporary presence in another Member State).[42] In this context, it can also be noted that all the commitments of the agreement relating to competition were considered by the Court to fall within the field of the CCP.[43]

While with respect to the above parts of the draft agreement the outcome was fairly obvious, the main discussion centred on those parts of the agreement which provided for commitments relating to investment, intellectual property protection and sustainable development. As far as investment is concerned (regulated in chapter 9 of the agreement), the Court easily came to the conclusion that the words 'foreign direct investment' in Article 207(1) TFEU must mean something and so the Court concluded that non-direct (portfolio) investment falls outside Article 207, pointing out that the use by the authors of the Treaty of the word 'direct' 'is an unequivocal expression of their intention not to include other foreign investment in the common commercial policy'.

Even with respect to direct investment,[44] however, some Member States tried to argue that the CCP only relates to the admission of new investment and not to

competence (exclusive or shared) to conclude an agreement, see, e.g. Opinion 1/03 (New Lugano Convention), EU:C:2006:81, para 112; Opinion 2/15, EU:C:2017:376, para 28.

[41] Opinion 2/15, EU:C:2017:376, paras 40–77. In the draft agreement, the commitments relating to market access appear in chapters 2 to 8 and chapter 10.

[42] *Ibidem*, paras 54–55.

[43] *Ibidem*, paras 131–138 (these commitments are contained in chapter 12 of the draft agreement).

[44] The Court, at para 80 of the Opinion, recalled its case law relating to the notion of direct

the protection of existing investment. The Court refuted this thesis, as well as the argument that certain provisions of the agreement enabling derogations with a view to safeguarding public order, public security and other public interests, or providing for guarantees that expropriations or criminal law, tax law or social security legislation be applied in a fair manner, would belong to an area of exclusive competence of the Member States.[45] Without going into the details of the Court's reasoning, it would appear that the Court adopted a holistic approach, based on the idea that the inclusion of 'foreign direct investment', without any qualifications or limitations, in Article 207 TFEU must mean that in principle all provisions of a trade agreement which aim at creating a level playing field for foreign investors (fair and equitable treatment, principle of non-discrimination, etc.) are integral parts of a contemporary trade policy.

This approach would apply to provisions relating to foreign direct investment of a substantive character. As to the institutional and procedural question of dispute settlement, Opinion 2/15 makes an important distinction between state-to-state and investor-to-state (hereinafter ISDS) dispute settlement.[46] While the former should follow the solution as regards the substantive commitments (in other words, a dispute settlement between the EU and Singapore falls within the CCP as far as direct investment is concerned, whilst the settlement of disputes concerning portfolio investment would belong to the sphere of shared competence), the Court viewed the question of ISDS differently. It ruled that the ISDS provisions of the draft agreement, whether relating to direct or non-direct investment, fall within a competence shared between the EU and its Member States, in so far as the private investor, by submitting a dispute to ISDS, would create a situation which would remove the dispute from the jurisdiction of the courts of the Member State. Such a system, according to the Court, 'cannot … be established without the Member States' consent'.[47] No further explanation of this view is provided.

As to the commitments relating to intellectual property rights, the Court, in the same vein as it had done in *Daiichi Sankyo*, concluded that they all belong to the sphere of the CCP. The Court pointed out, inter alia, that these commitments 'enable entrepreneurs of the [EU] and Singapore to enjoy, in the territory of the other Party, standards of protection of intellectual property rights

investment, which consists in investments 'which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available'. With respect to companies limited by shares, the investment becomes of a direct nature 'where the shares held by the shareholder enable him to participate effectively in the management of that company or in its control'.

[45] *Ibidem*, paras 101–109.

[46] On these concepts see A. Rosas, *The EU and International Dispute Settlement*..., pp. 18–19, 23–26.

[47] Opinion 2/15, EU:C:2017:376, para 292. The dispute settlement system of the draft agreement is discussed at paras 285–304.

displaying a degree of homogeneity and thus contribute to their participation on an equal footing in the free trade of goods and services between the [EU] and the Republic of Singapore'.[48] This reasoning also applied to the provisions relating to the implementation and enforcement of intellectual property rights (it should be added that similar provisions are to be found in TRIPS, which the Court, as noted above, in *Daiichi Sankyo* had considered to contain commitments belonging to the sphere of the common commercial policy). One specific point of this part of the Opinion still merits a comment: Some Member States had argued that a reference in a provision of the draft agreement relating to copyrights and related rights to certain multilateral conventions which included a provision on 'moral rights' rendered that particular provision 'non-commercial' in nature. The Court, without taking a stand on the commercial or non-commercial nature of moral rights as such, simply discarded the argument by observing that the reference in question was not enough to render that part of the draft agreement, which in itself 'does not mention moral rights', non-commercial in nature.[49]

Coming back to Opinion 2/15, the Court dealt at length with the nature of the commitments concerning sustainable development.[50] These commitments relate to a certain number of provisions of the draft agreement having an economic, social and environmental dimension, in particular the social protection of workers and environmental protection. In concluding that these provisions, too, fall with the common commercial policy, the Court, inter alia, underlined that according to the second sentence of Article 207(1) TFEU, 'the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'.[51] These principles and objectives, again, are stated above all in Article 21 TEU, which refers, inter alia, to sustainable development. In considering the relevant commitments contained in the draft agreement, the Court concluded that they did not serve to harmonise the labour or environment standards of the parties but were intended to 'govern trade …. by making liberalisation of that trade subject to the condition that the Parties comply with their international obligations concerning social protection of workers and environmental protection'.[52] The Court thus recognised, in following the arguments put forward by the European Parliament, that the aim of the negotiations with Singapore, 'was to reach agreement on a "new generation" free trade agreement, that is to say, a trade agreement including – in addition to the classical elements in such agreements, such as the reduction of tariff and non-tariff barriers to trade

[48] *Ibidem*, para 122. The part of the Opinion dealing with intellectual property protection is to be found in paras 111–130.

[49] *Ibidem*, para 129.

[50] Opinion 2/15, EU:C:2017:376, paras 139–167.

[51] *Ibidem*, para 142.

[52] *Ibidem*, para 166.

in goods and services – other aspects that are relevant, or even essential, to such trade'.[53]

Finally, it should be noted that the part of Opinion 2/15 dealing with the AETR/ERTA principle as expressed in Article 3(2) TFEU presents a mixed outcome. As far as transport (which, as was noted above, does not fall under the CCP) is concerned, the Court ruled that all the provisions dealing with transport belong to the field of exclusive competence as existing Union legislation would affect those common rules or alter their scope. As was already noted above, the Court came to a different conclusion with respect to portfolio investment, as the Court did not accept that the 'common rules' referred to in Article 3(2) TFEU could include primary EU law (such as Article 63 TFEU relating to capital movement) and as there was no secondary EU legislation that could have been affected by the provisions of the Singapore agreement. The end result was that the free trade agreement with Singapore falls within the exclusive competence of the Union (on the basis of either Article 3(1) or 3(2) TFEU), with the exception of the substantive commitments relating to non-direct (portfolio) investment, some ancillary provisions of an institutional nature relating to portfolio investment as well as the ISDS provisions of the investment chapter of the agreement.

6. Intellectual Property Rights Once Again

A more recent case, brought by the Commission against the Council, can be seen as a follow-up to *Daiichi Sankyo* and Opinion 2/15 (to the extent that the latter dealt with intellectual property rights), considered in Sections 3 and 5, respectively. The Court was thus once again called upon to rule on the scope of the CCP as far as intellectual property rights are concerned.[54] The case arose from the fact that the Council had taken a decision authorising the opening of negotiations on a revised Lisbon Agreement on Appellations of Origin and Geographical Indications based on the premise that the draft revised agreement should be concluded as a mixed agreement.

The Council and all the intervening Member States argued that the draft revised agreement did not fall within the field of the CCP as it did not display 'a specific link with international trade'. This view was essentially based on the following three considerations: First, the agreement was to be administered by the World Intellectual Property Organization (WIPO), which had as its primary objective to facilitate the efficient protection of intellectual property and to harmonise national legislation in this field rather than to promote international

[53] *Ibidem*, para 140.

[54] Case C-389/15, *Commission v. Council*, EU:C:2017:798.

trade. Second, the objective of the draft revised agreement itself was to establish a mechanism for protecting traditional products and providing information to consumers that would apply to all contracting parties, including the EU, rather than to facilitate international trade. Third, as its purpose was to establish a uniform procedural framework for the protection of appellations of origin and geographical indications, it fell within the area of internal market competence covered by Article 114 TFEU.[55]

The Court once again disagreed with this line of reasoning. In order to determine the aim of the draft agreement, it was important to consider the existing international agreements forming its context, namely the Paris Convention for the Protection of Industrial Property of 1883 with subsequent modifications and the above-mentioned Lisbon Agreement, which the draft agreement was meant to revise. According to the Court, the equivalent and homogeneous protection of industrial property rights which the Paris Convention grants is ultimately designed to enable the nationals of the contracting parties to participate in international trade on an equal footing. As to the Lisbon Agreement, the specific system enabling appellations of origin protected in one of the contracting parties to benefit from an international registration guaranteeing them protection in all contracting parties against usurpation or imitation is not an end in itself but a means to the end of developing trade between the contracting parties in a fair manner. Since the main objective of the revised draft agreement was to strengthen this body of international agreements, it must be regarded as being intended to facilitate and govern trade between the EU and the third States parties to the Lisbon Agreement.[56]

As regards the content of the draft revised agreement, its system of reciprocal protection of appellations of origin and geographical indications was, in essence, based on three sets of provisions, that is, a body of substantive law, obligations to establish, in each legal order, certain procedural guarantees, and a mechanism for a single registration that was to be valid in all States parties. The required specific link with international trade was to be seen, inter alia, in the single registration mechanism to be established, which would dispense manufactures from the obligation of having to lodge an application for registration of the appellations of origin and geographical indications that they use with the competent authorities of each of the contracting parties. The Court, in this context, also referred to what it had already observed in Opinion 2/15 concerning a single registration mechanism for geographical indications and a system of reciprocal protection of those indications against acts of unfair competition.[57] Also in this case, the Court

[55] *Ibidem*, paras 42–43.

[56] *Ibidem*, paras 52–62.

[57] *Ibidem*, paras 65–72.

concluded that the draft agreement was a trade agreement and that its negotiation thus fell within the exclusive competence of the Union, in accordance with Articles 3(1) and 207(1) TFEU.

7. Concluding Remarks

There can be no doubt that the case law of the ECJ from 2013 onwards relating to the question of competence in EU external relations has made an important contribution to the interpretation and application of the relevant provisions of Union primary law, notably Articles 3 and 207 TFEU, as they result from the Treaty of Lisbon. Five decisions in particular, that is *Daiichi Sankyo* (on the notion of trade-related intellectual property rights), *Commission v. Council* (on the distinction between international trade and the internal market in the area of services), Opinion 3/15 (on the distinction between international trade and derogations from intellectual property rights for non-commercial purposes), Opinion 2/15 (on several issues relating to the scope of Article 207 TFEU in the context of a bilateral trade agreement) and *Commission v. Council* (on intellectual property rights, more specifically appellations of origin and geographical indications), have clarified the Court's approach to the scope of the CCP. Four of these decisions were rendered by the Grand Chamber of the Court while Opinion 2/15 was even submitted to the full Court, a formation consisting of, in principle, all 28 judges of the ECJ and which is used only on very rare occasions.

This case law suggests that the Court favours a broad interpretation of Article 207(1) TFEU, recognising that contemporary trade policy requires a number of 'flanking' measures which do not constitute trade in goods and services in the strict sense but which serve to support trade by contributing to a level playing field between the parties to international trade agreements, be they multilateral (such as TRIPS) or bilateral (such as the agreement with Singapore). In the light of this case law, it can be asked whether the mere fact of including provisions on, say, services or intellectual property rights in an international agreement could be deemed to create the presumption that these provisions fall within Article 207 TFEU. If such provisions are included in an agreement concluded by the EU with third States, could it not be assumed that the objective is to facilitate international trade?

The consequences of this case law may be particularly important for bilateral trade agreements, as during the last 20 or so years it has become the rule (albeit with some exceptions) that bilateral trade and cooperation agreements are on the EU side concluded as mixed agreements, with the participation of all EU

Member States as contracting parties.[58] In the light of the Court's recent case law, this practice may now have to be changed, provided that the bilateral agreement envisaged excludes non-direct (portfolio) investment as well as an ISDS dispute settlement mechanism of the kind to be found in the Singapore or Canada agreements (that said, also trade agreements covering these aspects of investment protection *could* probably be concluded by the Union alone, provided that the EU Council decided to exercise a shared competence with a view to concluding a Union-only agreement[59]).

To what extent does the Court's recent case law suggest a change in approach, as compared to the situation before the entry into force of the Treaty of Lisbon? First of all, if there is a change, this should be largely attributed to the new provisions contained in the TFEU, and Articles 3 and 207 in particular. Second, this case law does not in any case seem to constitute any radical rupture with the past but rather a return to the Court's original approach to the concept of common commercial policy. In early case law, starting with Opinion 1/75, the common commercial policy was understood in a broad sense[60] and it was only with Opinions such as 1/94 and 2/00 that a more restrictive view seemed to gain ground. A similar development can be seen with regard to the AETR/ERTA principle, as the rather restrictive approach taken in Opinion 1/94 has been largely put to rest with Opinions 1/03, 1/13, 2/15 and 3/15 as well as the 2014 judgments in *Commission v. Council* and *Green Network*.[61]

This fairly recent case law will arguably imply that the EU will start concluding more Union-only trade agreements than has hitherto been the case. To the extent that such trade agreements fall within the scope of the CCP or become exclusive by virtue of the AETR/ERTA principle, the conclusion of a Union-only agreement becomes a legal necessity. Also, if there is a shared competence, a Union-only agreement could be envisaged,[62] but in this case the Council (and the Member States' representatives composing it) may well decline to accept the

[58] See A. Rosas, *Exclusive, Shared and National Competence...*, pp. 18–19.

[59] It is true that Opinion 2/15, EU:C:2017:376 (see paras 110 and 244 in particular), contains some formulations which could be interpreted to imply that the EU could exercise a competence only if it is of an exclusive nature. That was not the intention, however, and the relevant paragraphs of Opinion 2/15 have to be seen in the context of the particular circumstances of the case and the arguments of the Member States and the Council, which were based on the assumption that if the agreement did not fall within the area of exclusive competence, it should be concluded as a mixed agreement. Any doubts which may have existed in this respect were subsequently dispelled by the judgment of 5 December 2017 in Case C-600/14, *Germany v. Council*, EU:C:2017:935, in which the ECJ confirmed that the Union may exercise also externally a shared competence even if it has not before been the subject of internal rules.

[60] See A. Rosas, *Les relations internationales* commerciales...

[61] See Section 2 above and A. Rosas, *EU External Relations...*, *passim*.

[62] See note 59 above.

exercise of the shared competence and insist on a mixed agreement instead. To avoid paralysis in international trade relations, the Commission has begun to propose the conclusion of separate agreements for trade in goods, services and intellectual property, together with some flanking policies, on the one hand, and investment, on the other, taking into account that portfolio investment and ISDS mechanisms for dispute settlement do not belong to the area of exclusive competence. This approach has been endorsed by the Council, albeit with some reservations.[63]

It is obvious that the new approach has to be seen against the background of the recent case law from the ECJ. Does this post-Lisbon case law imply that most, if not all, contentious questions have now been settled? The answer seems to be in the negative. EU external relations are a both complex and dynamic field and also in the future will the ECJ most probably be seized with new problems, or re-formulations of old problems. To mention but one pending case relating to EU external trade relations: Belgium has asked the Court to give an Opinion on the compatibility of the ISDS mechanism contained in CETA, the new trade agreement with Canada, with Union law. It should be underlined that this case, contrary to the cases considered above, does not address the question of competence (exclusive or shared?) but requires the Court to judge whether the ISDS mechanism of this agreement is in conformity with the Union's constitutional order, including the crucial role played by the national courts of EU Member States in ensuring respect for Union law. To underline the importance of this question, the ECJ decided to allocate the case to the full court, as it had done before with respect to Opinion 2/15 relating to the Singapore agreement. The Opinion, which can be expected to be given at the beginning of 2019,[64] at the latest, will probably constitute one more important component of the changing architecture of EU trade relations.

[63] See Draft Council conclusions on the negotiation and conclusion of EU trade agreements, EU Council doc 8622/18 of 8 May 2018, adopted on 22 May 2018. The Council reserves its right to decide whether to open negotiations on the basis of two separate agreements, one covering trade belonging to the area of Union exclusive competence and the other relating to investment and to decide, on a case-by-case basis, on such splitting of trade agreements.

[64] The oral hearing was held on 26 June 2018 and an opinion of the Advocate General can be expected in October.

Allan Rosas

THE ENLARGED SCOPE OF THE EU'S COMMON COMMERCIAL POLICY

The aim of the study is to focus on the CCP as a basis for EU exclusive competence with a special emphasis on recent developments with regard to the scope of the CCP as it has become enlarged both by modifications to what is today Article 207 TFEU and through the case law of the ECJ. Article 207 sec. 1 TFEU provides basic parameters in regard to the conclusion of tariff and trade agreements relating to, inter alia, 'trade in goods and services', 'commercial aspects of intellectual property' and 'foreign direct investment'. This development can be seen in the broader context of a number of cases concerning the application of the AETR/ERTA principle as a basis for exclusive competence, as well as some other aspects of EU external relations. The regulation obtained its current wording in the Treaty of Lisbon which implied a specification of the entirely exclusive character of trade in services and the trade-related aspects of intellectual property and added the notion of foreign direct investment to the list.