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The external dimension of the EU policies: horizontal issues; trade and investment; immigration and asylum

XXVIII FIDE CONGRESS
Lisbon/Estoril
(23-26 May 2018)
Congress Proceedings
Vol. 3



ALMEDINA

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DIE EXTERNE DIMENSION DER EU-POLITIKEN: HORIZONTALE ASPEKTE; HANDEL UND INVESTITIONEN; EINWANDERUNG UND ASYL

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INTRODUCTION



INTRODUCTION

I. The XXVIII FIDE Congress in Estoril

It is not for nothing that Estoril, situated on the coast of the Atlantic Ocean and at the westernmost point of continental Europe, is the splendid venue of the XXVIII FIDE Congress. At the time when Lisbon was, during the Second World War, one of the most desired destinations for those trying to escape the slaughter ravaging the European continent, Estoril became the vibrant center of secret diplomacy as well as the preferred *lieu d'exil* for crowned heads and dignitaries. Nowadays, being on the outer edge of the European Union, Estoril's location again demonstrates the symbolic value of the region. It is not only a gateway to Europe and European values, represented to a large extent by European law, but it is also a platform from which to see beyond local issues. Just as in previous centuries, when the Portuguese coast served Vasco da Gama and Cabral as a starting point to set sail on their expeditions, we too are now embarking, as lawyers and academics, on an arduous journey that should lead the current reflection on European law to face the internal and external challenges of the Union – nowadays perhaps more than ever before.

Given the profile and location of the XXVIII FIDE Congress, it is not surprising that the organisation of this event has been entrusted to the Portuguese Association for European Law (APDE), which was created in 1984 with the aim of contributing to the dissemination of European law in Portugal. At the same time the APDE, in its capacity as a member of the FIDE, ensures the connection of the Portuguese legal community to the ongoing debate about the most important topics of the European Union.

II. FIDE

Since 1961, FIDE (Féderation Internationale pour le Droit Européen / International Federation for European Law) has brought together the European law

associations of each Member State, of candidate countries, as well as those of Norway and Switzerland.[1] For the last 50 years of its existence, as the common umbrella organization, it has been universally recognized by the international legal community as having a remarkable influence on the development and shaping of both the context and the culture of European Union law. The biennial FIDE Congresses gather several hundred lawyers and professionals from different backgrounds. They are the most important event of reflection and dialogue on EU law and policies, as regards both the legislative and policy developments in the European Union and their application by the EU and national courts. Together with their related publications, the reports compiled by FIDE, published in rich and dense volumes full of information and reflection, the Congresses generate an invaluable treasury of academic writing and debate; landmarks in the study of the core themes in European law and the case law of the Court of Justice of the EU, widely consulted by academics, practitioners and judges.[2]

Previous FIDE Congresses, hosted by numerous European national, cultural and academic capitals, have covered a vast gamut of fundamental and economic topics of vital interest for the European Union.[3] The last Congress in Budapest in 2016 put a special emphasis on the problems of European banking union, private enforcement and collective redress in European competition law, as well as on the division of competences and regulatory powers between the European Union and the Member States. All the chosen topics have been comprehensively analysed and discussed. This time, the XXVIII Congress in Estoril aims to go beyond, and significantly develop, the previous work. The adaptability of the thematic scope of the FIDE's Congresses and publications to the current political and economic context constitutes its distinctive feature.

Beside the unquestionable pertinence of the choice of topics, one of the greatest values of FIDE seems to be its well-established, varied and multilevel dimension. It is not only an organisational structure. It is an institutionalised federation of legal experts – *Great Minds of European Law*[4], empowered to shape its norma-

[1] Statute of the FIDE is available at https://www.fide-europe.org/xms/files/ABOUT_FIDE/Statutes_of_FIDE_FIDE_V3.pdf (10.4.2018).

[2] See Julia Laffranque, FIDE – Uniting Great Minds of European Law: 50 years of the International Federation of European Law, Juridica International XVIII/2011, pp. 173-181; Alexandre Bernier, Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970, in Contemporary European History, 2012, pp. 399-415

[3] For more information concerning previous and current FIDE Congresses see https://www.fide-europe.org/Congresses/ (10.4.2018).

[4] Julia Laffranque, op.cit., pp. 173-181, pp. 173-181. The expression, coined by Professor Julia Laffranque, served as a basis of the motto of the XXVI FIDE Congress ('FIDE – Uniting Great Minds of EUropean Law'). Its modified version has also been used by the authors of the Introduction to the XXVI FIDE Congress Publication – Professor Ulla Neergaard, Professor Catherine Jacqueson, Commissioner Nina

tive and cultural framework. As a research tool in understanding the diversity of legal reality, the Congresses and the publication of the results allow experts to share the knowledge they have gained, including with the younger generation of scholars in the PhD seminars. In this regard FIDE is where expertise and dialogue meet head on.

With such an important *spiritus movens* as the development of European legal culture and identity, FIDE is also burdened with responsibility. In times of numerous challenges facing the European Union, it undertakes to fulfil its difficult tasks as well as it can. The XXVIII Congress in Estoril, along with the present publication, serve as a preeminent example of how FIDE can fulfil its noble objectives.

III. Topics

As is the custom, for each of the three topics of the current FIDE biennial work, a questionnaire has been prepared by the General Rapporteur, who also undertakes the responsibility of coordinating the national reports, which have been drafted by experts appointed by the national associations of FIDE. All these reports, together with the general reports prepared by the General Rapporteurs, and accompanied by institutional reports drafted by representatives of the EU institutions, constitute the subject of the present collection.

The themes of the XXVIII Congress have been carefully chosen, accordingly to their general interest, topicality, relevance for the process of European integration and practical ability to attract the participants and a wider audience. '*World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it*'[5] – these words, uttered by Robert Schuman in 1950, are still up-to-date. The current necessity to balance openness and safety in the field of European law and policy provides a particular justification for the selection of this year's topics.

1. The internal market and the digital economy[6]

In the new digital era, the economy of new media may be considered as the single most important driver of innovation, competitiveness and growth in Europe and

Holst-Christensen, Professor Jens Hartig Danielsen and Professor Grith Skovgaard Ølykke who adopted it for one of the headlines ('A Collaboration of Great Minds of EUropean Law') in order to stress the relationship between EU law and European law.

[5] Robert Schuman Declaration, 9 May 1950.

[6] General Rapporteur: Professor Peggy Valcke, KU Leuven – CiTiP (Centre for IT & IP Law) – imec (BE), visiting professor at Tilburg University (NL) and Bocconi University Milan (IT). Institutional Rapporteur: Professor Piedade Costa de Oliveira, member of the Legal Service of the European Commission, visiting professor at University of São Paulo (Brazil).

the world. Internet and e-commerce, the new sharing economy and peer-to-peer transactions, not to mention media and telecoms across the borders, are thus at the heart of the discussion and of legislative initiatives at the national and European level. The issue of governance in the digital single market has also become one of the Commission's main priority policy areas for 2014-2019, illustrated by the Digital Single Market Strategy of May 2015[7]. Following its assumptions, the present topic includes in the first place the better access by consumers and businesses to new markets, online goods and services across Europe. In this regard, the necessity to eliminate key differences between the online and offline worlds and hence to remove obstacles to cross-border activity is of the highest importance. Second, the examination of the topic will address the development of the appropriate conditions for digital network and services. A particular emphasis has been placed on high-speed, secure and reliable infrastructures and content services, as well as on the tailor-made regulatory conditions for innovation, investment, fair competition and a level playing field. The final objective was to discuss the potential for growth of the digital economy in Europe, by analysing the desirability of investment in ICT infrastructures, cloud computing and Big Data, research innovation, accuracy of public services and industrial effectiveness.

Besides the study of the digital single market, its infrastructure and electronic commerce, the topic focuses on the existing and recently amended legal instruments, which cannot in turn be dissociated from the necessary protection of consumers, personal data and fundamental rights – freedom of expression and the right to privacy – information mass storage, confidentiality of communications and global security. Judicial review and the increasing case law on these matters are at the core of reflections on the topic.

As the general report shows, the major problem in this area is the risk of over-regulation in what is a highly changeable and unpredictable field. As such, it requires well-coordinated regulatory instruments but cannot ignore the growing diversity of the relevant activities. From the institutional perspective, it seems important, however, to point out the tendency of the Union legislature in all the above-mentioned areas to resort to regulations as a harmonisation tool, which seems to illustrate the political will to adopt uniform rules within the European Union.

2. Taxation, state aid and distortions of competition[8]

According to the existing case law on tax schemes and State aid, the problems of the tax rulings and their influence on competition, as well as the outcome of the

[7] COM (2015) 192 final.

[8] General Rapporteur: Professor Raymond Luja, Maastricht University (NL), fiscal state aid counsel to Loyens & Loeff N.V., Amsterdam (NL). Institutional Rapporteurs: Ms. Julia Rapp and Ms. Ramona Ianus of European Commission.

Commission's investigations, and pending or future Court's proceedings, are of the utmost importance for the current internal market legal policy. In this regard the present topic encompasses the relationship between such notions as profit shifting and harmful tax competition, double taxation and double non-taxation, including the OECD model instruments. It also provides an insight into the territorial reach of such dealings and remedies.

As the general report shows, both national and international tax systems still suffer from shortcomings, in practice substituting tax harmonization by State aid rules. The growing awareness of the case law and the learning-by-doing processes within the Commission nonetheless seem to be improving the effectiveness of the State aid regime. In the light of the fact that the future of unconditional tax exceptions in the European Union is being questioned, as well as the success of anti-tax avoidance legislation, the need for advance tax rulings is about to increase. From the institutional point of view, the role of the Commission is prominent in this respect, but it can only properly be played on the basis of guidance provided by the Court of Justice of the European Union.

3. The external dimension of the EU policies: horizontal issues; trade and investment; Playstation and asylum[9]

Last but not least, the external aspects of European policies merit our close attention. The evolution of the international community in times of political and military tensions, which have already given rise to significant human and social costs that are dramatically affecting future European Union policies, deserves to be urgently addressed by respected European and international figures.

First of all, an update on the division of powers and competences between the EU institutions and Member States and their respective roles on the international sphere will be required. This would provide a deep follow-up and focused analysis on one aspect that was addressed in the context of topic III in the Budapest XXVII Congress. Secondly, the topic focuses on the international agreements currently being negotiated by the European Union on trade liberalization, market access and investment protection, such as TTIP and CETA, within the context of other regional or global international agreements.[10] In the light of

[9] General Rapporteurs: Professor Christine Kaddous, Université de Genève (CH), visiting professor at the College of Europe (BL/PL) and at Université Paris II Panthéon-Assas (FR); Professor Nuno Piçarra, Professor at the Law Faculty of the Nova University of Lisbon; member of the Academic Network for Legal Studies on Immigration and Asylum in Europe (*Odysseus*) and of the management board of the European Union Agency for Fundamental Rights. Institutional Rapporteurs: Mr. Hubert Légal and Mr. Álvaro de Elera, Legal Service of the Council; Mr. Freddy Drexler and Mr. Anders Neergaard, Legal Service of the European Parliament.

[10] At the time of writing, the rapporteurs did not have access to the Court of Justice judgment in Case C-284/16, *Slovak Republic v. Achmea BV*. In its preliminary ruling of 6 March 2018, the Court concluded

recent case law of the Court of Justice, the institutional report considers mixed agreements as a political choice for the Union legislature and, in this context, raises the question of the conditions of recourse to this type of agreement. In relation to international agreements, the report also reveals the urgent need to strengthen the mechanisms of democratic scrutiny within the European Union institutions and Member States.

On the other hand, the immense challenges of immigration and asylum that our Area of Freedom, Security and Justice is facing will provide the opportunity for an intense debate. It is crucial to understand how the current crisis is impacting, or will impact, on the existing and evolving regulations, international agreements, practices and institutional machinery dealing with such fundamental issues, including judicial protection and the rule of law. It is our firm belief that the European Union is a unique framework to achieve all those objectives while respecting fundamental rights, democracy and the rule of law. The preservation of these values for the next generations of European citizens is one of the most important objectives of our times.

4. Further debates

In order to give a wider insight on the debate, an introductory panel on *Europe at the Crossroads* has been scheduled. In their opening lectures, Professor Catherine Barnard and Professor Michael O'Flaherty will discuss respectively 'The future of Europe post-Brexit' and 'Fundamental rights as a road sign at the crossroads'. This panel should provide an excellent starting point for the debate led by the prominent speakers in the panel on *Europe and Brexit,* concerning one of the most traumatic events in the current history of the European Union.

IV. Acknowledgments

As President and Members of the Board of the Portuguese Association for European Law (APDE – Associação Portuguesa de Direito Europeu), we would like to thank His Excellency the President of the Portuguese Republic and His Excellency the Prime Minister of Portugal for the institutional support given to the XXVIII FIDE Congress, organised by APDE in Estoril from 23 to 26 May 2018.

We would also like to express our gratitude to all the rapporteurs, speakers, chairpersons, moderators and interpreters involved in the work of the Congress and of the present publication.

that the arbitration clause in the Agreement between the Netherlands and Slovakia (intra-EU BIT) on the protection of investments is not compatible with EU law. The ruling raises further questions concerning arbitration in the European Union in Investor-State Dispute Settlement.

The organisation of the XXVIII FIDE Congress would not have been possible without the generous contribution of our sponsors and supporters.

The support of the Court of Justice of the European Union and of the European Commission was also of the utmost importance for the success of the Congress.

Last but not least, we would like to thank the members of the Executive Committee of the Congress, Alberto Saavedra, Filipa Pimentel, Joana Schmid Moura, João de Lemos Portugal, Leonor Bettencourt Nunes, Margarida Rosado da Fonseca, Margarida Sameiro, Piedade Castro e Sousa and Teresa Côrte-Real. Without their unconditional dedication to the Congress, its organisation would not have been possible.

José Luís da Cruz Vilaça, Carlos Botelho Moniz, Nuno Piçarra, Rita Leandro Vasconcelos, João Paulo Teixeira de Matos, Nuno Ruiz, Miguel Gorjão-Henriques

INTRODUCTION

I. Le XXVIIIe Congrès de la FIDE à Estoril

Non sans raison, c'est à Estoril, située sur la côte de l'océan Atlantique et à l'extrême ouest de l'Europe continentale, que se tient le XXVIIIe Congrès de la FIDE (Fédération Internationale pour le Droit Européen). À l'époque où Lisbonne était, pendant la Seconde Guerre mondiale, l'une des destinations les plus recherchées par ceux qui tentaient d'échapper au carnage qui ravageait le continent européen, Estoril devint le centre d'une diplomatie secrète effervescente et le lieu d'exil des têtes couronnées et dignitaires. De nos jours, se trouvant à la lisière de l'Union Européenne, la localisation d'Estoril atteste à nouveau du caractère symbolique de la région. Estoril n'offre pas seulement une porte d'entrée vers l'Europe et les valeurs européennes, représentées en grande partie par le droit de l'Union européenne, mais permet également de prendre de la hauteur de vue pour se projeter et /réfléchir au-delà des problèmes locaux. Comme des siècles auparavant, lorsque Vasco de Gama et Cabral partirent de la côte portugaise pour leurs expéditions, nous embarquons maintenant, en tant que juristes et universitaires, dans un périple difficile qui devrait aider la réflexion actuelle sur le droit de l'Union européenne à faire face aux défis internes et externes de l'Union, toujours plus prégnants. Compte tenu du programme et de la localisation du XXVIIIe Congrès de la FIDE, il n'est pas surprenant que son organisation ait été confiée à l'Association portugaise pour le droit européen (APDE), créée en 1984 dans le but de contribuer à la diffusion du droit européen au Portugal. L'APDE, en qualité de membre de la FIDE, est un lieu de débat renouvelé pour la communauté juridique portugaise sur les sujets les plus importants de l'Union européenne.

II. FIDE

Depuis 1961, la FIDE unit les associations de droit européen de chaque État membre, des pays candidats à l'adhésion, ainsi que de la Suisse et la Norvège[1]. En 50 ans d'existence, elle a été reconnue par la communauté juridique internationale comme ayant une influence remarquable sur la formation et le développement d'un cadre européen tant juridique que culturel. Les congrès biennaux de la FIDE réunissent plusieurs centaines de juristes venant d'horizons divers. Ils constituent le point d'orgue de la réflexion et du dialogue sur le droit et les politiques de l'Union, tant en ce qui concerne leur évolution que leur application par les juridictions nationales et européennes. Ensembles avec les congrès, les publications afférentes – les riches et denses Rapports préparés et publiés par la FIDE – constituent de précieux points de repère dans l'étude des thèmes fondamentaux du droit de l'Union et de la jurisprudence de la Cour de justice, largement utilisés par les universitaires, les praticiens et les juges[2].

Les congrès précédents de la FIDE, ayant eu lieu en plusieurs capitales nationales, culturelles et académiques de l'Europe, couvraient un large éventail de sujets juridiques et économiques présentant un intérêt vital pour l'Union européenne[3]. Le dernier Congrès de Budapest en 2016 a mis l'accent sur les problèmes de l'union bancaire européenne, l'exécution privée et les recours collectifs dans le droit européen de la concurrence, ainsi que sur la répartition des compétences et des pouvoirs réglementaires entre l'Union européenne et les États membres. Tous les thèmes choisis ont été analysés et discutés de manière approfondie. Se situant dans la même lignée, le XXVIIIe Congrès d'Estoril vise à approfondir le travail précédent. L'adéquation des thématiques des congrès et des publications de la FIDE au contexte politique et économique actuel constitue son trait distinctif.

Outre la pertinence incontestable du choix des sujets, l'un des plus grands atouts reconnu de la FIDE réside dans la multiplicité et de la diversité de son approche. Loin d'être une simple structure organisationnelle, elle constitue une fédération institutionnalisée d'experts juridiques – les *Grands esprits du droit Européen*[4] – à même d'orienter le cadre culturel et normatif de l'Union. Les études

[1] Statut de la FIDE est disponible sur : https://www.fide-europe.org/xms/files/ABOUT_FIDE/Statutes_of_FIDE_FIDE_V3.pdf (10.4.2018).

[2] Voir Julia Laffranque, FIDE – Uniting Great Minds of European Law: 50 years of the International Federation of European Law, Juridica International XVIII/2011, pp. 173-181; Alexandre Bernier, Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970, in Contemporary European History, 2012, pp. 399-415.

[3] Pour plus d'informations sur les congrès précédents et actuels de la FIDE, voir : https://www.fide-europe.org/congresses/ (10.4.2018).

[4] Julia Laffranque, op.cit., pp. 173-181. L'expression, créée par le professeur Julia Laffranque, a servi de base à la devise du XXVIe Congrès de la FIDE ('FIDE – Uniting Great Minds of EUropean Law'). Sa version modifiée a également été utilisée par les auteurs de la Publication accompagnant le Congrès de

juridiques comparatives, en tant qu'outil de recherche pour appréhender la réalité juridique dans sa complexité, la publication de ces travaux, ainsi que les congrès aident les experts à partager les connaissances acquises avec les autres, y compris avec la jeune génération pendant les Séminaires Doctoraux. À cet égard, la FIDE est l'endroit où l'expertise et le dialogue se réunissent.

En tant que *spiritus movens* du développement de la culture et de l'identité juridique européenne, la FIDE a également une responsabilité importante. Au moment où l'Union européenne est confrontée à de nombreux défis, la FIDE parvient, avec succès, à accomplir les missions qui sont les siennes. Le XXVIIIe Congrès d'Estoril, ainsi que la présente publication, en sont la parfaite illustration.

III. Thèmes

Comme le veut la tradition, pour chacun des trois thèmes des travaux de la FIDE, un questionnaire a été préparé par le Rapporteur général, auquel il incombe également de coordonner les rapports nationaux, rédigés par des experts des associations nationales membres de la FIDE. Ces rapports ainsi que les rapports généraux préparés par les rapporteurs généraux et accompagnés des rapports institutionnels élaborés par les représentants des institutions de l'Union, composent le présent ouvrage.

Les thèmes du XXVIIIe Congrès ont été choisis avec soin, en fonction de leur pertinence pour le processus d'intégration européenne, de l'actualité et de leur faculté à attirer de nombreux participants. « *La paix mondiale ne saurait être sauvegardée sans des efforts créateurs à la mesure des dangers qui la menacent.* »[5] – ces mots, prononcés par Robert Schuman en 1950, sont toujours d'actualité. La nécessité de trouver, au regard du droit et des politiques de l'Union européenne, un équilibre entre ouverture et sécurité permet d'aborder de façon particulièrement stimulante les sujets suivants :

1. Le marché intérieur et l'économie digitale[6]

Dans la nouvelle ère numérique, l'économie peut être considérée comme le moteur le plus important de l'innovation, de la compétitivité et de la croissance en Europe et dans le monde. L'Internet et le commerce électronique, la nouvelle

la XXVI de la FIDE – le professeur Ulla Neergaard, le professeur Catherine Jacqueson, le commisseur Nina Holst-Christensen, le professeur Jens Hartig Danielsen et le professeur Grith Skovgaard Ølykke qui l'ont adoptée pour l'un des titres de l'Introduction ('A Collaboration of Great Minds of EUropean Law') afin de souligner la relation entre le droit de l'UE et le droit européen.

[5] Déclaration de Robert Schuman, 9 mai 1950.

[6] Rapporteur général: Professeur Peggy Valcke, KU Leuven – CiTiP (Centre for IT & IP Law) – imec (BE), professeur invité à l'Université de Tilburg (NL) et à l'Université Bocconi de Milan (IT). Rapporteur institutionnel: Professeur Piedade Costa de Oliveira, membre du service juridique de la Commission européenne, professeur invité à l'Ecole Polytechnique de l'Université de São Paulo (Brésil).

économie du partage et les transactions *peer-to-peer,* sans oublier les médias et les télécommunications par-delà les frontières, sont ainsi au cœur de la discussion et des initiatives législatives au niveau national et européen. La question de la gouvernance dans le marché unique numérique est devenue l'un des principaux domaines d'action prioritaires de la Commission pour la période 2014-2019, illustrée par la Stratégie pour un marché unique numérique en mai 2015[7]. Suivant les hypothèses de cette Stratégie, le présent sujet suppose, en premier lieu, de réfléchir à un meilleur accès des consommateurs et des entreprises à de nouveaux marchés, biens et services en ligne à travers l'Europe. À cet égard, la nécessité d'éliminer les différences principales entre les mondes *on-line* et *off-line* pour mettre fin aux obstacles à l'activité transfrontalière est de la plus haute importance. En second lieu, le présent sujet porte sur des conditions adéquates pour le développement du réseau et des services numériques. Un accent particulier a été mis sur les infrastructures et les services en ligne rapides, sécurisés et fiables, ainsi que sur les conditions réglementaires appropriées aux innovations, à la concurrence loyale, à l'investissement et aux conditions de concurrence équitable. L'objectif final est de discuter du potentiel de croissance de l'économie numérique en Europe, en analysant la nécessité d'investir dans les infrastructures TIC, le *Cloud computing* et le *Big Data*, l'innovation dans la recherche, la pertinence des services publics ainsi que l'efficacité industrielle.

Outre l'étude du marché unique numérique, de ses infrastructures et du commerce électronique, les réflexions, ciblées sur des instruments juridiques existants et récemment révisés, ne peuvent être dissociées de l'objectif de protection des consommateurs, des données personnelles et des droits fondamentaux, comme l'illustre la nécessité de préserver la sécurité, la liberté d'expression et la confidentialité des communications face au le stockage de masse des informations Le contrôle judiciaire et la jurisprudence croissante sur ces questions sont au cœur de la réflexion proposée .

Comme le montre l'étude générale, le problème majeur du thème analysé concerne le risque d'une réglementation excessive dans une matière mouvante et imprévisible. En tant que tel, l'encadrement de l'économie numérique nécessite des instruments réglementaires adaptés et bien coordonnés. D'un point de vue institutionnel, il semble intéressant de souligner la tendance du législateur européen à appliquer fréquemment dans tous les domaines susmentionnés la réglementation en tant qu'instrument d'harmonisation ce qui semble illustrer la volonté d'adopter des règles uniformes au sein de l'Union européenne.

[7] COM (2015) 192 final.

2. Fiscalité, aides d'État et distorsions de la concurrence[8]

Au regard des problèmes de *tax ruling* et de leur influence sur la concurrence, les résultats des enquêtes de la Commission et l'issue des procédures éventuelles devant la Cour de justice revêtent une importance pressante pour la politique juridique européenne. À cet égard, le présent sujet englobe la relation entre des notions telles que le transfert de bénéfices, la concurrence fiscale dommageable et les conventions visant à éviter une double imposition, y compris les instruments types de l'OCDE, et fournit un aperçu à l'échelle territoriale des problèmes soulevés par ceux-ci.

Comme le montre l'étude générale, les systèmes fiscaux nationaux et internationaux comportent, en l'absence d'harmonisation fiscale, des lacunes. Cette absence d'harmonisation positive est palliée par le recours au droit des aides d'État. La sensibilisation croissante à la jurisprudence et les processus *learning-by-doing* au sein de la Commission semblent toutefois déjà en cours afin d'améliorer l'efficacité du régime des aides d'État. L'avenir des exemptions fiscales inconditionnelles dans l'Union étant remis en cause, de même que le succès des législations nationales anti-évitement et anti-abus, le besoin de décisions anticipées en matière fiscale augmente. Du point de vue institutionnel, le rôle de la Commission est important à cet égard, mais ne peut être joué que sur une base solide fournie par la Cour de justice.

3. La dimension extérieure des politiques de l'Union européenne: questions horizontales; commerce et investissements; immigration et asile[9]

Les aspects externes de la politique européenne devraient également retenir notre attention. Les évolutions au sein de la communauté internationale en période de tensions politiques et militaires, qui ont déjà entraîné des coûts humains et sociaux dramatiques affectant gravement les politiques de l'UE pour les temps à venir, mérite d'être traitée urgemment par d'éminentes personnalités européennes et internationales.

Premièrement, le sujet apporte une mise à jour quant à la répartition des pouvoirs et des compétences entre les institutions de l'Union et les États membres

[8] Rapporteur général: Professeur Raymond Luja, Université de Maastricht (NL), conseiller juridique en matière d'aides d'État auprès de Loyens & Loeff N.V., Amsterdam (NL). Rapporteurs institutionnels: Mme Julia Rapp, Mme Ramona Ianus, Services de la Commission européenne.

[9] Rapporteurs généraux: Professeur Christine Kaddous, Université de Genève (CH), professeur invité au Collège d'Europe (BL/ PL) et à l'Université Paris II Panthéon-Assas (FR); Professeur Nuno Piçarra, Professeur à la Faculté de droit de l'Université Nova de Lisbonne, membre du Réseau académique d'études juridiques sur l'immigration et l'asile en Europe (*Odysseus*) et du Conseil d'administration de l'Agence des droits fondamentaux de l'Union européenne. Rapporteurs institutionnels: M. Hubert Légal et M. Álvaro de Elera, Services juridiques du Conseil; M. Freddy Drexler et M. Anders Neergaard, Services juridiques du Parlement européen.

ainsi que leurs rôles respectifs sur la scène internationale. Il permet ainsi un approfondissement d' un des aspects déjà abordé dans le contexte du thème III du XXVIIe Congrès de Budapest En outre, le thème porte sur les accords internationaux actuellement négociés par l'UE dans le cadre de la libéralisation des échanges, l'accès au marché et la protection des investissements, tels que le TTIP et le CETA[10]. Au regard de la jurisprudence récente de la Cour de justice, le rapport institutionnel appréhende les accords mixtes en tant que choix politique pour le législateur de l'Union et, dans ce cadre, soulève la question des conditions de recours à ce type d'accords. Le rapport révèle également la nécessité urgente de renforcer les mécanismes de contrôle démocratique au sein des institutions européennes et des États membres s'agissant des accords internationaux.

Deuxièmement, les immenses défis en matière d'immigration et d'asile auxquels l'Espace de liberté, de sécurité et de justice est confronté, susciteront un débat intense. Il est essentiel de comprendre comment la crise actuelle affecte ou aura un impact sur les réglementations, les accords internationaux, les pratiques et les mécanismes institutionnels existants et futurs qui traitent des questions fondamentales, notamment la protection judiciaire et le respect du droit. Nous sommes fortement convaincus que l'Union européenne est un cadre unique pour relever ces défis dans le respect des droits fondamentaux, de la démocratie et du droit. La préservation de ces valeurs pour les prochaines générations de citoyens européens est l'un des objectifs les plus importants de notre époque.

4. Questions ouvertes

Afin de contextualiser nos réflexions, un panel introductif relatif à *l'Europe à la croisée des chemins* a été ajouté. Dans leurs interventions d'ouverture, les professeurs Catherine Barnard et Michael O'Flaherty discuteront sur les thèmes suivants : '*The future of Europe post Brexitet* ' et '*The fundamental rights as a road sign at the crossroads*'. Ce panel devrait servir de point de départ à un débat approfondi entre les éminents intervenants du panel sur *l'Europe et le Brexit*, l'un des événements les plus traumatisants de l'histoire récente de l'Union européenne.

IV. Remerciements

En qualité de président et membres du Conseil Directeur de l'Association Portugaise pour le Droit Européen (APDE – Associação Portuguesa de Direito Euro-

[10] Au moment de la rédaction du présent recueil, les rapporteurs n'avaient pas eu accès à l'arrêt de la CJUE du 6 mars 2018 dans l'affaire C-284, *Slovak Republic c. Achmea BV*. En réponse à la question préjudicielle, la Cour de justice a estimé que la clause d'arbitrage de l'accord entre les Pays-Bas et la Slovaquie (intra-UE TBI) sur la protection des investissements n'est pas compatible avec le droit de l'UE. La décision soulève de nombreuses questions concernant l'arbitrage des différends entre investisseurs et États au sein de l'Union.

peu), nous tenons à remercier Son Excellence le Président de la République Portugaise et Son Excellence le Premier Ministre du Portugal pour le soutien institutionnel apporté au XXVIIIème Congrès de la FIDE, que l'APDE a organisé à Estoril du 23 au 26 mai 2018.

Nous souhaitons également exprimer notre reconnaissance à tous les rapporteurs, orateurs, présidents de séance, modérateurs et interprètes qui ont contribué aux travaux du Congrès et de la présente publication. La réalisation du XXVIIIème Congrès de la FIDE n'aurait pas été possible sans la généreuse contribution de nos sponsors et supporters.

Nous souhaitons également mettre en exergue l'importance du soutien de la Cour de justice de l'Union européenne et de la Commission européenne pour le succès de ce Congrès.

Enfin, nous souhaitons remercier tout particulièrement les membres du Comité Exécutif du Congrès, Alberto Saavedra, Filipa Pimentel, Joana Schmid Moura, João de Lemos Portugal, Leonor Bettencourt Nunes, Margarida Rosado da Fonseca, Margarida Sameiro, Piedade Castro e Sousa et Teresa Côrte-Real. Sans leur dévouement inconditionnel au Congrès, l'organisation de celui-ci n'aurait pas été possible.

José Luís da Cruz Vilaça, Carlos Botelho Moniz, Nuno Piçarra, Rita Leandro Vasconcelos, João Paulo Teixeira de Matos, Nuno Ruiz, Miguel Gorjão-Henriques

EINFÜHRUNG

I. Der XXVIII. FIDE-Kongress in Estoril

Nicht umsonst ist Estoril, das sich an der Küste des Atlantischen Ozeans und am westlichsten Punkt Kontinentaleuropas befindet, der prächtige Schauplatz des XXVIII. FIDE-Kongresses. Während des Zweiten Weltkriegs, als Lissabon eines der begehrtesten Ziele war für diejenigen, die dem Massaker auf dem europäischen Kontinent entkommen wollten, wurde Estoril zum pulsierenden Zentrum der Geheimdiplomatie und zum bevorzugten Zufluchtsort für gekrönte Häupter und Würdenträger. Heute befindet sich Estoril am äußersten Rand der Europäischen Union und beweist erneut den symbolischen Wert der Region. Es ist nicht nur ein Tor zu Europa und europäischen Werten, die zu einem großen Teil vom europäischen Recht repräsentiert werden, sondern es ist auch eine Plattform, die die Möglichkeit bietet, über lokale Probleme hinauszublicken. Wie in früheren Jahrhunderten, als die portugiesische Küste Vasco da Gama und Cabral als Ausgangspunkt für ihre Expeditionen diente, begeben wir uns jetzt als Anwälte und Akademiker auf eine beschwerliche Reise, die das aktuelle Nachdenken über das europäische Recht anstoßen sollte, um den internen und externen Herausforderungen der Union ins Auge sehen zu können – heute vielleicht mehr als jemals zuvor.

Angesichts des Profils und des Standorts des XXVIII. FIDE-Kongresses ist es nicht verwunderlich, dass die Organisation dieser Veranstaltung der Portugiesischen Vereinigung für Europäisches Recht (APDE) anvertraut wurde, gegründet 1984 mit dem Ziel, zur Verbreitung des europäischen Rechts in Portugal beizutragen. Gleichzeitig stellt die APDE als Mitglied der FIDE die Verbindung der portugiesischen Rechtsgemeinschaft zur laufenden Debatte über die wichtigsten Themen der Europäischen Union sicher.

II. FIDE

Die FIDE (Fédération Internationale pour le Droit Européen / Internationale Vereinigung für Europarecht) hat seit 1961 die europäischen Rechtsverbände der einzelnen Mitgliedstaaten, der Bewerberländer sowie Norwegens und der Schweiz zusammengeführt[1]. In den letzten 50 Jahren ihres Bestehens wurde sie als gemeinsame Dachorganisation von der internationalen Rechtsgemeinschaft allgemein anerkannt, da sie einen bemerkenswerten Einfluss auf die Entwicklung und Gestaltung sowohl des Kontexts als auch der Kultur des Unionsrechts hat. Die alle zwei Jahre stattfindenden FIDE-Kongresse versammeln mehrere hundert Anwälte und Fachleute mit unterschiedlichem Hintergrund. Sie sind das wichtigste Ereignis der Reflexion und des Dialogs über EU-Recht und -Politik, sowohl was die legislativen als auch die politischen Entwicklungen in der Europäischen Union anbelangt, und ihre Anwendung durch die EU und die nationalen Gerichte. Zusammen mit den entsprechenden Publikationen, den Berichten der FIDE, die in reichen und schweren Bänden voller Information und Reflexion veröffentlicht werden, schaffen die Kongresse eine unbezahlbare Schatzkammer des wissenschaftlichen Schreibens und der Debatte; Orientierungspunkte bei der Untersuchung der Kernthemen des europäischen Rechts und der Rechtsprechung des Gerichtshofs der EU, die von Akademikern, Praktikern und Richtern umfassend konsultiert werden[2].

Frühere FIDE-Kongresse, die von zahlreichen europäischen nationalen, kulturellen und akademischen Hauptstädten veranstaltet wurden, decken ein breites Spektrum grundlegender und wirtschaftlicher Themen ab, die von vitaler Bedeutung für die Europäische Union sind[3]. Der letzte Kongress in Budapest im Jahr 2016 richtete besondere Aufmerksamkeit auf die Probleme der europäischen Bankenunion, die private Durchsetzung und den kollektiven Rechtsschutz im europäischen Wettbewerbsrecht sowie auf die Aufteilung der Zuständigkeiten und Regelungsbefugnisse zwischen der Europäischen Union und den Mitgliedstaaten. Alle ausgewählten Themen wurden ausführlich analysiert und diskutiert. Diesmal will der XXVIII. Kongress in Estoril die bisherige Arbeit übertreffen und deutlich weiterentwickeln. Die Anpassungsfähigkeit des thematischen Rahmens der FIDE-Kongresse und -Veröffentlichungen

[1] Das Statut der FIDE ist verfügbar unter https://www.fide-europe.org/xms/files/ABOUT_FIDE/Statutes_of_FIDE_FIDE_V3.pdf (10.4.2018).

[2] Siehe Julia Laffranque, FIDE – Uniting Great Minds of European Law: 50 years of the International Federation of European Law, Juridica International XVIII/2011, pp. 173-181; Alexandre Bernier, Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970, in Contemporary European History, 2012, pp. 399-415.

[3] Weitere Informationen zu früheren und aktuellen FIDE-Kongressen finden Sie unter HYPERLINK "https://www.fide-europe.org/congresses/" https://www.fide-europe.org/Congresses/ (10.4.2018).

an den aktuellen politischen und wirtschaftlichen Kontext macht seine Besonderheit aus.

Neben der unzweifelhaften Relevanz der Themenwahl scheint einer der größten Werte der FIDE ihre gut etablierte, vielfältige und mehrstufige Dimension zu sein. Es ist nicht nur eine Organisationsstruktur. Es ist ein institutionalisierter Verband von Rechtsexperten – Great Minds of European Law[4] mit der Befugnis, seinen normativen und kulturellen Rahmen zu gestalten. Als ein Forschungsinstrument zum Verständnis der Vielfalt der rechtlichen Realität ermöglichen die Kongresse und die Veröffentlichung der Ergebnisse den Experten, ihr erworbenes Wissen zu teilen, auch mit der jüngeren Wissenschaftlergeneration in den PhD-Seminaren. In dieser Hinsicht ist die FIDE der Ort, an dem Fachwissen und Dialog aufeinandertreffen.

Mit einem so wichtigen spiritus movens wie der Entwicklung der europäischen Rechtskultur und -identität trägt die FIDE auch eine gewisse Verantwortung. In Zeiten zahlreicher Herausforderungen für die Europäische Union verpflichtet sie sich, ihre schwierigen Aufgaben so gut wie möglich zu erfüllen. Zusammen mit der vorliegenden Veröffentlichung dient der XXVIII. Kongress in Estoril als herausragendes Beispiel dafür, wie die FIDE ihre edlen Ziele erfüllen kann.

III. Themen

Wie üblich, arbeitete der Generalberichterstatter für jedes der drei Themen der aktuellen zweijährlichen Arbeit der FIDE einen Fragebogen aus. Er übernimmt auch die Verantwortung für die Koordinierung der nationalen Berichte, zusammengestellt von Experten, die von den nationalen FIDE-Verbänden ernannt wurden. Zusammen mit den von den Generalberichterstattern erstellten allgemeinen Berichten und den von Vertretern der EU-Institutionen verfassten institutionellen Berichten bilden alle diese Berichte den Gegenstand der vorliegenden Sammlung.

Die Themen des XXVIII. Kongresses wurden sorgfältig ausgewählt, entsprechend ihrem allgemeinen Interesse, ihrer Aktualität, ihrer Relevanz für den Prozess der europäischen Integration und ihrer praktischen Fähigkeit, die Teilnehmer und ein breiteres Publikum zu gewinnen. „Es wird kaum möglich sein,

[4] Julia Laffranque, aaO, S. 173-181, S. 173-181. Der von Professorin Julia Laffranque geprägte Ausdruck diente als Grundlage für das Motto des XXVI. FIDE-Kongresses („FIDE – Uniting Great Minds of EUropean Law"). Seine modifizierte Version wurde auch von den Autoren der Einführung in die Publikationen des XXVI. FIDE-Kongresses – Professorin Ulla Neergaard, Professorin Catherine Jacqueson, Kommissarin Nina Holst-Christensen, Professor Jens Hartig Danielsen und Professor Grith Skovgaard Ølykke - verwendet, die ihn für eine der Titelzeilen („A Collaboration of Great Minds of EUrepean Law") übernahmen, um das Verhältnis zwischen EU-Recht und europäischem Recht zu betonen.

den Weltfrieden zu erhalten, wenn wir uns nicht auch um neuartige Lösungen bemühen, die den drohenden Gefahren wirklich gerecht werden“[5] – diese Worte von Robert Schuman aus dem Jahr 1950 sind immer noch aktuell. Die derzeitige Notwendigkeit, ein Gleichgewicht zwischen Offenheit und Sicherheit im Bereich des europäischen Rechts und der europäischen Politik herzustellen, ist eine besondere Rechtfertigung für die Auswahl der diesjährigen Themen.

1. Der Binnenmarkt und die digitale Wirtschaft[6]

In der neuen digitalen Ära kann die Wirtschaft der neuen Medien als der wichtigste Motor für Innovation, Wettbewerbsfähigkeit und Wachstum in Europa und der Welt angesehen werden. Internet und E-Commerce, die neue Sharing Economy und Peer-to-Peer-Transaktionen, ganz zu schweigen von Medien und Telekommunikation über die Grenzen hinweg, stehen daher im Mittelpunkt der Diskussion und der legislativen Initiativen auf nationaler und europäischer Ebene. Das Thema der Governance im digitalen Binnenmarkt ist auch zu einem der wichtigsten politischen Schwerpunktbereiche der Kommission für den Zeitraum 2014-2019 geworden, wie die Strategie für einen digitalen Binnenmarkt vom Mai 2015 zeigt[7]. Nach ihren Annahmen umfasst das vorliegende Thema in erster Linie den besseren Zugang von Verbrauchern und Unternehmen zu neuen Märkten, Online-Waren und -Dienstleistungen in ganz Europa. In dieser Hinsicht ist die Notwendigkeit, wesentliche Unterschiede zwischen der Online- und der Offline-Welt aufzuheben und somit Hindernisse für grenzüberschreitende Aktivitäten zu beseitigen, von größter Bedeutung. Zweitens befasst sich die Untersuchung des Themas mit der Entwicklung geeigneter Bedingungen für digitale Netze und Dienste. Ein besonderer Schwerpunkt wurde auf schnelle, sichere und zuverlässige Infrastrukturen und Inhaltedienste sowie auf die maßgeschneiderten Regulierungsbedingungen für Innovation, Investitionen, fairen Wettbewerb und gleiche Wettbewerbsbedingungen gelegt. Das endgültige Ziel bestand darin, das Wachstumspotenzial der digitalen Wirtschaft in Europa zu diskutieren, indem die Attraktivität von Investitionen in IKT-Infrastrukturen, Cloud Computing und Big Data, Forschungsinnovation, Genauigkeit der öffentlichen Dienste und industrielle Effizienz analysiert wurde.

[5] Erklärung von Robert Schuman, 9. Mai 1950.

[6] Generalberichterstatterin: Professorin Peggy Valcke, KU Leuven – CiTiP (Zentrum für IT & IP-Recht) - imec (BE), Gastprofessorin an der Universität Tilburg (NL) und an der Bocconi-Universität Mailand (IT). Institutionelle Berichterstatterin: Professorin Piedade Costa de Oliveira, Mitglied des Juristischen Dienstes der Europäischen Kommission, Gastprofessorin an der Universität São Paulo (Brasilien).

[7] Generalberichterstatter: Professor Raymond Luja, Universität Maastricht (NL), Steuerberater von Loyens & Loeff N.V., Amsterdam (NL). Institutionelle Berichterstatterinnen: Frau Julia Rapp und Frau Ramona Ianus von der Europäischen Kommission.

Neben der Untersuchung des digitalen Binnenmarkts, seiner Infrastruktur und seines elektronischen Handels konzentriert sich das Thema auf die bestehenden und kürzlich geänderten Rechtsinstrumente, die nicht vom notwendigen Schutz der Verbraucher, der personenbezogenen Daten und der Grundrechte – Meinungsfreiheit und Recht auf Privatsphäre – getrennt werden können, Massenspeicherung von Informationen, Vertraulichkeit der Kommunikation und globale Sicherheit. Die gerichtliche Überprüfung und die zunehmende Rechtsprechung zu diesen Fragen stehen im Mittelpunkt der Überlegungen zu diesem Thema.

Wie der allgemeine Bericht zeigt, besteht das Hauptproblem in diesem Bereich in der Gefahr einer Überregulierung in einem stark veränderlichen und unvorhersehbaren Bereich. Als solcher erfordert er gut koordinierte Regulierungsinstrumente, kann jedoch die wachsende Vielfalt der relevanten Aktivitäten nicht ignorieren. Aus institutioneller Sicht erscheint es jedoch wichtig, auf die Tendenz des Unionsgesetzgebers in allen oben genannten Bereichen hinzuweisen, als Harmonisierungsinstrument auf Regelungen zurückzugreifen, die den politischen Willen zur Annahme einheitlicher Regeln innerhalb der Europäischen Union zu veranschaulichen scheinen.

2. Besteuerung, staatliche Beihilfen und Wettbewerbsverzerrungen[8]

Nach der geltenden Rechtsprechung zu Steuerregelungen und staatlichen Beihilfen sind die Probleme der Steuervorbescheide und ihr Einfluss auf den Wettbewerb sowie das Ergebnis der Untersuchungen der Kommission und der laufenden oder künftigen Verfahren des Gerichtshofs von größter Bedeutung für die derzeitige Binnenmarktpolitik. In diesem Zusammenhang umfasst das vorliegende Thema die Beziehung zwischen Begriffen wie Gewinnverlagerung und schädlichem Steuerwettbewerb, Doppelbesteuerung und doppelter Nichtbesteuerung, einschließlich der OECD-Modellinstrumente. Es gibt auch einen Einblick in die territoriale Reichweite solcher Geschäfte und Abhilfemaßnahmen.

Wie der allgemeine Bericht zeigt, weisen sowohl die nationalen als auch die internationalen Steuersysteme nach wie vor Mängel auf, wobei in der Praxis die Steuerharmonisierung durch die Vorschriften über staatliche Beihilfen ersetzt wird. Das zunehmende Bewusstsein für die Rechtsprechung und die Learning-by-doing-Prozesse innerhalb der Kommission scheinen jedoch die Wirksamkeit der staatlichen Beihilferegelung zu verbessern. Angesichts der Tatsache, dass die Zukunft bedingungsloser Steuerausnahmen in der Europäischen Union in

[8] Generalberichterstatter: Professor Raymond Luja, Universität Maastricht (NL), Steuerberater von Loyens & Loeff N.V., Amsterdam (NL). Institutionelle Berichterstatterinnen: Frau Julia Rapp und Frau Ramona Ianus von der Europäischen Kommission.

Frage gestellt wird, sowie des Erfolgs der Rechtsvorschriften zur Bekämpfung der Steuervermeidung wird die Notwendigkeit von Steuervorbescheiden zunehmen. Aus institutioneller Sicht ist die Rolle der Kommission in dieser Hinsicht herausragend, aber sie kann nur auf der Grundlage von Leitlinien des Gerichtshofs der Europäischen Union angemessen umgesetzt werden.

3. Die externe Dimension der EU-Politiken: horizontale Aspekte; Handel und Investitionen; Einwanderung und Asyl[9]

Nicht zuletzt verdienen die externen Aspekte der europäischen Politik besondere Aufmerksamkeit. Die Entwicklung der internationalen Gemeinschaft in Zeiten politischer und militärischer Spannungen, die bereits zu erheblichen menschlichen und sozialen Kosten geführt haben mit dramatischer Auswirkung auf die künftige Politik der Europäischen Union, sollte dringend von angesehenen europäischen und internationalen Persönlichkeiten in Angriff genommen werden.

Vorab wird eine Aktualisierung der Verteilung von Zuständigkeiten und Befugnissen zwischen den EU-Organen und den Mitgliedstaaten und ihrer jeweiligen Rolle im internationalen Bereich gefordert. Dies würde eine eingehende und fokussierte Analyse zu einem Aspekt liefern, der im Rahmen des Themas III des XXVII. Kongresses in Budapest behandelt wurde. Zweitens konzentriert sich das Thema auf die internationalen Abkommen, die derzeit von der Europäischen Union über Handelsliberalisierung, Marktzugang und Investitionsschutz wie TTIP und CETA im Rahmen anderer regionaler oder globaler internationaler Abkommen ausgehandelt werden[10]. Vor dem Hintergrund der jüngsten Rechtsprechung des Gerichtshofs betrachtet der institutionelle Bericht

[9] Generalberichterstatter: Professorin Christine Kaddous, Universität Genf (CH), Gastprofessorin am Europakolleg (BL / PL) und an der Université Paris II Panthéon-Assas (FR); Professor Nuno Piçarra, Professor an der Rechtsfakultät der Universität Nova von Lissabon, Mitglied des Réseau académique d'études juridiques sur l'immigration et l'asile en Europe (*Odysseus*) und des Verwaltungsrates der Agentur der Europäischen Union für Grundrechte. Institutionelle Berichterstatter: Herr Hubert Légal und Herr Álvaro de Elera, Juristischer Dienst des Rates; Herr Freddy Drexler und Herr Anders Neergaard, Juristischer Dienst des Europäischen Parlaments.
Zum Zeitpunkt des Schreibens hatten die Berichterstatter keinen Zugang zu dem Urteil des Gerichtshofs in der Rechtssache C-284/16, *Slowakische Republik gegen Achmea BV*. In seinem Vorabentscheidungsverfahren vom 6. März 2018 kam der Gerichtshof zu dem Schluss, dass die Schiedsklausel im Abkommen zwischen den Niederlanden und der Slowakei (Intra-EU BIT) über den Investitionsschutz nicht mit dem Unionsrecht vereinbar ist. Das Urteil wirft weitere Fragen bezüglich der Schiedsgerichtsbarkeit in der Europäischen Union in der Investor-Staat-Streitbeilegung auf.

[10] Zum Zeitpunkt des Schreibens hatten die Berichterstatter keinen Zugang zu dem Urteil des Gerichtshofs in der Rechtssache C-284/16, *Slowakische Republik gegen Achmea BV*. In seinem Vorabentscheidungsverfahren vom 6. März 2018 kam der Gerichtshof zu dem Schluss, dass die Schiedsklausel im Abkommen zwischen den Niederlanden und der Slowakei (Intra-EU BIT) über den Investitionsschutz

gemischte Vereinbarungen als eine politische Entscheidung des Unionsgesetzgebers und wirft in diesem Zusammenhang die Frage nach den Bedingungen für den Rückgriff auf diese Art von Abkommen auf. In Bezug auf internationale Abkommen zeigt der Bericht auch die dringende Notwendigkeit, die Mechanismen der demokratischen Kontrolle innerhalb der Institutionen der Europäischen Union und der Mitgliedstaaten zu stärken.

Auf der anderen Seite bieten die immensen Herausforderungen der Einwanderung und des Asyls in unserem Raum der Freiheit, der Sicherheit und des Rechts die Gelegenheit zu einer intensiven Debatte. Es ist wichtig zu verstehen, wie sich die derzeitige Krise auf die bestehenden und sich entwickelnden Vorschriften, internationalen Abkommen, Praktiken und institutionellen Mechanismen auswirkt, die sich mit so grundlegenden Fragen wie dem Rechtsschutz und der Rechtsstaatlichkeit befassen. Wir sind der festen Überzeugung, dass die Europäische Union ein einzigartiger Rahmen ist, um all diese Ziele unter Wahrung der Grundrechte, der Demokratie und der Rechtsstaatlichkeit zu erreichen. Die Wahrung dieser Werte für die nächsten Generationen europäischer Bürger ist eines der wichtigsten Ziele unserer Zeit.

4. Weitere Debatten

Um einen breiteren Einblick in die Debatte zu geben, wurde ein einleitendes Podium über Europa am Scheideweg geplant. In ihren Eröffnungsvorträgen werden Professorin Catherine Barnard und Professor Michael O'Flaherty jeweils die „Zukunft Europas nach dem Brexit" und die „Grundrechte als Wegweiser am Scheideweg" diskutieren. Dieses Podium sollte einen hervorragenden Ausgangspunkt für die Debatte bieten, die von den prominenten Rednern des Podiums zu Europa und dem Brexit über eines der traumatischsten Ereignisse in der aktuellen Geschichte der Europäischen Union geführt wird.

IV. Worte der Dankbarkeit

Als Präsident und Vorstandsmitglieder der Portugiesische Gesellschaft für Europarecht (APDE – Associação Portuguesa de Direito Europeu) möchten wir Seiner Exzellenz, dem Präsidenten der Portugiesischen Republik, und Seiner Exzellenz, dem Premierminister Portugals, für die institutionelle Unterstützung des XXVIII. FIDE Kongresses danken, der vom 23. bis 26. Mai 2018 in Estoril von der APDE organisiert wurde.

Wir möchten auch allen Berichterstattern, Rednern, Vorsitzenden, Moderatoren und Dolmetschern danken, die zur Arbeit des Kongresses und dieser Veröffentlichung beigetragen haben.

nicht mit dem Unionsrecht vereinbar ist. Das Urteil wirft weitere Fragen bezüglich der Schiedsgerichtsbarkeit in der Europäischen Union in der Investor-Staat-Streitbeilegung auf.

Ohne den großzügigen Beitrag unserer Sponsoren und Unterstützer wäre die Organisation des XXVIII. FIDE Kongresses nicht möglich gewesen.

Die Unterstützung des Gerichtshofs der Europäischen Union und der Europäischen Kommission war ebenfalls von größter Bedeutung für den Erfolg des Kongresses.

Nicht zuletzt möchten wir insbesondere den Mitgliedern des Exekutivkomitees des Kongresses danken, Alberto Saavedra, Filipa Pimentel, Joana Schmid Moura, João de Lemos Portugal, Leonor Bettencourt Nunes, Margarida Rosado da Fonseca, Margarida Sameiro, Piedade Castro e Sousa und Teresa Côrte-Real. Ohne ihre bedingungslose Hingabe an den Kongress wäre die Organisation nicht möglich gewesen.

José Luís da Cruz Vilaça, Carlos Botelho Moniz, Nuno Piçarra, Rita Leandro Vasconcelos, João Paulo Teixeira de Matos, Nuno Ruiz, Miguel Gorjão-Henriques

QUESTIONNAIRE



QUESTIONNAIRE

Christine Kaddous*
Nuno Piçarra**

Introduction

The following questions relate to recent developments and new challenges in the European Union's external relations law. They cover topics that are important not only for the European Union and its institutions, but also for the Member States. They are grouped into five chapters: 1. Division of competences between the Union and its Member States, 2. Negotiation and conclusion of international agreements (questions relating to Article 218 TFEU), 3. Legal effects of international agreements, 4. Trade and protection of investments and 5. Area of freedom, security and justice. The breakdown into chapters enables to organize the discussion, but it does not prevent overlapping in the topics.

The questionnaire focuses on the effects of recent developments in European Union law on the Member States and on national law. It aims at identifying the problems that have been raised at national level and the difficulties that may have arisen, related to the current challenges in the field of external relations.

The national reports will provide a better understanding of how the law of external relations is applied in the different legal systems of the Member States. To this end, the rapporteurs will have to approach the national administrations and the relevant officials with a view to collecting the information needed to

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answer the questions. They will also be required to examine the national legislation and case law concerning the law of external relations. They may also include national official positions in the reports, comment them and discuss them. We are aware that it will not always be easy to identify the problems raised at the national level. The rapporteurs are also strongly encouraged to present their own opinion as well as that of the national doctrine on the subjects covered by the questionnaire.

We hope that the national reports, thanks to their rich content, will enable us to present a comparative perspective on the development of the law of external relations in the Member States of the Union.

Institutional rapporteurs are also invited to react/interact on the questions asked.

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

In accordance with the ERTA judgment, the European Union has exclusive competence to conclude an international agreement where that agreement affects or is likely to affect internal rules of the Union.

The European Union's legislation is developing in many areas. In what areas has the AETR effect been perceived recently? What is the position of the Member States in relation to this effect? What recent examples can be mentioned? Have there been any problems raised at the national level? If yes, of what nature: political, legal or other problem?

Question 2

With regard to exclusive competences for the conclusion of an international agreement, how is Article 3(2) TFEU perceived? What scope shall be given to this provision of the TFEU? What interpretation can be suggested of each of the cases referred to in this primary law provision? What if the third option is not exercised internally? What is the view of the Member States on these issues?

Question 3

What is the scope of Article 216(1) TFEU? What is the understanding of the Member States regarding this provision, which provides for general competences of the Union to conclude international agreements "*where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope*"?

Question 4
Do you consider that there is a link between Article 216 TFEU and Article 3(2) TFEU? If yes, which one? Please elaborate on this issue.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5
What is the experience of the Member States on the interaction between the negotiator/negotiating team and the special committee of Article 218(4) TFEU? What is the position of the Member States? What is the perception of the Member States regarding the position of the institutions of the Union?

Question 6
With regard to the provisional application of international agreements, what is the perspective of the Member States on how to determine which provisions are to be applied provisionally? The TFEU provides for a proposal by the negotiator and a decision by the Council of the European Union. Should the participation of the European Parliament be considered, even if the TFEU does not provide for it? If yes, in what form?

Question 7
What about the provisional application in the event of non-ratification by a Member State of a mixed agreement? Should this application be terminated? If so, should an agreement be renegotiated which the European Union would conclude alone with the third State?

Question 8
As regards the procedure for approval by the European Parliament, what interpretation should be given to Article 218(6)(a) (iii) *agreements establishing a specific institutional framework by organising cooperation procedures*, and (iv) *agreements with important budgetary implications for the European Union*?

Question 9
The cases of suspension of the application of international agreements shall be decided by the Council of the Union on a proposal from the European Commission or the High Representative. What is the general assessment made by the Member States of the application of this provision of the TFEU? Are there any specific remarks to be made in relation to the recent suspension cases?

Question 10
The TFEU provides for the procedure to be followed for establishing the positions to be adopted on behalf of the European Union in a body set up by an international agreement. Have there been any examples of decisions challenged and/or discussed at national level that have not been challenged before the Court of Justice?

Question 11
Pursuant to Article 218(11) TFEU, the European Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion procedure regarding international agreements. How do the Member States perceive this obligation? What is the role of national and/or regional parliaments?

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12
Is there any national case law on the application and/or interpretation of international agreements concluded solely by the European Union or of mixed agreements, which were not source of references for a preliminary ruling? Is there any national case law concerning the challenge of international agreements concluded solely by the European Union or of mixed agreements, without there being any references for a preliminary ruling on the interpretation of validity? If so, give a brief summary of those cases.

Question 13
What is the Member States' assessment of the recent case law of the Court of Justice on the direct effect of international agreements? Have there been specific discussions at national level in relation to this case law?

Question 14
Are there currently actions for failure to fulfil obligations brought by the European Commission against the Member States for failure to comply with the international commitments that are binding on the European Union? If so, give a brief summary of those actions.

Question 15
What control measures are taken by the Member States in view of ensuring compliance with the international agreements that are binding on the European Union, apart from the role of the European Commission as guardian of Union law?

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16
What should be the scope of the concept of common commercial policy since the entry into force of the Treaty of Lisbon? What are the Member States' views on foreign direct investments? Does the concept also include portfolio investments? What about the agreements in the field of transport? Is the entire TRIPs agreement covered by the concept of common commercial policy?

Question 17
How do Member States see the relationship between bilateral investment agreements and the agreements concluded by the European Union in this area?

Question 18
What is the position of the Member States on the dispute settlement mechanism regarding investment protection in the new generation of free trade agreements envisaged with the Union's partners (CETA, TTIP, etc.)?

Question 19
What is the position of the Member States on the liability of the Union and of the Member States resulting from a breach of the said agreements?

Question 20
In accordance with the last sentence of Article 207(1), the common commercial policy shall be carried out within the framework of the principles and objectives of the external action of the European Union. What is the relationship of this provision with Article 21 TEU? What are the views of the Member States on this matter?

Question 21
What is the perspective of the Member States on the procedure for negotiating and concluding international agreements regarding common commercial policy? Are there any particular aspects of this procedure that they would like to comment on specifically? Do the negotiation and the conclusion of the agreements referred to in Article 207(4)(2) and (3) TFEU, which require an unanimous decision within the Council, call for special remarks and observations from the Member States?

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

While the Union, in accordance with Article 3(1)(e) TFEU, has exclusive competence in the field of the common commercial policy, in the area of freedom, security and justice it has a shared competence with the Member States pursuant to Article 4(2)(j). As regards, in particular, the sub-area covered by this chapter (border controls, including the common policy on short-term visas, asylum and immigration), the "AETR effect" (see Chapter 1, Question 1) is perceived primarily in what concerns international agreements on exemption from the short-term visa requirement. Indeed, the Union has acquired exclusive competence to conclude such agreements as a result of the total harmonization, effected by Regulation No 539/2001, of the list of third countries whose nationals are subject to the visa requirement when crossing the external borders of the Member States and the list of those whose nationals are exempt from that requirement.

On the other hand, in accordance with the Protocol (No 23) on the external relations of the Member States with regard to the crossing of external borders, Article 77(2)(b) TFEU (granting the Union competence to define the checks applicable to those borders) does not prejudice the competence of the Member States "to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements". What meaning and what scope do you give to this Protocol in the light of, notably, Article 3(2) TFEU (see Chapter 1, Question 2)? Has your Member State entered into agreements on this matter since the entry into force of the Protocol, or does it maintain in force agreements of this type concluded previously?

Question 23

Under the combined provisions of Articles 33(2)(c) and 38 of Directive 2013/32/EU of 26.6.2013 on common procedures for granting and withdrawing international protection, a Member State may apply the safe third country concept in order to declare an application for international protection submitted by a third-country national from that country inadmissible and to return the applicant to the territory of that third country – even if the Member State at stake admitted that it was responsible for examining that application pursuant to Regulation No 604/2013 of 26.6.2013 (see judgment of the Court of Justice of 17.2.2016, *Mirza*, C-695/15, paras 42 and 46). At this stage of development of the Common European Asylum System (Article 78(2) TFEU), it is for the Member States to draw up the list of safe third countries, subject to the conditions provided for in Article 38.

Is there national case law on the interpretation and application of the safe third country concept? Does such a case law extend to the delimitation of this concept in relation to the concept of European safe third country ("super-safe third country") provided for in Article 39 of Directive 2013/32/EU? What is the approach of the national legal literature in this regard? How do you assess under EU law the link actually established by the Member States between, on the one hand, the policies and practices relating to the concept of a safe third country and, on the other hand, the extraterritorial control of immigration?

Question 24

According to the conclusions of the European Council of 26/27.6.2014 defining the strategic guidelines for legislative and operational planning within the area of freedom, security and justice, "[a] sustainable solution [to irregular migration] can only be found by intensifying cooperation with countries of origin and transit, including through assistance to strengthen their migration and border management capacity. Migration policies must become a much stronger integral part of the Union's external and development policies, applying the «more for more» principle and building on the Global Approach to Migration and Mobility" (point I.8.), established by the Communication from the Commission of 18.11.2011, COM(2011) 743 final [see also the communication of 21.2.2014, COM(2014) 96 final]. However, considering that "a solution to the irregular and uncontrolled movement of people [has become] a priority for the Union as a whole", the Commission proposed a "new results-oriented concept of cooperation", namely a new Partnership Framework with third countries in the context of the European Agenda for Migration [Communications of 7.6.2016, COM(2016) 385 final and of 18.10.2016, COM(2016) 700 final). Finally, in its conclusions of 20/21.10.2016, the European Council stressed that, with regard to the "implementation of a Partnership Framework of cooperation with individual countries of origin or transit, [the] initial focus [is] on Africa" (point 4).

What is your view on the practical impact of the Global Approach to Migration and Mobility? Do you consider that the new Partnership Framework with third countries displaces and replaces the Global Approach? If so, to what extent? Does your Member State maintain special relations with third countries "reflecting political, historic and cultural ties fostered through decades of contacts, [which] should also be exploited to the full for the benefit of the EU" and/or "the most developed bilateral relationships with a particular partner country" so as to "be fully involved in the EU's discussions with it" [see COM(2016) 385 final, p. 9] ? Has your Member State already concluded bilateral or multilateral pacts with African countries which could serve as an example for the launch of the pacts between the EU and the priority African countries?

Question 25

It is generally accepted that, notwithstanding the competence of the Union since the entry into force of the Treaty of Amsterdam to conclude agreements with third countries for the readmission, in the countries of origin or provenance, of third-country national who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States [Article 79(3) TFEU], the latter maintain their competence to conclude such agreements with third countries, either on bilateral or a multilateral level. Moreover, according to Regulation 2016/1624 of 14.9.2016 on the European Border and Coast Guard, "[t]he possible existence of an arrangement between a Member State and a third country does not absolve the Agency or the Member States from their obligations under Union or international law, in particular as regards compliance with the principle of *non-refoulement*" (recital 36).

Do you consider that the practice of concluding readmission agreements with third countries by the Member States is correct under, notably, Article 79(3) or Article 3(2) TFEU? If so, how should, on the one hand, readmission agreements concluded between the EU and a third country and, on the other hand readmission agreements concluded between a Member State and the same third country relate? Has your Member State concluded any readmission agreements after the entry into force of the Treaty of Amsterdam? Is it bound by readmission agreements containing "problematic clauses" such as the one providing for the repatriation of irregular migrants through simplified procedures, which was found to be contrary to the ECHR by the Strasbourg Court (see judgment of 1.9.2015, *Khlaifia and Others v. Italy*, application no. 16483/12, para 45).

QUESTIONNAIRE

Christine Kaddous*
Nuno Piçarra**

Introduction

Les questions ci-après ont trait aux récents développements et nouveaux défis dans le droit des relations extérieures de l'Union européenne. Elles portent sur des thèmes qui sont importants non seulement pour l'Union européenne et ses institutions, mais aussi pour les Etats membres. Elles sont regroupées en cinq chapitres : 1. Répartition des compétences entre l'Union et ses Etats membres 2. Négociation et conclusion des accords internationaux (questions en lien avec l'article 218 du traité FUE) 3. Effets juridiques des accords internationaux 4. Commerce et protection des investissements et 5. Espace de liberté, de sécurité et de justice. La répartition en chapitres permet d'organiser la discussion, mais elle ne permet pas d'éviter des recoupements dans les sujets.

Le questionnaire met l'accent sur les effets des développements récents du droit de l'Union européenne sur les Etats membres et sur le droit national. Il vise à identifier les problèmes qui ont été soulevés au niveau national ainsi que les difficultés qui ont pu surgir, liées aux défis actuels dans le domaine des relations extérieures.

Les rapports nationaux permettront de mieux comprendre comment le droit des relations extérieures est appliqué dans les différents ordres juridiques des Etats membres. Pour ce faire, les rapporteurs seront amenés à approcher les

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administrations nationales et les fonctionnaires compétents en vue de collecter les informations utiles pour répondre aux questions. Ils seront aussi amenés à examiner la législation et la jurisprudence nationale en lien avec le droit des relations extérieures. Ils pourront aussi intégrer dans les rapports les positions officielles nationales, les commenter et les discuter. Nous sommes conscients qu'il ne sera pas toujours facile d'identifier les problèmes soulevés au niveau national. Les rapporteurs sont aussi fortement encouragés à présenter leur propre opinion ainsi que celle de la doctrine nationale sur les thèmes abordés dans le questionnaire.

Nous espérons que les rapports nationaux, par la richesse de leur contenu, nous permettront de présenter une perspective comparative sur le développement du droit des relations extérieures dans les Etats membres de l'Union et en droit national.

Les rapporteurs institutionnels sont aussi invités à réagir /interagir sur les questions posées.

CHAPITRE 1: RÉPARTITION DES COMPÉTENCES ENTRE L'UNION EUROPÉENNE ET LES ETATS MEMBRES

Question 1

Conformément à l'arrêt AETR, l'Union européenne a une compétence exclusive de conclure un accord international lorsque ledit accord affecte ou est susceptible d'affecter des règles internes de l'Union.

La législation de l'Union européenne se développe dans de nombreux domaines. Dans quels domaines, l'effet AETR a-t-il été perçu récemment ? Quelle est la position des Etats membres par rapport à cet effet ? Quels exemples récents peuvent être mentionnés ? Y a-t-il eu des problèmes soulevés au niveau national ? Si oui, de quelle nature : problème politique, juridique ou autre (s) ?

Question 2

S'agissant des compétences exclusives en vue de la conclusion d'un accord international, comment est perçu l'article 3, paragraphe 2, du traité FUE ? Quelle portée donner à cette disposition du traité FUE ? Quelle interprétation peut être suggérée de chacun des cas visés dans cette disposition de droit primaire ? Quid si la troisième option n'est pas exercée sur le plan interne ? Quelle est la vue des Etats membres sur ces questions ?

Question 3

Quelle est la portée de l'article 216, paragraphe 1, du traité FUE ? Quelle lecture les Etats membres font-ils de cette disposition, qui prévoit des compétences générales de l'Union de conclure des accords internationaux «*lorsque les traités constitutifs*

le prévoient ou lorsque la conclusion d'un accord, soit est nécessaire pour réaliser l'un des objectifs visés par les traités, soit est prévue dans un acte juridique contraignant de l'Union européenne, soit encore est susceptible d'affecter des règles communes ou d'en altérer la portée» ?

Question 4
Considérez-vous qu'il y a un lien entre l'article 216 du traité FUE et l'article 3, paragraphe 2, du traité FUE ? Si oui, lequel ? Veuillez élaborer sur cette question.

CHAPITRE 2: QUESTIONS EN RELATION AVEC LA NÉGOCIATION ET LA CONCLUSION DES ACCORDS INTERNATIONAUX (ARTICLE 218 DU TRAITÉ FUE)

Question 5
Quelle est l'expérience des Etats membres sur l'interaction entre le négociateur /équipe de négociation et le comité spécial de l'article 218, paragraphe 4, du traité FUE ? Quelle est la position des Etats membres ? Quelle est la perception des Etats membres de la position des institutions de l'Union ?

Question 6
S'agissant de l'application provisoire des accords internationaux, quelle est la perspective des Etats membres sur la manière de déterminer les dispositions qui feront l'objet d'une application provisoire ? Le traité FUE prévoit une proposition par le négociateur, et une décision par le Conseil de l'Union européenne. Faudrait-il envisager la participation du Parlement européen, même si le traité FUE ne le prévoit pas ? Si oui, sous quelle forme ?

Question 7
Quid de l'application provisoire en cas de non-ratification par un Etat membre d'un accord mixte ? Cette application doit-elle prendre fin ? Si oui, convient-il de renégocier un accord que l'Union européenne conclurait seule avec l'Etat tiers ?

Question 8
S'agissant de la procédure d'approbation par le Parlement européen, quelle interprétation donner à l'article 218, paragraphe 6, lettre a), iii) accords créant un cadre institutionnel spécifique en organisant des procédures de coopération, et iv) accords ayant des implications budgétaires notables pour l'Union européenne ?

Question 9
Les cas de suspension de l'application des accords internationaux sont décidés par le Conseil de l'Union, sur proposition de la Commission européenne ou du

Haut représentant. Quelle est l'appréciation générale faite par les Etats membres de l'application de cette disposition du traité FUE ? Y a-t-il des remarques particulières à formuler par rapport aux cas de suspension récents ?

Question 10
Le traité FUE prévoit la procédure à suivre pour établir les positions à prendre au nom de l'Union européenne dans une instance créée par un accord international. Y at-il eu des exemples de décisions contestées et/ou discutées au niveau national qui n'ont pas été contestées devant la Cour de justice ?

Question 11
En vertu de l'article 218, paragraphe 11, du traité FUE, le Parlement européen est immédiatement et pleinement informé à toutes les étapes de la procédure de négociation et de conclusion des accords internationaux. Comment les Etats membres perçoivent-ils cette obligation ? Quid du rôle des parlements nationaux et/ou régionaux ?

CHAPITRE 3: EFFETS JURIDIQUES DES ACCORDS INTERNATIONAUX

Question 12
Y a-t-il une jurisprudence nationale relative à l'application et/ou à l'interprétation d'accords internationaux conclus uniquement par l'Union européenne ou d'accords mixtes qui n'ont pas été à l'origine de renvois préjudiciels ? Y a-t-il une jurisprudence nationale relative à la contestation d'accords internationaux conclus uniquement par l'Union européenne ou d'accords mixtes, sans qu'il y ait eu de renvois préjudiciels en interprétation de validité ? Dans l'affirmative, donner un bref résumé de ces affaires.

Question 13
Quelle appréciation les Etats membres font-ils de la jurisprudence récente de la Cour de justice relative à l'effet direct d'accords internationaux ? Y a-t-il eu des discussions particulières au niveau national en lien avec cette jurisprudence ?

Question 14
Y a-t-il actuellement des actions en manquement introduites par la Commission européenne contre les Etats membres pour non-respect des engagements internationaux qui lient l'Union européenne ? Si oui, donner un bref résumé de ces actions.

Question 15
Quelles mesures de contrôle sont prises par les Etats membres en vue de veiller au respect des accords internationaux qui lient l'Union européenne, en dehors du rôle de la Commission européenne en tant que gardienne du droit de l'Union ?

CHAPITRE 4: COMMERCE ET PROTECTION DES INVESTISSEMENTS

Question 16
Quelle devrait être la portée de la notion de politique commerciale commune depuis l'entrée en vigueur du traité de Lisbonne ? Quelles sont les vues des Etats membres relativement aux investissements étrangers directs ? La notion comprend-t-elle aussi les investissements portfolio ? *Quid* des accords dans le domaine des transports ? Est-ce que l'ensemble de l'accord TRIPs entre dans la notion de politique commerciale commune ?

Question 17
Comment les Etats membres voient-ils la relation entre les accords bilatéraux d'investissement et les accords conclus par l'Union européenne en la matière ?

Question 18
Quelle est la position des Etats membres sur le mécanisme de règlement des différends en matière de protection des investissements dans la nouvelle génération d'accords de libre-échange envisagés avec les partenaires de l'Union (CETA, TTIP, etc.) ?

Question 19
Quelle est la position des Etats membres au sujet de la responsabilité de l'Union et des Etats membres résultant d'une violation desdits accords ?

Question 20
Conformément à l'article 207, paragraphe 1, dernière phrase, la politique commerciale commune est menée dans le cadre des principes et objectifs de l'action extérieure de l'Union européenne. Quelle est la relation de cette disposition avec l'article 21 du traité UE ? Quelles sont les vues des Etats membres sur ce sujet ?

Question 21
Quelle est la perspective des Etats membres sur la procédure de négociation et de conclusion des accords internationaux en matière de politique commerciale commune ? Y a-t-il des aspects particuliers de cette procédure qu'ils

souhaiteraient commenter de manière spécifique ? La négociation et la conclusion des accords mentionnés à l'article 207, paragraphe 4, alinéas 2 et 3, du traité FUE, lesquels nécessitent une décision à l'unanimité au sein du Conseil, appellent-elles des remarques et observations spéciales de la part des Etats membres ?

CHAPITRE 5: ESPACE DE LIBERTÉ, DE SÉCURITÉ ET DE JUSTICE (POLITIQUES RELATIVES AUX CONTRÔLES AUX FRONTIÈRES, À L'ASILE ET À L'IMMIGRATION)

Question 22

Alors que, conformément à l'article 3, paragraphe 1, sous e), du traité FUE, l'Union dispose d'une compétence exclusive dans le domaine de la politique commerciale commune, dans le domaine de l'espace de liberté, de sécurité et de justice, elle dispose d'une compétence partagée avec les États membres, en vertu de l'article 4, paragraphe 2, sous j). Pour ce qui est, en particulier, du sous-domaine qui fait l'objet de ce chapitre (contrôles aux frontières, y compris la politique commune de visas de courte durée, asile et immigration), l'«effet AETR» (v. chapitre 1, question 1) est perçu avant tout en ce qui concerne les accords internationaux portant sur l'exemption de l'obligation de visa de courte durée. En effet, l'Union a acquis une compétence exclusive pour conclure ce type d'accords en conséquence de l'harmonisation totale, opérée par le Règlement nº 539/2001, de la liste des pays tiers dont les ressortissants sont soumis à l'obligation de visa pour franchir les frontières extérieures des États membres et la liste de ceux dont les ressortissants sont exemptés de cette obligation.

En revanche, conformément au Protocole (nº 23) sur les relations extérieures des États membres en ce qui concerne le franchissement des frontières extérieures, l'article 77, paragraphe 2, sous b), du traité FUE (attribuant à l'Union une compétence pour définir les contrôles applicables à ces frontières) ne préjuge pas la compétence des États membres «de négocier ou de conclure des accords avec des pays tiers, pour autant que lesdits accords respectent le droit de l'Union et les autres accords internationaux pertinents». Quel sens et quelle portée accordez-vous à ce protocole au regard notamment de l'article 3, paragraphe 2 (v. chapitre 1, question 2) ? Est-ce que votre État membre a conclu des accords en la matière depuis l'entrée en vigueur du protocole, ou maintient-il en vigueur des accords de ce type conclus précédemment ?

Question 23

En vertu des dispositions combinées des articles 33, paragraphe 2, sous c), et 38 de la directive 2013/32/UE du 26.6.2013, relative à des procédures communes pour l'octroi et le retrait de la protection internationale, un État membre peut

appliquer le concept de pays tiers sûr pour déclarer irrecevable une demande de protection internationale présentée par un ressortissant d'un pays tiers en provenance de ce pays et renvoyer le demandeur sur le territoire de celui-ci – même si l'État membre concerné a admis être responsable de l'examen de cette demande en application du règlement nº 604/2013 du 26.6.2013 (v. arrêt de la Cour de justice du 17.3.2016, *Mirza*, C-695/15, points 42 et 46). A ce stade d'évolution du système européen commun d'asile (article 78, paragraphe 2, du traité FUE), c'est aux États membres qu'il revient d'établir la liste des pays tiers sûrs, dans le respect des conditions prévues à l'article 38.

Y a-t-il une jurisprudence nationale relative à l'interprétation et à l'application du concept de pays tiers sûr ? Une telle jurisprudence s'étend à la délimitation de ce concept par rapport au concept de pays tiers européen sûr («pays tiers super-sûr») prévu à l'article 39 de la directive 2013/32/UE ? Quelle est l'approche de la littérature juridique nationale à cet égard ? Comment appréciez-vous au regard du droit de l'Union le lien effectivement établi par les États membres entre, d'une part, les politiques et les pratiques relatives au concept de pays tiers sûr et, d'autre part, le contrôle extraterritorial de l'immigration ?

Question 24

Selon les conclusions du Conseil européen du 26/27.6.2014 définissant les orientations stratégiques de la programmation législative et opérationnelle dans l'espace de liberté, de sécurité et de justice, «[i]l ne sera possible de parvenir à une solution durable [pour la migration irrégulière] qu'en intensifiant la coopération avec les pays d'origine et de transit, y compris en les aidant à renforcer leurs capacités en matière de migration et de gestion des frontières. Il faudra que les politiques migratoires deviennent une composante bien plus importante des politiques extérieures et de développement de l'Union par l'application du principe consistant à «donner plus pour recevoir plus» et la prise en compte de l'Approche globale de la question des migrations et de la mobilité» (point I.8.), établie par la communication de la Commission du 18.11.2011, COM(2011) 743 final [v. aussi la communication du 21.2.2014, COM(2014) 96 final]. Toutefois, considérant que «la recherche d'une solution aux déplacements irréguliers et non maîtrisés de populations est [devenue] une priorité pour l'Union dans son ensemble», la Commission a proposé un «nouveau concept de coopération axé sur les résultats», à savoir un nouveau cadre de partenariat avec les pays tiers dans le cadre de l'Agenda européen en matière de migration [Communications du 7.6.2016, COM(2016) 385 final et du 18.10.2016, COM(2016) 700 final]. Enfin, le Conseil européen dans ses conclusions du 20/21.10.2016 a souligné que, s'agissant de la «mise en œuvre d'un cadre de partenariat pour la coopération avec différents pays d'origine ou de transit, l'accent [est] mis dans un premier temps sur l'Afrique» (point 4).

Quelle est votre vue sur l'impact pratique de l'Approche globale de la question des migrations et de la mobilité ? Estimez-vous que le nouveau cadre de partenariat avec les pays tiers écarte et remplace cette approche globale ? Si oui, dans quelle mesure ? Est-ce que votre État membre entretient avec des pays tiers des relations spéciales «qui sont le reflet de liens politiques, historiques et culturels tissés au fil de décennies de contact, [qui] devraient aussi être pleinement exploités au profit de l'UE» et/ou a «les relations bilatérales les plus développées avec un pays partenaire donné» de façon à «être pleinement associé aux discussions de l'UE avec ce pays» [v. COM(2016) 385 final, p. 9] ? Est-ce que votre État membre a déjà conclu des pactes bilatéraux ou multilatéraux avec des pays africains qui pourraient servir d'exemple pour le lancement des pactes entre l'UE et les pays africains prioritaires?

Question 25

Il est généralement admis que, nonobstant la compétence dont l'Union dispose depuis l'entrée en vigueur du traité d'Amsterdam pour conclure avec des pays tiers des accords visant la réadmission, dans les pays d'origine ou de provenance, de ressortissants de pays tiers qui ne remplissent pas ou ne remplissent plus les conditions d'entrée, de présence ou de séjour sur le territoire de l'un des États membres (article 79, paragraphe 3, traité FUE), ceux-ci maintiennent leur compétence pour conclure avec des pays tiers ce type d'accords, soit à niveau bilatéral, soit à niveau multilatéral. Enfin, selon le récent règlement 2016/1624 du 14.9.2016, relatif au corps européen de garde-frontières et de garde-côtes, «[l]'existence éventuelle d'un accord entre un État membre et un pays tiers n'exempte pas l'Agence ou les États membres des obligations que leur impose le droit de l'Union ou le droit international, notamment en ce qui concerne le respect du principe du non-refoulement» (considérant 36).

Estimez-vous que la pratique de conclusion d'accords de réadmission avec des pays tiers par les États membres est correcte au regard notamment de l'article 79, paragraphe 3, ou de l'article 3, paragraphe 2, du traité FUE ? Si oui, comment doivent s'articuler, d'une part, les accords de réadmission conclus entre l'UE et un pays tiers et, d'autre part, les accords de réadmission conclus entre un État membre et le même pays tiers ? Est-ce que votre État membre a conclu des accords de réadmission après l'entrée en vigueur du traité d'Amsterdam ? Est-ce qu'il est lié par des accords de réadmission contenant des «clauses problématiques» comme celle prévoyant le rapatriement des migrants irréguliers par le biais de procédures simplifiées, qui a été jugée contraire à la CEDH par la Cour de Strasbourg (v. arrêt du 1.9.2015, *Khlaifia et autres c. Italie*, requête nº 16483/12, § 45) ?

FRAGEBOGEN

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Einführung

Die nachfolgenden Fragen beziehen sich auf die neuesten Entwicklungen und Herausforderungen auf dem Gebiet des Rechts der Aussenbeziehungen der Europäischen Union. Es geht um Themen, die nicht nur für die Europäische Union und ihre Organe wichtig sind, sondern auch für die Mitgliedstaaten selbst. Die Fragen sind in fünf Kapitel unterteilt: 1. Die Verteilung der Zuständigkeiten zwischen der Union und den Mitgliedstaaten. 2. Verhandlungen und Abschlüsse der internationalen Übereinkünfte (in Bezug auf Artikel 218 des FUE Vertrags). 3. Rechtswirkungen der internationalen Übereinkünfte. 4. Handel und Investitionsschutz und 5. Raum der Freiheit, Sicherheit und des Rechts. Die Verteilung in Kapitel erlaubt eine Organisation der Diskussion, verhindert aber nicht ein etwaiges Überlappen der Inhalte.

Der Fragebogen bezieht sich vor Allem auf die Auswirkungen der jüngsten Entwicklungen des Rechts der Europäischen Union auf die Mitgliedstaaten und das nationale Recht. Ziel ist es, die auf nationaler Ebene entstandenen Probleme sowie die mit den aktuellen Herausforderungen auf dem Gebiet der Aussenbeziehungen in Zusammenhang stehenden Schwierigkeiten zu identifizieren.

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Die nationalen Berichte werden es uns erlauben die Anwendung des Rechts der Aussenbeziehungen in den verschiedenen nationalen Rechtsordnungen besser zu verstehen. Um dieses Ziel zu erreichen werden die nationalen Berichterstatter aufgefordert, mit den jeweiligen nationalen Behörden und zuständigen Beamten in Kontakt zu treten, um so viel nützliche Informationen wie möglich zu sammeln. Sie werden auch dazu aufgefordert, im Gebiet des Rechts der Aussenbeziehungen ihre jeweiligen nationalen Rechtsordnungen und Rechtsprechung zu untersuchen. Desweiteren könnten sie die nationalen offiziellen Stellungsnahmen in ihre Berichte einbeziehen und sie kommentieren. Wir sind uns darüber im Klaren dass es nicht immer einfach sein wird, die auf nationalem Niveau aufgekommenen Probleme zu identifizieren. Natürlich sind die nationalen Berichterstatter auch aufgerufen, ihre eigene Meinung sowie die der nationalen Doktrin bzgl. der angegebenen Themen darzulegen.

Wir hoffen dass die nationalen Berichte dank der Reichhaltigkeit ihres Inhalts es uns erlauben werden, eine vergleichende Perspektive über die Entwicklung des Rechts der Aussenbeziehungen in den Mitgliedstaaten. Auch die institutionellen Berichterstatter sind eingeladen auf die gestellten Fragen zu reagieren.

KAPITEL 1: VERTEILUNG DER ZUSTÄNDIGKEITEN ZWISCHEN DER EUROPÄISCHEN UNION UND DEN MITGLIEDSTAATEN

Frage 1

Gemäß dem „Urteil AETR" besitzt die Europäische Union die ausschließliche Zuständigkeit zum Abschluss einer internationalen Übereinkunft wenn die in Frage stehende Übereinkunft die internen Regeln der Union beeinträchtigen oder beeinträchtigen können. Die Gesetzgebung der Union entwickelt sich in vielen Gebieten. In welchen Gebieten hat sich der „Effekt AETR" in jüngster Zeit gezeigt? Welche aktuellen Beispiele können aufgezählt werden? Gab es auf nationaler Ebene Probleme? Wenn ja, welcher Art: politische, juristische oder andere?

Frage 2

Wie wird Artikel 3, Paragraph 2 des Vertrags FUE im Bereich der ausschließlichen Zuständigkeiten zum Abschluss einer internationalen Übereinkunft eingeschätzt? Welche Bedeutung wird dieser Bestimmung des Vertrag FUE zugesprochen? Welche Interpretation kann jedem einzelnen der in dieser Bestimmung des primären Rechts vorgesehenen Fälle zugesprochen werden? Was, wenn die dritte Möglichkeit nicht auf interner Ebene ausgeübt wird? Was ist der Standpunkt der Mitgliedstaaten bzgl. dieser Fragen?

Frage 3
Was ist die Reichweite des Artikels 216, Paragraph 1, des Vertrags FUE? Wie verstehen die Mitgliedstaaten diese Bestimmung, die die generelle Zuständigkeit der Europäischen Union für den Abschluss internationaler Abkommen vorsieht „wenn dies in den Verträgen vorgesehen ist oder wenn der Abschluss einer Übereinkunft im Rahmen der Politik der Union entweder zur Verwirklichung eines in den Verträgen festgesetzten Zielen erforderlich oder in einem verbindlichen Rechtsakt der Union vorgesehen ist oder aber gemeinsame Vorschriften beeinträchtigen oder deren Anwendungsbereich ändern könnte."

Frage 4
Glauben Sie dass eine Verbindung zwischen Artikel 216 des Vertrags FUE und Artikel 3, Paragraph 2 des Vertrags FUE besteht? Wenn ja, welche? Würden Sie bitte Ihre Meinung bzgl. dieser Frage ausarbeiten und begründen?

KAPITEL 2: VERHANDLUNGEN UND ABSCHLÜSSE INTERNATIONALER ÜBEREINKÜNFTE (ARTIKEL 218 DES VERTRAGS FUE)

Frage 5
Welches sind die Erfahrungen, die die Mitgliedstaaten bzgl. des Zusammenspiels zwischen dem Verhandlungsführer/dem Verhandlungsteam und dem Sonderausschuss des Artikels 218, Paragraph 4 des Vertrags FUE gemacht haben? Was ist der Standpunkt der Mitgliedstaaten? Wie interpretieren die Mitgliedstaaten den Standpunkt der Organe der Union?

Frage 6
Im Falle der vorläufigen Anwendung internationaler Übereinkünfte: Welchen Standpunkt beziehen die Mitgliedstaaten bzgl. der Art der Festsetzung der Regelungen, die Gegenstand der provisorischen Anwendung sein werden? Der Vertrag FUE sieht einen Vorschlag des Verhandlungsführers und einen Beschluss des Rates der Union vor. Sollte man die Einbeziehung des Europäischen Parlaments vorsehen, auch wenn der Vertrag FUE selbst dies nicht tut? Wenn ja, in welcher Form?

Frage 7
Was sollte mit der vorläufigen Anwendung im Falle einer Nicht-Ratifizierung eines Mitgliedstaates einer gemischten Übereinkunft geschehen? Sollte sie beendet werden? Wenn ja, sollte eine neue Übereinkunft, dieses Mal nur zwischen der Europäischen Union und dem betreffenden Drittstaat geschlossen werden?

Frage 8
Was das Zustimmungs-Verfahren durch das Europäische Parlament angeht: wie ist Artikel 218, Paragraph 6, Buchstabe a) iii) „Übereinkünfte, die durch die Einführung von Zusammenarbeitsverfahren einen besonderen institutionellen Rahmen schaffen" und iv)"Übereinkünfte mit erheblichen finanziellen Folgen für die Union" zu interpretieren?

Frage 9
Auf Vorschlag der Europäischen Kommission oder des Hohen Vertreters der Union beschließt der Europäische Rat die Aussetzung der Anwendung der internationalen Übereinkünfte. Was ist der generelle Standpunkt der Mitgliedstaaten bzgl. der Anwendung dieser Norm des Vertrags FUE? Existieren spezielle Bemerkungen/Meinungen in Bezug auf vor Kurzem stattgefundene Fälle der Aussetzung?

Frage 10
Der Vertrag FUE sieht Vorgehensweisen vor, wenn im Namen der Europäischen Union vor durch eine internationale Übereinkunft geschaffene Organe gesprochen wird. Gab es bereits angefochtene Entscheidungen und/oder auf nationalem Niveau angefochtene Entscheidungen, die nicht bis zum EUGH vorgedrungen sind?

Frage 11
Gemäß Artikel 218, Paragraph 10 des Vertrags FUE wird das Europäische Parlament in allen Phasen des Abschlusses einer internationalen Übereinkunft unverzüglich und umfassend unterrichtet. Wie verstehen die Mitgliedstaaten diese Verbindlichkeit? Welche Rolle spielen in diesem Zusammenhang die nationalen und/oder regionalen Parlamente?

KAPITEL 3: RECHTSAUSWIRKUNGEN DER INTERNATIONALEN ÜBEREINKÜNFTE

Frage 12
Gibt es eine nationale Rechtsprechung bzgl. der Anwendung und/oder Interpretation von ausschließlich mit der Europäischen Union geschlossenen Übereinkünften oder mit gemischten Übereinkünften, die nicht Gegenstand eines Vorabverfahrens waren? Existiert eine nationale Rechtsprechung über die Infragestellung internationaler Übereinkünfte, die ausschließlich von der Europäischen Union geschlossen wurden und /oder gemischter Übereinkünfte, ohne dass es zu einem Vorabentscheidungsverfahren bzgl. der Frage der Gültigkeit gekommen wäre? Wenn ja, bitte beschreiben Sie kurz diese Fälle.

Frage 13
Wie bewerten die Mitgliedstaaten die jüngste Rechtsprechung des EUGH bzgl. der unmittelbaren Auswirkung der internationalen Übereinkünfte? Gab es, auf nationalem Niveau, spezifische Diskussionen bzgl. dieses Themas?

Frage 14
Existieren zur Zeit von der Kommission gegen Mitgliedstaaten eingeleitete Vertragsverletzungsverfahren wegen Verstoßes gegen von der Europäischen Union eingegangene internationalen Verpflichtungen? Wenn ja, bitte beschreiben Sie kurz diese Fälle.

Frage 15
Welche Kontrollmaßnahmen bzgl. des Respekts internationaler, die Europäische Union bindende Übereinkünfte existieren seitens der Mitgliedstaaten (unabhängig der Europäischen Kommission als Wächter des Europarechts)?

KAPITEL 4: HANDEL UND INVESTITIONSSCHUTZ

Frage 16
Was sollte die Reichweite des Begriffs „gemeinsame Handelspolitik" nach Inkrafttreten des Lissabonner Vertrags sein? Was ist der Standpunkt der Mitgliedstaaten, wenn es um ausländische Direktinvestitionen geht? Beinhaltet dieser Begriff auch die Investitionen „Portofolio"? Und was, wenn es sich um Abkommen über den Dienstleistungsverkehr handelt? Ist die Übereinkunft „TRIPS" in dem Begriff einer gemeinsamen Handelspolitik inbegriffen?

Frage 17
Wie verstehen die Mitgliedstaaten das Verhältnis zwischen den bilateral geschlossenen Investitionsabkommen und denen, die auf diesem Gebiet von der Europäischen Union geschlossen wurden?

Frage 18
Was ist der Standpunkt der Mitgliedstaaten bzgl. des Mechanismus der Differenzen auf dem Gebiet des Investitionsschutzes in der neuen Generation von Übereinkünften des von den Partnern der EU (CETA, TTIP usw.) beabsichtigten freien Austausches?

Frage 19
Was ist der Standpunkt der Mitgliedstaaten bzgl. der Verantwortlichkeit der Union sowie der Mitgliedstaaten im Falle einer Verletzung dieser Abkommen?

Frage 20
Gemäß Artikel 207, Paragraph 1, letzter Satz (AEUV), wird die gemeinsame Handelspolitik im Rahmen der Grundsätze und Ziele des auswärtigen Handels der Union gestaltet. Was ist das Verhältnis zwischen dieser Regelung und dem Artikel 21 EU? Was ist der Standpunkt der Mitgliedstaaten hierzu?

Frage 21
Wie verstehen die Mitgliedstaaten die Aushandlung und den Abschluss internationaler Abkommen auf dem Gebiet der gemeinsamen Handelspolitik? Gibt es ganz spezifische Aspekte dieses Verfahrens, die sie kommentieren wollten? Bedürfen die in Artikel 207, Paragraph, 4 Absatz 2 und 3 Vertrag FUE genannten Bedingungen (die Einstimmigkeit des Rates) bestimmter Bemerkungen ihrerseits oder gibt es Standpunkte der Mitgliedstaaten diesbezüglich?

KAPITEL 5: RAUM DER FREIHEIT, DER SICHERHEIT UND DES RECHTS (POLITIK BZGL. DER GRENZKONTROLLEN, DES ASYLRECHTS UND DER EINWANDERUNG)

Frage 22
Obgleich die Union gemäß Artikel 3, Paragraph 1 Buchstabe e) des Vertrags „FUE" (Vertrag über die Arbeitsweise der Europäischen Union) über die ausschließliche Zuständigkeit im Bereich der gemeinsamen Handelspolitik verfügt, teilt sie, im Gebiet des Raums der Freiheit, der Sicherheit und des Rechts gemäß Artikel 4, Paragraph 2 Buchstabe j) ihre Zuständigkeit mit den Mitgliedstaaten. Was insbesondere den Bereich anbelangt, dem sich dieses Kapitel widmet (Grenzkontrollen, die gemeinsame Politik des Visum für eine kurze Zeit, Asyl und Einwanderung inbegriffen), so spürt man den „Effekt AETR" (vgl. Kapitel 1, Frage 1) vor Allem im Zusammenhang mit den internationalen Übereinkünften die die Befreiung der Visumspflicht zum Gegenstand haben. In der Tat hat die Union aufgrund der totalen Harmonisierung die ausschließliche Zuständigkeit zum Abschluss derartiger Übereinkünfte inne, geregelt durch die Verordnung 539/2001, der Liste der Drittländer deren Staatsangehörige der Visumspflicht beim Überschreiten der Aussengrenzen der Mitgliedstaaten unterliegen und der Liste derjenigen Drittländer, deren Staatsangehörige von einer solchen Visumspflicht befreit sind.

Im Einklang mit dem Protokoll (Nr. 23) über die Aussenbeziehungen der Mitgliedstaaten bzgl. des Überschreitens der Aussengrenzen berührt Artikel 77, Paragraph 2 Buchstabe b) des Vertrags „FUE" (der der Union eine Zuständigkeit zur Definition der anwendbaren Kontrollen an seinen Grenzen zuspricht) jedoch nicht das Recht der Mitgliedstaaten „Übereinkünfte mit Drittländern

zu verhandeln oder abzuschließen, solange diese Übereinkünfte mit dem Recht der Union und den anderen einschlägigen Übereinkünften in Einklang stehen". Welchen Sinn und welche Tragweite gestehen Sie diesem Protokoll zu, insbesondere im Hinblick auf Artikel 3, Paragraph 2 des Vertrags „FUE" (siehe Kapitel 1, Frage 2)? Hat Ihr Staat seit dem Inkrafttreten dieses Protokolls Übereinkünfte auf diesem Gebiet geschlossen oder hält er die bereits vor dem Protokoll existierenden Übereinkünfte aufrecht?

Frage 23

Gemäß den Bestimmungen des Artikels 33, Paragraph 2 Buchstabe c) und des Artikels 38 der Verordnung 2013/32/EU vom 26.6.2013 über die gemeinsamen Verfahren bzgl. der Anerkennung oder Ablehnung auf internationalen Schutz kann ein Mitgliedstaat das Konzept des sicheren Herkunftsstaates für die Unzulässigkeitserklärung eines Antrags auf internationalen Schutz anwenden und den Antragsteller in dieses Herkunftsland zurücksenden – selbst dann, wenn dieser Mitgliedstaat seine Verantwortung zur Prüfung dieses Antrags in Anwendung der Verordnung 604/2013 vom 26.6.2013 erklärt hatte (vgl. EUGH-Urteil vom 17.3.2016, Mirza, C-695/15, Punkte 42 und 46). Im Licht des jetzigen Standpunktes der Entwicklung des einheitlichen europäischen Asylsystems (Artikel 78, Paragraph 2 des Vertrags „FUE") obliegt es den Mitgliedstaaten, eine Liste der sicheren Drittstaaten im Einklang mit den in Artikel 38 aufgezählten Voraussetzungen aufzustellen.

Gibt es eine nationale Rechtsprechung bzgl. der Interpretation und der Anwendung des Konzepts des sicheren Drittstaates? Bezieht sich eine derartige Rechtsprechung auch auf die Begrenzung dieses Konzeptes in Bezug auf das Konzept des sicheren europäischen Drittstaates („super-sicherer Drittstaat"), so wie in Artikel 39 der Verordnung 2013/32/EU vorgesehen? Wie beurteilen Sie im Lichte des Unionsrechts die effektiv von den Mitgliedstaaten hergestellte Verbindung zwischen der Politik und den Vorgehensweisen in Bezug auf das Konzept des sicheren Drittstaats einerseits und der aussergrenzlichen Kontrolle der Einwanderung andererseits?

Frage 24

Gemäß den Schlussfolgerungen des Europäischen Rates vom 26/27.6.2014, die die strategischen Leitlinien der gesetzgeberischen und operativen Programmplanung im Raum der Freiheit, der Sicherheit und des Rechts definiert, „(kann) eine dauerhafte Lösung nur durch eine Intensivierung der Zusammenarbeit mit den Herkunfts-und Transitländern gefunden werden, u.a. indem diese beim Ausbau ihrer Kapazitäten zur Migrationssteuerung und zum Grenzmanagment unterstützt werden. Die Migrationspolitik muss viel stärker integraler Bestandteil

der Aussen-und Entwicklungspolitik der EU werden, indem der Grundsatz „mehr für mehr" angewandt und auf dem Gesamtansatz für Migration und Mobilität aufgebaut wird" (Punkt 8), festgesetzt in der Mitteilung der Kommission vom 18.11.2011, KOM(2011) 743 final (vgl. auch die Mitteilung vom 21.2.2014, KOM(2014) 96 final). Die Kommission hat jedoch angesichts dessen, dass „es von wesentlicher Bedeutung (ist), unseren Partnern gegenüber in enger Zusammenarbeit mit allen Mitgliedstaaten deutlich zu machen, dass eine Lösung für die irregulären und unkontrollierten Wanderbewegungen eine Priorität für die Union als Ganzes darstellt" ein „neues, auf konkrete Ergebnisse ausgerichtetes Konzept" vorgeschlagen, nämlich einen neuen Partnerschaftsrahmen mit den Drittstaaten, eingebunden in der europäischen Migrationsagenda (Mitteilung vom 7.6.2016, KOM(2016) 385 final und vom 18.10.2016, KOM(2016) 700 final. Schlussendlich hat der Europäische Rat in seinen Schlussfolgerungen vom 20/21.10.2016 darauf hingewiesen „wie wichtig es ist, dass weiter auf die Umsetzung des Partnerschaftsrahmens für die Zusammenarbeit mit einzelnen Herkunfts-oder Transitländern hingearbeitet wird, wobei der Schwerpunkt zunächst auf Afrika liegen wird" (Punkt 4).

Was ist Ihre Meinung bzgl. der praktischen Auswirkungen einer globalen Annäherung des Problems der Migration und der Mobilität? Glauben Sie, dass der neue Partnerschaftsrahmen mit den Drittstaaten diese globale Annäherung ausschließt und ersetzt? Wenn ja, in welchem Ausmaß? Unterhält Ihr Staat besondere Beziehungen mit Drittstaaten „die auf jahrzehntelang gepflegte politische, historische und kulturelle Bindungen und Kontakte zurückzuführen sind" und „zum Nutzen der EU voll ausgeschöpft werden" sollten und/oder „umfassende bilaterale Beziehungen zu einem bestimmten Partnerland" und daher „in vollem Umfang an den Diskussionen zwischen der EU und diesem Land" beteiligt sein sollten (Vgl. KOM(2016) 385 final, Punkt 9)? Hat Ihr Staat bereits bilaterale oder multilaterale Übereinkünfte mit afrikanischen Staaten abgeschlossen, die als Beispiel für die

Umsetzung der Übereinkünfte zwischen der EU und den vorrangigen afrikanischen Ländern dienen können?

Frage 25

Seit dem Inkrafttreten des Vertrags von Amsterdam besitzt die Union die Zuständigkeit zum Abschluss von Übereinkünften mit Drittländern über die Rückübernahme von den Drittstaatsangehörigen in ihr Ursprungs-oder Herkunftsland, die die Voraussetzungen für die Einreise in das Hoheitsgebiet eines der Mitgliedstaaten oder die Anwesenheit oder den Aufenthalt in diesem Gebiet nicht oder nicht mehr erfüllen (Artikel 79, Paragraph 3, FUE). Dennoch wird generell davon ausgegangen, dass diese Mitgliedstaaten gleichwohl nach wie vor über die

Zuständigkeit verfügen, mit Drittländern derartige Übereinkünfte, seien sie bilateraler oder multilateraler Art, zu schließen. Darüber hinaus stellt die Verordnung 2016/1624 vom 14.9.2016 über die Europäische Grenz-und Küstenwache fest, dass „das etwaige Bestehen einer Vereinbarung zwischen Mitgliedstaaten und einem Drittstaat die Agentur oder die Mitgliedstaaten nicht von ihren Verpflichtungen nach dem Recht der Union oder dem Völkerrecht, insbesondere hinsichtlich der Einhaltung des Grundsatzes der Nicht-Zurückweisung entbinden (kann)“ (Punkt 36). Sind Sie der Meinung, dass die von Mitgliedstaaten geübte Praxis des Abschlusses von Übereinkünften über die Rückübernahme mit Drittstaaten insbesondere mit Artikel 79, Paragraph 3 oder mit Artikel 3, Paragraph 2 FUE vereinbar ist? Wenn ja, in welchem Verhältnis sollten die Vereinbarungen über die Rückübernahme, die einerseits von der Union mit Drittländern geschlossen wurden zu denjenigen stehen, die Mitgliedstaaten mit dem gleichen Drittland geschlossen haben? Hat Ihr Staat seit dem Inkrafttreten des Vertrags von Amsterdam eine Übereinkunft über die Rückübernahme geschlossen? Ist er an Vereinbarungen über die Rückübernahme gebunden, die „problematische Klauseln“ enthalten, wie die Klausel, die ein vereinfachtes Verfahren für die Rückübernahme illegaler Einwanderer vorsieht – eine Klausel, die vom Gericht in Straßburg als gegen CEDH verstoßend erklärt wurde (siehe Urteil vom 1.9.2015, Khlaifia u.a. gegen Italien, Nr. 16483/12, Paragraph 45)?

GENERAL REPORT



GENERAL REPORT

Christine Kaddous*
Nuno Piçarra**

Introduction

The field of EU external relations is subject to constant changes and is facing new challenges, in particular after the entry into force of the Lisbon Treaty. The present general report will cover the current roles of the EU institutions and of the Member States in EU external relations, but also the external dimension of two EU policies: trade and the area of freedom, security and justice, chosen because of their importance in the activity of the European Union today.

The general rapporteurs were invited to prepare a questionnaire focused on the effects of recent developments in European Union law on the Member States and on national law. It aimed at identifying the problems that have been raised at national level and the difficulties that may have arisen, related to the current challenges in the field of external relations. In doing so, the questionnaire attempted to group the current issues under five chapters: 1. Division of competences between the Union and its Member States; 2. Negotiation and conclusion of international agreements (questions relating to Article 218 TFEU); 3. Legal effects of international agreements; 4. Trade and protection of investments; 5. Area of freedom, security and justice. The breakdown into chapters enabled to organize the discussion, but it did not prevent overlapping in the topics, as the reader will see.

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The general rapporteurs are very grateful to the various national rapporteurs and to the institutional rapporteurs. They have produced excellent reports, which made the writing of this report interesting and enjoyable. The aim here is not to give a summary of all the reports, but rather to present a general discussion of the various topics, based on information from the various reports in order to provide a better understanding of how the law of external relations is understood, interpreted and applied by the EU institutions and in the different legal systems of the Member States. The report does not attempt to provide an overview of relevant academic literature. This was not possible in the bounds of the report, but academic opinions are referred to in the institutional report as well as in the national reports.

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES[1]

The issue of division of competences between the Union and the Member States continues to be at the heart of EU external relations. The principle of conferral of competences remains the basic rule: the Union may only act within the limits of the competences conferred upon it by the Treaties. This principle enshrined in Article 5(2) TEU has to be respected *internally*, in the action of the Union as well as *externally*, in the action of the Union on the international scene. Therefore where the Union acts on the basis of a Treaty provision, the Union exercises its competence according to the means and procedure laid down in that specific provision. However, some Treaty provisions do not provide for all the necessary information needed in order to exercise a specific competence. It is in such cases that the Court of justice has recognised the existence of implied competences. The ERTA judgment is at the origin of the implied competences doctrine. In that case, the Court stated that the competence to conclude an international agreement arises not only from an express conferment by the Treaty, but it may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by Union institutions[2]. The case-law that followed developed other situations where implied competences have been recognised. In Opinion 1/76 it was recognised that authority to enter into international commitments may not only arise from an express attribution by the Treaty, but may equally flow implicitly from its provisions. The Court considered that whenever Union law has created for the institutions of the Union competences within the internal system of the Union for the purpose of attaining

[1] Chapter 1 to Chapter 4 were written by Christine Kaddous.

[2] Case 22/70, *Commission v Council*, EU:C:1971:32, para. 16.

a specific objective, the Union has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision concerning the matter[3].

The case-law acknowledged the existence of implied external competences alongside the external competences expressly provided for in the Treaties. Parallel to this discussion on the existence of the EU external competence to conclude an international agreement, arose the question of the nature of that specific external competence. In the ERTA judgement the implied competence of the Union to negotiate and conclude the European Agreement concerning the work of crews of vehicles engaged in international road transport was considered as exclusive. This judgement establishes the criteria of the "affectation of the internal rules of the Union", according to which if there is such effect, the EU external competence is to be exclusive[4].

The affectation criteria was introduced in Article 3(2) TFEU as a result of the modifications brought by the Lisbon Treaty to the existing Treaties. The exclusiveness of the competence of the Union on the basis of the application of this criteria is the first topic of Chapter 1 of the questionnaire.

Question 1

The ERTA effect doctrine (Article 3(2) TFEU) played a role recently in the case-law rendered by the Court of Justice. The affectation of the common rules is established when the field concerned by the international agreement is covered in large parts by Union's rules.

If we look at the case-law rendered in 2014, there are two cases dealing with Article 3(2) TFEU: judgment *Commission v Council* regarding the participation of the European Union and its Member States in the negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organisations and Opinion 1/13 related to the 1980 Hague Convention on the civil aspects of international child abduction.

In the *Commission v Council* judgment the Court held that the words used in the last clause of Article 3(2) TFEU correspond to those by which the Court in the ERTA judgment, defined the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions,

[3] Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741, para. 3.

[4] Case 22/70 *Commission v Council,* EU:C:1971:32, para. 17, in which the Court considered that "each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules".

where common EU rules have been promulgated for the attainment of the objectives of the Treaty[5]. According to the Court's case-law, there is a risk that common EU rules might be adversely affected by international commitments, or that the scope of those rules might be altered, which justifies an exclusive external competence of the European Union, where those commitments fall within the scope of those rules[6]. In this respect it is not necessary in order to acknowledge the existence of such a risk that the areas covered by the international commitments and those covered by EU rules coincide fully[7]. It suffices that the area at stake is already largely covered by common rules[8]. In Opinion 1/13 on the competence of the Union to accept the accession of a non-Union country to the Convention on the civil aspects of international child abduction, it was considered that provisions of the Convention may have an effect on the meaning, scope and effectiveness of the rules laid down in Regulation No 2201/2003 concerning the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, because of the overlap and the close connection between the two respective set of rules in the instruments (Regulation and Convention)[9].

More recently the issue of Article 3(2) TFEU played a role in two opinions rendered by the Court of justice: Opinion 3/15 and Opinion 2/15[10]. Opinion 3/15 concerned the conclusion of the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled. The Court held that the conclusion of the envisaged international agreement may affect or alter the scope of the common rules laid down in Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society and therefore falls within the exclusive competence of the European Union[11]. It recalled at that occasion that since the Union is vested only with conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the EU law in force. This analysis must take into account the areas covered, respectively, by the rules of EU law and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules

[5] Case C-114/12, *Commission v Council*, EU:2014:2151, para. 66.
[6] Case C-114/12, *Commission v Council*, EU:2014:2151, para. 68.
[7] Case C-114/12, *Commission v Council*, EU:2014:2151, para. 69 and Opinion 1/03, EU:C:2006:81, para. 126.
[8] Case C-114/12, *Commission v Council*, EU:2014:2151, para. 70 and the case-law mentioned.
[9] Opinion 1/13, *Accession of third countries to the Hague Convention on the civil aspects of international child abduction*, EU:C:2014:2303, para. 85.
[10] Opinion 3/15, *Marrakesh Treaty*, EU:C:2017:114 and *Opinion 2/15, Singapore Agreement*, EU:C:2017:375.
[11] Opinion 3/15, *Marrakesh Treaty*, EU :C :2017 :114, paras 102-130.

and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish[12]. It must also be stressed that according to the Court's settled case-law, Member States may not enter, outside the framework of the EU institutions, into international commitments falling within an area that is already covered to a large extent by common EU rules, even if there is no possible contradiction between those commitments and the common EU rules[13].

In the Marrakesh Opinion, the Court rejected the Member States' argument pleading for a shared competence on the basis that Directive 2001/29 brought only minimum harmonisation of certain aspects of copyright and related rights and did not in particular harmonise the exceptions and limitations to those rights. For the Court, the Directive's provisions do not set a minimum level of protection of copyright and related rights, but rather introduce a derogation from the rights harmonised by the EU legislature, permitting the Member States to provide, subject to certain conditions, for an exception or limitation to those rights. In that regard Member States' discretion has to be exercised within the limits imposed by EU law, which means that the Member States are not free to determine, in an un-harmonised manner, the overall boundaries of the exception or limitation for persons with a disability[14]. Whilst Directive 2001/29 provides only for an option allowing the Member States to introduce an exception or limitation for beneficiary persons, the Marrakesh Treaty lays down an obligation to introduce such an exception or limitation. Consequently, the conclusion of the Marrakesh Treaty would mean that the various constraints and requirements imposed by EU law will apply to all the Member States, which would henceforth be required to provide for such an exception or limitation under the Marrakech Treaty[15]. Accordingly, the body of obligations laid down by the Marrakesh Treaty falls within an area that is already covered to a large extent by common EU rules and the conclusion of that treaty may thus affect those rules or alter their scope[16]. The conclusion of the Marrakesh Treaty falls therefore within the exclusive competence of the European Union[17].

In Opinion 2/15 regarding the draft free trade agreement between the European Union and the Republic of Singapore, the ERTA effect (Article 3(2) TFEU) is considered in the context of two different issues: the cross-border transport

[12] Opinion 3/15, *Marrakesh Treaty*, EU :C :2017 :114, para. 108.
[13] Opinion 3/15, *Marrakesh Treaty*, EU :C :2017 :114, para. 113.
[14] Opinion 3/15, *Marrakesh Treaty*, EU :C :2017 :114, para. 122.
[15] Opinion 3/15, *Marrakesh Treaty*, EU :C :2017 :114, para. 127.
[16] Opinion 3/15, *Marrakesh Treaty*, EU :C :2017 :114, para. 129.
[17] Opinion 3/15, *Marrakesh Treaty*, EU :C :2017 :114, para. 130.

services and the non-direct foreign investments. The Court held that commitments concerning services in the field of transport, maritime transport, rail transport, road transport, internal waterways transport and commitments concerning public procurement within the field of transport all fall within the exclusive competence of the Union pursuant to Article 3(2) TFEU. It recalled that the existence of a risk of affectation of EU common rules does not presuppose that the area covered by the international commitments and that covered by the EU rules coincide fully[18]. This being said, the Court considered that the commitments foreseen in the draft agreement fall within an area which is already covered to a large extent by EU common rules and therefore may affect or alter the scope of those rules[19] and concluded in favour of an exclusive competence of the Union to conclude the envisaged agreement in that field. The analysis of the relationship between the draft agreement and the EU law in force has been considered as not having been done comprehensively and detailed as supposed to be according to the settled case-law of the Court. The exclusive competence was not expected in such an extensive manner in the field of cross-border transport services (see also the comments ad question 2 below). It must however be stressed that it remains difficult to compare existing legislation with the norms covered by the respective international commitments in order to assess the coverage and the risk to have common rules affected.

As to non-direct investments, the question at stake was whether the European Union has an exclusive competence pursuant to Article 3(2) TFEU, because of the overlap between the commitments contained in the draft agreement with Singapore concerning those investments and the prohibition of restrictions on movements of capital and on payments between Member States and third States as laid down in Article 63 TFEU. The Court held rightly in our view that "common rules" within the meaning of Article 3(2) TFEU cannot consist of rules of primary EU law, such as Article 63 TFEU. It therefore only applies to rules of secondary law adopted on the basis of the TFEU[20]. It follows that the European Union does not have exclusive competence pursuant to Article 3(2) TFEU to conclude an international agreement with the Republic of Singapore in so far as it relates to the protection of non-direct foreign investments[21].

In conclusion the formula of Article 3(2) TFEU, according to which the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion may affect common rules or alter their scope, received an extensive interpretation in Opinion 3/15 and Opinion 2/15, which equates to a

[18] Opinion 2/15, *Singapore Agreement*, EU:C:2017:375, para. 181.
[19] Opinion 2/15, *Singapore Agreement*, EU:C:2017:375, paras 168-224.
[20] Opinion 2/15, *Singapore Agreement*, EU:C:2017:375, para. 230.
[21] Opinion 2/15, *Singapore Agreement*, EU:C:2017:375, para. 238.

large recognition of the ERTA effect as developed in the judgment of 31 March 1971 and in the subsequent case-law. This extensive interpretation did have a limit in the definition of the concept of "common rules" that do not include provisions of primary law.

The questionnaire asked for practical examples of the areas in which the AETR effect has been recently perceived. It also asked for the position of the Member States in relation to this effect and whether there have been any problems raised at the national level in that respect. Rapporteurs, including these ones, were fortunate enough for the Court to issue Opinion 3/15 and Opinion 2/15 within the framework of the preparation of the FIDE Congress. Several national reports commented upon these two opinions which brought useful clarifications to the application of the ERTA effect. In the national report for the Netherlands, the rapporteur rightly draws attention to the fact that the ERTA effect is not only relevant to the competence of the Union to conclude an international agreement, but also with regard to positions to be adopted within international organisations within the meaning of Article 218(9) TFEU[22]. These are cases where the Union is not signatory of the conventions and it therefore authorises the Member States that are members of the international organisations at stake to express Union's positions acting jointly in the interest of the Union. Another example is given in the French national report. It concerns the situation where the Union cannot as such become party to an international agreement, but as the matter covered by that international agreement falls under its exclusive competence pursuant to Article 3(2) TFEU, it authorises the Member States to sign, sign and ratify or accede, as appropriate, the international convention[23].

In general the ERTA effect is well perceived and accepted by the Member States. Some concerns have however been expressed as to the broad interpretation given by the Court to this effect. The national report for the United Kingdom highlights the classic question as to the meaning given to the words "may affect common rules", in the way that a contradiction between the international

[22] The example is given of Decision 2017/449 of 7 March 2017 on the position to be adopted, on behalf of the European Union, in the 60th session of the Commission on Narcotic Drugs on the scheduling of substances under the Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol, and the Convention on Psychotropic Substances of 1971, *OJ L 69*, 15.3.2017, p. 25. The reference to Article 3(2) TFEU was made in the Commission's proposal but disappeared in the Decision adopted, COM (2017) 72 final. This results from the fact that changes to the schedules of the 1961 and 1971 UN Conventions have direct repercussions for the scope of application of Union law in the area of drug control for all Member States. Therefore any change to the Schedules annexed to these conventions directly affects common rules and alters their scope, within the meaning of Article 3(2) TFEU.

[23] Decision 2014/95 authorising Member States to sign, ratify or accede to the Cape Town Agreement of 2012 on the Implementation of the Provisions of the Torremolinos Protocol of 1993 relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977, *OJ L 106, 9.4.2014, p. 4.*

agreement and internal rules is not necessary for exclusivity to be triggered, as long as the meaning, scope and effectiveness of the latter might be affected[24]. Other reports mention that the analysis made by the Court of the concept of "affectation" is not always detailed enough in order to be considered in conformity with the conditions developed in the settled case-law, i.e. "comprehensive and detailed analysis" (Austria, Greece, United Kingdom). This reference was made in relation to Opinion 1/13 and Opinion 2/15. Other national reports draw attention to the fact that it is important to maintain the presence of the Member States along with the Union in the conclusion of international agreements in areas where some EU legislation exist (Finland and Italy) and in international fora linked to the risk of the weight loss of the "European entity" (France). The national report for Greece rejects the position held by the Court in Opinion 2/15 as to the exclusive competence of the Union in the field of cross-border transport services, in particular as to the maritime transports. The Czech national report mentions the political problem caused by the shift of competences, lying in the fact that the national parliament is excluded from the procedure when it comes to exclusive competences of the Union. On the other hand, the Greek and United Kingdom reports welcome the refusal of the Court in the Singapore Opinion to include in the concept of "common rules" the rules of primary EU law.

Question 2

Article 3(1) TFEU provides for the areas in which the Union has exclusive competence "internally" (customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of maritime biological resources under the common fisheries policy, and common commercial policy), whereas Article 3(2) TFEU provides for the European Union's exclusive competence to conclude international agreements in three sets of circumstances. First when the conclusion of the international agreement is provided for in a legislative act of the Union; second, when it is necessary to enable the Union to exercise its internal competence; and third when the conclusion of the international agreement may affect common rules or alter their scope. This provision of the TFEU as mentioned in the present report ad question 1 refers to the case-law developed by the Court on the exclusive implied competences since the early 1970s. Out of the three sets of circumstances, only the last one gave rise to recent interpretations in the case-law.

[24] Opinion 1/03, *New Lugano Convention*, EU:C:2006:81, paras 143, 151-153, Opinion 1/13, *Accession of third countries to the Hague Convention on the civil aspects of international child abduction*, EU:C:2014:2303, paras 84-90, Opinion 2/91, EU:C:1993:106, paras 25-26.

The first option results from Opinion 1/94, in which the Court has recognised that whenever the Union has included in its internal legislative acts provisions or conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts[25]. The second option relates to Opinion 1/76, according to which whenever Union law has created for the institutions of the Union powers within its internal system for the purpose of attaining a specific objective, the European Union has authority to enter into international commitments necessary for the attainment of that objective, even in the absence of an express provision in that connection[26]. The conditions for applying this option are quite strict and rarely met. On the contrary the third option has been frequently applied recently (see comments ad question 1)[27].

Pursuant to the ERTA judgment, the Union has exclusive competence if there is a risk that Union common rules might be affected by international commitments undertaken by the Member States, or that the scope of those rules might be altered, when the scope of the international commitments fall within the scope of Union's rules[28]. To assess whether the Union has exclusive competence to conclude an international agreement, "a comprehensive and detailed analysis" of the relationship between the international agreement envisaged and the EU law in force has to be delivered. It appears from the recent case-law that the Court applies the last ground of Article 3(2) TFEU widely. First, a finding that there is a risk that common rules might be affected does not presuppose that the area covered by the international commitments and that of the Union coincide fully. It is sufficient if the commitments fall within an area which is already covered to a large extent by such rules[29]. The Court also held that it is necessary to take into account not only the current state of Union law in the area in question, but also its future development insofar as that it is foreseeable at the time of the analysis[30]. Furthermore Union rules may be affected by international commitments even if there is no possible contradiction between those commitments

[25] Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property,* EU:C:1994:384, para. 95. See also Opinion 2/92, ***C****ompetence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national* treatment, EU:C:1995:83, para. 33.

[26] Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, EU:C:1977:63, para. 3.

[27] Opinion 2/15, para. 232, and Opinion 1/13, para. 74.

[28] Case 22/70, *Commission v Council*, EU:C:1971:32, paras 22 and 30.

[29] Opinion 1/13, paras 72-73 and Case C-66/13, paras 30-31.

[30] Opinion 1/03**,** *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters***,** EU:C:2006:81, para. 126 and Opinion 2/91, EU:C:1993:106, para. 25.

and Union rules[31]. Finally the fact that an international agreement contains minimum requirements does not necessarily mean that it cannot lead to exclusive external Union competence[32].

In the recent cases the Member States argued in favour of a more restrictive interpretation of Article 3(2) TFEU. In *Commission v Council* (C-114/12) for example the Council, supported by the Czech Republic, Germany, the Netherlands, Poland and the United Kingdom, argued that the future Convention of the Council of Europe falls within an area of shared competences between the European Union and its Member States, namely that of the internal market, which encompasses protection of intellectual property. Consequently, both the European Union and the Member States should be involved in the negotiations by cooperating closely in all stages of the process in order to ensure the unity of the external representation of the European Union. They were arguing that the fact that a part, even a significant one, of the envisaged international agreement falls within an area covered by common EU rules is not sufficient to conclude that the competence of the European Union to negotiate that agreement is exclusive[33]. The reasoning of the Court on maritime transport in Opinion 2/15 has been criticized in the Dutch national report. It highlights that the legislation for maritime transport consists of a short Regulation (3 pages)[34], which deals with a few aspects of maritime transport only. On that basis the Court had found that the entirety of the maritime obligations in the Singapore FTA succumb to the effect of Article 3(2) TFEU. In general there is an acceptance of the interpretation of Article 3(2) TFEU. However several critics have been made in the national reports as to the wide interpretation given to the last ground as mentioned in the present report ad question 1.

Questions 3 and 4

These questions are going to be dealt with together in the present report, taking into consideration the recent case-law rendered by the Court dealing with both provisions of the Treaty.

Article 216 TFEU contains the rules governing the competence of the European Union to conclude international agreements with one or more third countries or international organisations. It refers equally to express and implied

[31] Opinion 1/13, para. 86, Opinion 2/91, EU:C:1993:106, paras 25 and 26, and *Commission* v *Council*, EU:C:2014:2151, para. 71.

[32] Case C-114/12, *Commission* v *Council*, EU:C:2014:2151, paras 48 and 90-91.

[33] Case C-114/12, *Commission* v *Council*, EU:C:2014:2151, paras 49 and 50.

[34] Council Regulation N° 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ L 378 of 31.12.1986, p. 1.

competences. Pursuant to Article 216(1), the Union may conclude such agreements where the Treaties so provide (first ground) or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties (second ground), or is provided for in a legally binding Union act (third ground) or is likely to affect common rules or alter their scope (fourth ground). This provision reflects the Court's case-law on the existence of external Union competence and does not refer to the exclusive or shared nature of this possible competence. In Opinion 1/03, the Court made already a clear distinction between the existence and the nature of the competence[35]. As to the existence issue, the Court held that such a competence to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Union institutions (*ERTA* judgment)[36]. The Court also held that whenever Union law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Union had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/76)[37]. This being said, the Court highlighted in Opinion 1/03 that the competence to conclude international agreements may be exclusive or shared with the Member States[38].

The first ground "where the Treaties so provide" refers to the Union's express competences to conclude international agreements with third countries or international organisations. This ground is straightforward, but may still raise interesting questions as it happened in Opinion 2/15. The institutions, and finally the Court, had to determine whether the competence to conclude the FTA with Singapore under Article 207 TFEU includes the non-direct investment provisions envisaged in the agreement. The Court held that the use by the framers of the Treaty of the words "foreign direct investment" in Article 207 is an unequivocal expression of their intention not to include other foreign investment (i.e. non-direct investments) in the EU common commercial policy[39].

The second ground "where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties" reflects the situation envisaged in Opinion 1/76. This ground was applied again by the Court in Opinion 2/15. It held that a specific

[35] Opinion 1/03, *New Lugano Convention*, paras 114-115.
[36] Case 22/71, *Commission v Council*, EU:C:1971:32, para. 16.
[37] Opinion 1/76, para. 3, and Opinion 2/91, para. 7.
[38] Opinion 1/03, para 115.
[39] Opinion 2/15, para. 83.

section of the FTA with Singapore, in so far as it does not concern foreign direct investments, falls within the competence relating to the internal market that is shared between the European Union and the Member States pursuant to Article 4(2) (a) TFEU[40]. The Court added that the competence conferred on the European Union by Article 216(1) TFEU in respect of the conclusion of an agreement which is "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties" is shared, since Article 4(1) TFEU provides that the European Union "shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6". In these paragraphs of Opinion 2/15, the Court assessed the existence of the EU competence pursuant to Article 216(1) second ground as well as the nature of the competence, which has been considered as shared between the Union and the Member states, because non-direct investment relates to free movement of capital, which is part of the internal market.

It is true that the similarity of the words used in the second ground of Article 216 TFEU "*where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*" and the second ground of Article 3(2) "*conclusion of an international agreement necessary to enable the Union to exercise its internal competence*" brings some confusion and does not help the clarity of EU law.

In *Germany v Council* of the 5th of December 2017[41], rendered a couple of months later than Opinion 2/15, the Court also applied Article 216(1) second ground. It rightly recognised that the Union may conclude an international agreement with one or more third countries when this is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, without being necessary to have had first adopted common rules in the areas concerned[42]. The external competence of the Union in the second ground of Article 216(1) TFEU, unlike the fourth ground laid down in that provision, is not subject to any condition relating to the prior adoption of EU rules that are likely to be affected[43].

The third ground of Article 216(1) TFEU "where the conclusion of an agreement is provided for in a legally binding Union act" is quite straightforward. This provision did not give rise to recent applications by the Court. It is however worth noting that there is a difference of wording with the first ground of Article 3(2) TFEU which relates to the exclusivity of the EU external competence. Pursuant

[40] Opinion 2/15, paras 239-241.
[41] Case C-600/14, *Germany v Council*, EU:C:2017:935.
[42] Case C-600/14, *Germany v Council*, EU:C:2017:935, para. 53.
[43] Case C-600/14, *Germany v Council*, EU:C:2017:935, para. 52.

to this last provision the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union. This means that if a legally "binding act" provides for the European Union to conclude such an international agreement (third ground under Article 216(1) TFEU), there will be a competence by virtue of that provision. If that act is a "legislative act" (first ground under Article 3(2) TFEU), the Union will have exclusive external competence[44].

As to the fourth ground of Article 216(1) TFEU "where the conclusion of an agreement is likely to affect common rules or alter their scope", the Court referred in Opinion 2/15 to the *ERTA* judgment, in which it recognised that when the European Union adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third States which affect those rules[45]. The Court held that in line with that case-law Article 216 TFEU grants to the EU competence to conclude, inter alia, any international agreement which "is likely to affect common rules or alter their scope"[46] and that under Article 3(2) TFEU, the competence of the European Union to conclude such an agreement is exclusive[47]. In doing so, the Court distinguished the respective roles of Article 216(1) fourth ground and Article 3(2) third ground.

The question of facultative mixity has to be discussed in the present report as it is one of the sources of disagreement concerning the distribution of competences that was submitted to the Court and discussed in the recent case-law. It is linked to the issue of the nature of the external competence and of the content of the envisaged agreements.

If the agreements envisaged do not contain provisions falling under Member States competences, then the agreements are to be concluded as *Union only agreements*. If however the agreements contain provisions falling under the exclusive competence of the Union and provisions belonging to Member States competences without any Union competence involved, these will have to be concluded as *mixed agreements* (compulsory mixed agreements, see also the Institutional report on that issue[48]). As a third category, one might take the example of agreements that contain provisions falling under a non-exclusive EU competence. In these

[44] See also in this respect opinion of AG Sharpston in Opinion 2/15, para. 68.

[45] Case 22/70, *Commission* v *Council,* EU:C:1971:32, para. 17 and Case C-467/98, *Commission* v *Denmark*, EU:C:2002:625, paras 77-80.

[46] Opinion 2/15, para. 171.

[47] Opinion 2/15, para. 172.

[48] Fernando Castillo de la Torre, The Court of justice and external competences after Lisbon: some reflections on the latest case-law, in The European Union's external action in times of crisis, Hart Publishing 2016, p. 129-189, p. 180.

cases, there is choice, a political choice, given to the Union's legislature (Council and Parliament, but it is mainly the Council that is concerned[49]) to decide either in favour of a *Union only agreement* or a *mixed agreement* in the sense of a *facultative mixity*. This choice, when available, has been recognised by the Court in the case-law. In *Germany v Council*, the Court held that it follows from the very wording of Article 216 TFEU, in which no distinction is made according to whether the Union's external competence is exclusive or shared, that the Union possesses a competence to conclude international agreements in the four situations mentioned in that Treaty provision[50], and that the second situation, unlike the fourth situation laid down in the same provision, is not subject to any condition relating to the prior adoption of EU rules that are likely to be affected[51]. On the other hand, the Court referred to Opinion 2/15 and explained its position as to the provisions on non-direct foreign investment contained in the draft agreement with Singapore. It highlighted that, in paragraph 244 of that Opinion, it held that the relevant provisions of the agreement concerned, "which fall within the shared competence of the Union and the Member States", could not be approved by the Union alone. However, 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"[52]. This means that if the Council would have been able to obtain the required majority, the Union would have been able to exercise alone the external competence it shares with the Member State. This is impliedly a recognition of the possibility of using facultative mixity, as a policy choice for the EU legislature, to exercise the competence to conclude an international agreement that contain provisions falling within shared competences between the Union and the Member States (i.e. provisions falling under a non-exclusive EU competence as described above). The authors of the present reports share the view that it will be for the EU legislature to decide in favour of a mixed agreement or an EU-only agreement, taking into consideration the advantages and downsides known to the respective categories of international agreements.

The questionnaire asked the national rapporteurs to address the issue of the scope of Article 216(1) TFEU and to consider the link between this provision

[49] The Parliament will be involved when it may refuse to give its consent in the hypotheses mentioned in Article 218 TFEU if it does not agree with the characterisation of an agreement as mixed or Union only.
[50] Case C-600/14, *Germany v Council*, EU:C:2017:935, para. 49.
[51] This makes the difference between Article 216(1) TFEU and Article 3(2) TFEU. Case C-600/14, *Germany v Council*, EU:C:2017:935, para. 52.
[52] Case C-600/14, *Germany v Council*, EU:C:2017:935, para. 68.

and Article 3(2) TFEU. Most of the reports submitted acknowledge the difference between Article 216(1) TFEU, which relates to the existence of the Union's external competence, and Article 3(2) TFEU that concerns the exclusivity of the Union's external competence (Austria, Bulgaria, Croatia, Finland, France, Greece, Hungary, Ireland, Italy, Netherlands, Poland, Portugal, Romania, Slovenia, Sweden, United Kingdom).

The Czech and Polish reports have expressed critics as to the broad interpretation given to Article 216(1), in particular fourth ground, which is considered as being contrary to Member States and fathers of the Treaties' views. Several reports mention the lack of clarity between the two provisions of the Treaty (Croatia, Czech Republic, Ireland, Netherlands, Slovenia, United Kingdom) but it must be noted that most of the national reports were submitted before the Court renders its judgment in *Germany v Council*[53].

The issue of facultative mixity was rarely discussed in the national reports. The Greek national report does not support such a possibility and excludes its application. The French report expresses also its reluctance to the use of the opportunity given to the Union to exercise the competence alone in a field which does not fall under its exclusive competence.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Without prejudice to the provisions laid down in Article 207 TFEU or Article 219 TFEU, international agreements between the European Union and third countries or international organizations shall be negotiated and concluded in accordance with Article 218 TFEU which provides for the procedure to be followed by Union's institutions in that process.

Pursuant to Article 218(3) TFEU, the European Commission or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to foreign and security policy (CFSP), make recommendations to the Council, which adopts a decision authorizing the opening of negotiations and nominates, depending on the subject matter of the agreement envisaged, the Union's negotiator or the head of the Union negotiating team. This procedure also provides that the Council may address directives to the negotiator and designate a special committee, in consultation with which the negotiations are to be conducted. There are therefore two main obligations for the Commission: the obligation to conduct the negotiations

[53] Case C-600/14, *Germany v Council*, EU:C:2017:935.

within the framework of the directives drawn up by the Council and the obligation to consult with the special committee assisting it in those negotiations[54]. In this context the first question in this chapter relates to the interactions between the EU negotiator and the special committee.

Question 5

The relationship between the Union's negotiator/negotiating team and the special committee, composed of representatives of the Member States, may become sensitive as there is an increased awareness in the Member States of the potential negative consequences that may arise from the conclusion of important agreements such as the comprehensive free trade agreement with Canada (CETA) or the transatlantic trade and investment partnership (TTIP) to be negotiated with the United States. The political debate in several Member States proved the increased criticism formulated against the negotiation and conclusion of such agreements which rely mainly on the EU institutions and do not incorporate sufficiently the participation of the actors and stakeholders at national level.

In this sensitive context, the procedure provided for in Article 218 TFEU has to be governed by the principle of institutional balance, developed in the case-law of the Court and today enshrined in Article 13(2) TEU, according to which each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them[55]. As far as the negotiation and conclusion of international agreements are concerned, this balance can be briefly summarized in the role of the Commission (and the High Representative or the negotiating team) as the negotiator, the role of the Council as the decision-maker and the role of the European Parliament as strengthening democratic legitimacy in the whole process. Important guidance has been given by the Court on the respective roles of the Commission, Council and the special committee in *Commission v Council* of 2015[56].

As to the roles of the institutions, the Court held that the Council and the Commission are required to comply with the second sentence of Article 13(2) TEU, which states that "the institutions shall practice mutual sincere cooperation"[57]. In the circumstances of Article 218(4) TFEU, the Commission must provide the special committee with all the information necessary for it to

[54] This special committee acts as an advisory body and is the forum in which the negotiating positions of the member states are co-ordinated with each other and with the Commission, see J. Czuczai, "Mixity in Practice: Some Problems and Their (Real or Possible) Solution, in C. Hillion and P. Koutrakos (eds), Mixed Agreements Revisited, Oxford, Hart Publishing, 2010, p. 232.

[55] Case C-409/13, *Council* v *Commission*, EU:C:2015:217, para. 64.

[56] Case C-425/13, *Commission v Council*, EU :C :2015 :483.

[57] Case C-425/13, *Commission v Council*, EU :C :2015 :483, para. 64.

monitor the progress of the negotiations, such as, in particular, the general aims announced and the positions taken by the other parties throughout the negotiations. It is only in this way that the special committee is in a position to formulate opinions and advice relating to the negotiations[58]. The Commission can be required to provide that information to the Council as well[59] and it may also be required to report regularly after each negotiating session and, in any event, at least quarterly[60]. Furthermore, the Court highlighted that Article 218(4) TFEU must be interpreted as empowering the Council to set out, in the negotiating directives, procedural arrangements governing the process for the provision of information, for communication and for consultation between the special committee and the Commission[61]. However these negotiating positions have the objective of assisting the negotiator and cannot be understood as implying an obligation for the Commission to achieve the "recommended result". These positions established by the special committee or by the Council itself, if they are intended to be binding on the negotiator, are to be considered as contrary to Article 218(4) TFEU[62]. Whilst it is true that Article 218(4) TFEU authorises the Council to draw up negotiating directives, it does not, on the other hand, invest that institution with the power to impose "detailed negotiating positions" on the negotiator[63]. In the end, the position of the Court is well balanced in that judgment. The negotiating powers of the Commission under Article 17 TEU (ensure the Union's external representation, with the exception of the High Representative) as well as the policy-making function of the Council under Article 16 TEU have both been safeguarded in accordance with the institutional balance principle. It is worth noting that the Commission was supported in that case by the European Parliament and that the Council was supported by 8 Member States (Czech Republic**,** Denmark, Germany, France, Netherlands, Poland, Sweden, United Kingdom).

As to the information provided to the Council or to the special committee on the conduct of the international negotiations, the European Parliament considers that the negotiator should also be required to provide it to the European Parliament pursuant to Article 218(10) TFEU. This would allow the institution to exercise its democratic control in relation to the envisaged agreements. This issue was dealt with in *Parliament v Council* of 2014[64] and will be discussed below

[58] Case C-425/13, *Commission v Council*, EU :C :2015 :483, para. 66.
[59] Case C-425/13, *Commission v Council*, EU :C :2015 :483, para. 67.
[60] Case C-425/13, *Commission v Council*, EU :C :2015 :483, para. 68.
[61] Case C-425/13, *Commission v Council*, EU :C :2015 :483, para. 78.
[62] Case C-425/13, *Commission v Council*, EU :C :2015 :483, paras 87-88.
[63] Case C-425/13, *Commission v Council*, EU :C :2015 :483, para. 90.
[64] Case C-658/11, *Parliament v Council*, EU :C :2014, 2025.

in the present report under question 11. The Framework agreement between the European Parliament and the Commission stipulates in particular that in the case of international agreements the conclusion of which requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process all relevant information that is also provided to the Council (or to the special committee). For the Council, the Framework agreement does not form part of the Union legal framework and therefore cannot be invoked and does not bind the institutions in any way. For these diverging positions, attention is to be drawn to the institutional report.

The position of the Member States, supporting the Council in the 2015 case, is reflected in the national reports. The Greek report considers that cooperation between the Commission and the special committee has to be improved and transparency should be enhanced. The Austrian and French reports highlight that the communication of information with the Commission is not optimal (delays in the transmission of documents to the committee). Some other reports mention that there are differences depending on the policy areas concerned. The Dutch report, notes that for trade matters, DG trade has a relatively strong position vis-à-vis the Member States, whereas in development policy, the Commission tends to be somewhat more reverent. This difference from one sector to another has also been mentioned as regards both the intensity of the control exercised by the special committee upon the Commission and the level of sharing of information on the negotiations by the Commission with the special committee (Finland, and expressed differently by the Czech Republic and Poland). The Czech report notes that it is also a question of persons: some Commission representatives are cooperative and others are not. Some other reports consider that interactions between the negotiator and the special committee as satisfactory (Malta, Ireland, Slovenia).

The Dutch and Czech reports also highlight the importance of having early discussions on the substantive legal basis (including the nature of the agreement: EU-only or mixed) as this largely defines the subsequent decisions to be taken. The Slovenian report notes that when mixed agreements are being negotiated, the mixity allows for greater interaction and leaves state officials feeling that the opinions of committee members are better taken into consideration by the negotiator.

Question 6

The provisional application, referred to in Article 25 of the Vienna Convention on the Law of Treaties, allows the rapid application of an international agreement without having to wait for the completion of the approval and ratification procedures necessary for its entry into force.

The founding treaties of the European Union contained no reference to the provisional application of international agreements. It was only with the entry into force of the Amsterdam Treaty that such a provision was introduced in former Article 300 TEC. However, the Union institutions have used this technique before it was formally incorporated in the Treaties.

Today, pursuant Article 218(5) TFEU, the decision authorising the provisional application of an international agreement is to be decided by the Council, on a proposal made by the negotiator and only if necessary. The provisional application should only be envisaged as to the part of the agreement that fall under the exclusive competence of the Union. The determination of the part of the agreement that may be subject to provisional application belongs to the Council. This decision amounts to a political choice made by the Council, on a case-by-case basis, and upon a proposal of the negotiator or the negotiating team. In order to accommodate the concerns of the Member States on the scope of the provisional application that may touch upon their competences, the Council decisions on signature and provisional application usually list the provisions of the agreements subject to provisional application[65].

Originally provisional application was conceived in cases of mixed agreements, due to the fact that the ratification process of such agreements in all the Member States requires a considerable amount of time. The constitutional provisions of the 28 national legal systems are to be respected in addition to the approval procedure at Union level. In total the approval and ratification procedures have to be accomplished in 29 different legal systems before the international agreement can get into force. However, the necessity criteria enshrined in Article 218(5) TFEU could be applied in other situations than the above mentioned one. The institutional report explains that the provisional application may take place for reasons of emergency, a need to build confidence, the test the workability of the agreement or the need to guarantee the continuity of the rights and obligations with the third party. It does not however give examples to illustrate these situations.

Pursuant to Article 218(5) TFEU no formal role is devoted to the European Parliament in the process of provisional application. The positions of the institutions on this role are conflicting. In the opinion of the Parliament, because this tool must be used in manner which respects the need for democratic scrutiny of the international agreement, provisional application should be used only where there is a real need that the agreement is applied before the applicable form of scrutiny has taken place. If a provisional application is foreseen without the

[65] See for example the provisional application of the EU-Ukraine Association agreement, *Decision 2014/295, OJ L 161, 29.5.2014, p. 1 ad Decision 2014/668, OJ L 278, 20.9.2014, p. 1.*

Parliament being requested to give its consent, this risks to jeopardise the Treaty prerogatives of the Parliament, as it would otherwise have had a possibility to decline the consent, thus leading to the termination of provisional application. On the other hand, the Council takes the view that it possesses a broad discretion to make a decision on this matter in function of the political context in which the agreement is being negotiated and will be applied and no role is provided for the European Parliament either for the initiation or the termination of the provisional application (institutional report). The Court of justice has not yet decided on this issue. The case-law rendered by the Court up to now is about the right of the European Parliament to be immediately and fully informed at all stages of the procedure of negotiation and conclusion of international agreements as set out in Article 218. However practice between institutions developed an interesting solution consisting in postponing the actual provisional application until the European Parliament has given its consent to the international agreement. This has been applied for the first time in relation to the free trade agreement with Singapore[66] and later notably for the CETA[67].

Most of the national reports consider that the decision authorising the provisional application belongs to the Council and that the present situation reflects the institutional balance provided for in the Treaties bringing the difference between executive and legislative functions (Austria, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Poland and United Kingdom). At the same time these reports welcome the usefulness of the practice developed in politically sensitive cases consisting of postponing the date of notification of provisional practice until after the consent of the Parliament has been given (Austria, Bulgaria, France, Netherlands, Portugal, Romania, Slovenia and Sweden). The national report for the Netherlands however mentions that the scope of provisional application has broadened over the years, often going beyond trade-related elements into areas ranging from economic cooperation, political dialogue to even CFSP. Therefore, the listing of the provisions concerned by the provisional application is considered as a good practice. Several reports highlight in this context the right of the European Parliament under Article 218(10) TFEU to be immediately and full informed at all stages of the negotiation and conclusion procedure France, Germany, Greece, Italy, Netherlands, Slovenia, Sweden, United Kingdom) but this issue will be discussed below in details under question 11.

[66] This practice started with the free trade agreement to be concluded with Singapore, OJ 2011 L 127, p. 1.
[67] The conclusions of the Council provided that pursuant to Article 1.2 of the Council Decision on provisional application, the date by which the notification referred to in Article 30.7(3) of the Agreement is to be sent to Canada shall be 17 February 2017, provided that the European Parliament has given its consent to the agreement".

Question 7

Practice revealed the problems that may result from the provisional application of an international agreement. The example of the 1999 Agreement on Trade, Development and Cooperation with South Africa is significant in this regard. This agreement had been signed in the form of a mixed agreement, and several parts of the agreement, including the trade part, had been considered for provisional application[68]. Between the date of signature of the agreement and the entry into force of the part of the agreement concerned by the provisional application, Italy had informed the European Commission, the Council and South Africa, that it did not intend to ratify the main agreement. It had invoked Article 25 of the Vienna Convention on the Law of Treaties and considered that its refusal to conclude the mixed agreement also prevented the entry into force of the part of the agreement which the European Community intended to apply provisionally[69]. As a matter of fact, Italy was not satisfied with the lack of protection in the agreement of the name "Grappa" and wanted to try to negotiate with South Africa a specific status for this product, even if "Grappa" was not considered a geographical indication within the meaning of the TRIPs Agreement[70]. The European Commission has invoked the principle of sincere cooperation and the unity of the Union's external representation, as well as the bilateral nature of the agreement, to consider that the Italian notification could not as such automatically revoke the provisional application of the "Community" part of the agreement, which had been decided by the Council and which was about to enter into force a few days after the Italian notification. After intense negotiations between all the parties concerned, including with the third country partner, the provisional application was saved because Italy was able to obtain concessions relating to the protection of the name "Grappa" on the South African market[71]. What lessons can we draw from this example?

[68] Council Decision 1999/753 of 29 July 1999 concerning the provisional application of the Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, OJ L 311, 4.12.1999, p. 1.

[69] Article 25 of the Vienna Convention on the law of treaties provides:

"1. A treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty".

[70] On the positions of Italy and the Commission in this case, see the facts related by A. Rosas, *The future of Mixity*, in C. Hillion and P. Koutrakos (eds), Mixed Agreements Revisited, Oxford Hart Publishing, 2010, p. 368-369.

[71] In the process, concessions were also negotiated by Greece for the "ouzo".

Clearly the provisional application has the advantage of allowing a rapid application of certain provisions of a mixed agreement, without waiting for the end of the lengthy ratification procedures in the Member States, but it also creates a certain legal uncertainty, since the contracting parties may terminate it without delay, in accordance with Article 25 of the Vienna convention on the law of treaties. Although the case of Italy with regard to the agreement with South Africa remains exceptional, one can also mention the case of the Association agreement with Ukraine, which contain important provisions that are applied provisionally since 1 September 2014[72].

With regard to the Association agreement with Ukraine, the Dutch population was consulted in an optional referendum in April 2016 and opposed the ratification of the agreement by the Netherlands. The problem with this consultative referendum was that the Association agreement could only enter into force if the Netherlands ratifies it. In order to get out of this stalemate, discussions were held between the various protagonists at national and European levels. In December 2016 the Heads of State or Government of the 28 Member States, meeting within the European Council, adopted a decision on the Association agreement with Ukraine[73]. This has unlocked the situation and allowed the ratification of the agreement in the Netherlands and the approval at the Union level. The agreement finally entered into force on 1 September 2017.

The situation in the Netherlands undoubtedly echoed the turmoil that surrounded the CETA and its signature by Belgium. For the association agreement with Ukraine, it was the ratification stage that posed problem. For the CETA, it is the stage of the signing of the agreement by Belgium that has raised difficulties, even before the question of the provisional application of the agreement arises.

These examples related to the ratification by the Netherlands of the Association Agreement with Ukraine, on the one hand, and the signature of CETA by Belgium, on the other hand, highlight that the national constitutional rules increasingly interfere with the external action of the European Union and put the Union regularly in difficulty on the international scene.

The question of the implications of non-ratification by a Member State of a mixed agreement for the provisional application arises usually in the context of

[72] The provisions on the Deep and Comprehensive Free Trade Area have been provisionally applied since 1 January 2016, see the website of the Council of the European Union, http://www.consilium.europa.eu/en/policies/eastern-partnership/ukraine/.

[73] Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their States Member States, on the one hand, and Ukraine, on the other. This decision is annexed to the conclusions of the European Council of 15 December 2016 on Ukraine.

bilateral mixed agreements[74] (i.e. trade, cooperation or association agreements). If it happens that a Member State does not ratify such a mixed agreement, this means that agreement cannot in principle enter into force between the contracting parties. However, such non-ratification does not in principle affect the provisional application of the parts of the agreement between the Union and the third country. Furthermore, pursuant to Article 216(2) TFEU the effects resulting from the Union's decision to apply the agreement provisionally should also continue to be exerted on the Member States in their capacity of members of the Union. The provisional application between the Union and the third country should in principle continue until either of the parties gives notification of its intention to terminate the provisional application[75]. The same is true in the event of a non-ratification of the agreement by a Member State. The provisional application should continue till that Member States notifies its intention to terminate the provisional application. However in practice such situations are handled out in a way to take into account a number of factors including the scope of the provisional application, the reason for the non-ratification by a Member State (temporary or permanent nature of the obstacle) and the broader context in political and economic terms of the position and interests of the Union and its Member States as well as of the other contracting party. An overall assessment should be made of the mutual benefits and balance of rights and obligations resulting from the agreement in order to decide whether to end or continue the provisional application. The case of the ratification process in the Netherlands of the Association agreement with Ukraine provides a good example. Discussions and consultations took place both at the national and European levels ending up in a Decision of the Heads of States or Government, meeting within the European Council, to agree on a solution, which was stated in an additional declaration to the association agreement and which allowed the ratification by the Netherlands of the agreement and finally the entry into force of the agreement.

As to the question of the implications of non-ratification by a Member State for the definitive entry into force of the agreement, there are different options depending on the importance and scope of the agreement, as well as on the political will in the Union and in the third country concerned. First, the Union could conclude the agreement as an EU-only (without the participation of the

[74] Mixed agreements concluded between the Union and its Member States, on one side, and a third country or a group of third country on the other side. On mixed agreements, see Ch. Kaddous, *Accords mixtes*, Commentaire J. Mégret, 3rd edition, 2018, Relations extérieures, Les accords internationaux, forthcoming.

[75] Should the Union wants to terminate the provisional application of an agreement, the same decision-making procedure that was applied for the initial decision to apply it provisionally should be respected by analogy.

Member States) after having renegotiated, where appropriate, the agreement with the third country. Secondly, the agreement could be renegotiated as a mixed agreement in order to take into account the concerns that were raised at national level in the non-ratification process. However in doing so the third country must be willing to reopen the negotiations and go into the direction proposed by the Union and its Member States. Thirdly, a solution such as the one developed by the Netherlands in the case of the ratification of the Association agreement with Ukraine, which is a pragmatic option, mixing political and legal aspects (Decision of the Heads of States or Government) that did not require a "renegotiation" of the agreement with the third State will and should stay exceptional, considering the increase of scepticism in the Member States. It is also worth noting that in the context of the CETA, a statement has been entered in the Council minutes to the Council decision authorising the signing of the agreement, stating that "If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures"[76]. This provision acknowledges the difficulty of the situation and means in principle that if the conditions mentioned in the provision are met, the provisional application of the agreement will be terminated by a notification by the Union to the third country, after having taken a decision pursuant to the same decision-making procedure applied for the initial decision to apply the agreement provisionally.

In general this question has been considered difficult to answer in the national reports because it depends largely on the subject matter of the agreement (Czech and Polish reports). Some reports did not discuss the question at all (i.e. Greece). Otherwise most of the national reports deal with the question of non-ratification in a pragmatic way and illustrate the situations with the recent examples that have arisen in relation to the ratification process of the Association agreement with Ukraine in the Netherlands and to the signature of the CETA in Belgium (Austria, Czech Republic, Finland, France, Germany, Italy, Netherlands, Poland, Romania, United Kingdom). Several reports specially highlight the political character of resolving the question of the provisional application and the non-ratification by a Member State and refer to the options discussed above in the present report in order to settle the issues raised (Austria, Czech Republic, Finland, France, Ireland, Malta, Netherlands, Poland, Portugal, Romania, Sweden, United Kingdom). The Portuguese report makes an interesting suggestion. It advocates for a conversion solution (i.e. the possibility of transforming the

[76] Statements to be entered in the Council minutes, *OJ L 11, 14.1.2017, p. 9.*

provisional application of an agreement into a definitive one with no need to reopen the negotiations) that should be explicitly referred to and regulated in the body of Article 218 TFEU – in order to safeguard and stabilize the negotiation consensus reached in the part of the agreement concerning matters falling under the Union's exclusive competence.

The principle of sincere cooperation was mentioned in several reports in order to be respected in the dialogue and consultation that may take place internally between the Union and the Member States concerned to tackle the difficulties that arise due to the non-ratification of a given international agreement (Bulgaria, Germany, Hungary, Italy). The Hungarian national report considers that there is an obligation for Member States to complete the national ratification procedure, even if there is no legally binding obligation.

Question 8

The conclusion by the European Union of international agreements requires the adoption of a decision by the Council of the Union on the proposal of the negotiator. The Council adopts its conclusion decision after the approval of the European Parliament for a number of international agreements that are listed in Article 218(6) TFEU: Association agreements (letter i), for the agreement on Union accession to the ECHR (letter ii), for agreements establishing a specific institutional framework for organizing cooperation procedures (letter iii), for agreements with important budgetary implications for the Union (letter iv), and for agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. In other cases, the Council shall adopt the decision to conclude the agreement after consulting the European Parliament. It should also be noted that the Council concludes CFSP agreements without any involvement of the European Parliament.

The scope of the agreements envisaged under Article 218(6) letters iii) and iv) is unclear and has not been interpreted by the Court of justice so far, except the category of agreements having "budgetary implications for the Union". It is also worth noting that these two categories of agreements were already mentioned in the Treaties before the entry into force of the Lisbon Treaty (article 300(3)(2) TEC)

As to the agreements establishing a specific institutional framework by organising cooperation procedures (letter iii), it is meant, in all likelihood, to address agreements that establish a more complex institutional structure than what is classically provided for in an agreement that establish bilateral bodies. The literature mentions the example of the participation of the Union in international organisations that create complex institutional structures, such as the WTO

agreement[77] or the EU accession to the Hague conference on private international law[78]. Pursuant to this approach, the classical structure of the bilateral agreements between the Union and Switzerland such as the agreement on road transport (1999)[79] would certainly not fall under this category. However, the ongoing complex negotiations on an institutional framework agreement between these two parties covering the areas of legal developments, supervision, interpretation and dispute settlement may correspond to the words "specific institutional framework by organising cooperation procedures". To sum up, in order to meet the conditions of this provision the agreement should probably contain a structure to be considered more than "classic" and different from the one envisaged in an association agreement already covered by letter i) of Article 218(6) TFEU. In any case, the wording in letter iii) is sufficiently broad and flexible to encompass various institutional structures that may be envisaged in international agreements.

The category of agreements with important budgetary implications for the Union has been interpreted in the case-law. The Court defined some criteria in the *Parliament v Council*[80]. A comparison between the annual financial cost of an agreement and the overall Union budget scarcely appears significant, and to apply such a criterion might render the relevant wording of the provision of the Treaty wholly ineffective[81]. It was also held that a relatively modest annual expenditure may, over a number of years, represent a significant budgetary outlay[82]. A comparison of the expenditure under an agreement with the amount of the appropriations designed to finance the Union's external operations enables that agreement to be set in the context of the budgetary outlay approved by the Union's external policy. That comparison thus offers a more appropriate means of assessing the financial importance which the agreement actually has for Union[83].

These two provisions of Article 218(6) letters iii) and iv) lose today part of their relevance as most EU policies are subject either to the ordinary legislative procedure or the special legislative procedure. Therefore the required consent of the European Parliament according to these two letters might be anyway covered by the category of agreements envisaged in letter v). In a broader perspective the five categories of agreements mentioned in Article 218(6) (a) TFEU contribute

[77] K. Lenaerts and P. Van Nuffel, *European Union Law*, Sweet and Maxwell, 3rd edition, 2011, para. 26-012 (footnote 39).

[78] Council Decision 2006/719 of 5 October 2006 on the accession of the Community to the Hague conference on private international law, OJ L 297, 26.10.2006, p. 1.

[79] Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road of 21 June 1999, OJ 2002 L 114, p. 91.

[80] Case C-189/97, *European Parliament v Council*, EU :C :1999 :366.

[81] Case C-189/97, *European Parliament v Council*, EU :C :1999 :366, para. 26.

[82] Case C-189/97, *European Parliament v Council*, EU :C :1999 :366, para. 29.

[83] Case C-189/97, *European Parliament v Council*, EU :C :1999 :366, para. 31.

to safeguarding the democratic control assigned to the European Parliament by the fathers of the Treaties.

Most of the national reports stressed that it is not clear how the institutional framework must be organised and which competences the bodies must be assigned to in the agreement in order to trigger the consent of the European Parliament (Austria, Czech Republic, Hungary, United Kingdom). The Austrian, Czech and Finnish reports note that there is no case-law on the matter, except the fisheries agreement case with Mauritia on the important budgetary implications for the Union but they do not take specific positions on the issue. On the other hand, the Bulgarian, German, Polish and Swedish national reports support a broad interpretation of letters iii) and iv). The loose of relevance of letters iii) and iv) in comparison to letter v) has been mentioned in the Croatian and French reports.

Question 9

Article 218(9) TFEU refers to decisions suspending the application of international agreements. Such decisions are to be adopted by the Council on a proposal by the Commission or the High Representative. No specific role is conferred on the European Parliament. The experience of suspension by the Union is quite limited. Prior to the entry into force of the Lisbon Treaty, the Council and the Member States had suspended the application of the Cooperation agreement with Yougoslavia[84]. In the post-Lisbon period, the Council has only taken two decisions under Article 218(9) to partially suspend the application of the Cooperation agreement with Syria[85]. The procedure for the suspension of international agreements is very political and allows the Council to adopt measures if a consent may be reached within the institution. However such decisions are known to be difficult to adopt as the circumstances and the context are often very sensitive. This is clearly a field in which rightly the participation of the European Parliament is avoided as being a field belonging primarily the executive. Article 218 TFEU only provides for the right to be "immediately and fully informed". According to the

[84] Decision of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 11 November 1991 suspending the application of the Agreements between the European Community, its Member States and the Socialist Federal Republic of Yugoslavia, *OJ L 315, 15.11.1991, p. 47.* There have also been a few suspension cases but adopted on the basis of Article 96 of the Cotonou agreement, which allows the suspension as a measure of last resort in case of a Party failing to meet the essential elements.

[85] Council Decision 2011/523/EU of 2 September 2011 partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, *OJ L 228, 3.9.2011, p. 19* and Council Decision 2012/123/CFSP of 27 February 2012 amending Decision 2011/523/EU partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic**,** *OJ L 54, 28.2.2012, p. 18.*

Framework agreement on relations between the European Parliament and the European Commission, the Commission shall "inform the Council and the Parliament simultaneously and in due time of its intention to propose to the Council the suspension of an international agreement and of the reasons therefor"[86].

The Austrian, Bulgarian, Swedish and British national reports note the highly political act of the decision to suspend an international agreement, which explain the reluctance of attributing participatory rights to the European Parliament and justify the existing Treaty procedure. The Bulgarian report highlights that the suspension of international agreements deal with questions of "general foreign policy". The national report for Hungary considers that there is an "interest of the Member States to maintain full control over the suspension procedure and lessen the involvement of the European Parliament in those cases". On the contrary, the French report regrets the lack of participation of the European Parliament in the suspension procedure and finds the wording of Article 218(9) TFEU surprising given the general role of this institution as the defender of respect for human rights and the democratic principles which constitute the core of the "essential elements" provisions inserted in the agreements concluded by the Union. According to this national report, the Parliament should be capable of debating suspension issues. The Hungarian report draws the attention on the fact that "even if the TFEU excludes completely any strong legal function of the Parliament in the suspension of agreements, it is well understandable that the Parliament is striving after setting, at least, the political scene of the debates in the suspension cases".

Several national reports do not make any general assessment on the application of the provision of the TFEU (Greece, Ireland, Italy, Malta, Portugal and Slovenia). The Austrian and Romanian reports consider that at the European Union level, there are agreements containing clauses which are considered as essential and the breach of which would lead to the suspension of the agreement. The Romanian report mentions the example of the Draft Free Trade Agreement with Singapore. The Polish report considers that the suspension of a treaty is an extraordinary procedure, used mainly in case of a severe violation of human rights by a party of an agreement. For this report, suspension is in fact treated as a measure of last resort and is rarely used. The national report for Austria draws attention on the fact that it is not clear to proceed with the suspension of a mixed agreement. It does however refer to the principle of sincere cooperation according to which there should be a duty to consult between the Union and the Member States. This national rapporteur considers that if the Union's part has been suspended, the remaining part may become obsolete for the Member States too.

[86] Framework agreement on relations between the European Parliament and the European Commission, *OJ L 304, 20.11.2010, p. 47.*

Question 10

Article 218(9) TFEU also refers to decisions establishing the positions to be adopted on behalf of the European Union in a body set up by an international agreement. This type of decisions are to be adopted by the Council on a proposal from the Commission or the High Representative. No specific role is conferred upon the European Parliament. This provision of the Treaty has been interpreted by the Court in *Germany v Council*[87] concerning the International Organisation of Vine and Wine (OIV).

Article 218(9) TFEU refers to a body created by "an agreement", without specifying that the Union should be party to such an agreement. The Court held that the reference in that provision to the positions to be adopted "on the Union's behalf" does not mean that the European Union has to have been a party to the agreement which set up the international body in question. Nothing in the wording of Article 218(9) TFEU prevents the European Union from adopting a decision establishing a position to be adopted on its behalf in a body set up by an international agreement to which it is not a party[88]. Consequently, where an area of law falls within a competence of the Union, the fact that the Union did not take part in the international agreement in question does not prevent it from exercising that competence by establishing, through its institutions, a position to be adopted on its behalf in the body set up by that agreement, in particular through the Member States which are party to that agreement acting jointly in its interest[89].

As to the acts to be adopted, they do not need to be legally binding. It suffices that they have an impact on Union law. In that judgment, the Court held that the recommendations under consideration relate to new oenological practices, methods of analysis for determining the composition of products of the wine sector, or purity and identification specifications of substances used in oenological practices and are capable of decisively influencing the content of the legislation adopted by the Union legislature in the area of the common organisation of the wine markets. It follows that by reason of their incorporation into Union law they have legal effects in that area for the purposes of Article 218(9) TFEU and that the Union, while not a party to the OIV Agreement, is entitled to establish a position to be adopted on its behalf with regard to those recommendations, in view of their direct impact on the Union's acquis in that area[90].

[87] Case C-399/12, *Germany v Council*, EU:C:2014:2258.

[88] Case C-399/12, *Germany v Council*, EU:C:2014:2258, paras 49-50.

[89] Case C-399/12, *Germany v Council*, EU:C:2014:2258, para. 52. See also *Commission* v *Greece*, C-45/07, EU:C:2009:81, paras 30-31 and Opinion 2/91, EU:C:1993:106, para. 5.

[90] Case C-399/12, *Germany v Council*, EU:C:2014:2258, paras 63-63.

It is worth noting that the meaning of Article 218(9) TFEU was highly disputed before the Court. On the one hand, Germany was supported by 7 Member States (Czech Republic, Luxembourg, Hungary, Netherlands, Austria, Slovak Republic, United Kingdom) and on the other hand, the Council was supported by the Commission. Another aspect of that provision was interpreted in the recent judgment *Commission v Council*[91]. The Court held that the Council, by adopting conclusions, instead of a decision, as laid down by Article 218(9) TFEU, infringed the essential procedural requirements laid down by that provision. The fact that an institution of the Union derogates from the legal form laid down by the Treaties constitutes an infringement of essential procedural requirements that is such as to require the annulment of the act concerned, since that derogation is likely to create uncertainty as to the nature of that act or as to the procedure to be followed for its adoption, thereby undermining legal certainty[92].

Several national reports acknowledge the case-law rendered by the Court on the interpretation of Article 218(9) TFEU. Some national reports refer however to a certain number of issues which did not or did not yet end up before the Court. The Czech report mentions in this regard the Action plans[93], Political priorities[94] and other implementing acts to the ENP Association agreements. For these decisions the Commission proposes to adopt the EU position on the basis of Article 218(9) TFEU. However some Member States oppose this practice since they consider these acts as implementing acts are, as to their content, usually *political* programming documents adopted in the form of a *recommendation* of the respective Association Council. For these States the hypothesis of Article 218(9) TFEU (*"acts having legal effects"*) is thus not fulfilled. In that respect, the Czech report acknowledges the necessity to have *some* common EU position, but nevertheless considers that simple Council conclusions (or, in some cases *joint* conclusions of the Council *and* the representatives of the Member States within the Council[95]) should be convenient.

[91] Case C-687/15, *Commission v Council*, EU:C:2017:803.

[92] Case C-687/15, *Commission v Council*, EU:C:2017:803, paras 44 and 47.

[93] For instance Relations with Jordan Approval of the position to be adopted by the European Union and its Member States within the Association Council established by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, with regard to the adoption of a Recommendation on the implementation of the EU-Jordan ENP Action Plan; Council doc. 7685/1/12

[94] For instance Council decision on the position to be taken on behalf of the European Union within the Cooperation Council established by the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part, with regard to the adoption of the EU-Armenia Partnership Priorities; Council doc. 11258/17.

[95] According to the national report, these Council conclusions are so called „floating format", and as purely political act have no express grounding in the Treaties; thus, the CJEU case-law against the *hybrid acts* does not concern them.

The German report relates the issue of application of Article 218(9) with several provisions of the CETA, as this was dealt with by the German constitutional Court[96]. The national report for Sweden refers to the principle of sincere cooperation that has to be respected within the scope of the Union's positions to be established in international organisations in order to highlight the need for the Union to speak with one voice. The Greek report considers that the obligation to express a common position in cases falling within the shared competence of the Union and its Member States should not be considered as an obligation of result[97].

Question 11

Pursuant to Article 218(10) TFEU, the European Parliament is immediately and fully informed at all stages of the procedure. This provision applies to all agreements, including agreements with CFSP provisions.

The case law of the Court of Justice on the role of the European Parliament in external action has recently been enriched by two important judgments: *Parliament v. Council* of 24 June 2014 and of 14 June 2016, respectively the *Mauritius and Tanzania* cases[98]. The two judgments provide important clarifications regarding the obligations of the Council and the High Representative in their respective relations with the European Parliament in the negotiation and conclusion of international agreements.

In *Parliament v Council* of June 2014, the Court held that the procedural rule laid down in Article 218(10) TFEU constitutes an essential procedural requirement within the meaning of the second paragraph of Article 263 TFEU and its infringement leads to the nullity of the measure thereby vitiated. This rule is an expression of the democratic principles on which the European Union is founded. In particular, the Parliament's involvement in the decision-making process is the reflection, at the Union's level, of the fundamental democratic principle that the

[96] BVerfG, Urt. v. 13.10.2016- 2 BvR 1368/16 u.a., RN 62-64, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/10/rs20161013_2bvr136816.html. It held notably that an inter-institutional agreement, for example, might ensure that decisions taken by the CETA Joint Committee pursuant to Art. 30.2 sec. 2 CETA may only be passed on the basis of a common position (Article 218 (9) TFEU) unanimously adopted by the Council (Press Release in English language, No. 71/2016 of 13 October 2016).

[97] In general, Greece is hostile to the loss of autonomy of its international action in the maritime field, given the national interests at stake and its strong presence in the international shipping sector. See *Commission v Greece*, C-45/07, EU:C:2009:81. It should be noted that Greece is in favour of seeking a common position with the Member States which share the same interests in the maritime field, in particular Cyprus and Malta.

[98] Case C-658/11, *Parliament v Council*, EU:C:2014:2025 and Case C-263/14, *Parliament v Council*, EU:C:2016:435.

people should participate in the exercise of power through the intermediary of a representative assembly[99].

The information requirement "to be fully and immediately informed", arising under Article 218(10) TFEU, has been broadly interpreted by the Court and ensures that the Parliament is in a position to exercise democratic scrutiny of the European Union's external action and, more specifically, to verify that its powers are respected precisely in consequence of the choice of legal basis for a decision concluding an agreement[100], but also to exercise its own powers with full knowledge of the European Union's external action as a whole[101].

The responsibility to inform the Parliament of the conduct of negotiations and to ensure that the obligation laid down by Article 218(10) TFEU is fulfilled (including agreements relating to CFSP) is incumbent on the Council, since Article 218(2) TFEU provides that it is for the Council to authorize the opening of negotiations, to adopt negotiating directives, and to authorize the signing and conclusion of the agreements[102].

The scope of the information obligation covered by Article 218(10) TFEU includes, inter alia, the authorization to open negotiations, the definition of the negotiating directives, the nomination of the Union negotiator and, in some cases, the designation of a special committee, the completion of negotiations, the authorization to sign the agreement, where necessary, the decision on the provisional application of the agreement before its entry into force and the conclusion of the agreement[103]. It has been underlined that it does not extend to stages that are part of the internal preparatory process within the Council, but does include the intermediate results reached by the negotiations, such as the text of the draft agreement and the text of the draft Council decisions[104]. As to the word "immediately", the Court held that a period of nine days after the adoption of the contested decision was late, but admitted that it is conceivable that, in some circumstances, information delivered to the Parliament after a period of a few days could be described as 'immediate', within the meaning of that provision[105].

It is worth noting that this timely and extensive information requirement is also in the interest of the Council and the Commission, due to the participation of the European Parliament in the conclusion of the international agreements

[99] Case 138/79, *Roquette Frères v Council* EU:C:1980:249, para. 33, and Parliament v Council EU:C:2012:472, para. 81. Case C-658/11, *Parliament v Council*, EU:C:2014:2025, paras 80-81.
[100] Case C-658/11, *Parliament v Council*, EU:C:2014:2025, para. 79.
[101] Case C-263/14, *Parliament v Council*, EU:C:2016:435, para. 71.
[102] Case C-263/14, *Parliament v Council*, EU:C:2016:435, para. 73.
[103] Case C-263/14, *Parliament v Council*, EU:C:2016:435, para. 76.
[104] Case C-263/14, *Parliament v Council*, EU:C:2016:435, para. 77.
[105] Case C-263/14, *Parliament v Council*, EU:C:2016:435, paras 81-82.

the Union negotiates with third countries or international organisations according to Article 218(6) TFEU (approval or consultation procedure).

The interinstitutional agreement on Better Law-Making provides for the Council, the Parliament and the Commission to meet in order to negotiate practical arrangements for cooperation and information-sharing within the framework of the Treaties[106]. The negotiations are currently taking place.

Several national reports make reference to the above mentioned case-law on the interpretation of Article 218 (10) TFEU and consider that the right to be immediately and fully informed is justified and indispensable since the European Parliament is directly elected and called to exercise democratic control at the European level (Austria, Bulgaria). Some of these reports however highlight that this right should be interpreted in a rather restrictive view. It should not for instance mean "to have direct access to any negotiating document on the table" (Czech Republic), or that the right to be informed equate to a consultation right (Czech Republic, France). Some other reports point out that some of the information may be sensitive or classified and express their concerns about maintaining its confidential nature. They do refer to the security rules put into place to this end and considered them successful (United Kingdom).

As to the role of the national parliaments, the national reports refer to the national constitutional rules within the Member States. They explain the way the national or regional parliaments take part in the process of conclusion of international agreements and the obligations that rely on governments as far as the duty to inform is concerned. The Austrian report highlights that the double democratic representation, participation and political control exercised by the European and national/regional parliaments is in full conformity with Article 10(2) TEU. The Bulgarian, Portuguese and Romanian reports refer to the role of the national and regional parliaments within the ratification process of mixed agreements. The national report for Croatia mentions that the rights of the European Parliament under Article 218(10) TFEU are greater than those of the national parliament. The Irish report explains that the increase of the powers of the European Parliament does not necessarily result in a concomitant expansion of the role of national parliaments. The Dutch report considers that the information of the national and regional parliaments is equally important. It however mentions that there are also good arguments against giving Member States' parliaments rights on the conclusion of Union agreements or the Union's part of mixed agreements. It is clear that democratic control and legitimacy ensured by bodies elected in general elections is considered as one of the biggest challenges of contemporary international law. The Polish report mentions the existence of

[106] Interinstitutional Agreement on Better Law-Making, *OJ L 123, 12.5.2016, para. 40.*

interparliamentary bodies (COSAC for instance) that should be explored and used to ensure participation of national parliaments.

The issue of the participation of the national parliaments in the negotiation and conclusion of international agreements to be concluded by the Union and its Member States was also largely debated in the national reports as to the relationship with the CETA and TTIP agreements. It has also been acknowledged that the efforts made on the part of the institutions on transparency such as in the context of the TTIP, did not suffice, even if it increased the possibilities for public debate at the European and national levels (European Parliament, national and regional parliaments as well as public debate).The Dutch report mentions the critics which were formulated as to the lack of democratic legitimacy in particular of this kind of international agreements[107].

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

International agreements concluded by the European Union form an integral part of the European Union's legal order as soon as they enter into force. The *Haegeman* formula[108] clearly rules out the technique of receiving international agreements in the legal order of the European Union, because it excludes any idea of transformation. Mixed agreements have the same status in the Union's legal order as agreements concluded solely by the Union, at least as far as the provisions falling within the Union's competence are concerned.

Pursuant to Article 216(2) TFEU, agreements concluded by the Union are binding on the institutions of the Union and on its Member States. It is incumbent upon the institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements. Therefore, this chapter deals with the issue of interpretation and application of international agreements at the Union and national levels (question 12), as well as of their direct effect (question 13).

After this first part, the report focusses on the issue of compliance with international agreements that bind the Union and the Member States. Consequently, the role of the Commission as to potential cases of failure is examined (question 14) as well as other mechanisms that may be put into place at the national level to this end (question 15).

[107] Two opposing declarations on the issue of international agreements and democratic legitimacy: *Namur Declaration*, http://declarationdenamur.eu/, and *" Trading together" Declaration*, https://www.trading-together-declaration.org/

[108] Case 181/73, *Haegeman*, EU:C:1974:41, para. 5 (slightly adapted here).

Question 12

As mentioned in the introduction, the issue of interpretation and application of international agreements is dealt with both at the Union and national levels. In the 1974 *Haegeman* judgment, one of the first cases in which the Court had to interpret an international agreement, it held that an agreement is, in so far as concerns the Union, an act of one of its institutions within the meaning of the Treaty provision on preliminary ruling[109]. The Court of justice interpreted indifferently EU-only agreements and mixed agreements without necessarily first examining the question of its jurisdiction. As the case-law on this matters is rather known and does not raise particular problems, the present report intends to examine whether national courts did interpret these international agreements binding on the Union and, how the Member States dealt with this issue.

The picture resulting from the national reports is not homogeneous. Several reports note that there is virtually no national case-law to report. In other Member States, there is quite a lot going on. It seems that Union's external relations field is not different from other areas of Union law: in other areas too one often notice differences in terms of the kind of issues submitted to national judges.

In Austria, there is a court's practice with regard to Union's external action cases since the accession to the European Union in 1995. Three relevant cases are mentioned dealing respectively with the Lugano convention of 1988, the Association agreement with Poland and the Euro-Mediterranean agreement with Israel of 1995. The judgments were rendered by the Supreme Court of Justice or the Supreme Administrative Court. In the last mentioned case, the Court had to decide on the application of the CILFIT judgement and ruled that a request for preliminary ruling was not compulsory in the circumstances of the case. The Austrian report also highlights that since its accession to the European Union, there were about 11 Austrian preliminary rulings requests concerning international agreements. 7 were related to the Association agreement with Turkey, 1 to the Association agreement with Bulgaria and 3 to the Free movement of persons agreement with Switzerland.

The national report for the Czech Republic mentions that the Constitutional Court held, in a case concerning the Aarhus convention and its effects in the Czech legal order, that the provisions of national law must be interpreted in conformity with Union law (the Aarhus Convention being part of it). At the same time, the same constitutional Court ruled that the Lisbon Treaty was in conformity with the constitutional order of the Czech Republic.

The French Conseil d'Etat, in a case concerning the Kyoto protocol, held that the Court of justice is the competent court to assess the invocability of the

[109] Case 181/73, *Haegeman*, EU:C:1974:41, para. 4.

provisions of the international agreement. However, a reference for a preliminary ruling was not made in that case on the basis of the application of the "acte clair" theory resulting from the CILFIT judgment. To this end, the Conseil d'Etat referred to the ATAA judgment, in which the Court of justice declined the direct effect of Article 2(2) of the Kyoto Protocol. It seems that even if the Court of justice did not comment on the direct effect of the specific provision, the Conseil d'Etat considered that the lack of direct effect of that provision did not raise any doubt, since the provision did not lay down any clear and precise obligation. This resulted in a no-reference to the Court of Justice.

In Germany, the two cases referred to in the national report concern the free trade agreement with Canada (CETA). The first one is the judgment of the Federal Constitutional Court already mentioned and the second case is a judgment rendered by the Constitutional Court of the Land of Bayern. In Bulgaria as well there is a reference made by the President of Bulgaria to the Constitutional court on the text of the CETA.

The national report for Greece mentions that national judges accept the position of the Court of justice on mixed agreements as developed in the *Haegeman* case. These agreements form an integral part of Union law according to Article 216(2) TFEU and the Court of justice has jurisdiction to interpret them. The Greek courts have not had the opportunity to rule on the direct effect of provisions of mixed agreements falling within the Member State competence and there is no national case-law challenging international agreements (EU-only or mixed agreements), other than the ones which were referred to the Court of justice of the European Union.

The Irish report notes that the law is clear that an international agreement cannot prevail over domestic law, save to the extent that such agreements have been made part of domestic law. The Irish Constitution is dualist in nature. International agreements and national law are separate, and international law only has effect when it is incorporated into national law. Several cases are mentioned. In the case of the Aarhus Convention, the judge held that it could not be said that either the existence of the Convention in general or specific articles thereof could or should decisively influence the interpretation of the Irish legislation.

The other national reports either have not answered the questions or simply mention that there is no such case-law (Croatia, Finland, Hungary, Italy, Malta, Netherlands, Poland, Portugal, Romania, Slovenia, Sweden, United Kingdom).

The conclusion to be drawn from national reports is that there are not many problems as regards the interpretation and application of international agreements at the national level. It seems also, as mentioned in the Polish report, that the complexity of the issues raised by these international agreements concluded by the Union alone or by the Union with the Member States preclude national

courts from referring to them in their own case-law. However it is worth noting that more and more often the question of the Union competences is not only disputed before courts at the Union level but also at the national or the regional levels, as evidenced by the CETA example.

Question 13

The doctrine of direct effect (or direct applicability) in Union law has been set down by the Court of Justice in the *Van Gend en Loos* judgment of 1963[110]. Direct effect can be defined as a characteristic of a Union rule which confers the capacity to create rights and obligations upon individuals. The question of direct effect is of great importance because if an agreement is interpreted as only creating rights and obligations between the contracting parties, its effectiveness is obviously more limited than if it were to create rights and obligations that individuals could enforce before their national authorities.

According to settled case law, the Court considers that a provision of an international agreement must be regarded as having direct effect when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure[111]. These principles are applicable to agreements to which the Union is a party,[112] including mixed agreements, [113] as well as to decisions of association councils adopted under the agreements[114].

The Court has accepted on a very broad basis the direct effect of provisions of free trade agreements, ACP agreements, association agreements, cooperation agreements and the EEA Agreement[115], whereas it denied as early as 1972 the direct effect of the GATT in *International Fruit Company*[116], and many years later it reached the same conclusion in relation to provisions of the WTO agreements[117]. Whilst for a long time WTO was the only case of agreements for which the Court denied direct effect, more recently it also held that provisions of the United Nations Convention on the law of the Sea (UNCLOS)[118], the Kyoto

[110] Case 26/62, *Van Gend en Loos*, EU:C:1963:1.
[111] Case 12/86, *Demirel*, EU:C:1987:400.
[112] Case 270/80, *Polydor*, EU:C:1982:43 and Case 104/81, *Kupferberg*, EU:C:1982:362.
[113] Case 87/75, *Bresciani*, EU:C:1976:18, Case 71/81, *Pabst*, EU:C:1982:129 and Case C-58/93, *Kziber*, EU:C:1994:160.
[114] Case C-192/89, *Sevince*, EU:C:1990:322.
[115] Case T-115/94, *Opel Austria*, EU:T:1997:3.
[116] Case 21-24/72, *International fruit company*, EU:C:1972:115.
[117] Case C-149/96, *Portugal v Council*, EU:C:1999:574.
[118] Case C- 308/06, *Intertanko*, EU:C:2008: 312.

Protocol[119] and the United Nations Convention on the rights of persons with disabilities[120] were not capable of having direct effect. One may wonder whether the Court has not adopted a more cautious approach towards multilateral agreements than to bilateral agreements.

It must also be recalled that the Court held in the *Kupferberg* judgment that in conformity with the principles of public international law, Union institutions, which have power to negotiate and conclude an agreement, are free to agree with the third States what effect the provisions of that agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the Agreement in the Union[121].

In the vast majority of international agreements, this issue is not settled by the contracting parties and it is therefore for the Court of Justice to decide on this issue when it is seized. However, the institutions of the European Union have developed the practice, essentially since 2008, of expressly excluding the direct effect of the provisions of Union's trade agreements, thus departing from the traditional approach that was applicable so far in the matter. One of the last example is the CETA agreement, which provides for this exclusion in Article 30.6.

The free trade agreements in question (free trade agreements only[122] or broader agreements including a free trade agreement[123]) share the common denominator of integrating, to varying degrees, WTO provisions in their respective texts and to include a dispute settlement mechanism largely inspired by that applicable in the WTO. This source of inspiration, which is the law of the WTO, largely explains the exclusion of the direct effect of the provisions in these agreements, knowing that this exclusion now derives from the actual texts of the

[119] Case C-366/10, *ATAA*, EU :C :2011 :864.

[120] Case C-363/12, *Z.*, EU:C:2014:159.

[121] Case 104/81, *Kupferberg*, EU:C:1982:362, para. 17.

[122] See for instance the agreement with South Korea, (Article 8 of Council Decision 2011/265. OJ L 127, 2011, p. 1 and Article 336 of the Agreement OJ L 127, 2011, p. 6), the Agreement with Colombia and Peru (Article 336 OJ L 354, 2012, p. 3, and Article 7 of Council Dec. 2012/735 on the signing, on behalf of the Union, and provisional application of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ L 354, 2012, p. 1), the Free Trade Agreement with Singapore (Article 17.15).

[123] See for instance the Association Agreements with Central America (Art. 356, OJ L 346, 2012, p. 3 and Article 7 of Council Dec. 2012/734, OJ L 346, 2012, p. 1), Ukraine (Ch. 14 of the Agreement, as well as provisions on services and establishment. See also Article 5 of Council Dec. 2014/295, OJ L 161, 2014, p. 1), Georgia (Article 5 of Council Dec. 2016/838, OJ L 141, 2016, p. 26.), and Moldova (Art. 5 of Council Dec. 2016/839, OJ L 141, 2016, p. 28).

agreements and no longer from the examination of these texts made by the Court of Justice. This new trend is likely to be at least partly due to the broad (too broad in the eyes of some) recognition by the Court of justice of direct effect of provisions contained in a large variety of international agreements. A difference could probably be made depending on whether the exclusion is provided for in the agreement itself or in the decision authorising the signing of the agreement. In the first case, the contracting parties exclude any assessment to be made by the Court of justice of the European Union or by the courts of the other contracting party. In the second one, it is not certain if direct effect could not still be recognised as stemming from the provisions of the agreement itself.

The questionnaire asked for the Member States' assessment of the recent case law of the Court of Justice on the direct effect of international agreements. Several national reports agree with the case-law rendered by the Court of justice on direct effect of international agreements (Austria, Bulgaria, Croatia, Germany, Ireland, Italy, Poland, Portugal, United Kingdom). The French national report notes that the Conseil d'Etat has gradually moved closer to the positions of the Court of justice, which seems to testify of its adherence to the case-law of the Court on direct effect. The report also mentions that the Cour de Cassation referred to the Court of justice's case-law to rule on the invocability of mixed agreements concluded with Turkey and Algeria.

Some national reports refer to the new trend introducing the exclusion of non-direct effect of provisions in commercial agreements (Austria, Germany, Portugal, United Kingdom) and only the Czech report considers this trend problematic, in particular when it comes to access to justice by smaller investors given that it creates a gap in the efficient legal protection.

The conclusion to be drawn from national reports is that there are not many problems as regards the case-law of the Court of Justice on direct effect of international agreements.

Question 14

This question concerns the obligation resulting from Union law for the Member States to comply with the international agreements concluded by the Union according to Article 216(2) TFEU. It aims at analysing the current actions that may have been brought by the Commission against the Member States pursuant to Article 258 TFEU.

In Austria, certain problems have arisen as to the correct application of the Association agreement with Turkey that resulted in tensions between amendments to the national laws and the direct applicable provisions of the said agreement. The Commission started a case against Austria (C-1/15) that has been removed from the list of cases by decision of the Court on 22 September 2016.

There is also a preliminary ruling procedure that started recently concerning again the Association agreement with Turkey (C-629/16, pending).

There are a few cases as regards the Czech Republic. Two cases concerned aviation agreements with Russia and the United States and one case concerned aviation navigation services in connection with an interstate agreement establishing the Functional Airspace Block Central Europe (FAB CE). The two first cases are still pending. According to the Commission the agreements are in breach of Union law and the Czech Republic did not take appropriate measures to remove the incompatibilities.

France is concerned by a reasoned opinion published by the Commission in the context of infringement proceedings for breach of the EEA Agreement. The Commission has asked France to amend certain provisions relating to the method of calculating the personal income tax. By maintaining these provisions, France ignores the EEA provisions on the free movement of workers, the right of establishment and the free movement of capital.

Hungary is concerned by the implementation of EU asylum and migration acquis that imply indirectly international obligations (infringement n°20152201, formal notice sent on 17 May 2017). The alleged incompatibilities focus mainly on three areas: asylum procedures, rules on return and reception conditions.

The last case of infringement procedure introduced by the Commission against the Netherlands was decided in 2010 (C-92/07). It concerned the situation that higher charges on the issue of residence permits for Turkish nationals were imposed by that Member State than for nationals of the EU Member States, the EEA and Swiss nationals. The Court held that the Netherlands had violated the Association agreement with Turkey. The country is also facing an infringement procedure in relation to the 1991 bilateral investment agreement between the Netherlands and Slovakia. The Commission alleges a violation of EU internal market rules. There is also reasoned opinions of the Commission requesting a certain number of countries to terminate their intra-EU bilateral investment treaties (Austria, Romania, Slovakia and Sweden).

The other national reports either have not answered the questions or simply mention that there are no such cases of infringement pending (Bulgaria, Finland, Germany, Greece, Italy, Ireland, Malta, Poland, Portugal, Romania, Slovenia, Sweden, United Kingdom). The conclusion to be drawn from the reports is that there are not many problems with the respect by Member States of international agreements concluded by the Union with third countries.

Question 15

This question refers to possible measures the Member States may or could have put into place to ensure, on their respective territories, that the obligations

resulting for them from the international agreements concluded by the Union alone or as mixed agreements are respected. These potential measures are to be envisaged as additional means to the infringement procedure for enforcing international agreements.

In most of the Member States there is no specific mechanism dedicated to the supervision of compatibility of national law with international agreements that are binding on the Union and the Member States. There are only general measures undertaken to ensure that new legislation in Poland is in line with EU law, which includes international agreements. This is also true for France, Germany, Hungary, Ireland, Poland, Romania, and the United Kingdom. In Austria, the national report mentions that this type of scrutiny is in principle integrated in the usual mechanisms of inter-ministerial consultation before the authorisation of negotiations and during the negotiation process.

The national report for Bulgaria notes that the control over the implementation of international agreements is exercised by the Council of ministers, pursuant to Article 28 of the Law on International Agreements. The ministers who are in charge of the implementation of the international agreement, in accordance with its subject and provisions, are responsible for ensuring compliance with the obligations arising therefrom. The Minister of Foreign Affairs monitors the implementation of the international agreements, informs the Council of ministers of cases of non-compliance, and may propose measures for their elimination.

The Croatian report highlights that there are no particular control measures in place. Such agreements would presumably be treated as part of EU law. However the national rapporteurs expresses a concern for the implementation of EU-only agreements, to which Croatia is not formally a party. They note that it is not clear under the Croatian constitution if such agreements would be treated as agreements "concluded and ratified in accordance with the Constitution" which are considered as part of Croatia's internal legal order (Art 134 of the Constitution), or just as another part of EU law, for which the Constitution states more vaguely that they must be "applied in accordance with the European Union *acquis*" (Art 141.c(2)). In the latter scenario, the rapporteurs fear that Croatian authorities – especially, for example, courts dealing with a dispute between private parties – may be reluctant to directly apply such agreements, and may not be aware of the fact that Croatia is bound by them by virtue of EU law (Article 216(2) TFEU).

The national report for the Czech Republic notes that provisions of a law which are in contradiction with an international agreement (including those concluded by the European Union) will not be applied and the rules laid down in the international agreement will prevail. According to the national report, the effects and primacy of agreements under the exclusive competence of the European

Union are governed by EU law. These agreements concern matters in relation to which the Czech Republic has transferred the necessary competences to the European Union on the basis of the Constitution. To avoid any violation of international agreements that are binding on the European Union, the national system provides that every proposal of a legal act which is to be adopted by the Czech Parliament is screened by relevant institutions of the Czech Republic (competent line ministry, EU law Department and the International Law department at the Ministry of Foreign Affairs and the Compatibility Department at the Office of the Government of the Czech Republic).

There are also several control measures provided for in Italy to ensure compliance with the international agreements binding on the European Union, that implies notably the Chamber's Rules of Procedure, the Commissioni di merito, the Department of the Presidency of the council of ministers, "Dipartimento per le politiche europee".

The national report for Malta notes that enforceability is subject to ratification and adoption of the international agreements as acts of Maltese Parliament.

The other national reports either have not answered the question or simply mention that there are no specific control measures taken by the national authorities in view of ensuring compliance with the international agreements that are binding on the European Union (Finland, Greece, Ireland, Portugal, Slovenia, Sweden). The conclusion to be drawn from the reports is that in most of the Member States international agreements are subject to the same control than any other rule of Union law.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

The Common Commercial Policy (CCP) is at the heart of the European integration process since the entry into force of the EEC Treaty in 1958. With its internal and external dimensions, it plays a crucial role in the economic development of the European Union. Trade policy is also the most important field of the Union's external relations in practical terms. It notably allowed the European Union to become one of the key actors of the global trading system, competing with other economic powers like the USA or China[124].

CCP has been deeply transformed since its inception, in relation to its scope and to the nature of the Union's competence, in relation also to the objectives to be achieved in that policy as well as to the roles of the Union's institutions in the definition and implementation of that policy. The content of CCP has been

[124] See *European Commission,* Global Europe – Competing in the World, A contribution to the EU's Growth and Jobs Strategy, COM (2006) 567 final.

adapted to the needs of the economy and to the realities of international trade. The transformation occurred stepwise. It was sometimes carried out on the basis of teleological interpretations in the case-law rendered by the Court of justice (see for instance Opinion 1/78) and sometimes, when extensive interpretations were not possible, through modifications of treaty provisions (see the modifications of the treaty after Opinion 1/94).

This report analyses the situation eight years after the entry into force of the Lisbon Treaty. The recognition of the exclusivity of Union's competence in the CCP through case-law had impacts on the definition of this policy internally in the adoption of autonomous rules, and externally in the conclusion of international agreements such as recently the Singapore free trade agreement that gave rise to Opinion 2/15, the CETA or the TTIP.

The CCP includes today fields such as trade in goods and services, commercial aspects of intellectual property rights and foreign direct investment. Trade and investment protection is definitely one of the areas that was the most disputed and that has met a strong opposition in the public debate recently.

The general principles and objectives called to guide Union's action on the international scene has also to be respected and pursued in the CCP. This obligation affects the design of the CCP and may give rise to problems when these general principles and objectives conflict with the trade objectives of the CCP. The relationship between Article 207 TFEU and this set of general principles and objectives will also have to be examined.

Finally, the transformation of the CCP is also related to the change brought by the Lisbon Treaty to the distribution of powers between the Union's institutions and to the roles attributed to each of them in the design and implementation of the CCP. The main actors in trade issues are today the Council, the European Parliament and the Commission, even if the European Council has become involved in the external action of the European Union in identifying the EU strategic interests and objectives (including the commercial ones), and even though the High Representative was assigned responsibility to assist the Council and the Commission in their task to ensure consistency between the different areas of external action and between these and the other policies of the Union.

Question 16

The Lisbon Treaty extended the scope of CCP as it was defined in Article 133 TEC. Today Article 207 TFEU entrusts the Union with full powers in trade notably in the fields of services, commercial aspects of intellectual property rights and foreign direct investment. The precise content of what is meant in these different fields was unclear till recently. The exclusivity of Union's competence in CCP, anchored henceforth in Article 3 TFEU, had clearly an impact on the scope

of the above mentioned notions, as evidenced by the recent case-law in matters of TRIPs (*Daiichi Sankyo* and Opinion 2/15)[125], services (*Commission v. Council*)[126], transport and investments in Opinion 2/15.

Common commercial policy in general

In Opinion 2/15 the scope of common commercial policy has been interpreted in a very broad manner. The Court of justice clarified a certain number of important issues. In the first place, it held that the proposed agreement with Singapore seeks to establish a free-trade area, to liberalize, and to facilitate trade and investment between the contracting parties. In doing so, it considered that priority should be given to the extent to which the provisions of the proposed agreement fall within the exclusive competence of the Union, as referred to in Article 3 TFEU.

Recalling the wording of Article 207(1) TFEU and its now settled case-law on the concept of common commercial policy, the Court stated that the only circumstance that an act of the Union, such as an agreement concluded by it, is liable to have implications for international trade is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, a European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade[127].

On the basis of these considerations, the Court did verify, area by area, whether the commitments contained in the draft agreement are intended to promote, facilitate or regulate such trade and have direct and immediate effects on it. It did examine consecutively the provisions on market access, investment protection, intellectual property protection, competition and sustainable development.

The Court ruled that the chapters related to market access meet the abovementioned criteria of promoting, facilitating or governing trade and have direct and immediate effects on it. These concern national treatment and market access for goods, trade remedies, technical barriers to trade, sanitary and phytosanitary measures, customs and trade facilitation, non-tariff barriers to trade and investment in renewable energy generation and government procurement. With regard to the chapters on services and establishment, covering the four modes of GATS: cross-border supply of services (GATS mode 1 and 2), establishment (GATS mode 3) and temporary presence of natural persons (mode 4 GATS), all

[125] Case C-414/11, *Daiichi Sankyo*, EU:C:2013:520.

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

[127] Opinion 2/15, EU:C:2017:376, para. 36. See also Case C-414/11, *Daiichi Sankyo*, EU: C: 2013: 520, para. 51, and Case C-137/12, *Commission v. Council*, EU:C:2013:67522, para. 57, as well as *Opinion 3/15*, Marrakesh Treaty on Access to Published Works, EU: C: 2017: 114, para. 61.

these provisions are intended to promote, facilitate or govern trade and have direct and immediate effects on trade in services. They are therefore part of the common commercial policy. The Court has also acknowledged that the provisions on financial services as well as those on the mutual recognition of professional qualifications fell as well under the common commercial policy[128]. There is however the exception for the supply of services in the field of transport, that are expressly excluded from the concept of common commercial policy by Article 207(5) TFEU. This area has been considered as falling under the exclusive competence of the Union not under Article 207 TFEU but under Article 3(2) TFEU (see our comments above under question 1).

Investment protection

As to investment protection the Court clarified in Opinion 2/15 that the Union has exclusive competence pursuant to Article 207 to conclude international agreements on foreign direct investments (FDI). These consist in investments of any kind made by natural or legal persons 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 in order to carry out an economic activity. Acquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable him to participate effectively in the management of that company or in its control[129]. It follows that the Union has competence to approve any commitment vis-à-vis a third State relating to investments made by natural or legal persons of that third State in the European Union and vice versa which enable effective participation in the management or control of a company carrying out an economic activity[130].

However the use, by the framers of the TFEU, of the words "foreign direct investment" in Article 207 is an unequivocal expression of their intention not to include other foreign investment in the common commercial policy. These non-direct investments have been defined by the Court and may, *inter alia*, take place in the form of the acquisition of company securities with the intention of making a financial investment without any intention to influence the management

[128] Opinion 2/15, EU:C:2017:376, para. 53. This was already admitted in Opinion 1/08, agreements modifying the Schedules of Specific Commitments of the Community and its Member States under the GATS, EU:C:2009:739, paras 4, 118-119.

[129] Opinion 2/15, EU:C:2017:376, para. 80. Reference is made to the settled case-law in the matter, inter alia, C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paras 181-182; Case C-326/07, *Commission* v *Italy*, EU:C:2009:193, para. 35; and C-464/14, *SECIL*, EU:C:2016:896, paras 75-76.

[130] Opinion 2/15, EU:C:2017:376, para. 82.

and control of the undertaking (portfolio investments). Such investments constitute movements of capital for the purposes of Article 63 TFEU[131].

Accordingly, commitments vis-à-vis a third State relating to other foreign investment do not fall within the exclusive competence of the European Union[132]. There is also no exclusive EU competence in this area under Article 3 (2) TFEU according to the ERTA effect. Therefore, the commitments concerning non-direct investments (portfolio investment) do not fall under an exclusive competence of the Union but a shared competence between the Union and the Member States. The Court also held that the investor to state dispute settlement falls outside the scope of the common commercial policy[133].

Intellectual property rights

In *Daiichi Sankyo* and Opinion 3/15, the Court held that international commitments concerning intellectual property fall within the "commercial aspects" referred to in Article 207 TFEU when they present a specific link with international trade in that they are essentially intended to promote, facilitate or govern such trade and have direct and immediate effects on it[134]. As to the draft agreement with Singapore, the Court highlighted in Opinion 2/15 that the agreement, which includes a series of provisions on copyright and related rights, trademarks, geographical indications, designs, patents, and plant varieties, aims at ensuring that entrepreneurs of the European Union and Singapore participate on an equal footing in the free trade of goods and services between the parties. It has been acknowledged that the protection of intellectual property rights plays a key role in trade in goods and services in general, and in combatting unlawful trade in particular, and that as such they have direct and immediate effects on trade. Therefore they fall within the concept of commercial aspects of intellectual property within the meaning of Article 207 TFEU.

The field of intellectual property rights was recently scrutinized in a judgment *Commission v Council* rendered in October 2017. Referring largely to Opinion 2/15, the Court considered that an international agreement in the field of appellations of origin and geographical indications falls under the scope of the "commercial aspects of intellectual property rights" within the meaning of Article 207 TFEU[135].

[131] Opinion 2/15, EU:C:2017:376, para. 227. See, inter alia, Cases C-282/04 and C-283/04, *Commission* v *Netherlands*, EU:C:2006:208, para. 19; C-81/09, *Idryma Typou*, EU:C:2010:622, para. 48; and Case C-212/09, *Commission* v *Portugal*, EU:C:2011:717, para. 47.

[132] Opinion 2/15, EU:C:2017:376, para. 83.

[133] Opinion 2/15, EU:C:2017:376, paras 291-292.

[134] Case C-414/11, *Daiichi Sankyo*, EU: C: 2013: 520, paras. 49-52, and *Opinion 3/15, Marrakesh Treaty on Access to Published Works*, EU: C: 2017: 114, para. 78.

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

Competition

The provisions of the proposed competition agreement are aimed at creating free and undistorted competition in trade between the European Union and Singapore. They require the contracting parties to effectively combat agreements between undertakings, decisions of associations of undertakings and concerted practices the object or effect of which is to prevent, restrict or distort competition and against abuses of dominant positions and mergers between companies leading to a significant decrease in competition. These provisions are part of the liberalization of trade between the Union and Singapore. They relate specifically to the combatting of anti-competitive activity and of concentrations whose object or effect is to prevent trade between the European Union and that third State from taking place in healthy conditions of competition[136]. They therefore fall naturally within the sphere of the common commercial policy[137].

Sustainable development

An important and innovative element of Opinion 2/15 is that the provisions on sustainable development are taken into account in the common commercial policy. This is the result of the transformation of the common commercial policy, following the entry into force of the Lisbon Treaty, which now requires a combined reading of the general objectives of the European Union's external action and the specific objectives in terms of common commercial policy. In concrete terms, the common commercial policy is nowadays subject to two categories of objectives. The specific aspects of liberalization enshrined in Article 206 TFEU continue to be encouraged, but they are complemented by a number of general principles and objectives which must be respected and pursued throughout the field of the Union's external action. This more comprehensive legal framework results from the text of Article 207(1) TFEU, Article 21(3) TEU and Article 205 TFEU.

In Opinion 2/15 the Court held that the obligation to integrate those general objectives and principles into the conduct of the common commercial policy is apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU[138]. It referred also to Articles 9 and 11 TFEU, according to which the Union shall take into account the requirements linked to "... the guarantee of adequate social protection" and "environmental protection" in the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development[139].

[136] Opinion 2/15, EU:C:2017:376, para. 134.
[137] Opinion 2/15, EU:C:2017:376, para. 138.
[138] Opinion 2/15, EU:C:2017:376, para. 143.
[139] Opinion 2/15, EU:C:2017:376, para. 146.

Article 3(5) TEU was also mentioned in that respect. The provision states that the European Union shall contribute, in its relations with the wider world, to "free and fair" trade[140]. It followed that the objective of sustainable development henceforth forms an integral part of the common commercial policy[141].

The Court pointed out that the provisions relating to environment and to the social protection of workers form part of the objectives of trade relations between the Union and Singapore[142] and play an essential role in the envisaged agreement[143]. It highlighted that the exclusive competence of the Union under CCP cannot be exercised in order to regulate the levels of social and environmental protection in the parties' respective territory[144]. This said, the Court noted that the provisions (chapter 13) of the envisaged agreement do not provide for a harmonization of labour and environmental standards but only intend to govern trade by making liberalisation of that trade subject to the condition that the parties comply with their existing international obligations in the same fields[145]. The international commitment taken by both parties to respect the existing conventions in those fields intends to reduce the risk of lowering the social and environmental protection in the respective territories below the standards set in the international conventions[146]. It follows therefrom that the provisions at stake in the envisaged agreement intend essentially to promote, facilitate or govern trade and do have direct and immediate effects on it. They fall therefore within the common commercial policy in the meaning of Article 207 TFEU[147].

Transport policy

The Court of justice gave some useful clarification in Opinion 2/15 on the exclusion of the negotiation and conclusion of international agreements in the field of transport from the Union's common commercial policy under Article 207 TFEU. It held that paragraph 5 of this provision concerns all modes of supply of transport services, limited however to those inherently linked to a physical act of moving persons or goods from one place to another by a means of transport[148]. Neither "aircraft repair and maintenance services during which an aircraft is withdrawn from service" nor services for the sale, marketing or reservation of air transport services, whether they are supplied by travel agencies or by other commercial

[140] Opinion 2/15, EU:C:2017:376, para. 146.
[141] Opinion 2/15, EU:C:2017:376, para. 147.
[142] Opinion 2/15, EU:C:2017:376, para. 148.
[143] Opinion 2/15, EU:C:2017:376, para. 162.
[144] Opinion 2/15, EU:C:2017:376, para. 164.
[145] Opinion 2/15, EU:C:2017:376, para. 166.
[146] Opinion 2/15, EU:C:2017:376, para. 158.
[147] Opinion 2/15, EU:C:2017:376, para. 167.
[148] Opinion 2/15, EU:C:2017:376, para. 61.

service-providers, are inherently linked to transport services, within the meaning specified by the case-law. Therefore these services are not to be considered as transport services. They are to be understood as auxiliary services in the field of transport and fall within the scope of common commercial policy[149]. The examination by the Court of the existing Union's rules in the field of transport services for the application of Article 3(2) TFEU is discussed under question 1.

Institutional provisions

Pursuant to settled case-law the competence of the European Union to enter into international commitments includes the competence to couple those commitments with institutional provisions. The presence of these institutional provisions in the agreement has no effect on the nature of the competence to conclude it. Those provisions are of an ancillary nature and fall within the same competence as the substantive provisions which they accompany[150].

Accordingly the institutional provisions of the envisaged agreement with Singapore establish various obligations and procedures for the exchange of information, notification, verification, cooperation and mediation, as well as the creation of trade committees (and then specialized committees, namely a Committee on Trade in Goods, a Committee on Sanitary and Phytosanitary Measures, a Committee on Customs and a Committee on Trade in Services, Investments and Public Procurement). These provisions and mechanisms are intended to ensure the effectiveness of the substantive provisions of the envisaged agreement, by establishing, essentially, an organisational structure, methods of cooperation, obligations to exchange information and certain decision-making powers[151]. Therefore, the competence of the Union for these ancillary provisions follows the competence of the Union in the corresponding substantive provisions.

As to the dispute settlement provisions, a distinction has to be made between the investor-state dispute settlement and the dispute settlement between the contracting parties.

The investor-state dispute settlement mechanism is a sensitive topic, as was evidenced by the legal and political debates surrounding the signature of the Free Trade Agreement with Canada (CETA) in autumn 2016. The draft agreement with Singapore examined by the Court in Opinion 2/15 provides for the conditions to be fulfilled in order for a dispute to be submitted to arbitration.

[149] Opinion 2/15, EU:C:2017:376, paras 62-66.

[150] Inter alia, Opinion 1/76, *Agreement on the establishment of a European Laying-up Fund for Inland Waterway Vessels*, EU:C:1977:63, para. 5; Opinion 1/78, *International Agreement on Natural Rubber*, EU:C:1979:224, para. 56; C-137/12, *Commission* v *Council*, EU:C:2013:675, paras 70 and 71; and Opinion 2/15, EU:C:2017:376, para. 276.

[151] Opinion 2/15, EU:C:2017:376, para. 275.

If the dispute cannot be settled amicably or through consultations, the investor concerned may notify his intention to resort to arbitration. The regime put into place allow the claimant investor to decide to submit the dispute to arbitration, without that Member State being able to oppose this, as the consent of the latter in this regard is deemed to be obtained under the envisaged agreement[152]. Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature within the meaning of the case-law recalled above and cannot, therefore, be established without the Member States' consent[153]. These provisions do not fall within the exclusive competence of the European Union, but within a competence shared between the Union and its Member States[154].

The mechanism for settling the disputes arising between the contracting parties on the interpretation and application of the draft agreement with Singapore (chapters 2 to 12) is largely based on the dispute settlement mechanism of the WTO. The draft agreement provides, as a first step, for a consultation procedure, which is followed, in case of non-settlement of the dispute, by the possibility for the complaining party to request the establishment of an arbitration panel, which takes binding decisions on the parties[155]. It is also envisaged that the complaining party may decide not to apply the dispute settlement regime provided for in the draft agreement, and brings instead an action within the framework of the WTO. The Court, after having highlighted that Opinion 2/15 does not address the issue of the compatibility of the mechanism envisaged with EU law, held that the dispute settlement regime forms part of the institutional framework of the envisaged agreement. Since that regime relates to disputes between the Union and Singapore, it is, unlike the investor-State dispute settlement regime, not liable to remove disputes from the jurisdiction of the courts of the Member States or of the European Union. Accordingly, the rule laid down in the case-law as to the institutional provisions of an agreement (ancillary nature) is here applicable. In these circumstances, the Union's competence over dispute settlement provisions between the contracting parties follows the same competence of that applicable to the substantive provisions they support.

It follows from Opinion 2/15 that the concept of common commercial policy is broadly interpreted by the Court. It covers the fields contained in the new generation of free trade agreements, except mainly the areas of non-direct investment (portfolio investment), transport services, and investor-state dispute settlement mechanism. The field of transport is expressly excluded from Article 207 TFEU.

[152] Opinion 2/15, EU:C:2017:376, para. 291.
[153] Opinion 2/15, EU:C:2017:376, para. 292.
[154] Opinion 2/15, EU:C:2017:376, para. 293.
[155] Opinion 2/15, EU:C:2017:376, para. 296.

However, the services in that field were recognised as falling under the exclusive competence of the Union pursuant to Article 3(2) TFEU, with a clear reluctance expressed by the Member States that intervened in the procedure.

The scope of the common commercial policy as interpreted by the Court has been considered as too broad by a certain number of national reports (Czech Republic, Slovenia, Romania). The national report for the Czech Republic highlights for example that although a specific link to trade is necessary to consider that an agreement falls under the CCP, the contours of such specific link "are still rather vague" and enable to find a "specific link" in a very large number of cases". The national report for Slovenia seems to share this view since it states that "the dynamic and broad interpretation of Article 207 ... was no longer necessary, because the provision was sufficiently developed by the inclusion of new policies". The Romanian report refers to the case-law to answer this question, but seems quite skeptical about a broad scope of the CCP. It stresses that "the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the CCP". On the other hand, some national reports seem to agree with the enlargement of the scope of the CCP. For example, the national report for Greece underlines that it has always supported the broadening of such scope.

Otherwise a large number of national reports acknowledge the distribution of competences as resulting from Opinion 2/15. It is worth noting that even if the Court has decided that portfolio investments do not fall within the CCP, several reports keep arguing that these investments are not covered by the exclusive competence of the Union under Article 207 TFEU, nor by the exclusive competence pursuant to Article 3(2) TFEU (Austria, Bulgaria, Croatia, Czech Republic, Hungary, Italy, Netherlands, Poland, Portugal, Slovenia, Sweden, United Kingdom).

Several reports also highlight that CCP does not cover the entire TRIPs agreement, for the reason that competences with regard to criminal law remain with the Member States (Austria, Ireland, Slovenia). Some other reports consider that it cannot be said that any rule on intellectual property in international agreements will always be part of the common commercial policy (difference between commercial and non-commercial aspects) (Czech Republic, Greece, United Kingdom).

There is a large consensus in the national reports that transport services do not fall within the CCP. The only exception that can be mentioned is the national report for Malta, which states that the aspects of trade in transports can be considered "a remit of the common commercial policy". The other reports rely mostly on the reasoning of the Court in Opinion 2/15 (Austria, Bulgaria, Italy, Netherlands, Poland). While the national report for Austria acknowledges the

position adopted in Opinion 2/15 stating that transport services do not fall within the CCP, it considers that "the Court establishes a very delicate distinction (...) between so to say genuine transport services, to be interpreted narrowly, and non-related technical or other services subject to the common commercial policy". According to this national report, this statement will probably raise problems of interpretation in the future. The national report for Greece does not support the Court's position in this matter and argues that the fact that transport services do not fall within the CCP includes services linked to transport services.

On the other hand, a large number of national reports disagree with the position held in Opinion 2/15 that transport services fall within the exclusive competence of the Union under Article 3(2) TFEU. The national report for Poland considers that in the field of transports consent of Member States should be required. The national report for the Czech Republic is critical too. The national reports for Austria and Slovenia ask for further clarifications after Opinion 2/15. The Austrian report considers that the explanations as to whether there were existing EU rules to apply the ERTA doctrine were "rather summary and not detailed enough".

Finally, regarding the TRIPs agreement there seems to be some clarifications needed. Most national reports acknowledge that this agreement falls within the CCP. However, there are diverging views on whether the whole agreement is covered by the concept of common commercial policy or only some of its provisions. On the one hand, some national reports consider that the TRIPs agreement in its entirety falls within the CCP (Bulgaria, Czech Republic, Finland, Malta). The national report for the Czech Republic recalls however that this conclusion does not mean that any rule at all on intellectual property will fall under the CCP. On the other hand, some other reports only admit to include some of the TRIPs provisions within the CCP (Austria, France, Greece, Ireland, Slovenia). The national report for France considers notably that everything in the TRIPs agreement falls within the CCP except rights not strictly related to trade. The national report for Ireland refers to the case-law of the Court in *Hermès*, *Parfums Christian Dior* and *Merck Genericos* to argue that not all aspects of the TRIPs agreement should be included in the CCP. The Slovenian report also considers that some provisions of the TRIPS agreement are not covered by the concept of CCP. Some other reports refer to the issue of moral or non-commercial rights (France, Greece, Netherlands, United Kingdom). For instance, the national report for Greece mentions that those moral rights should be excluded from the CCP because they are non-commercial aspects of intellectual property rights.

Question 17

The fate of the bilateral investment treaties concluded by the Member States of the European Union with third countries (extra-EU BITs) and of those con-

cluded between Member States (intra-EU BITs) is an important issue in the field of investment protection.

The compatibility of the extra-EU BITs with EU law was considered by the Court of Justice in 2009 in three infringement procedures introduced by the Commission against Austria, Finland and Sweden[156]. The judgments revealed the incompatibility of these agreements with EU law, due to the fact that these agreements do not contain any provision reserving the possibility for the Union to restrict the free movement of capital connected with investments and allowing the Member States to give effect to the restrictive measures which could be adopted by the Council against third parties in connection with investments. Therefore, the Court held that the Member States in not having taken appropriate steps to eliminate the incompatibilities with EU law have failed to fulfil their obligations under Article 307(2) TEC. Following this important case-law a regulation has been adopted, in 2012, by the Council and the European Parliament to establish transitional arrangements for bilateral investment agreements concluded between Member States and third countries[157]. In that sensitive context, the Union decided to maintain in force, at least transitionally, these bilateral investment treaties for legal certainty reasons[158]. However the Commission is empowered to conduct an evaluation of these agreements, in cooperation with the Member States, in order to assess whether the provisions of these agreements constitute a serious obstacle to the negotiation and conclusion by the Union of bilateral investment treaties with third countries, in view of the gradual replacement of the existing agreements[159] due to the Union's competence in the matter pursuant to Article 207 TFEU. The 2012 regulation also foresees an authorization procedure when a Member State intends to conclude a new agreement with a third country or wishes to amend an existing one, and attributes to the Commission a potential right of participation in the negotiations with the third country[160]. This regulation clearly strengthens legal certainty as to the existing bilateral investment treaties concluded between Member States and third countries, even if these agreements are to be replaced over time by others concluded presumably jointly by the Union and its Member States, if these future agreements are intending to cover a similar content to the one provided for in

[156] Case C-205/06, *Commission v. Austria*, EU:C:2009:118; Case C-249/06, *Commission v. Sweden*, EU:C:2009:119; Case C-118/07, *Commission v. Finland*, EU:C:2009:715.

[157] Regulation No 1219/2012, of the European Parliament and the Council, of 12 December 2012, establishing transitional arrangements for bilateral investment agreements between the Member States and third countries, OJ L 351, 20.12.2012, p. 40.

[158] Article 3 of Regulation No 1219/2012.

[159] Articles 5 and 6 of Regulation No 1219/2012.

[160] Articles 7 to 11 of Regulation No 1219/2012.

the envisaged free trade agreement with Singapore that was examined by the Court in Opinion 2/15.

In Opinion 2/15, the Court held that since the entry into force of the Lisbon Treaty the European Union has an exclusive competence regarding foreign direct investment, it has therefore competence to approve, by itself, a provision of an agreement concluded by it with a third State which stipulates that the commitments concerning direct investment contained in bilateral agreements previously concluded between Member States of the European Union and that third State must, upon the entry into force of that agreement concluded by the Union, be regarded as replaced by the latter[161]. The link between the existing bilateral investment treaties of the Member States and the future ones concluded by the Union is made by the Court, and the legal relationship between them is henceforth defined, even if it is criticised by some and accepted by others.

As to the bilateral agreements concluded between Member States of the European Union (intra-EU BITs), Regulation No 1219/2012 is silent and their fate was for a long time difficult to determine. The Commission communication of July 2010, which describes the main directions of EU investment policy for the future, did not address this sensitive and controversial issue. For a specific period of time, the Union's institutions left the question in the hands of arbitral tribunals and national courts[162]. This is not anymore true. On the one hand, the European Commission has initiated infringement proceedings against five Member States (Austria, Netherlands, Romania, Slovakia and Sweden) in June 2015 requesting them to terminate intra-EU bilateral investment treaties. The Czech Republic, Ireland, Italy, and Romania have terminated their intra-EU BITs unilaterally, while Poland and Denmark have expressed an intention to do the same; other Member States such as Germany, Finland, the Netherlands, Austria and France proposed a system for multilateral termination of intra-EU BITs. The question of compatibility with EU law of the intra-EU BITs has been brought up in the *Slovak Republic v. Achmea* case concerning a preliminary ruling from a German court[163] on the interpretation of Articles 18, 267 and 344 TFEU in relation with the 1991 Agreement on encouragement and reciprocal protection of investments between the Netherlands and the Czech and Slovak Federative Republic.

In that 2018 judgment, the Court recalled its settled case-law according to which an international agreement cannot affect the allocation of powers fixed by the Treaties or the autonomy of the EU legal system. That principle is enshrined in

[161] Opinion 2/15, EU:C:2017:376, para. 249.

[162] Christine Kaddous, *Arbitrage, Union européenne et accords bilatéraux d'investissement*, Revue suisse de droit international et européen, RSDIE 1/2013, p. 3.

[163] Case C-284/16, *Achmea*, EU:C:2018:158. See also, inter alia, Opinion 2/13, *Accession of the EU to the ECHR*, EU:C:2014:2454, para. 201.

particular in Article 344 TFEU, according to which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties[164].

Having examined the characteristics of the arbitral tribunal envisaged in the BIT concerned, the Court held that, by concluding the said international agreement, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law[165].

The disputes falling within the jurisdiction of that arbitral tribunal may relate to the interpretation of both the BIT and EU law. Therefore this bilateral investment treaty establishes the possibility of submitting those disputes to a body which is not part of the judicial system of the European Union, and which is provided for by an agreement concluded not by the Union but by its Member States. In those circumstances, the international agreement is calling into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is therefore not compatible with the principle of sincere cooperation[166]. The Court concluded that the provision of the agreement concerned with the arbitral tribunal (Article 8) had an adverse effect on the autonomy of EU law[167]. It has therefore to be considered as not compatible with Articles 267 and 344 TFEU.

The questionnaire asked the Member States to assess the relationship between bilateral investment treaties and the agreements concluded by the Union in that field. Most of the national reports address both the issue of extra-EU and intra-EU BITs.

As to the extra-EU BITs, there are divergent views on the status of the agreements concluded by Member States once there are EU investment agreements concluded with third countries. Most national reports consider that, when a new EU investment agreement is concluded, it should replace the existing BITs concluded by the Member States (Austria, Croatia, Finland, France, Greece, Poland). The national report for Poland notes that EU investment agreements are a way "to get much more modern agreements with better defined rights and obligations of states and companies" because the national BITs were never amended or renegotiated. The national report for Austria welcomes "efforts by the EU to

[164] Case C-284/16, *Achmea*, EU:C:2018:158, para. 32.
[165] Case C-284/16, *Achmea*, EU:C:2018:158, para. 56.
[166] Case C-284/16, *Achmea*, EU:C:2018:158, para. 58.
[167] Case C-284/16, *Achmea*, EU:C:2018:158, para. 59.

negotiate modern investment agreements with a view to progressively replace the current fragmented system of Member States BITs". Two national reports recall that the obligation upon Member States to terminate the existing BITs when the EU concludes an investment agreement results from Article 3 of Regulation No 1219/2012 (Austria and Poland).

However, some national reports express other ideas. For example, the national report for Malta states that extra-EU BITs and EU agreements should be complementary and that the co-existence of both types of agreements is necessary. The national report for the Czech Republic suggests that due to the public disagreement regarding investment chapters in free trade agreements, the solution may not only be to remove them from the general free trade agreements and to negotiate them as separate mixed agreements but to "entrust the negotiation of investments agreements back to individual Member States". The Dutch national report considers that extra-EU BITs "still prove necessary as long as the EU has not provided for equally high standards of investment protection". The national report for Austria addresses its concern as to the position adopted in Opinion 2/15 and questions the Union's competence to terminate earlier Member States BITs concluded with third countries (Austria). As to this last element, it is worth noting that the national report for France expresses its support to the Court's position on this issue in Opinion 2/15 and mentions that as soon as the Union starts to negotiate an investment protection agreement with a third country, that Member State should abstain from any similar approach and accept that the agreement negotiated by the Union itself provides for the termination of the existing bilateral agreement concluded by the Member State. This was envisaged by the draft free trade agreement with Singapore and admitted by the Court in its Opinion, as noted also by the national report for Greece.

Some national reports put forward that the Member States are still negotiating extra-EU BITs under the conditions of Regulation No 1219/2012. For example, The Netherlands have concluded a BIT with the United Arab Emirates (in 2013) which is still not yet in force. France states that it will not terminate its BITs currently in force and that it is still negotiating BITs with the authorization of the Commission. In this respect, it mentions the conclusion of an agreement with Colombia in 2016.

Several reports highlight their deep concern as to the lengthy ongoing of the EU negotiations on investments treaties. They notably mention all the controversies surrounding investment protection and ISDS, and state that this problem of duration is likely to continue, as the discussion on the splitting of the future FTAs is not yet over (Croatia). In this respect, some reports advocate for a wide interpretation of the possibility to be given to Member States to submit applications for authorisation to negotiate new BITs or to amend the existing ones

until the Union has concluded an agreement containing investment protection provisions with the same partner (Portugal).

As to the intra-EU BITs, the comments in the national reports are fewer than for the extra-EU BITs. The national report for Bulgaria recalls that these agreements have been repeatedly criticized by the Commission, which sent a letter in 2011 asking for information on these agreements and on the Government's readiness to terminate them. The Croatian national report considers that intra-EU BITs go against Union's exclusive competence and are thus illegal under EU law. It notes also that these agreements have also been subject to a constitutionality review under the Croatian Constitutional Court. The national report for Greece considered that the arbitral dispute settlement mechanism envisaged in the intra-EU BIT (*Achmea* case) was incompatible under EU law and expressed its support to the adoption of a coordinated EU procedure in this area. In this respect, the national report for Bulgaria recalls some of the measures that have been taken in order to find a solution to intra-EU BITs: a non-paper of April 2016 from Austria, Finland, France, Germany and the Netherlands with a compromise solution to establish a single agreement between all Member States to "phase-out" the existing intra-EU BITs and to establish an appropriate "investment protection after the phasing-out of intra-EU BITs". The Bulgarian report also mentions the inception impact assessment "Prevention and amicable resolution of investment disputes within the single market" published by the Commission in July 2017, which has the general objective to improve the investment climate in the EU by providing (i) dispute prevention tools and (ii) tools for the effective amicable resolution of intra-EU investment disputes with the help of an independent third party[168]. In particular, the Commission proposes the creation of an EU legal framework for mediation, enabling mediation between investors and the relevant national authorities and ensuring minimum standards of quality and transparency for the mediation process, as well as creating permanent agencies in each Member State or a single EU wide Mediation agency to administer the mediation services or act as mediators.

The conclusion to be drawn from national reports is that the fate of the extra-EU and intra-EU BITs raises a great interest on the part of the Member States. Many issues are still open and various suggestions have been made to tackle them. The topic will without any doubt be subject to developments in the coming months.

Question 18

In recent years, the inclusion of investor-state dispute settlement (ISDS) in trade and investment agreements has become subject to increased public scrutiny and

[168] European Commission, Inception Impact Assessment, Ref. Ares(2017)3735364 – 25 July 2017.

questioning. There are a number of problems that have been identified as stemming from ISDS, which is based on the principles of arbitration. These problems may be summarized briefly as including the lack of or limited legitimacy, consistency and transparency as well as the absence of a possibility of review.

The Union's approach since 2015 has been to institutionalise the system for the resolution of investment disputes in EU trade and investment agreements through the inclusion of the Investment Court System (ICS). This system was negotiated with Canada and is now part of the CETA. However, due to its bilateral nature, the ICS cannot fully address all the aforementioned problems. Moreover, the inclusion of ICSs in Union agreements has costs in terms of administrative complexity and budgetary impact.

Therefore the multilateral investment court initiative aims at setting up a framework for the resolution of international investment disputes that is permanent, independent and legitimate; predictable in delivering consistent case-law; allowing for an appeal of decisions; cost-effective; transparent and efficient proceedings and allowing for third party interventions (including for example interested environmental or labour organisations). The independence of this multilateral Court should be guaranteed through stringent requirements on ethics and impartiality, non-renewable appointments, full time employment of adjudicators and independent mechanisms for appointment[169].

On 20 March 2018, the Council adopted the negotiating directives authorising the Commission to negotiate, on behalf of the Union, a convention establishing a multilateral court for the settlement of investment disputes**.** The Council also decided to make the negotiating directives public[170].

At the time of writing this report, it remains to be seen what clarifications the request for an opinion of the Court under Article 218(11) TFEU by Belgium (Opinion 1/17) concerning the compatibility of the dispute settlement in the CETA will bring. The field of investment dispute settlement is currently in a phase of intensive development and, during 2018, there may well be further developments.

In the national reports, some of the rapporteurs comment on the three main mechanisms envisaged: the investor-state dispute settlement (ISDS), the international court system (ICS) and the multilateral investment court. However most of them only cover specific aspects.

Several reports do support the ISDS mechanism. The national report for the Czech Republic holds that ISDS is a useful complementary tool for the protection

[169] Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM(2017) 493 final.
[170] Document 12981/17 ADD 1 RESTREINT UE/EU RESTRICTED.

of investors' interests. It nevertheless considers that investors should have a choice to use ISDS or to proceed via national courts, due to the fact that ISDS and ICS are too demanding (notably costs) for small and medium size investors which may be impeded in their access to justice. It also believes that both ISDS and ICS might be incompatible with EU law and therefore awaits the Opinion of the Court on CETA. The national report for Poland favors the old settlement mechanism of arbitration. This Member State sees in the "ICS a lack of guarantees that a judge appointed by Poland will be chosen to the investment court". The United Kingdom report considers that there is "some misunderstanding about the function and implications of the existing ISDS procedures and stresses the need to ensure confidence for investors". It mentions also that the UK Government has made "reservations about the ICS set out in CETA but has not expressed an objection to it". In particular what the UK government considers controversial is that CETA system "removes the rights of the EU Governments and investors to appoint arbitrators".

Some reports are not totally against ISDS but question its compatibility with the Treaties. For example, the national report for Slovenia states that "the Court's clarifications with regard to CETA will be a welcome and necessary one since this has been one of Slovenia's major concerns". The position of this Member State has always been skeptical about such compatibility and it looks forward to reforming the system although it is not either satisfied with the ICS and expresses its concerns about it (notably appointment of arbitrators that not guarantee that a dispute concerning Slovenia would be assessed by an arbiter from Slovenia and chosen by Slovenia). The national report for Sweden, without questioning the system of ISDS, considers positive that the Court clarifies its compatibility with the Treaties. The national report for Greece wonders whether ISDS could cause problems in terms of the autonomy of EU law.

Some other reports are rather against ISDS but quite satisfied with ICS. The national report for Finland notes that the Parliament, academia and the social society criticize ISDS but are rather positive about ICS (enhanced transparency, increased legitimacy, permanent character of the jurisdiction, inclusion of an appeal system and role provided for domestic courts). The Dutch report can also be positioned here since it was "one of the Member States calling for a revision of the former ISDS-system and has approved, both politically and legally, the new EU Investment Court System". The national report for France mentions that the country was at the origin of the ICS and therefore supports the reform of the ISDS in CETA in order to include the ICS. The Romanian national report seems also rather in favor of an investment court system. The national report for Austria is supportive of ISDS as well as of ICS. However, it considers that ICS raises the question of the enforceability of the awards and recalls that, given the diverging

view of Member States on the forms of dispute settlement mechanisms, "some of the novel approach on ISDS could require reconsideration". The Austrian report still considers that in the long term the Union should strive to replace the ICS by a multilateral investment court. The national report for Hungary states that the Government criticizes CETA and TTIP because of the investor-State dispute settlement system but the proposal of the Commission in favor of an international arbitration court have calmed down the debates in the country. The national report for Malta supports the EU's new generation dispute settlement mechanism as it improves significantly some aspects of concern with older style dispute settlement in BITs. The national report for Portugal draws attention on the arguments against investment arbitration and considers the evolution towards the creation of an ICS, enshrined in the CETA positive.

Finally, some reports also express their support to the establishment of a multilateral investment court. Although the national report for Croatia favors the approach adopted in agreements such as CETA or TTIP, "a multilateral court or at least an institutionalized appeal jurisdiction should be the ultimate objective". This approach is shared in the national reports for Austria, France, Greece and the Netherlands.

The conclusion to be drawn from national reports is that there are diverging views on the dispute mechanism system to be envisaged for the resolution of investor-state disputes. The debates on the matter will be rich these coming months between Union's institutions and the Member States.

Question 19

The provisions on investment protection in the various free trade agreements provide for the rules concerning the determination of the respondent for disputes involving the European Union or its Member States, such as Article 8.21 CETA or Article 9.15 (2) EUSFTA.

At the European Union level, Regulation No 912/2014 applies to investor-to-state dispute settlement conducted pursuant to an agreement to which the Union is party, or the Union and its Member States are parties, and initiated by a claimant of a third country[171]. This regulation provides for specific criteria for allocating financial responsibility. It allows to identify in which cases the Union and/or the Member States can act as respondents in dispute settlement procedures, and be liable to pay damages to investors. According to the Regulation, "Financial responsibility" means an obligation to pay a sum of money awarded by an

[171] Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, *OJ L 257, 28.8.2014, p. 121.*

arbitration tribunal or agreed as part of a settlement and including the costs arising from the arbitration[172]. However the apportionment of the financial responsibility is dissociated from the issue of the international responsibility and the determination of the respondent. International responsibility for treatment subject to dispute settlement follows the division of competences between the Union and the Member States. As a consequence, the Union will in principle be responsible for defending any claims alleging a violation of rules included in an agreement which fall within the Union's exclusive competence, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State[173].

According to Article 3 of the Regulation, the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies, offices or agencies of the Union. The Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State. Finally, the Union shall bear the financial responsibility arising from treatment afforded by a Member State where such treatment was required by Union law. In the last situation, "required by Union law" refers to treatment where the Member State concerned could only have avoided the alleged breach of the agreement by disregarding an obligation under Union law such as where it has no discretion or margin of appreciation as to the result to be achieved[174]. The whole mechanism put into place in the Regulation refers to the respect of the sincere cooperation principle anchored in Article 4(3) TEU. The Commission and the Member States shall take all necessary steps to defend and protect the interests of the Union and of the Member States[175].

Most of the national reports consider the criteria and the rules enshrined in the Regulation as appropriate and do not formulate any specific remarks on the system in place. This approach was followed by the national reports for Austria, Croatia, Czech Republic, Finland, France, Germany, Malta, Netherlands, Poland, Romania and the United Kingdom.

The national report for Finland notably discusses the choice of the legal basis for the adoption of Regulation No 912/2014. While Article 207 TFEU was maintained as the sole legal basis for the legislation, the national rapporteur considers that the scope of application of the regulation is limited to foreign direct investment. It is worth noting that Finland pleaded for such an approach in Opinion 2/15 but the Court of justice did not address the issue. Some other reports wonder how the responsibility of the Member State will apply in the case of an

[172] Article 2 g) of Regulation No 912/2014.
[173] Recital 3 of Regulation No 912/2014.
[174] Article 2 l) of Regulation No 912/2014.
[175] For instance Article 6 of Regulation No 912/2014.

EU-only agreement to which the Member States are not formally contracting parties (Bulgaria, France).

The national report for Greece mentions that if the free trade agreements "new generation" will be mixed agreements, the liability should be "joint and several" between the Union and the Member States as this results from the system of mixed agreements[176]. Some other reports comment on the CETA and TTIP provisions as examples for liability clauses. These reports refer to the fact that distribution of liability in those new generation of agreements follows the practice developed by the Union within the framework of the WTO dispute settlement mechanism in spite of the fact that this mechanism is of intergovernmental nature (Sweden, Ireland).

The conclusion to be drawn from national reports is that there are not many issues raised by the liability of the Union and the Member States for a breach of the international agreements governed by Regulation No 912/2014.

Question 20

The common commercial policy is since 2009 linked to the objectives and principles that govern the Union's external action introduced by the Lisbon Treaty. Common commercial policy is henceforth subject to two categories of objectives and principles. The specific policy objectives are fostered around liberalisation and open markets. Article 206 TFEU reflects this and acknowledges the extension of the scope of CCP while referring to the harmonious development of world trade. These objectives are supplemented by a set of principles and objectives that have to be respected and pursued in the conduct of the Union's action on the international scene.

The link between the specific economic objectives and the more comprehensive legal framework results from Article 207(1) TFEU, according to which CCP shall be conducted in the context of these general principles and objectives. Those principles are listed in Article 21(1) TEU and relate to "democracy", "rule of law", "universality and indivisibility of human rights and fundamental freedoms", "respect for human dignity", "principles of equality and solidarity" and "respect for the principles of the UN Charter and international law". They are part of the Union's funding values and principles and shall therefore guide its action on the international scene.

Pursuant to Article 21(2) TEU, the Union shall also define and pursue common policies and actions[177], and work for a high degree of cooperation in all fields

[176] A. Dimopoulos, The involvement of the EU in Investor-State Dispute Settlement : a question of Responsabilities, Common Market Law Review, 2014, p. 1671-1720, p. 1688 ff. ; E. Neframi, *Recherches sur les accords mixtes de la Communauté européenne*, Bruxelles, Bruylant, 2007, p. 524 and ff.

[177] The provision uses the verb "shall" which in the text of the Treaties relates to an obligation for the Union.

of international relations in order to "safeguard its values", "consolidate and support" democracy, the rule of law, human rights, to "foster" sustainable development, to "help" develop environmental protection measures, and to "encourage" integration of all countries into the world economy. Some of these objectives were introduced by the Lisbon Treaty, such as the promotion of an international system based on an enhanced multilateral cooperation and good worldwide governance. Others resume partially the objectives mentioned in the common foreign and security policy (CFSP): development cooperation, common commercial policy or environment matters. Whereas most of these objectives appear familiar, the fact of putting them together in one single provision, at the heading of the title devoted to the general provisions on the Union's external action constitutes a major "innovation" in the foreign policy of the Union.

The general framework of Article 21 shall apply to the whole range of the Union's external action and shall constitute the basis for operating choices in the development of this action. This set of principles and objectives may be considered as constituting the "spinal column" of Union's action on the international scene.

As far as CCP is concerned, the entry into force of the Lisbon Treaty implied changes in the definition of the CCP, insofar as measures taken by the Union in that field should be based upon the general principles and objectives (Article 21 TEU) and comply with the specific objectives of the CCP (article 206 TFEU). The pursuance of the general goals of Article 21 results in the integration of non-trade objectives in the formulation of CCP. This may require potential reorientations[178]. Two examples to illustrate the phenomenon: the reference to the principles of democracy, rule of law, and the respect for human rights in international agreements is of fundamental significance for the application of trade conditionality. In the same way, the reference to help and develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources ensures that environmental protection is integrated within the CCP, although it has anyway to be part of all Union policies according to Article 11 TEU.

The core issue is to reconcile Article 21 non-trade objectives with CCP specific objectives, when these two sets of objectives may come into conflict. In that regard a decision to maintain trade relations with third countries which openly violate democracy or human rights principles, should in principle require from

[178] See however the discussion on the concept of "free and fair trade" mentioned in Article 3 (5) TEU and the objective "to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade" enshrined in Article 21 (2) (e) TEU. The concept of "fair trade" is linked with social and labour goals, see on this point the European Commission Communication *"on Fair Trade"*, COM (1999) 619 final, 19.11.1999, p. 4.

the Union's institutions detailed explanations and strong motivation in order to explain how and why the pursuance of EU economic goals should prevail over the fundamental principles. The link created between the CCP and the general provisions of Article 21 has been considered in doctrine as leading to a "politicisation" of trade policy. This is true. However trade policy was never "apolitical", as demonstrated by the integration of human rights considerations as incentives for trade concessions in the Union's system of generalized preferences for developing countries[179].

Hence trade policy is to be defined to meet the objectives and respect the principles of Articles 21 TEU, 206 and 207 TFEU. The pursuance of these general principles and objectives in all fields of the Union's external action is of a binding nature, as is the achievement of the trade objectives in the CCP[180]. Therefore it is for the Union institutions to consider respect for Article 21 in the formulation and implementation of Union's trade policy. In accomplishing that mission the Council and the European Parliament, but also the Commission when exercising its initiative's right, benefit from a large political discretion, given the fact that the general objectives (Article 21(2) TEU) are broadly formulated.

Although the application of Article 21 TEU raises many difficulties, the general framework given by this provision is to be considered a positive development brought about by the Lisbon Treaty in the definition of Union's external relations. It aims at strengthening the global coherence of the external action as well as the consistency between the internal and external policies of the Union. The common list of principles and objectives helps to achieve this better consistency, even if it is evidently not sufficient to guarantee it alone.

In Opinion 2/15 the Court interpreted those general objectives and principles and clarified the relationship between Articles 207 (1) TFEU and Article 21 TEU. It held that the obligation to integrate those general objectives and principles into the conduct of the common commercial policy is apparent from Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU[181]. It followed that the objective of sustainable development forms an integral part of the common commercial policy[182].

[179] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, *OJ L 303*, 31.10.2012, p. 1.

[180] Semantics matter. Article 21 TEU uses the word "shall" when it refers to the principles that have to guide the Union in its international action, and when it lists the objectives to be pursued by it. The same word appears in Article 207 (1) TFEU for their application in the CCP. According to Article 207 (1), "The common commercial policy *shall be conducted* in the context of the principles and objectives of the Union's external action".

[181] Opinion 2/15, EU:C:2017:376, para. 143.

[182] Opinion 2/15, EU:C:2017:376, para. 147.

In doing so, the Court of justice brought the provisions of the draft agreement with Singapore on sustainable development within the scope of CCP and within the Union's exclusive competence. It interpreted broadly the scope of CCP and large similarities can be observed with Opinion 1/78[183]. The CCP was construed in broad terms in order to allow the Community at that time to adapt its policy with a view to furthering the development of international trade[184].

The questionnaire asked the national reports to reflect on the relationship between Article 207 TFEU and Article 21 TEU and to give the Member States views on this issue.

The position taken by the Court in Opinion 2/15 on sustainable development has been welcomed in several national reports. The national reports for Austria, the Czech Republic and Malta note that they fully support the general principle, according to which common commercial policy cannot be pursued without taking into account the general principles and objectives of the Union's external action. The national report for Romania supports a similar approach while applying it to human rights: support is given to an "integrated approach targeting the observance of human rights in the context of the common commercial policy". Interestingly enough the national report for Poland considers that there is "a general obligation to pursue trade policy in a manner not contrary to the general EU external policy" but does not consider both provisions (Article 21 TEU and Article 207 TFEU) as closely linked.

Other reports highlight the possible impact and the difficulties that may arise from the inclusion of the objective of sustainable development in the CCP, referring to the issue of delineating the scope of CCP from that of other policies. The national report for Bulgaria mentions the example between environment and CCP, as evidenced in Opinion 2/00 on the Rotterdam Convention. The Czech report considers that where there are clear commitments e.g. regarding environment again, these should be considered as equal standing commitments and this should result in the need for a separate legal basis (and possibly not fall under the exclusive competence of the Union).The Greek report seems to support the same idea of preferring the use of additional legal basis instead of broadening the scope of CCP. The same line of reasoning is developed in the United Kingdom report that raises the question whether the broad interpretation of CCP would erode for instance the development cooperation policy of the Union? This brings the discussion around the nature of the Union's competence: exclusive or shared.

The report for Croatia notes that "the objectives of Article 21 TEU are set at a high level of generality" making it rather difficult for a conflict to arise between

[183] Opinion 1/78, *International Agreement on Natural Rubber*, EU:C:1979:224.

[184] Opinion 1/78, *International Agreement on Natural Rubber*, EU:C:1979:224, para. 44.

a CCP action and this provision. The French and Hungarian reports, referring to potential conflicts between the trade and non-trade objectives, consider that the principles enshrined in Article 21 TEU should be taken into consideration by the Council in the conduct of the external action of the Union, acknowledging that those are to be balanced with the trade principles and objectives according to a wide discretion to be given to the Council in this matter. The Slovenian report also mentions the potential conflicts between CFSP provisions and Article 21 TEU.

Finally some reports refer to coherence. The United Kingdom report recalls that the set of common principles and objectives were introduced in the Treaties with the aim to improve the coherence of the Union's external action. The Dutch report highlights that the respect of both principles and objectives are indispensable for the coherence in the Union's foreign policy.

The conclusion to be drawn from national reports is that the position taken by the Court in Opinion 2/15 on sustainable development has been generally welcomed, whereas some reports draw attention on possible difficulties of interpretation and application.

Question 21

The negotiation and conclusion of international agreements in the field of CCP has been discussed as to the potential changes that may occur as consequences of Opinion 2/15. According to the Court most of the provisions of such comprehensive agreements fall under the CCP and consequently under the exclusive competence of the Union. Some provisions do not fall under Article 207 TFEU, but are considered as falling under an exclusive competence pursuant to Article 3(2) TFEU (transport services). As a matter of fact very few provisions are recognized as being outside Union's exclusive competence, essentially non-direct investments and the investor-state dispute settlement mechanism. One of the main issues is therefore to determine how these free trade agreements should and will be concluded in the future. Are the institutions going to split the content of these agreements? Would Provisions on foreign direct investments be included in EU-only agreements and non-direct investments and ISDS in separate agreements, most probably mixed agreement? Or could another scenario consist in concluding EU-only agreements for foreign direct investments and including non-direct investments and ISDS in a protocol to be ratified by the Member States? The proposal of the mandate for the negotiations of a free trade agreement with Australia, which was prepared in 2017, follows the splitting idea[185].

The discussion is still ongoing on the advantages and risks of splitting or not splitting. The political debate is very nourished. Furthermore, the threat of

[185] Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with Australia, COM(2017) 472 final.

weakening social, sanitary and environmental rules still lies in the heart of the concerns of Union's citizens in several Member States. At the same time, the European Parliament scrutinizes the negotiations of free trade agreements on the basis of the "fully and immediately informed" provision of Article 218(10) TFEU. The Commission has taken measures in favor of developing a wide transparency policy in order to contribute to the promotion of a democratic debate at an early stage of the negotiations. This policy of transparency should allow a political debate involving the public in general and civil society at the Union and Member States levels regardless of whether the agreements are concluded as EU-only or mixed agreements.

The questionnaire asked for further comments on the procedure of negotiation and conclusion of agreement in the field of common commercial policy and on the roles of the main institutions in this process.

Some national reports do not support the Commission's ambition to make negotiating mandates public immediately after their adoption. They are rather in favor of a case by case approach to decide whether the need of transparency overweighs the advantages of keeping the negotiations strategy unrevealed to the negotiating partners of the Union (for instance the Czech Republic). On the other hand, other reports ask for more transparency. The national report for Slovenia insists on the need for more transparency and dialogue between the Union, the stakeholders and citizens. The report for Portugal refers to the issue of transparency and suggests some solutions to resolve the conflict between the need for transparency and the confidential nature of some information. According to this report, there should be two separate reports, an institutional communication for civil society and other stakeholders and a detailed technical report for experts monitoring the negotiations. The report also highlights that negotiating directives should not be published before the conclusion of the negotiation phase, as this may weaken the Union's negotiating power.

Several reports discuss the possibility of splitting the content of free trade agreements (a general agreement on the one hand and another dealing with investment protection on the other hand). While some of national reports consider this to be an opportunity to increase efficiency (Portugal), others are not fully convinced of the suitability of this possibility (Czech Republic, France). The national report for the Czech Republic notes that splitting could lead to a situation where both agreements could not be concluded at the same time, even though they should in principle be closely linked. This report also mentions that such division does not make much sense since "the legal framework for the investment protection should be closely linked to the legal framework for the access of investments to the market". The national report for France mentions that negotiating separately an agreement on investment protection may

have the consequence that the Union would be less capable of imposing on its partners its new approach to investments, provided that access to Union market would no longer be weighed with the other trade provisions in the negotiations. In short, negotiating several separate agreements could lead to the weakening of the Union as a negotiator. More broadly, the French national report seems to wish that trade agreements which will be negotiated by the Union should be enriched with new chapters in order to justify the mixed nature of these agreements. This report also expresses a fear of exclusivity. The report explains that negotiation of agreements that fall under the exclusive competence of the Union may lead to a situation where France could find itself outvoted within the Council at the time the decision of conclusion is taken. The national report for Portugal, which supports in principle the splitting, mentions that there will always be new areas of negotiations that will lead to mixed agreements in accordance with the principle of preemption.

Finally, some observations are made as to the efficiency of the procedure. The Dutch report considers desirable in terms of effectiveness, legitimacy and transparency to give the information on whether an agreement will be EU-only or mixed at the earliest possible stage and not as practice developed it at the time the Council decides upon a proposal of the Commission to sign the agreement. Taking this into account would favor a better participation of the national parliaments and the various stakeholders in the political debate. Some other reports highlight that the procedures to negotiate trade agreements are not very efficient. The national report for Portugal notes that the negotiating procedure is too lengthy and that the several stages (public consultations translation, national ratification procedures...) could be shortened. The Maltese national report would be in favor of a simple procedure that make EU trade policy more efficient and timely.

As to the application of Article 207(4) (2 and 3), several national reports indicate that the issue hardly arises (Hungary, Netherlands, United Kingdom). The national report for Hungary notes simply that the exceptions listed in this provision might pertain to the core of the national interest.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)[186]

Upon the entry into force of the Treaty of Lisbon, by virtue of Article 3(2) TUE as amended by the former, the political aim of the Union to offer its citizens an area of freedom, security and justice without internal frontiers – in which the free movement of persons is ensured in conjunction with appropriate measures

[186] This Chapter was written by Nuno Piçarra.

with respect to external border controls, asylum, immigration and the prevention and combating of crime – took precedence over the mainly economical aim to establish an internal market. However, the "unprecedented migratory and refugee crisis" that the Union has been facing especially since 2015 has put increasingly under strain the area of freedom security and justice. The solutions envisaged to overcome this crisis focus more and more on the external dimension of the policies on border checks, asylum and immigration.

The four questions of this chapter address some of the most current and important issues on the matter, the framework of which is the division of competences between the European Union and the Member States in the field of external relations. Such issues deal with cooperation and agreements with third countries on border controls, migration and readmission of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of the Member States. Therefore, the subject of this chapter should be red in thigh connection with the first three chapters of the general report.

Question 22

1. This question aims, on the one hand, at determining the meaning and scope of the Protocol No 23 on the external relations of the Member States with regard to the crossing of external borders,[187] annexed to the EU Treaties, in the light of Article 3(2) TFEU on the exclusive competence of the EU to conclude international agreements. On the other hand, this question aims at determining whether the Member States have concluded agreements with third countries on the crossing of the external borders since the entry into force of Protocol No 23 or whether they maintain in force agreements of this kind concluded previously.

2. According to Protocol No 23, Article 77(2)(b) TFEU (conferring competence on the Union to define the checks to which persons crossing external borders are subject) does not prejudice the competence of the Member States "to

[187] The definition of 'external borders' (of the Member States of the European Union) is in Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across the borders (Schengen Borders Code). According to Article 2(2) of this Code 'external borders' means the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders. The latter are defined by Article 2(1)(3) and (4) as *(i)* the common land borders, including river and lake borders, of the Member States; *(ii)* the airports of the Member States for internal flights (*i.e.* any flight exclusively to or from the territories of the Member States and not landing in the territory of a third country); *(iii)* sea, river and lake ports of the Member States for regular internal ferry connections (*i.e.* any ferry connection between the same two or more ports situated on the territory of the Member States, not calling at any ports situated outside their territory, and consisting of the transport of passengers and vehicles according to a published timetable).

negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements". Protocol No 23 attempts to clarify the issue of the EU external competence as regards the definition of the checks to which persons crossing external borders are subject. This matter is comprised in the Title V of the TFEU ("Area of freedom, security and justice"), an area to which shared competence between the Union and the Member States applies pursuant to Article 4(2)(j), and which is governed by the implied powers principle concerning the conclusion of international agreements by the Union, with one exception (readmission agreements).[188]

On the other hand, according to Article 3(2) TFEU, the EU's external powers become exclusive in a specific area, notably through the exercise, by the EU, of its internal competence with a view to adopt harmonized internal common rules governing the elements of the same area.[189] In this case, the conclusion of an international agreement is likely to affect such common rules or to alter their scope.

However, even where the EU has acquired exclusive external competence through the exercise of a shared competence leading to the full internal harmonisation in a certain area, as it is implicitly allowed by Article 2(2) TFEU,[190] the Member States may be empowered by the Union to adopt legally binding acts, including agreements with third countries, under Article 2(1), *in fine*, TFEU.

3. The Protocol No 23 as amended by the Treaty of Lisbon had its original version under the Treaty of Amsterdam [as Protocol No 21, which referred to Article 62(2)(a) TEC], in line with the Schengen *acquis* concerning Member States' competence to conclude external borders agreements with third countries.

Pursuant to Article 136(1) of the Schengen Convention "A Contracting Party which envisages conducting negotiations on border checks with a third State shall inform the other Contracting Parties thereof in good time." However, under Article 136(2), no Contracting Party was allowed to conclude with one or more third States agreements simplifying or abolishing border checks "without the prior agreement of the other Contracting Parties, subject to the *right of the Member States of the European Communities to conclude such agreements jointly*." (emphasis added) On the other hand, Article 136(3) expressly empowered each Contracting Party to conclude with third countries bilateral agreements in the area of local

[188] See below the developments concerning question 25.

[189] As the sole Article of the Protocol No 25 on the exercise of shared competence clarifies, "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area."

[190] Under Article 2(2) when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence *to the extent that the Union has not exercised its competence*." (emphasis added).

border traffic (and also concerning special categories of maritime traffic such as pleasure boating and coastal fishing) in so far as such bilateral agreements "comply with the exceptions and arrangements adopted by the Executive Committee under Article 3(1)" of the Schengen Convention.

4. The competence to harmonize the law on the checks to which persons crossing external borders are subject, conferred on the EU by Article 77(2)(b) TFEU, is extensive in accordance with the broad mandate of the Union to develop a policy with a view to *(i)* ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; *(ii)* carrying out checks on persons and efficient monitoring of the crossing of external borders and *(iii)* the gradual introduction of an integrated management system for external borders [Article 77(1)].

The common rules governing border control of persons crossing the external borders, as well as those on the absence of border control of persons crossing the internal borders, are laid down in the Schengen Borders Code, as amended, among others, by Regulation 2017/458 of 15 March 2017 as regards the reinforcement of checks against relevant data bases at the external borders.[191]

The provisions of Chapter 1 of Title II of the Schengen Borders Code ("Crossing of external borders and conditions of entry [for third-country nationals]", Articles 5 and 6) and the provisions of Chapter 2 ("Control of external borders and refusal of entry", Articles 7 to 14, respectively on conduct of border checks, border checks on persons, relaxation of border checks, separate lanes and information on signs, stamping of the travel documents, presumption as regards fulfilment of conditions of duration of stay, border surveillance and refusal of entry) constitute detailed highly harmonized common rules. This conclusion is not questioned by Article 16(1) of the Schengen Borders Code under which the border control provided for by Articles 7 to 14 is carried out by border guards in accordance with the provisions of this Code and "with national law". On the contrary, such a conclusion is confirmed by the fact that the Schengen Borders Code lays down a considerable number of express authorisations to the Member States for the conclusion of bilateral agreements with third countries on several aspects of the crossing of external borders.

[191] According to recital 1 of Regulation 2017/458, "The carrying-out of checks at the external borders remains one of the main safeguards of the area without internal border control and significantly contributes to guaranteeing the long-term security of the Union and its citizens. Such checks are carried out in the interest of all Member States. One of the purposes of such checks is to prevent any threat to the internal security and public policy of the Member States, irrespective of the origin of such threat, including where such a threat derives from Union citizens."; see Nuno Piçarra, "Une réforme qui est une révolution: sur le règlement 2017/458 modifiant le Code Frontières Schengen," July 2017, in http://eumigrationlawblog.eu/une-reforme-qui-est-une-revolution-sur-le-reglement-2017458-modifiant-le-code-frontieres-schengen.

Firstly, Annex VI of the Schengen Borders Code ("Specific rules for the various types of border and the various means of transport used for crossing the Member States' external borders") empowers Member States to conclude or maintain bilateral agreements *(i)* to channel and block traffic at the land borders (point 1.1., checks on road traffic); *(ii)* concerning the establishment of shared border crossing points[192] with neighbouring third countries (point 1.1.4.)[193]; *(iii)* on how to conduct checks on rail traffic respecting the principles set out in point 1.1.4.; *(iv)* according to which checks on maritime traffic may also be carried out during crossings or, upon the ship's arrival or departure, on the territory of a third country, respecting the principles set out in point 1.1.4 (point 3.1.1.).

Secondly, Annex VII of the Schengen Borders Code ("Special rules for certain categories of persons"), point 7, empowers Member States to conclude bilateral agreements with third countries on the entry and exit of members of rescue services, police, fire brigades and border guards.

Thirdly, Regulation No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external borders, referred to by Article 40 of the Schengen Borders Code, authorises the Member States to conclude or maintain bilateral agreements with neighbouring third countries for the purpose of implementing the local border traffic regime established by that Regulation [Article 1(2)]. This regime includes derogations to the general rules defining the checks to which persons crossing the external borders are subject, set out by the Schengen Borders Code. Such derogations are the only which the mentioned bilateral agreements may contain. In fact, under Article 13(2) of Regulation No 1931/2006, "[b}efore concluding or amending any bilateral Agreement on local border traffic with a neighbouring third country the Member States concerned shall consult the Commission

[192] Defined by Article 2(9) of the Schengen Borders Code as "any border crossing point situated either on the territory of a Member State or on the territory of a third country, at which Member State border guards and third-country border guards carry out exit and entry checks one after another in accordance with their national law and pursuant to a *bilateral agreement*." (emphasis added).

[193] When the shared border crossing point is situated on the territory of a Member State, the bilateral agreement "shall contain an authorisation for third-country border guards to exercise their tasks in the Member State", respecting the principles set out in point 1.1.4.2.; when the shared border crossing point is situated on the territory of a third country, the bilateral agreement "shall contain an authorisation for Member State border guards to perform their tasks in the third country", respecting the principles set out in point 1.1.4.3. Under point 1.1.4.4., "before concluding or amending any bilateral agreement on shared border crossing points, the Member State concerned shall consult the Commission as to the compatibility of the agreement with Union law. Pre-existing bilateral agreements shall be notified to the Commission by 20 January 2014. If the Commission considers the agreement to be incompatible with Union law, it shall notify the Member State concerned. The *Member State shall take all appropriate steps to amend the agreement* within a reasonable period in such a way as to eliminate the incompatibilities established." (emphasis added).

as to the compatibility of the Agreement with this Regulation. If the Commission considers the Agreement to be incompatible with this Regulation, it shall notify the Member State concerned. The Member State shall take all appropriate steps to amend the Agreement within a reasonable period in such a way as *to eliminate the incompatibilities established*." (emphasis added)

Finally, according to Article 42, Member States shall notify the Commission of the bilateral agreements authorised by Regulation No 1931/2006. Subsequent changes to those provisions shall be notified within five working days. The information notified by the Member States shall be published in the *Official Journal of the European Union*, C Series.

5. In the light of the foregoing, it must be concluded that the rules on local border traffic at the external borders laid down in Regulation No 1931/2006, in so far as they constitute *lex specialis* vis-à-vis of the Schengen Borders Code – which sets out the general regime on the crossing of external borders pursuant to Article 77(2)(b) TFEU –, are excluded from the scope of Protocol No 23. The bilateral agreements on local border traffic at the external borders concluded between Member States themselves and third countries must be qualified as authorised agreements within the meaning of Article 2(1) TFEU.[194]

Furthermore, in view of the above mentioned provisions of the Schengen Borders Code authorising Member States to conclude agreements with third countries, Protocol No 23 should not be interpreted as precluding the Union from adopting provisions which regulate Member States' conclusion of bilateral agreements with third countries as regards border controls. [195]

Finally, in the light of the general content of the Schengen Borders Code, and of its purpose of fully harmonizing the rules applicable to the crossing of external borders, it can also be concluded that, in the absence of Protocol No 23, the external competence of the Union to sign agreements with third countries defining the checks to which persons crossing external borders are subject should be qualified as exclusive within the meaning of Article 3(2) TFEU. It is in this context that the meaning and the scope of the Protocol must be determined.

[194] According to Steve Peers, *EU Justice and Home Affairs Law, Volume I: EU Immigration and Asylum Law*, 4th Edition, Oxford, OUP, 2016, p. 65, the local border traffic regulation could be regarded as an example of the rule that even where EU external powers are exclusive, the EU can always choose to authorize the Member States to exercise some limited external powers, subject to the detailed framework established by Regulation No 1931/2006. As noted by the Romanian report, details as those related to the border area in which the regime set out by this Regulation is applicable "could not be established at European level because they have to take into account the local characteristics."

[195] See Steve Peers, *EU Justice and Home Affairs Law, Volume I: EU Immigration and Asylum Law*, cit., p. 65 and p. 162.

6. Protocol No 23 may be interpreted in two different main ways.[196]

First, the EU would fail to gain exclusive external power over the definition of the checks to which persons crossing external borders are subject even after the full harmonization of the internal law on the same issue at the EU level. In other words, Protocol No 23 would preclude the pre-emption effect established by Article 2(2) second subparagraph from applying in full and therefore the exclusivity of the Union's competence to conclude agreements with third countries on the crossing of external borders pursuant to Article 3(2). Most of the reports interpret the Protocol with this meaning.[197]

However, if Protocol No 23 is interpreted as precluding the EU from obtaining exclusive external competence even if it has fully harmonized the internal law relating to border controls, this would be incompatible with the objective of establishing common rules at the external borders, given the obvious impact which any unilateral treaty-making by individual Member States would have on the control of the external border as a whole.[198]

[196] At the level of the EU Court of Justice, the only reference to Protocol No 23 is in the opinion of the Advocate General Pedro Cruz Villalón delivered on 6.12.2012 in case C-254/11, *Oskar Shomodi*, footnote 55, which reads: "It should be pointed out that, in accordance with Protocol No 23 (...), if, in the absence of provisions adopted on the basis of Article 77(1)(b) TFEU, Member States retain a competence to negotiate and conclude agreements with third countries, they may do so only provided they respect European Union law and other international agreements. The same applies a fortiori in the case of bilateral agreements the conclusion of which is provided for, ordered, by an act of secondary legislation (...), such as Regulation No 1931/2006."

[197] See the institutional report, according to which "[t]he practical effect of the Protocol No 23 is to restrict the application of the exclusive competence under Article 3(2) TFEU and the application of the pre-emption principle in this specific area as far as international agreements are concerned. As a result Member States are allowed to continue to conclude international agreements covering the matter irrespectively of the internal exercise of the competence and the level of harmonization, provided that those agreements comply with the existing Union legislation and the applicable international agreements in the field. Protocol No 23 allows Member States to conclude international agreements but it does not restrict the competence of the EU to do so."; see also the national reports from Bulgaria ("Protocol No 23 indicates that the Member States are not willing to transfer completely their external competences to the EU and should be perceived as a necessary compromise with Article 3(2) TFEU."); Finland (one of the proponents of the predecessor of Protocol No 23), France ("quand bien même l'UE aurait adopté des mesures sur le fondement de l'article 77 § 2 sous b) TFUE, ce qui pourrait lui permettre de disposer d'une compétence exclusive pour la conclusion d'un accord international, conformément à l'article 3 § 2 ..., le protocole l'en empêche"); Germany [Protokoll 23 "hinsichtlich des AETR-Effekts als 'Lex specialis' eine Ausnahme von Art. 3(2) AEUV vorsieht."], Italy (Protocol No 23 "must be assessed as a 'special law' partially derogating the general principle of 'shared competences' clearly stated in the 'AETR' judgement, according to which the Union ought to have acquired an exclusive competence to conclude international agreements (...)."; see also the Romanian and the Spanish reports.

[198] See the Greek report, according to which, "(...) l'interprétation du protocole nº 23 dans le sens que la compétence externe de l'Union n'a pas vocation à devenir exclusive se heurterait à l'objectif d'établissement d'une politique commune en matière de franchissement des frontières extérieures. (...) Il peut être ainsi soutenu que le protocole nº 23 confirme l'effet de préemption au lieu de le réfuter : lorsque

According to the other possible interpretation of Protocol No 23, Member States retain external power as long as there is no internal legislation fully harmonizing the rules on the crossing of external borders pursuant to Article 77(2)(b) TFEU. Some national reports interpret the Protocol within this sense.[199]

However, if it is correct to interpret the Protocol as merely confirming that the EU's external competence on this issue is not *a priori* exclusive, but only exclusive by exercise, then the Protocol no longer serves any purpose, since this principle is now set out in Article 2(2) TFEU.[200]

Finally, a national report interprets the Protocol No 23 "as a safeguard for initiatives of the Member States in the fields of border checks only to the extent that cooperation instruments or other initiatives have not or cannot, by virtue of the subsidiarity principle, be handled at EU level."[201]

7. Concerning the sub-question of whether Member States have concluded agreements with third countries on the crossing of the external borders since the entry into force of Protocol No 23 or whether they maintain in force agreements of this kind concluded previously, five national rapporteurs answered affirmatively: from Bulgaria, Finland, Italy, Poland and Spain.

The Hungarian report specified that the bilateral agreement concluded with Ukraine falls within the scope of Regulation No 1931/2006, and thus not within the scope of the Schengen Borders Code.

Question 23

1. The sub-questions comprised under this question are the following: *(i)* whether there is a national case-law on the interpretation and application of the concept of safe third country set out by Article 38 of Directive 2013/32/EU of 26

l'Union exerce sa compétence interne et aboutit à une harmonisation complète, les États membres son dessaisis de leur compétence et ne peuvent conclure ou maintenir des accords internationaux que sur autorisation. " See also Steve Peers, *EU Justice and Home Affairs Law, Volume I: EU Immigration and Asylum Law*, cit., p. 163, according to whom, on those grounds, "the Protocol needs to be repealed" if it is to be interpreted with the latter meaning.

[199] See the reports from Austria ("With regard to Protocol No 23 (...) as soon as the Commission has a mandate to negotiate a treaty on the issue governed by it, Member States are no longer allowed to start or proceed with bilateral negotiations on the same issue with a third country."), Czech Republic, Poland ("Protocol No 23 itself does not confer any new rights to the Member States") and United Kingdom (Protocol No 23 "makes it clear that the Union's competence to define the checks applicable to external borders pursuant to Article 77(2)(b) is not exclusive *a priori*."; this report also recalls that the formula used in the Protocol No 23 is not unique in primary law: "[w]e find a similar formulation in the provisions governing environmental policy (Article 191(4) subparagraph 2 TFEU) and development cooperation (Article 209(2) subparagraph 2 TFEU)."

[200] Underlining this point see Steve Peers, *EU Justice and Home Affairs Law, Volume I: EU Immigration and Asylum Law*, cit., p. 65 and p. 163.

[201] See the Dutch report. The Croatian report also invokes the principle of subsidiarity in this context.

June 2013 on common procedures for granting and withdrawing international protection (recast); *(ii)* whether such a case law extend to the delimitation of the concept of safe third country in relation to the concept of European safe third country ("super-safe third country") provided for by Article 39 of that Directive; *(iii)* the approach of the national legal literature in this regard; *(iv)* an assessment of the rapporteurs about the link established by the Member States between, on the one hand, the policies and practices relating to the concept of a safe third country and, on the other hand, the extraterritorial control of immigration.

2. Directive 2013/32 is a key element of the common European asylum system the establishment of which is imposed by Article 78(2) TFEU. This Directive is based on Article 78(2)(d) which entrusts the EU legislator with the adoption of common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status. However, at this stage of development of the common European asylum system[202], it is for the Member States to draw up the respective list of safe third countries, subject to the conditions provided for in Article 38.[203]

According to the first paragraph of this Article, Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned: *(i)* life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; *(ii)* there is no risk of serious harm as defined in Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted ; *(iii)* the principle of non-refoulement in accordance with the Geneva Convention is respected; *(iv)* the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; *(v)* the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

[202] For further developments see for instance Marteen Den Heijer, Jorrit Rijpma and Thomas Van Spijkerboer, "Coercion, Prohibition and Great Expectations. The Continuing Failure of the Common Asylum", in *Common Market Law Review*, 53, 2016.

[203] It should be recalled that in its judgment in case C-133/06, *European Parliament v. Council*, of 6.5.2008, the ECJ annulled Article 36(3) of the Council Directive 2005/85/EC of 1.12.2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, which empowered the Council to adopt and amend a common list of third countries that should be regarded as safe third countries. According to the ECJ, by including in that Directive the secondary legal bases constituted by the contested provision, the Council exceeded the powers conferred on it by the Treaty. "To acknowledge that an institution can establish secondary legal bases, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaty. (paras. 56 and 61).

Furthermore, according to Article 38(2) the application of the safe third country concept is subject to rules laid down in national law, including: *(i)* rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country; *(ii)* rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant; such methodology includes case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe; *(iii)* rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge not only the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances, but also the existence of a connection between him or her and the third country.

3. Under the combined provisions of Articles 33(2)(c) and 38 of Directive 2013/32/EU, a Member State may apply the safe third country concept in order to declare an application for international protection submitted by a third-country national from that country inadmissible and to return the applicant to the territory of that third country – even if the Member State at stake admitted that it was responsible for examining that application pursuant to Regulation No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.[204]

The concept of European safe third country also allows Member States to not carry out or not carry out full examination of applications for international protection regarding applicants who enter their territory from such a European third country. According to Article 39(2) this qualification can only be acknowledged whereas the third country at stake *(i)* has ratified and observes the provisions of the Geneva Convention without any geographical limitation; *(ii)* has in place an asylum procedure prescribed by law; *(iii)* has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies.

4. Most of the national reports inform that the respective Member States have a case-law on the interpretation and application of the concept of safe third country based on the national acts of transposition of Directive 2013/32/EU, normally

[204] See judgment of the Court of Justice of 17.2.2016, C-695/15, *Mirza*, paras. 42 and 46.

their asylum statutes.[205] Several reports give interesting and sometimes extensive overviews of such case-law.[206] The inexistence at national level of a case-law on that issue is the exception and does not mean that the concept of safe third country is not consecrated at the legislative level.[207]

The concept of European safe third country is not provided for in the legal orders of some Member States.[208]

5. Concerning the question of the link between the policies and practices relating to the concept of safe third country and the extraterritorial control of immigration, some reports underline that such a concept is one of the instruments of externalization of the EU asylum policy, since through its application it is possible to send the asylum seekers to third countries of transit.[209]

Question 24

1. This question comprises four sub-questions. The first two concern the Global Approach to Migration and Mobility ("GAMM") presented by the Commission in its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,

[205] See the reports from Austria, Bulgaria, Finland, Italy and the United Kingdom (although not bound by Directive 2013/32/EU).

[206] See the reports from France (with the *caveat* at the outset that "la jurisprudence française ne met pas la même signification que le droit de l'UE derrière l'expression « pays tiers sûrs ». Un état des lieux de la jurisprudence administrative française montre en effet que l'utilisation de cette expression renvoie à des réalités diverses, toutes éloignées du sens donné au concept par le droit de l'Union. (...) le droit français n'a pas transposé la directive 2013/32/UE [et] ignore le concept de « pays tiers sûr », 23.1.)"); Germany (the main conclusion of which is "Insgesamt lässt sich feststellen, dass Fragen der Konsequenzen von Schutz in sicheren Drittstaaten in Deutschland bisher vornehmlich anhand der im nationalen Bereich entwickelt Kriterien diskutiert werden."); Greece (with a detailed mention to the case law on the application of the concept of safe third country to Turkey); Hungary (noting that "[i]n the practice of Hungarian authorities and Courts, transit or stay is a sufficient connexion [with a third country], even in cases where a person was smuggled through [that] country."); Slovenia (informing that its Constitutional Court annulled the legal provisions on the concepts of safe third country and European safe third country on grounds of inconsistency with Article 18 of the Slovenian Constitution); Spain (informing that national courts rely on the ECJ case law concerning the interpretation of the concept of safe third country); Netherlands (underlining that the national courts require the governmental authorities to investigate and give evidence themselves that a third country is safe or has become safe within the meaning of Directive 2013/32/EU).

[207] See the reports from Croatia (which informs that its Act on International and Temporary Protection introduced new concepts such as safe country of origin, safe third country and European safe third country to ensure alignment with Directive 2013/32/EU, but does not include a national list of safe third countries), Ireland, Malta and Poland.

[208] See the reports from Finland, Ireland (which has not opted into Directive 2013/32/EU) and Italy.

[209] See for instance the reports from Bulgaria, France, Greece and Italy. According to the Finish report, "[i]f there is no workable concept of a safe country, combined with a procedure for a speedy or immediate return of applicants, there is no possibility of controlling the migration flows."

of 18 November 2011, with a view to find a sustainable solution to irregular migration based on the intensification of the cooperation with third countries of origin and transit, including through assistance to strengthen their migration and border management capacity.[210] The rapporteurs are invited, on the one hand, to assess the practical impact of the GAMM and, on the other hand, to pronounce themselves on the relationship between the GAMM and the new Partnership Framework of cooperation with third countries of origin or of transit under the European Agenda on Migration, presented by the Commission on 7 June 2016, on grounds that "a solution to the irregular and uncontrolled movement of people [has become] a priority for the Union as a whole" which demands a "new results-oriented concept of cooperation."[211] By the last two sub-questions the national rapporteurs are asked whether their respective Member States *(i)* maintain special relations with third countries "reflecting political, historic and cultural ties fostered through decades of contacts, [which] should also be exploited to the full for the benefit of the EU" and/or "the most developed bilateral relationships with a particular partner country" so as to "be fully involved in the EU's discussions with it"[212] and whether these Member States *(ii)* have already concluded bilateral or multilateral pacts with African countries which could serve as an example for the launch of the pacts between the EU and the priority African countries pursuant to the Partnership Framework.

2. According to the conclusions of the European Council of 26/27 June 2014 on the strategic guidelines for legislative and operational planning within the area of freedom, security and justice under Article 68 TFEU, "[a] sustainable solution [to irregular migration] can only be found by intensifying cooperation with countries of origin and transit, including through assistance to strengthen their migration and border management capacity. Migration policies must become a much stronger integral part of the Union's external and development policies (...) building on the Global Approach to Migration and Mobility." (I.8.).

The GAMM established by the mentioned Communication from the Commission of 18 November 2011 represents a second phase of the EU's Global Approach to Migration adopted in 2005 designed to address all relevant aspects of migration in a balanced and comprehensive way, in partnership with non-EU countries. As that Communication states, the GAMM is based on four equally important pillars, each one with its set of priorities: *(i)* organizing and facilitating legal migration and mobility; *(ii)* preventing and reducing irregular migration

[210] COM(2011) 743 final.

[211] COM(2016) 385 final. Pursuant to the conclusions of the European Council of 20/21 October 2016, the initial focus of the implementation of the new Partnership Framework of cooperation is on Africa (point 4).

[212] See the Communication COM(2016) 385 final p. 9.

and trafficking in human beings; *(iii)* promoting international protection and enhancing the external dimension of asylum policy; *(iv)* maximizing the development impact of migration and mobility. It should be "migrant-centered" and "truly global": dialogue and cooperation on migration issues should be pursued across the globe with all interested and relevant partners based on their and the EU's respective priorities. [213]

The GAMM should be applied in a structured and systematic way, through tailor-made bilateral partnership frameworks negotiated between the EU and each priority country concerned. Its most important instruments for that purpose are, firstly, the Mobility Partnership (MP) followed, alternatively, by the Common Agenda on Migration and Mobility (CAMM). The former includes the negotiation of visa facilitation agreements and readmission agreements normally with neighbouring third countries; the latter does not include such agreements and is normally used with non-neighbouring countries. Nine MPs have been signed so far: with Cape Verde, Moldova, Georgia, Armenia, Morocco, Azerbaijan, Tunisia, Jordan and Belarus. Two CAMMs have been signed with Ethiopia and Nigeria.

In its first report on the implementation of the GAMM during 2012-2013, the Commission informed that under the aegis of the GAMM it was possible for the EU to speak with one voice and that during that period "important steps have been taken towards a more consolidated, coherent external migration and asylum policy. Significant progress has been made in strengthening political relations with third countries and regions, e.g. the Southern Mediterranean countries, and the Eastern Partnership countries. Actions were also undertaken to contribute to institutional and legislative reforms and capacity building in partner countries. In particular the MP have proved to be a sophisticated bilateral framework to address migration and asylum issues in a way that makes cooperation mutually beneficial."[214]

3. The "unprecedented migratory and refugee crisis" following a sharp increase of mixed migratory flows which the Union has been facing especially since 2015 was the main cause of the above mentioned proposition, by the Commission, of a "new results-oriented concept of cooperation" and of its Communication of 7 June 2016, on establishing a new Partnership Framework with third countries under the European Agenda of Migration. This instrument takes into account the new context of the migratory crisis and aims to better integrate the migratory issue in the general framework of the relationship between the EU and third countries. The key actions envisaged by the Commission are the

[213] The Greek report considers that "dans le cadre de l'Approche globale de la question des migrations et de la mobilité, la gestion des flux migratoires est un objectif absorbé par l'objectif de la coopération au développement ou autres objectifs externes."

[214] COM(2014) 96 final, of 21.2.2014, points 4.3. and 6.

following: *(i)* to conclude compacts with Jordan and Lebanon and to explore with Tunisia how best to take cooperation with the EU to the next level; *(ii)* to launch and agree compacts with Niger, Nigeria, Senegal, Mali and Ethiopia; *(iii)* to stand ready to support the Libyan Government of National Accord in its efforts to manage irregular migration flows, also by making efforts to foster regional cooperation with Libya's Southern neighbours and the Sahel region.

As the Commission itself had the occasion to recall some months later, the new Partnership Framework approach means changing the way the EU, together with its Member States, manages migration relations with third countries of origin and transit. A key component in this approach is the concept of "compacts", defined as a political framework for continued and operational cooperation, pulling together the different work strands in order to develop a comprehensive partnership with third countries, combining the instruments, tools and leverages available to the EU and Member States to deliver clear targets and joint commitments. Formal international agreements, such as readmission agreements, can flow from the compacts process. But the compacts approach avoids the risk that concrete delivery is held up by technical negotiations for a fully-fledged formal agreement. As the elements of a mutually beneficial relation on migration management are progressively identified, this mutual understanding is being operationalised into compacts, tailor-made to the specific situation of each partner country.[215]

4. Concerning the practical impact of the GAMM, the assessments of the national reports are contrasting. Only two reports inform that their respective Member States adopted a positive approach (Bulgaria and United Kingdom[216]). The negative assessments vary between the very negative (Italy) and the ones who hold the opinion that the practical impact of the GAMM is "not great" (Croatia) or "relatively modest" (Finland). The report of Malta considers that the GAMM failed to provide the necessary incentives for the finalization of return agreements with partner countries.

The Irish report explains that since Ireland has not "opted into any of these measures to facilitate lawful migration (...), the GAMM could not have had any practical impact in Ireland."

5. Concerning the relationship between the GAMM and the Partnership Framework with third countries under the European Agenda of Migration, it

[215] See the Communication from the Commission of 18.10.2016, First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 700 final, point 2 on "Operationalizing the Partnership Frameworks. The compacts."

[216] The latter welcomes particularly the focus on practical cooperation and the non-binding and voluntary character of the GAMM, which allows Member States to decide how they can best contribute to joint initiatives in this area.

must be recalled at the outset that the Communications from the Commission which establish both instruments cannot be considered as acts of EU hard law, but rather as acts of soft law. This does not mean however that the classical legal concepts of *lex posterior* and of *lex specialis* cannot be used in this context, at least by analogy.

Several national reports consider, explicit or implicitly, that the Partnership Framework is "special" vis-à-vis the previously adopted GAMM, the scope of which is wider. Therefore the former does not replace the latter but adapt it to the migratory crisis[217] or displaces it to the prevention and combat against irregular immigration, goals on which the Partnership Framework focus.[218]

Other national reports, starting from the discussable point of view that the GAMM and the Partnership Framework are built upon the same basic ideas, tend to consider that the latter develops particular aspects of the former. [219]

Two national reports believe that the Partnership Framework replaces the GAMM to a significant degree, at least from a political point of view.[220]

One national report holds the opinion that "the newer Partnership Framework possibly integrates GAMM and displaces the EU's migration policy to a broader policy context in which security and development cooperation concerns play a greater role."[221]

[217] See the French report.

[218] See the reports from Austria, which underlines that the Partnership Framework focus on the fight against migrant smuggling, return and introduces the concept of "less for less", whereas the GAMM concerns, inter alia, a dialogue on a global level, mobility and legal migration and applies the "more for more principle"; Germany ("Partnerschaftsrahmen sind zum einen als *lex posterior* und zum anderen als *lex specialis* gegenüber dem Gesamtansatz vorrängig. (...) Insoweit wird der Gesamtansatz teilweise durch die Vorschläge zu Partnerschaftsrahmen verdrängt aber nicht ersetzt"); Finland, which underlines that the Partnership Framework has its own distinct objectives one of which is the promotion of returning of asylum seekers; Spain, according to which "the new Partnership Framework is ultimately a more consistent tool than the GAMM, as it incorporates action instruments that make it possible to address, on a horizontal basis, the priority objective in the fight against illegal immigration. Both instruments may coexist."

[219] See the reports from Bulgaria and Croatia ("Partnership Frameworks are GAMM level 3.0. – upgraded, targeted and with more focus.").

[220] See the Greek report ("À la différence de l'Approche globale de la question des migrations et de la mobilité, le nouveau cadre de partenariat avec les pays tiers a pour objectif principal la gestion efficace de l'immigration et instrumentalise l'objectif de coopération au développement à cet effet. En ce sens, nous pouvons considérer que le nouveau cadre de partenariat vise à remplacer l'approche globale, en inversant l'objectif principal affiché sur le plan international.") and the Irish report ("The new Partnership Framework with third countries seems to mark a shift from migration management to a focus on migration control. (...) The emphasis is markedly on border control mechanisms and preventing the arrival of immigrants to the territory of the EU.").

[221] See the Dutch report: "In other words, it appears that whereas GAMM introduced more flexible instruments to develop cooperation mechanisms on migration with third countries, the new Partnership Framework seeks to bring together migration policy with the fight against organized crime (human

6. In reply to the third sub-question, the French report informs that France maintains special relations with Mali, Niger and Senegal (three of the five priority countries for the EU), as well as with Algeria, Morocco and Tunisia, "reflecting political, historic and cultural ties fostered through decades of contact." The Italian report refers to Albania. The Maltese report informs that Malta, as a Commonwealth member, has good relations with a number of African Commonwealth countries. The Dutch report refers to Mali and the report from the United Kingdom informs that this Member State has most significant bilateral interests with Nigeria and Ethiopia.

7. Concerning the last sub-question, the Spanish report is the only to answer that the "new generation" agreements concluded by Spain with six African countries – which address in a comprehensive manner the different aspects related to migration – "can be regarded as examples for the launch of compacts between the EU and the priority African countries."

Austria, France, Germany, Italy, Malta and the Netherlands inform that they have concluded several agreements with African countries. However, they do not consider such agreements as examples for the launching of pacts between the EU and the priority African countries.[222]

Question 25

1. This question comprises four sub-questions: *(i)* the first on the legal correctness of the bilateral conclusion of readmission agreements between the Member States and third countries in the light of Article 79(3) and Article 3(2) TFEU; *(ii)* the second on the relationship of, on the one hand, readmission agreements concluded between the EU and third countries and, on the other hand, readmission agreements concluded bilaterally between Member States and third countries; *(iii)* the third on whether Member States have concluded bilaterally readmission agreements after the entry into force of the Treaty of Amsterdam and *(iv)* the fourth on whether there are Member States bound by readmission agreements containing "problematic clauses" such as the one providing for the repatriation of irregular migrants through simplified procedures, which was found to be contrary to the European Convention on Human Rights by the Strasbourg Court.[223]

trafficking) and development cooperation in order to assist third countries that have a special position in the current migratory crisis. (...) At the same time, the EU makes clear that the short-term goal of the Partnership Framework is to tackle the current crisis."

[222] The French report notes that the bilateral agreements concluded between France and the African countries "n'avaient pas donné les résultats escomptés (...) il était préférable de privilégier le cadre européen dès lors que l'UE est en mesure de consacrer davantage de moyens à cette politique."

[223] See judgment of 1.9.2015, *Khlaifia and Others v. Italy*, application no. 16483/12, § 45.

2. It must be recalled at the outset that the readmission agreements are the EU's main instrument for ensuring that third-country nationals whom the Member States want to expel are removed from their territories or, more precisely, for ensuring return within the meaning of Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the so-called "Returns Directive").[224]

The field of readmission agreements is the only one in Title V of Part III of the TFEU which is not governed by the implied powers principle since the entry into force of the Treaty of Lisbon.[225] As a matter of fact, under Article 79(3) TFEU "the Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States." Since 2004, the Union has so far concluded 17 readmission agreements (with Albania, Armenia, Azerbaijan, Bosnia-Herzegovina, Cape Verde, former Yugoslav Republic of Macedonia, Georgia, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, the Special Administrative Regions of Hong Kong and Macao, Turkey and Ukraine),[226] and has opened negotiations for another six (with Algeria, Belarus, Jordan, Morocco[227], Nigeria and Tunisia). The 17 agreements concluded at the EU level are essentially identical.[228] As it has been noted, most third countries do not want to engage in negotiations

[224] According to Article 3(3) of Directive 2008/115, "'return' means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to: *(i)* his or her country of origin, or *(ii)* a country of transit in accordance with [Union] or bilateral readmission agreements or other arrangements, or *(iii)* another third country to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted."

[225] Before the entry into force of the Treaty of Amsterdam, the European Community (EC) lacked competence to conclude readmission agreements with third countries. With the entry into force of that treaty, the EC acquired an implied external competence in this field. In fact, Article 63(3)(b) TEC empowered the EC legislator to adopt measures on immigration policy within the area of illegal immigration and illegal residence, including *repatriation of illegal residents*. The European Council of Tampere stated that "the Amsterdam Treaty conferred powers on the Community in the field of readmission" and invited the Council "to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries."

[226] The United Kingdom is entitled to decide whether to participate in EU readmission agreements "on a case-by-case basis, depending on the priority we attach to the country concerned in terms of numbers of immigration returns and the degree to which we enjoy a good bilateral relationship with that country."; this Member State participates in 14 of such agreements. For its part, Ireland, which is in the same legal situation, participates in 12 of the readmission agreements concluded by the EU.

[227] The Spanish report notes that the existence of bilateral readmission agreements between Morocco and immigration receiving Member States (among which, Spain) has not facilitated the negotiation of the readmission agreement with this third country at the EU level.

[228] For the details see Steve Peers, *EU Justice and Home Affairs Law, Volume I: EU Immigration and Asylum Law*, cit., pp. 533-534.

on readmission agreements mainly due to internal political considerations, as such agreements can be a source of public hostility. As a result, the ongoing negotiations with Morocco and Algeria are at a standstill and those that were launched in 2016 with Nigeria, Jordan and Tunisia have not progressed as needed. [229]

3. Since the Member States also retain a key role in the implementation of the readmission agreements concluded at the EU level, each agreement provides that Member States can conclude special implementing protocols with the third-country party, in order to flesh out the practical details of the cooperation between the national administrations involved and with a view to ensure respect, on a case-by-case basis, of the rights of the individuals concerned, including the *non-refoulement* principle.[230] Recent readmission agreements concluded by the EU (such as the one with Cape Verde) state that the implementing protocols concluded by the Member States with the third country party enter into force only once such protocols are notified to the Joint Readmission Committee, *i.e.* a managerial committee tasked with monitoring and managing the implementation of those EU readmission agreements.[231] On the other hand, the readmission agreements concluded by the EU provide that such agreements take precedence over any incompatible bilateral agreement between a Member State and the other contracting party.[232]

Based on these provisions, several national reports answer to the first subquestion that the practice of the Member States to conclude readmission agreements with third countries is correct and answer to the second sub-question that readmission agreements concluded between the EU and a third country prevail over bilateral agreements of Member States and that the latter agreements continue to apply in so far as they do not contradict the readmission agreements concluded at the EU level.

[229] See the letter of the Director-General of the Commission (Directorate-General Migration and Home Affairs) to the chair of the LIBE Committee of the European Parliament on "Readmission developments – State of play October 2017." Due to the above mentioned reluctance of most third countries to engage in negotiations on readmission agreements with the EU and with its Member States, "[t]he Commission's focus is therefore on improving practical cooperation. Practical arrangements on return and readmission can facilitate cooperation, as they allow the administrations of third countries and Member States to work more transparently, efficiently and predictably on the identification and return of irregularly staying persons. They also represent a first step in establishing mutual trust as well as towards the launch of formal negotiations for fully-fledged readmission agreements."

[230] See for instance Article 20(1) of the EU – Cape Verde readmission agreement.

[231] For further developments see the Dutch report.

[232] See Article 20 of the EU – Cape Verde readmission agreement, under which "The provisions of this Agreement shall take precedence over the provisions of any legally binding instrument on the readmission of persons residing without authorisation which, under Article 19, have been or may be concluded between individual Member States and Cape Verde, in so far as the provisions of any such legally binding instrument are incompatible with those of this Agreement."

4. However, the first sub-question also comprises the readmission agreements concluded by Member States in their own name with third countries which cannot be qualified as mere implementing protocols of readmission agreements between the EU and the same third countries. In this case, in order to determine whether the readmission agreements between Member States and third countries are allowed by Article 3(2) TFEU, it must be determined whether the competence conferred on the EU by Article 79(3) to conclude readmission agreements has become exclusive *(i)* pursuant to sufficient harmonization of the relevant internal common rules which, therefore, could be affected or altered in their scope by the conclusion of readmission agreements, or *(ii)* because it is essential for the EU to conclude readmission agreements in order to enable it to exercise its internal competence. The relevant internal legislation has been adopted under Article 79(2)(c) in the fields of prevention of and combat to illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation. The main legislative act on this matter is the Returns Directive.[233]

As the ECJ had already occasion to clarify, Directive 2008/115/CE is not designed to harmonise in their entirety the national rules on the stay of foreign nationals, but concerns only the return of illegally staying third-country nationals in a Member State.[234] "In particular, it is apparent from its recital 17 that the conditions for the initial arrest of third-country nationals suspected of staying in a Member State illegally remain governed by national law."[235]

Several provisions of Directive 2008/115 confirm this conclusion. On the one hand, Article 2(2) provides that Member States may decide not to apply this Directive to third-country nationals who: *(i)* are subject to a refusal of entry in accordance with Article [14] of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State, under the conditions set out in Article 4(4); *(ii)* are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.[236] On the other

[233] For other acts based on Article 79(2)(c) or on its antecedent see the institutional report, footnote 75.

[234] According to Article 3(2), 'illegal stay' means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article [6] of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.

[235] See judgment of 6.12.2012, in case C-329/11, *Achughbabian*, paras. 28 and 30.

[236] Among similar provisions, see Article 4(3), under which "[t]his Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive"; Article 6(4) under which "Member States may at any moment decide to grant an autonomous residence permit or other

hand, and still more explicitly, by virtue of its Article 4(1), Directive 2008/115 shall be without prejudice to more favourable provisions of: *(i)* bilateral or multilateral agreements between the [Union] or the [Union] and its Member States and one or more third countries; *(ii)* bilateral or multilateral agreements between one or more Member States and one or more third countries. Recital 7 underlines *the need for Union and bilateral readmission agreements with third countries* to facilitate the return process. "International cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return."

5. In the light of the foregoing, it can be concluded that the competence conferred on the Union by Article 79(3) TFEU to sign readmission agreements has not become exclusive by virtue of Article 3(2).[237] It remains thus as a shared competence with the Member States, governed by Article 2(2). Being a shared competence, as long as the EU has not concluded a readmission agreement with a third country, the individual Member States are still entitled to conclude readmission agreements with this country or any other agreement such as a Development and Cooperation Agreement with a readmission clause.[238] This seems fully compatible with Article 2(2) in so far as it provides that "when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and *adopt legally binding acts in that*

authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory"; Article 11(3) *in fine* under which Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons and may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

[237] In the same sense, see the position of the members of the Legal Service of the Council who co-signed the institutional report, the Austrian and the Italian reports. In a contrary sense, see the position of the members of the Legal Service of the European Parliament who co-signed the institutional report, according to which "(...) the agreements that Member States may be allowed to conclude are only those that would implement the Return directive or are otherwise authorised in the meaning of Article 2(1) TFEU. (...) full harmonisation is not a condition for exclusive competence but only one situation which may establish it."; see also the German report: "die besseren Argumente daür sprechen, der Union auch hinsichtlich ihrer Aussenbeziehung beim Abschluss von Rückführungsabkommen eine ausschliessliche Kompetenz zuzugestehen. The author notes however that "Eine herrschende Meinung zu dieser Frage habe ich in der deutschen juristischen Literatur allerdings nicht feststellen können." It should be noted that for the German rapporteur Article 4 of the Returns Directive, quoted above, is to be understood as a "ausdrückliche Ermächtigung an die Mitgliedstaaten (...) bestehende bilaterale Abkommen beizubehalten und entsprechend die unionalen Regelungen fortzuentwickeln."; for the Irish report, "[i]n the light of the continuous development of the CEAS [Common European Asylum System], it seems that the conclusion of readmission agreements with third countries is now necessary to enable the Union to exercise its internal competence. Furthermore, the conclusion of such agreements is likely to affect or alter the scope of the common rules of the CEAS. To this extent, there is a strong argument to contend that the Union has come to acquire exclusive competence in this field which would render the practice of member states in concluding readmission agreements with third countries of dubious standing under EU law."

[238] Explicitly in this sense, see the Dutch report.

area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence." (emphasis added).[239] And this especially after the ECJ clarified that in areas where the EU and its Member States have shared competence, an external Union competence can exist outside the situations laid down in Article 3(2) TFEU.[240]

Furthermore, as it was underlined by some reports, there are strong practical reasons supporting this solution. In fact, in situations where the Union has not concluded – or does not envisage to conclude – a readmission agreement with a third country, even if the internal common rules on return where sufficiently harmonized, to prevent a Member State from concluding a readmission agreement with that third country would endanger the achievement of the objectives of such common rules.[241] As it was noted, to sign a readmission agreement with a particular third country with which no readmission agreement has been concluded at the EU level may be of vital importance for a Member State.[242]

Finally, this conclusion does not seem to be brought into question by the fact that, with the entry into force of Regulation 2016/1624 of 14 September 2016 on the European Border and Coast Guard, the mandate on return given to the European Border and Coast Guard Agency has been enlarged in order to include the power to organise joint return operations on its own initiative, but "without entering into the merits of return decisions" which are exclusively incumbent upon the Member States [Article 28(1)]. This enlarged mandate of the Agency implying more centralization in the implementation of the EU return policy does not seem to demand the existence of readmission agreements exclusively concluded by the Union. This is to some extent confirmed by recital 36 of Regulation 2016/1624 pursuant to which "[t]he possible existence of an arrangement between a Member State and a third country does not absolve the Agency or the Member States from their obligations under Union or international law, in particular as regards compliance with the principle of non-refoulement."

Conversely, Member States shall refrain from entering into readmission agreements with third countries when the Union has already done so, except if

[239] It seems particularly pertinent to recall in this context the Protocol No 25 on the exercise of shared competence. According to its sole Article, "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area." Concretely, a readmission agreement concluded by the EU with a certain third country does not cover the whole area of readmission agreements with third countries.

[240] See judgment of 5 December 2017, C-600/14, *Federal Republic of Germany v. Council*, para. 61.

[241] Underlining this aspect see the institutional report; in the same sense see the Italian report (point 12).The German report informs, however, that "Insgesamt hat Deutschland seit dem Inkrafttreten des Vertrags von Lissabon den Abschluss von Rückführungsabkommen im Wesentlich der Union überlassen."

[242] See the Czech report.

expressly authorized or on matters regarding the implementation of the readmission agreement concluded at the EU level.[243]

6. Be that as it may, the principle of sincere cooperation set out in Article 4(3) TEU – under which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out the tasks provided for by the Treaties – establishes some limits to the conclusion, by Member States, of readmission agreements with third countries with which the EU has not (yet) concluded a readmission agreement.

On the one hand, when a Member State is negotiating a bilateral readmission agreement with a third country and the Commission has received in the meantime a mandate from the Council to start negotiations of an EU readmission agreement with the same third country, the Member State must withdraw from its negotiations.[244] On the other hand, as long as the Commission negotiates a readmission agreement with a third country, the Member States shall not negotiate and conclude themselves bilateral agreements on the same matter with that third country, except in case of long lasting, unsuccessful negotiations by the Commission. In such cases Member States should be allowed to continue the former bilateral negotiations or to start new negotiations.[245]

7. A different and very relevant question in this context is the relationship between a readmission agreement concluded by the EU with a certain third country and the readmission agreements concluded previously with the same third country by Member States. As a matter of fact, most of the Member States had concluded readmission agreements with third countries with which the EU concluded later readmission agreements. The answers of the national rapporteurs are different in this regard, depending upon the perspective they adopt.

Some national reports consider that the conclusion of a readmission agreement between the EU and a third country has the consequence that the bilateral agreements previously concluded between Member States and that third country are terminated and accordingly no longer give rise to rights and obligations upon the entry into force of the agreement concluded with that third State at the EU level. In other words, the conclusion of a readmission agreement between the EU and a third country expresses the consent of the latter as well of

[243] See the Spanish report. The institutional report believes that Member States are not in principle prohibited from concluding readmission agreements with a third country even if there is already a EU readmission agreement with the same third country, provided that the provisions of such bilateral agreements "are both compatible with, and more favourable than those of the Returns Directive.". According to the latter report this could change if the Union's legislator decided to fully harmonize the system of return. If this is correct, it must be asked if such a solution also applies when the existing EU readmission agreement contains itself more favourable provisions than those of the Returns Directive.

[244] See the Czech report.

[245] See for instance the Austrian and the French reports.

the Member States to put an end to the bilateral agreements that will be replaced by the agreement concluded at the EU level.[246] A national rapporteur informs that upon the date of entry into force of a readmission agreement concluded between the EU and a certain third country, the Member State concerned has ceased to apply its bilateral readmission agreement previously concluded with the some third country with a view to fully comply with the principle of sincere cooperation towards the EU.[247]

Other reports admit that bilateral readmission agreements concluded with third countries before a readmission agreement has been concluded at EU level may be equated to implementing protocols of the readmission agreement concluded between the EU and the same third country and may continue to govern the correspondent readmission operations, provided that such agreements do not in any way contravene the provisions of EU or international law, including the principle of *non-refoulement*.[248] However, the parallel existence of readmission agreements concluded at EU level and by a Member State with the some third country that cannot be qualified as implementing protocols of the former are likely to provoke legal uncertainty. In any case, Member States may not apply their bilateral agreements in a way inconsistent with the readmission agreement concluded by the EU with the same third countries.

8. Concerning the last two sub-questions, the national reports inform that most of the Member States had concluded with third countries readmission agreements or memoranda of understanding for the return of nationals found illegally in their territories before the EU itself concluded readmission agreements with the same third countries. The number of such bilateral agreements varies substantially from Member State to Member State (from three concluded by Finland to almost 20 concluded by the United Kingdom).

Some Member States also concluded readmission agreements or memoranda of understanding with third countries not bound by a readmission agreement concluded at EU level. A national rapporteur informs that the respective Member State concluded a memorandum of understanding with a third country with which the EU itself was negotiating a readmission agreement.

Several Member States have signed with third countries implementing protocols of readmission agreements concluded at the EU level.[249]

[246] See for the French and the Greek report. The Polish report recalls that in areas, like aviation, there have been traditionally bilateral agreements the majority of which has been amended by number of agreements concluded solely by the EU.

[247] See the Romanian report.

[248] See the Maltese and the Slovenian reports.

[249] Bulgaria, France, Germany, Greece, Hungary and Poland.

No national report informs about the conclusion at national level of a readmission agreement that cannot be substantially qualified as an implementing protocol of a readmission agreement concluded at the EU level after the entry into force of the latter.

Finally, only two national report inform about the existence of "problematic clauses" contained in readmission agreements concluded at national level.

INSTITUTIONAL REPORT



INSTITUTIONAL REPORT*

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CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES (QUESTIONS 1-4)

The division of competences between the Union and its Member States has traditionally been one of the key issues in the academic debate of EU law, turning mostly around the exact delimitation of the sphere of competence of the Union versus that of the Member States. From an institutional perspective however the interest lies -unsurprisingly- on the institutional impact itself of the division of competences, and this will be the approach here adopted. Instead of addressing the specific questions separately, they will be presented together to better address the institutional dimension.

* This report is a joint exercise by four colleagues from the Legal Services of the Council (CLS) and of the European Parliament (PLS). Chapters 1 and 5 were chiefly prepared by H. Legal and A. de Elera, Chapters 3 and 4 by F. Drexler and A. Neergaard and Chapter 2 jointly. Inevitably, because of the different perspectives and ongoing work, the rapporteurs do not agree on all issues; these divergences have been explicitly indicated in the most salient cases. For ease of presentation, the views of H. Legal and A. de Elera will be presented as the views of "CLS members" and the views of F. Drexler and A. Neergaard as the views of "PLS members". It must however be stressed that *the views contained in the report are presented in the context of academic debate, are strictly personal and do not represent those of the institutions or of their legal services*.

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The chapter will start by a brief systematisation of the division of competences, beginning with the basic foundations that regulate that division, continuing with the classification of competences and finally applying the resulting categories to international agreements to have them categorised accordingly.

After that, the chapter will focus on the issue of the so-called facultative mixity, which has contributed to many inter-institutional disagreements in the last years. It then turns to the practical management of mixity through all the lifespan of an agreement: negotiation, signature and provisional application, conclusion and subsequent implementation, to finalize with a set of short conclusions.

1.1. Treaty foundations of the division of competences

The division of competences between the Union and its Member States rests on a basic premise, the principle of conferral contained in Article 5(2) TEU, according to which "*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*"; this principle applies equally for both internal and external policies.

The general classification of Union competences is then established in Article 2 TFEU, which refers to three different categories (exclusive, shared and support to Member States' competences) and additionally mentions specific areas in which the Union may act, such as CFSP or economic and employment policies. Concerning shared competence, Article 2(2) TFEU also establishes the pre-emption principle, whereby when dealing with shared competence "*The Member States shall exercise their competence to the extent that the Union has not exercised its competence*" or "*has decided to cease exercising its competence*". This must be read together with Protocols No 25, which establishes that "*With reference to Article 2(2) [TFEU] on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover all the area*" and No 23, in accordance with which "*The provisions on the measures on the crossing of external borders included in Article 77(2)(b) of the Treaty on the Functioning of the European Union shall be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements*".[1]

[1] For the sake of completeness, reference should also be made to Declarations 18 "*Declaration in relation to the delimitation of competences*", 13 and 14 "*Declaration concerning the common foreign and security policy*" and 36 "*Declaration on Article 218 of the Treaty on the Functioning of the European Union concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice*".

Articles 3 to 6 TFEU detail the specific policy areas falling into the different categories[2], with Article 3 TFEU dealing with exclusive Union competence, Article 4 TFEU with shared (including parallel) competence and Article 6 TFEU with the competence of support. Even though their relevance is different for the two categories, the content of these Articles apply to both internal and external Union competence except if otherwise explicitly provided.

Article 4(1) TFEU defines as shared competence any Union competence in areas not referred to in Article 3 TFEU (exclusive) and Article 6 TFEU (competence of support) and thus includes the areas mentioned in Article 2(3) TFEU, in Article 5 TFEU (coordination of economic and employment policy) and Article 2(4) TFEU (CFSP). Nevertheless, Article 4(2) TFEU lists the shared competence areas where the pre-emption principle of Article 2(2) TFEU may take place, while Article 4(3) and 4(4) TFEU lists areas of shared competence where no pre-emption happens (the so-called parallel competence); in this regard it would seem to follow from the specific provisions in Article 2(4) on the CFSP and in Article 2(3) and Article 5 TFEU on the coordination of economic and employment policies, that these competences must also be considered as parallel, as Member States retain their competence even after the Union has acted[3]. This should not be confused with the fact that, also in the absence of pre-emption, Member States have to respect any adopted Union acts.

Concerning specifically external competence, the Treaties establish the limits of the existence of Union competence to conclude international agreements in Article 216(1) TFEU; additionally, they qualify this competence as exclusive in the cases referred to in Article 3(2) TFEU. To this, the provisions of Title V TEU on a Common Foreign and Security Policy must be added, including Article 37 TEU on the possibility for the Union to conclude agreements in the field.

On that basis, our analysis of the division of external competence follows a series of consecutive steps: 1) to verify the existence of Union competence; 2) once the existence of a Union competence has been ascertained, to define its nature (exclusive or non-exclusive), so as to see whether or not a role nevertheless remains for Member States; and 3) to apply the results of the previous analysis to a given agreement to see whether it must be concluded by the Union alone or

[2] Except for CFSP, which is dealt with in the TEU Treaty.

[3] The nature of CFSP as a parallel competence can be clearly inferred from Declarations 13 and 14, according to which "the provisions covering the Common Foreign and Security Policy (...) do/will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations". See further Ricardo Gosalbo and Frederik Naert, 'The Reluctant (Lisbon) Treaty and Its Implementation in the Practice of the Council', in Piet Eeckhout., *The European Union's External Action in Times of Crisis*, Kindle Locations 1184, Bloomsbury Publishing, Kindle Edition.

by the Union and its Member States, or whether there is a choice in this regard for the Union legislature[4]. We will now see these steps in detail.

1.2. The existence of external Union competence

In accordance with the principle of conferral of Article 5(2) TEU, external Union competence can only exist when a general Union competence exists. To verify this, it will be sufficient to look at whether there is a legal basis of substance in the Treaties allowing for general Union action, as this will also cover external action. Indeed, while it could be argued that Article 216 TFEU limits the cases where general Union competence can be applied externally, the second of the possibilities mentioned in that Article -"*where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*"- is an expression of the general principle of conferral of Article 5(2) TFEU. If this condition is satisfied, "*the European Union would have the external competence required to establish positions with respect to the amendments at issue, whether or not it had, first, adopted common rules in the areas concerned, likely to be affected by those amendments*"[5]. This provision thus allows the EU legislature a policy choice whether to act or not, be it by means of internal and external instruments for the implementation of Union policies, making thus *de facto* coincide the scope of internal and external Union competence.

1.3. The nature of external Union competence

Once the existence of external Union competence has been verified, its nature must be ascertained. The relevant question under this analysis is whether the competence is exclusive or not. As we will see, if the external Union competence is exclusive, Member States will be prevented from acting; if it is non-exclusive, the EU legislature will have the possibility to decide whether the Union is to act alone or together with the Member States.

1.3.1. *Exclusive external Union competence*

When this type of external Union competence is involved, Member States are excluded from acting. The rapporteurs have here a slightly different interpretation.

CLS members consider that this type of competence may arise only in two situations: 1) when the general Union competence refers to one of the policy fields mentioned in Article 3(1) TFEU and is thus directly defined as exclusive

[4] For a seminal typology see Allan Rosas, 'The European Union and mixed agreements', in Alan Dashwood and Christophe Hillion (eds.), *The General Law of E.C. External Relations*, at 206.

[5] Judgment 5 December 2017, C-600/14, Germany v Council, EU:C:2017:935, paragraphs 46 to 51, 53.

by the Treaties (exclusive external competence *by origin*); and 2) when the general Union competence is one of those referred to in Article 4(2) TFEU as shared with the Member States and one or more of the situations referred to in Article 3(2) TFEU arises (exclusive external competence *by exercise*).

For PLS members, Article 3(2) TFEU does not exclude any specific policy area from its scope. The competences referred to in Article 4(3) and (4) would not seem relevant, as the risk of an effect on common rules should be excluded by the fact that the EU measures must anyway be such that they do not prevent Member States from exercising their competence. Additionally, it would in principle seem perfectly possible that the common rules affected as referred to in Article 3(2) TFEU could be rules that have been adopted on the basis of the legal bases concerned by Articles 5 or 6 TFEU[6].

1.3.2. *Non-exclusive external Union competence*

This type of external Union competence implies that Member States are entitled to act alongside the Union. CLS members consider that it arises in two situations: 1) where the Union competence refers to one of the policy areas mentioned in Article 4(2) TFEU *and* none of the cases referred to in Article 3(2) TFEU occur; and 2) where the Union competence refers to the policy areas mentioned in Articles 4(3) and 4(4) TFEU (parallel competence), 5 TFEU (coordination of economic and employment policies), 6 TFEU (supporting competence) and Title V TEU (CFSP).

As follows from the explanations under 1.3.1, PLS members see this slightly differently, as they consider that this type of external Union competence arises for every Union competence and where none of the cases referred to in Article 3(2) TFEU occur.

1.4. The resulting typology of Union agreements depending on the nature of external Union competence

Union agreements may be classified applying the abovementioned categories of external Union competence to the contents of any given agreement.

1.4.1. *Compulsory Union only agreements*

Compulsory Union only agreements are agreements that do not contain competence that belongs to Member States. In this case, only the Union is entitled to be party to the agreement and there is no choice for the EU legislature as to its nature.

[6] For the definition of an exclusive competence, the PLS members would simply refer to Opinion 2/15, notably paragraphs 180, 181 and 201.

1.4.2. *Compulsory mixed agreements*

This type of agreement contains both clauses where there is no Union competence involved and clauses falling under exclusive Union competence. In this case, there will be no choice for the EU legislature as to the nature of the agreement, which will need to be mixed.

1.4.3. *Facultative Union-only or mixed agreements*

These are agreements containing clauses falling under non-exclusive Union competence. The EU legislature may in this case decide to configure them as Union-only or as mixed (facultative mixity). While the other two type of agreements do not entail any consequences regarding the nature of the competences involved, this type of agreements may entail certain consequences where the policy areas of Article 4(2) TFEU are concerned and a Union-only agreement is chosen, as the agreement could then pre-empt Member State action in the meaning of Article 2(2) TFEU. The extent to which the Union competence will become exclusive (both internally and externally), depends on whether the rules adopted may be affected or their scope altered in the meaning of Article 3(2) TEU[7].

1.5. Facultative mixity as a policy choice for the EU legislature

One of the main sources of institutional disagreement in the last years concerning the distribution of competences has turned around the case of facultative mixity, which has contributed to legal differences ending up before the Court in Luxembourg[8]. Facultative mixity is also contested by some authors, who perceive it mainly as a way through which Member States aim to maintain their pre-Lisbon prerogatives in the field of external relations[9].

The arguments against facultative mixity have been manifold and include denying its very existence, contesting collective action by Member States, rejecting the use of the General Secretariat of the Council and Council facilities to support such collective action, or considering unlawful the internal organization of work by the Council (i.e., the practice that the relevant Union decision is put to the vote only once it has been checked that the political preconditions for an agreement are present, meaning in this case that Member States are ready to proceed concerning their part). However, and as the Court has already

[7] An open question is whether it is possible to act (externally as well as internally) on a specific situation for the first time by adopting an individual act, without an earlier legal act having previously set out general rules on the matter.

[8] See *inter alia* Case C-600/14, see also cases C-28/12 and C-114/12.

[9] See Castillo, Fernando, in *The European Union's External Action in Times of Crisis*, Kindle Location 5178, Bloomsbury Publishing, Kindle Edition; Erlbacher, Fritz, in *Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty*.

established, the "*resolution of the issue of the allocation of competence cannot depend on problems which may possibly arise in administration of the agreements*"[10].

Concerning the existence of facultative mixity, and as seen above, whenever an agreement, falling under non-exclusive Union competence the EU legislature can, in line with the criteria laid down in Article 216 TFEU, *freely* decide whether or not to exercise the competence externally as a matter of political discretion[11]. This indeed implies that "*shared does not mean mixed*", as has been put many times[12]; but it is equally true that "*shared* may *mean mixed*" and that the choice between mixed and Union-only is, when available, one for the EU legislature to freely make, both options being equally sound in legal terms.

The existence of such a choice was recognised by the Court already in its judgment in Cases C-181/91 and C-248/91, where it established that where "*the Community does not have exclusive competence in the field [...] the Member States are not precluded from exercising their competence in that regard collectively in the Council or outside it*"[13]. This was further confirmed in Case C-316/91, where the Court established that when "*The Community's competence in* [a] *field is not exclusive, the Member States are (...) entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community*"[14]. More recently, the existence of facultative mixity was explicitly stated by Advocate-General Sharpston, according to whom for "*an international agreement covering areas that fall within shared external competence that is eventually signed and concluded by the European Union alone (...) the Member States together (acting in their capacity as members of the Council) have the power to agree that the European Union shall act or to insist that they will continue to exercise individual external competence*"[15], with Advocate-General Wahl being of the same view: "*The 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. That decision, as it is predominantly political in nature, may be subject to only limited judicial review*"[16]. Finally, the Court made clear in case C-600/14 (judgment of 5 December 2017, Germany v Council, EU:C:2017:935, paragraphs 48 to 51 and 68) that the EU may, under Article 216 TFEU, have a competence falling outside Article 3(2) TEU, that the condition laid down in Article 216 TFEU

[10] See point 107 of Opinion 1/94.

[11] This refers mainly to the Council although the Parliament could also refuse to give its consent, in the cases it is entitled to give it, if it were to disagree with the characterization of an agreement as mixed or as Union-only.

[12] See Castillo and Erlbacher in 6 above.

[13] Point 16.

[14] Point 26.

[15] Conclusions in Opinion 2/15, at 75.

[16] This was quoted afterwards by AG Szpunar in his conclusions in case C-600/14, at para 84.

that "*the agreement is necessary to achieve, within the framework of the Union's policies, one of the objectives referred to in the treaties*" does not require that there is any prior EU act adopted, and that the Union may decide to leave to the Member states to exercise such a competence.

Indeed, it is for the EU legislature (and not for the Member States as such, as some authors consider[17]) to decide whether or not the Union is to exercise its external competence in a given case *where it has the choice* to do so[18], and the Member States will have to abide with the choice made by the Council: if the required majority within the Council would decide to exercise external Union competence, any Member State dissenting with that choice would not be able to individually exercise its own competence[19]. Conversely, should the Council under the required majority decide that the Union should refrain from exercising its external competence in a case where it has the choice to do so, any dissenting Member States (but also other Union institutions) would have no choice but to accept that the matter would be for Member States to deal with, and not for the Union[20].

As regards the alleged unlawfulness of collective acting by Member States, i.e., the fact that Member States may act by means of a single Decision of the Representatives of Governments of the Member States when opening negotiations and mandating the negotiator on their behalf, the case-law of the Court in cases C-181/91 and C-316/91[21] has made it clear that Member States can act collectively for issues falling under their competence, even though such confirmation is not necessary as indeed the Union legal order cannot specify in which way Member States are to exercise their own competences beyond the application of the principles of loyal cooperation and unity in external representation[22]. Once the power to act of Member States has been established, they alone are free to decide on the modalities of their acting provided they respect the abovementioned principles, the choice between acting together or separately having no relevance in this regard[23].

[17] See Erlbacher mentioned at 6 above, p. 35.

[18] A different question is of course whether or not such a choice really exists, this is, whether the external Union competences in question are non-exclusive rather than exclusive.

[19] See case C-600/14.

[20] Of course there would be no explicit decision not to exercise Union competence, the decision would be implicit.

[21] Case C-181/91, at 12: "*acts adopted by representatives of the Member States acting (...) as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court*". Case C-316/91, at 34: "*the competence of the Community (...) is not exclusive, so that the Member States are entitled collectively to exercise their competence in that field*". See also C-370/12 at 158.

[22] See Opinion 2/91 of 19 March 1993, [1993] ECR I-1061, para 36.

[23] Equally, whether Member States act collectively *inter se* or vis-à-vis third countries is of no relevance, as this again is for Member States alone to decide: once it has been ascertained that they can act externally,

When it comes to the *use of the General Secretariat of the Council and of Council facilities* for collective decision making by Member States, the Court of Justice has been equally clear as it has explicitly stated that Member States may entrust the Union institutions with functions going beyond those conferred on them by the Treaties, "*such as the task of coordinating collective action undertaken by Member States*", provided certain conditions are fulfilled[24]. The General Secretariat of the Council has, from its very creation, served as secretariat for the collective action of Member States.

Finally, and coming to the *organization of the internal work of the Council*, in the case of mixed agreements the Council decision on signature and conclusion are normally not put to the vote until all Member States have indicated that they are in a position to commit themselves internationally, as far as their own competence is concerned. This practice is necessitated by the principle of unity in external representation, which the ECJ has stressed on numerous occasions[25]. For some authors this amounts to replacing the voting rules contained in the Treaties by the consensus of individual Member States, thus violating the applicable procedure and modifying the balance of powers, contrary to the case-law of the Court in case C-28/12[26]. However, since that judgment, no hybrid decisions are adopted and therefore no contamination of Treaty voting rules takes place – the Union applies its own procedures and voting rules to adopt its own decision and, through separate decisions and mechanisms, Member States act on their part, in full respect of the case-law of the Court[27].

Concerning the *choreography of the vote*, while there is no legal obligation on the Council to wait until there is clarity concerning the course of action by Member States, nor is there any legal obligation to proceed to the vote before that moment. Therefore, no legal obligations being incumbent on the Council to act

whether they do it collectively or individually, and then *inter se* or vis-à-vis third countries, is nothing for the Union to intrude in. In any event, such collective action has been accepted by the Court: "*The Member States are accordingly entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community*", Case C-361/91 at para 26.

[24] C-370/12 Pringle at 158. See also C-316/91 at 41 (emphasis added): "*No provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up*". More generally, see Paul Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance', European Constitutional Law Review, 9: 263–284, 2013.

[25] See Opinion 2/91, ILO Convention 170, EU:C:1993:106 and Opinion 1/94, WTO Agreement, EU:C:1994:384, paragraph 108.

[26] See Castillo, at 6 above, Kindle Locations 5201-5203.

[27] In this regard, whether or not Member States act collectively or separately has no relevance. What certainly cannot be helped is that in mixed agreements the consent of both the Union and the Member States is required, but that is nothing more than the necessary consequence of the Member States being party to an agreement alongside the Union.

in a specific way in this regard, the specific moment of voting is a free and legitimate choice made by the Council under policy considerations for the organization of its internal works in accordance with Article 11(1) of its Rules of Procedure: "*The Council shall vote on the initiative of its President. The President shall, furthermore, be required to open a voting procedure on the initiative of a member of the Council or of the Commission, provided that a majority of the Council's members so decides*". Therefore, a vote will take place at the moment when a simple majority of members of the Council or, more often, its President, find it politically convenient to do so. If the decision is to consider politically inconvenient to submit the issue to the vote in the Council until there is certainty that Member States will agree to their part, this is a lawful and pragmatic approach, as the case of the Association Agreement with Ukraine showed recently[28].

In the opinion of PLS members, the reasons for this practice are fundamentally the same as the reason why it is very sensible to await Parliament's position before deciding on provisional application, inform Parliament appropriately under Article 218(10) TFEU and generally ensure that the EU can honour commitments taken, be it in the conclusion of international agreements or in the position taken in bodies set up by such agreements. For CLS members no such direct parallelism exists.

1.6. The institutional management of mixity

When an agreement is qualified as mixed, the competence to negotiate, sign and conclude it will be shared between the Union and its Member States, and both will also have a say and its implementation, all of which entails a series of institutional and practical consequences.

Once the Commission (or, where relevant the HR) presents a recommendation for negotiation directives, it is for the Council to assess whether (as a matter of law) the agreement will be mixed or (in cases of facultative mixity) whether shared competence should be exercised by the Union. The question may be raised whether the European Parliament is willing to give its consent to a mixed agreement, if it considers that it should be concluded as an EU only agreement.

[28] The saga concerning the ratification of the Association Agreement with Ukraine after the referendum held in the Netherlands in that respect is well known. The political (and possibly legal) consequences of a ratification by the Union before a referendum in a Member State are easy to imagine, and would only worsen if the result of such a referendum were to be against ratification – as was the case there. See in this respect Guillaume Van der Loo, Ramses A. Wessel, 'The non-ratification of mixed agreements: Legal consequences and solutions' (2017) 54 Common Market Law Review, Issue 3, pp. 735–770.

1.6.1. *Mixity and the opening of negotiations*

If the mixity of an agreement is determined already from the outset, the Commission (or the HR when dealing with CFSP) will negotiate not just on the Union's behalf but also on behalf on the Member States (CLS members point out that the rotating Presidencies may also be entrusted with this task). Because hybrid decisions are no longer possible, the Representatives of the Governments of the Member States acting within the Council will typically adopt a decision (by consensus) to entrust the negotiator to conduct negotiations on their behalf. The two decisions (one for the Union and one for the Member States) are normally adopted in parallel but always by means of separate acts and procedures.

An option sometimes used to avoid inter-institutional disagreements concerning mixity at this stage is to altogether avoid the matter, adopt only a Decision on behalf of the Union, and include in it a recital stating that the nature of the agreement (Union-only or mixed) will be determined only after the end of the negotiations.

1.6.2. *Mixity, signature and provisional application*

The second step is signature and provisional application. If the qualification of the agreement was not made when opening negotiations, it will necessarily have to be done at the time of signature, since the text of the agreement is fixed at that point. If the negotiator rejected mixity at the time of opening negotiations, it may need to reopen the text after initialling and before signature to include the necessary references to the Member States. This happened in the case of CETA.

Provisional application may be used to circumvent the lengthy processes of national ratification and thus allow parts of the agreement to be immediately implemented. Because such application is not possible under the legal orders of some Member States, it is applied only to the Union part of the agreement. This can be done by stating in the decision that provisional application will only cover Union competence without specifying any further (with the consequent negative impact in terms of legal certainty) or by proceeding to specify the division of competence.

1.6.3. *Mixity and conclusion*

The third step is conclusion. At this point in time, the nature of the agreement has been established and moreover no parallel decisions are possible, as Member States need to go through their individual national procedures. The problem for some arises here in the fact that the Council proceeds to the vote only after being sure of the position of Member States concerning their part (even if in some cases their part is not defined). As we have seen before, this is both lawful and politically convenient.

1.6.4. *Mixity and the implementation of concluded agreements*

Finally, a last step is the implementation of the agreement, case in which mixity is also relevant. Any draft decision falling under 218(9) TFEU and concerning a mixed agreement should thus be assessed as regards its content to see whether it falls under Union or under Member States competence or even both[29].

The implementation of an international agreement by a body set up in the international agreement is normally done solely by means of Article 218(9) TFEU decisions[30], but the application of the principle of conferral implies that the management of an mixed agreement is something that would generally require the intervention of both the Union and its Member States. This means that a decision under Article 218(9) TFEU to suspend the agreement or, what is more relevant in quantitative terms, to establish the Union's position concerning a given agreement could need to be supplemented, as relevant, by a collective Member State decision.

1.7. Conclusions

It is common for many authors to consider mixity at best as a necessary evil[31]. However, shared competence is the rule rather than the exception in the Treaties and consequently, mixed agreements are a normal feature of the Union's external relations. CLS members would argue that mixity reinforces the democratic legitimacy of the international agreements of the Union and renders the political debate more transparent, as it allows the governments of the Member States to assume full responsibility for those agreements. In any event, and as seen in this chapter, sometimes there is no choice concerning the nature of an international agreement; when there is one, the choice for mixity is equally lawful and legitimate as is the choice for Union-only agreements. PLS members point out that where there is an exclusive competence of the EU, it is for the European parliament to ensure its democratic legitimacy, and Member States also contribute to the democratic legitimacy by ensuring that the position they take in Council is properly anchored in their national parliament and population.

[29] Here, and contrary to what Helikoski affirms (note 24 above, at 146), it is not necessarily the case that "*mixed agreements are governed by the principle of alternative exercise of rights*". Such alternative exercise is rather imposed by the counterparties in multilateral agreements to avoid giving to the Union and its Member States double rights in representation or voting. In bilateral settings, the issue moves to the intra-EU sphere by considering that the management of the agreement will be done bilaterally (EU + Member States on the one side and the third country on the other side) regardless of whether the EU side is composed of 1 party (the EU), 28 (the Member States) or 29 (the EU and its Member States acting concurrently); in any case this will not affect the eventual need for separate consents.

[30] Such decisions may require the adaptation of EU law.

[31] Though some others take a different view, see *inter alia* JHH Weiler, *The Constitution of Europe*, at 185-187, and Markus Klamert, *The Principle of Loyalty in EU law*, pp. 183-206.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU) (QUESTIONS 5-11)

The questions of this chapter may be seen against the background of the increased interest to which various international agreements have given rise, both in the European Parliament and in several of the Member States. This interest would seem to be motivated by an increased awareness that international agreements can have important consequences, as well as perhaps a growing uncertainty as to what those specific consequences are.

The political debates in several Member States expressing a strong scepticism against certain agreements, such as the EU-Ukraine Association Agreement[32] in the Netherlands and TTIP[33] and CETA[34], in particular in Belgium and Germany, may also have nourished the interest for scrutinising or controlling the conclusion of international agreements.

The public interest in international agreements is certainly also reflected in the political activities of both the EU institutions and the Member States.

On the one hand, to the extent that the EU has competence, it must be underlined that the European Parliament has undertaken important efforts to strengthen political control, which it is expected to exercise under the Treaties. In line with Articles 10(2) and 14(1) TEU and Article 218(10) TFEU, it is the role of the European Parliament to provide democratic legitimacy to and exercise political control over the various decisions taken.

This being said, the Council maintains its role as the decision-maker, thereby ensuring the legitimacy of the international agreements in line with Articles 10(2) and 16(1) and (6) TEU. The Commission and the High Representative play their role as negotiators, as well as taking the initiatives for the decisions on authorisation for the negotiation, the signing and the conclusion of the agreements, in accordance with Article 218 TFEU.

On the other hand, the question of the extent of the European Union's competence remains of great sensitivity to the Member States and the Union institutions, as is demonstrated by the discussions on whether a particular agreement should be concluded as an EU-only agreement or as a mixed agreement. As seen in Chapter 1, the determination of the competence has to be based on the legally

[32] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.5.2017, p. 3.

[33] Envisaged Transatlantic Trade and Investment Partnership Agreement between the European Union and the United States.

[34] Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, OJ L 11, 14.1.2017, p. 23.

relevant and objective factors, and the legitimate policy choices of the institutions in this regard must be respected.

Ensuring the necessary democratic support for the conclusion and the implementation of international agreements represents a significant challenge for both the EU institutions and the Member States, which needs to be addressed.

In any event, all action by the institutions must fully respect the principle of institutional balance of Article 13(2) TEU, according to which each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions[35].

The general powers of the institutions in external action are defined in Title III TEU and further elaborated by the case-law. The European Parliament (Article 14 TEU) shall exercise functions of political control and consultation, including democratic scrutiny of the EU external action and contributions to the coherence and consistency of that action[36]. The Council (Article 16 TEU) shall carry out policy-making and coordinating functions, elaborate the Union's external action and ensure that the Union's action is consistent. The Commission (Article 17 TEU) shall ensure the Union's external representation and take the relevant initiatives in respect[37]. Concerning international agreements, Article 218 TFEU, which constitutes a specification of those general powers and sets out the procedure for the negotiations and conclusions of agreements. External action of the institutions not linked to international agreements is framed by the general powers as specified in the TEU[38].

2.1. Negotiation of agreements: negotiator/negotiating team, special committee, Member States and Union institutions (Question 5)

The judgment in case C-425/13[39] spells out the respective roles of the Commission, the Council and the special committee of Article 218(4) TFEU.

It is the Commission's task to negotiate international agreements and to ensure the external representation of the EU, with the exception of the CFSP

[35] See case C-409/13 Council v Commission, paragraph 64.

[36] See cases C-658/11 European Parliament v Council, paragraph 79, and C-263/14 European Parliament v Council, paragraph 72.

[37] "With the exception of the common foreign and security policy, and other cases provided for in the Treaties".

[38] See case C-660/13 Council v Commission.

[39] Judgment of 16 July 2015, *European Commission v Council of the European Union*, C-425/13, EU: C:2015:483.

and certain other specific cases provided for in the Treaties. The power to conclude the agreements is conferred on the Council, subject to the powers vested in the Commission (C-425/13, paragraphs 62 and 63). Under Article 13(2) TFEU, the institutions are obliged to practice mutual sincere cooperation, and "*cooperation is of particular importance for EU action at international level, as such action triggers a closely circumscribed process of concerted action and consultation between the EU institutions*" (C-425/13, paragraph 64).

As to the role of the special committee, bearing in mind Article 218(4) TFEU, this means that the Commission shall conduct the negotiations in consultation with the special committee and provide it with all the information necessary for it to monitor the progress of the negotiations, so that it can formulate its opinions and advice. Having regard to the various functions of the institutions in the negotiation and conclusion of international agreements, the Commission can be required to provide that information to the Council as well. It is "expedient" for the Council to have clear knowledge of the course of the negotiations concerning the preparation of a draft agreement that will be submitted to it for approval. The Commission may therefore be required to report regularly to the special committee (C-425/13, paragraphs 64 to 68).

The role of the special committee is defined by the consultative function assigned to it by Article 218(4) TFEU and precludes that it establishes detailed or binding negotiating positions of the European Union; this applies also to the Council (C-425/13, paragraphs 88 to 91).

Finally, PLS members consider that, in line with Article 218(10) TFEU, during the conduct of negotiations, all information which the negotiator provides to the special committee should also be provided to the European Parliament. The European Parliament must be in a position to provide a democratic scrutiny of the envisaged agreements, as outlined by the Court in case C-658/11[40] (paragraphs 75 to 79). In that regard, point 5 of Annex 3 of the European Parliament – European Commission Framework Agreement[41] stipulates in particular that "[i]n the case of international agreements the conclusion of which requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (or to the special committee appointed by the Council)".

In the view of CLS members, the Framework Agreement between the European Parliament and the Commission does not form part of the Union legal framework. For this reason it cannot be invoked and does not bind the institutions in any way.

[40] Judgment of 24 June 2014, *European Parliament v Council of the European Union*, C-658/11, EU:C:2014:2025.
[41] Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304, 20.11.2010, p. 47.

2.2. The provisional application of international agreements and the possibility of a role for the European Parliament (Question 6)

Under Article 218(5) TFEU, the Council may authorise the provisional application of agreements only "*if necessary*". The necessity is a binding pre-condition, established by the Treaty. It is thus subject to objective criteria and possible judicial control. These criteria may be summarised as follows: reasons of urgency, expected delay in the ratification process, a need to build confidence and test the workability of the agreement, or a need to guarantee the continuity of the rights and obligations with the third party. No formal role is foreseen for the European Parliament concerning the decision on provisional application.

However, in the opinion of PLS members, and because this tool must be used in a manner which respects the need for democratic scrutiny of the international agreement, provisional application should be used only where there is a real need that the agreement is applied before the applicable form of scrutiny has taken place.

On the other hand, CLS members take the view that the Council possesses a broad discretion to make a decision on this matter in function of the political context in which the agreement is being negotiated and will be applied.

Where the competence concerned is an exclusive EU competence, only the consent of the European Parliament is required (no ratifications in the Member States). Assuming that the obligation to inform immediately and fully the European Parliament during the negotiations has been respected, this consent can be obtained relatively swiftly (with a reservation for the right to decline the consent). Save in urgent cases, the provisional application should therefore not be necessary for agreements falling under the Union's exclusive external competence and which are not subject to the ratification of national parliaments. For such agreements, once the European Parliament gives its consent, the Council could proceed with the conclusion of the agreement without the need for any provisional application.

On the other hand, for mixed agreements the constitutional requirements of all the Member States may require a considerable amount of time, which justifies the use of the instrument of provisional application. The need to respect the constitutional requirements of the Member States and the applicable democratic scrutiny is also reflected in the practice of the EU. In fact, the EU only decides on the provisional application of those parts of the agreement that fall within the EU's competence. For those parts, it should be assessed whether it really is necessary that the agreement is applied before the European Parliament has given its consent.

At this point, it seems necessary to acknowledge a difference of views between the rapporteurs. For CLS members, the literal reading of Article 218 TFEU is

clear in that the Council is to act alone on this matter, without any role for the European Parliament being established for neither the initiation nor the termination of provisional application. From the perspective of PLS members, a situation where agreements are provisionally applied without the European Parliament being requested by the Council to give its consent risks, in particular if it occurs during a prolonged period, jeopardizing the Treaty prerogatives of the European Parliament, as it would otherwise have had a possibility to decline the consent, thus leading to the termination of provisional application.

2.3. The non-ratification by a Member State of a mixed agreement (Question 7)

Provisional application does not substitute the final entry into force of the agreement. It is by nature not of an indefinite nature, as this would circumvent the procedural requirements and guarantees applicable to the conclusion. Once it becomes clear that the agreement can never enter into force, the provisional application of the agreement must, in principle, be terminated. Indeed, Article 25(2) of the Vienna Convention addresses the danger of abuse or indefinite provisional application by allowing for the unilateral termination of an agreement by the parties.

On the other hand, although provisional application is intended as a transitory mechanism pending the entry into force of the agreement, the Vienna Convention leaves wide discretion to the parties to agree on the specific conditions for its termination. For example, the agreement could enter into force for the parties which have deposited their instruments of ratification, but at the same time continue to be provisionally applied by the parties whose ratification procedure is still pending.

The parts and provisions of the agreements where the European Union and Member States together form one party are provisionally applied only to the extent that they cover matters falling within the Union's competence. The provisional application thus does not concern the parts of the agreement that are under the competence of the Member States. As the Court has underlined, when a mixed agreement is negotiated and concluded, both the EU and the Member States "*must act within the framework of the competences which it has while respecting the competences of any other contracting party.*"(Case C-28/12, paragraph 47) [42].

Pursuant to Article 4(3) TEU, the Member States shall take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties and, pursuant to Article 216(2) TFEU, the international agreements of the Union are binding upon the Member States. The Member States must ensure the

[42] Judgment of 28 April 2015, *European Commission v Council of the European Union*, C-28/12, EU:C:2015:282.

fulfilment of obligations stemming from international agreements of the Union. Hence, even if a Member State were to provide a notification under Article 25(2) of the Vienna Convention, it would still be bound to apply, not directly but as a Member State of the Union, the parts of the agreement that are provisionally applied and fall within the competence of the Union[43]. Thus, the non-ratification by one Member State does not have direct or immediate effect on the provisional application of the agreement, as only parts falling under EU competence will be concerned[44].

However, despite the fact that the provisional application of the parts falling within the Union's competence should not be affected by the ratification in the Member States, one has to bear in mind that Article 25(1) of the Vienna Convention allows the provisional application only for the agreements that may finally enter into force. Indeed, the fact that one Member State cannot ratify an international agreement leads to a situation where it cannot be concluded as it stands. In such cases, negotiations on its content could be reopened.

2.4. Approval by the European Parliament of agreements mentioned in Article 218(6)(a)(iii) and (iv) TFEU (Question 8)

According to Article 218(6)(a)(v) TFEU, introduced by the Lisbon Treaty, the consent of the European Parliament must be obtained for "*agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required*". As a consequence, the two categories referred to in Article 218(6)(a)(iii) have lost the main part of their pre-Lisbon (Article 300(3)(2) TEC) significance, since the consent of the European Parliament will anyway be required for the conclusion of the vast majority of agreements. The specific reference to categories in Article 218(6)(a)(iii) and (iv) nevertheless also underlines that these two types of agreements require a particular democratic scrutiny.

Moreover, these categories and conditions remain relevant for the agreements concluded under a legal basis of the Treaty that provides for the special legislative procedure, where the European Parliament is only consulted. Presumably, the criteria established by the Court of Justice before the Lisbon Treaty are still to be applied.

In case C-189/97[45], the Court defined some criteria for the assessment of whether the EC/Mauritania fisheries agreement entailed important budgetary

[43] Additionally, it should be noted that Member States would be in any case bound to respect the principles of sincere cooperation and unity in external representation within this context.

[44] See the declarations by Council, Germany, Austria and Poland made upon signature of the CETA, OJ L 11, 14.1.2017, p. 15.

[45] Judgment of 8 July 1999, *European Parliament v Council of the European Union*, C-189/97, EU:C:1999:366.

implications. A comparison between the annual financial cost of an agreement and the overall Union budget scarcely appears significant and to apply such a criterion might render the relevant wording of the second subparagraph of Article 228(3) TEC wholly ineffective (C-189/97, paragraphs 26 and 31). Furthermore, a relatively modest annual expenditure may, over a number of years, represent a significant budgetary outlay (C-189/97, paragraph 29). A comparison of the expenditure under an agreement with the amount of the appropriations designed to finance the Union's external operations enables that agreement to be set in the context of the budgetary outlay for the Union's external policy. That comparison thus offers a more appropriate means of assessing the financial importance which the agreement actually has for the Union.

As far as the establishment of a specific institutional framework is concerned, the question was raised in case C-566/08[46], but here Parliament withdrew its application from the Court when the Treaty of Lisbon entered into force, as from then on the consent of Parliament would in any case be required for the relevant agreement. One may note that Parliament argued that as the association agreements were a separate category, the "*specific institutional framework*" did not need to amount to an association-like cooperation procedure. In the view of PLS members, this would also apply to agreements establishing new bodies like joint councils, committees and assemblies, as forms of institutionalised cooperation between the EU and the relevant third country. This is in particular relevant when that joint body is empowered to adopt modifications to the agreement or called upon to adopt acts having legal effects.

2.5. Decisions adopted under Article 218(9) TFEU (Questions 9 and 10)

Article 218(9) TFEU refers to two types of decisions, those "suspending application of an agreement" and those "*establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement*".

Both types of decisions are to be adopted by the Council on a proposal from the Commission or the High Representative. Article 218(9) TFEU does not confer a specific role on the European Parliament, but the latter it is always free to request that the application of an agreement is suspended under Article 218(9) TFEU, without the Council being bound by the request.

The suspension of an agreement must not be confused with the termination of an agreement, for which the procedure under Article 218(6) TFEU should be applied.

[46] Order of 25 February 2010, *European Parliament v Council of the European Union*, C-566/08, EU:C:2010:94.

After the entry into force of the Treaty of Lisbon, the Council has taken two decisions under Article 218(9) TFEU partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic[47].

Concerning *decisions establishing Union positions*, the bodies set up by international agreements may be empowered to adopt decisions which produce legal effects within the Union through the provisions of Union law, by which they are enforced. Such bodies must have an identified composition and mandate or powers, and perform executive or governance functions within the framework of that international agreement; they exclude bodies of which the Union (or by delegation the Member States) is not a party[48]. The body must have been set up by a binding instrument, without there being a requirement for the Union to be a contracting party to that agreement, or to have otherwise participated in the creation of that body, in order for the Union to be able to adopt a position for the meeting of the body in question[49].

As concerns the act to be adopted, it does not need to be legally binding, being it sufficient for it to have a direct or indirect impact on the Union acquis[50]. Decisions affecting the essential characteristics of the institutions put in place by the agreement in question are not to be adopted under Article 218(9) TFEU.

The fact that Article 218(9) TFEU does not foresee the active involvement of the European Parliament in the procedure gives rise, in the view of PLS members, to two remarks. First, the EU needs to be certain that it can honour the commitments it takes in such bodies. The case-law of the Court of Justice, makes clear that the acts adopted by those bodies may affect the Union legal order where they must subsequently be incorporated into Union law by the co-legislators. As the Court stated in case C-399/12, the acts adopted by such bodies are capable of decisively influencing the content of the legislation adopted by the Union legislature (C-399/12, paragraphs 63-64). Hence, where the act to be adopted by that body entails the adoption or amendment of an act adopted in accordance with the ordinary legislative procedure or with the special legislative procedure, where consent by the European Parliament is required, it is necessary that the

[47] Council Decision 2011/523/EU of 2 September 2011, partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, OJ L 228, 3.9.2011, p. 19, and Council Decision 2012/123/CFSP of 27 February 2012 amending Decision 2011/523/EU partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, OJ L 54, 28.2.2012, p. 18.

[48] See C-73/14, ITLOS, *Council v. Commission*, EU:C:2015:663, paras. 63-67.

[49] Judgment of 7 October 2014, *Federal Republic of Germany v Council of the European Union*, OIV, C-399/12, EU:C:2014:2258, paras. 49-55.

[50] See C-399/12, OIV, footnote above, paras. 56-64.

Council adopts its decision only after the European Parliament has expressed its views. Secondly, it would be incompatible with the rights of Parliament as a co-legislator if it has to face a *fait accompli,* as this would put it under pressure not to exercise fully its legislative functions. Most of all, Parliament itself need to take into account whether the powers conferred on this type of body respects the appropriate limits in order to ensure that the positions taken in this type of body do not concern issues that require a stronger democratic legitimacy, when it decides on whether to give consent to the agreement conferring these powers.

For CLS members there is no legal basis in the Treaties to confer on the European Parliament any role in the adoption of decisions under Article 218(9) TFEU. The internal and external powers of the institutions do not coincide, and a role for the European Parliament in the procedure would infringe the principle of institutional balance as established in Article 13(2) TFEU.

2.7. The right of information of the European Parliament of Article 218(10) TFEU (Question 11)

Article 218(10) TFEU is the instrument that allows Parliament to prepare its later position on whether to give consent or not. It allows the European Parliament to make its views known during the procedure, as the Court confirmed in the abovementioned case C-658/11, paragraph 86, and in case C-263/14[51], paragraph 84.

Article 218(10) TFEU is an expression of the democratic principles on which the Union is founded and the Parliament's involvement in the decision-making process is the reflection, at Union level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly (C-658/11, paragraph 81, and C-263/14, paragraph 70).

Article 218(10) TFEU allows the Parliament to exercise its own powers with full knowledge of the Union's external action as a whole (C-263/14, paragraph 71) but not to participate in the negotiation and conclusion of agreements concerning CFSP. The duty to inform owed by the other institutions to the Parliament under Article 218(10) TFEU contributes to ensuring the coherence and consistency of that action (C-263/14, paragraph 72).

The scope of the information obligation under Article 218(10) TFEU includes, inter alia, the authorization to open negotiations, the definition of the negotiating directives, the nomination of the Union negotiator and, in some cases, the designation of a special committee, the completion of negotiations, the authorization to sign the agreement, where necessary, the decision on the provisional

[51] Judgment of 14 June 2016, *European Parliament v Council of the European Union*, C-263/14, EU:C:2016:435.

application of the agreement before its entry into force and the conclusion of the agreement (C-263/14, paragraph 76). This obligation extends also to the intermediate results reached by the negotiators, such as texts of the draft agreements and texts of the draft Council decisions (C-263/14, paragraph 77).

Article 218(10) TFEU is applicable to all types of procedures envisaged in Article 218 TFEU, including agreements relating exclusively to the CFSP (C-658/11, paragraphs 82, 84 and 85, and C-263/14, paragraph 69). If the Parliament is not immediately and fully informed at all stages of the procedure in accordance with Article 218(10) TFEU, including that preceding the conclusion of the agreement, it is not in a position to exercise the right of scrutiny which the Treaties have conferred on it in relation to the CFSP or, where appropriate, to make its views known as regards, in particular, the correct legal basis for the act concerned (C-658/11, paragraph 86).

The Parliament, the Council, the Commission and the High Representative are currently negotiating the practical arrangements in order to define the precise content of the obligations under Article 218(10) TFEU.

The European Parliament, for its part, has established mechanisms for this scrutiny. In particular, Rule 108 of its Rules of Procedure provides for the possibility of drawing up reports when it is intended to open negotiations on the conclusion, renewal or amendment of international agreements, as well as at any stage of the negotiations and thereafter up to the conclusion of the agreement. The Parliament may thus adopt positions on these decisions and recommendations in view of the negotiations, without the Council anyway being bound by them. These positions and recommendations must be seen in the light of Parliament's right to later give its consent to the conclusion of the agreement.

In a context where during the negotiations there are certain difficulties to hold an open debate because of the need to keep a certain confidentiality of the negotiations, PLS members underline the importance of the principle of sincere cooperation in this context as well as the interest in developing modalities under which the European Parliament is informed during the negotiations while ensuring respect for confidentiality. It is in the light of this that both the interinstitutional agreements and the arrangements for specific negotiations and the ongoing negotiations to define the precise content of the obligations under Article 218(10) TFEU should be seen[52]. Likewise, PLS members consider

[52] See, notably, Inter-institutional agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, OJ C 95, of 1.4.2014, p. 1; See also paragraph 40 of the Interinstitutional Agreement of 13 April 2016 on better law-making, OJ L 123, 12.5.2016, p. 1, under which the European Parliament, the Council and the European Commission are to negotiate improved practical arrangements for cooperation and

that there are very interesting indications as to possible ways forward both in the exceptional transparency initiative that the Commission took in the context of the negotiations on TTIP and the commitment to publish any new proposal for negotiating mandates, in order to make the EU's trade policy the most transparent and inclusive in the world, taken by President Juncker in his State of the Union speech on 13 September 2017, represent.

CLS members do not share the views of PLS members concerning the State of the Union speech and remind that any arrangements concerning the confidentiality or otherwise of negotiations must be agreed between the three institutions and are in any case bound to respect the powers, rights and obligations of the institutions conforming the institutional balance as established by the Treaties, regardless of any other considerations.

As to the role of Member States and national parliaments in the context of the right of information, it must be underlined that, on one hand, Member States are, according to Article 10(2) TEU, represented in the Council by their governments. These governments, on the other hand, are democratically accountable either to their national parliaments or their citizens. In line with this fundamental feature of the European Union's institutional set up, each Member State has a very important role to ensure that its action in the Council, including throughout the stages of Article 218 TFEU, is appropriately anchored under its own constitutional requirements. However, these issues fall under the competence of each Member State. The procedure in the Member States and national parliaments is not regulated by Article 218 TFEU, and Member States and national parliaments are not covered by the Treaty obligation to inform the European Parliament. Likewise, Member States have a role under Article 218 TFEU as members of Council and the role of each of their parliaments in this context is to be determined by each Member State. National parliaments therefore have no direct right under Article 218(10) TFEU to be informed, and this rather is an issue for national law.

In spite of this mechanism for democratic scrutiny, objections have recently been raised in the public debate against the democratic legitimacy of certain international agreements, in particular Free Trade Agreements like CETA and TTIP (see, notably, the "Declaration de Namur"[53]). It would seem that the efforts

information-sharing within the framework of the Treaties. PLS members also point to the Framework Agreement on relations between the European Parliament and the European Commission, OJ L304, 20.11.2010, p. 47. CLS members stress that the latter instrument does not in their view form part of the Union legal framework and does not bind the institutions.

[53] See the website of the Namur declaration: http://declarationdenamur.eu/en/index.php/namur-declaration/

made by the institutions to increase democratic scrutiny have not been taken fully into account in this debate[54].

In addition, the efforts that the governments of the Member States may have made to anchor their positions on CETA in the public opinion at home seem to have gained little attention in the debate. The governments have taken a position in Council on several occasions during the procedure when deciding on authorising the negotiations and thereafter until the decision on signature of the CETA Agreement. As CETA is envisaged as a mixed agreement, they will also need to take a position in view of their own ratification.

The question may therefore be raised whether the mechanisms for democratic scrutiny of international agreements can be strengthened, both in the European Parliament under Article 218(10) TFEU and within Member States. This issue is further discussed under Chapter 4, Question 21.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS (QUESTIONS 12-15)

The questions in this chapter are specifically addressed to the Member States. This report therefore limits its comments to a few fundamental aspects. On the general level, it should be noted that the importance of international agreements in the EU legal order is underlined by the fact that they may, in certain circumstances, be directly invoked before the courts. Nevertheless, the decision of the EU to undertake a binding commitment in international law requires an appropriate involvement of the Member States as well as the EU institutions, even if it would not be a commitment that can be invoked directly before the courts, as it is binding on them. The questions 12, 14 and 15 are left to the Member States to comment on and this report limits itself to some succinct remarks on question 13.

3.1. The case law of the Court of Justice on the direct effect of international agreements (Question 13)

The action for annulment brought by *Rusal Armenal* against anti-dumping measures raised the question of the possibility to challenge the legality of norms of EU law in light of provisions of WTO agreements. In the appeal procedure against the judgment of the General Court[55], the European Parliament intervened in

[54] In the opinion of PLS members, which is not shared by CLS members, the exceptional transparency initiative undertaken by the Commission in the context of the negotiations on TTIP, radically increased the possibilities for a public debate in the European Parliament, in national parliaments and among the public at large. Nevertheless, in the public debate it has been claimed that precisely those negotiations were particularly secretive.

[55] Judgment of 16 July 2015, *European Commission v Rusal Armenal ZAO*, C-21/14P, EU:C:2015:494.

support of the Commission to defend the view that under the circumstances of the case, the WTO Anti-Dumping Agreement could not be invoked against measures adopted by the Union institutions. The Council was a respondent in this case and also took this position.

Following the institutions' arguments, the Court of Justice considered that Article 2(7) of the Union's Anti-Dumping Regulation applicable to imports from non-market economy WTO countries was not intended to ensure the implementation, in the EU legal order, of a particular obligation in WTO law (paragraph 50). Consequently, the conditions to which the *Nakajima* exception[56] – to the impossibility to invoke norms of WTO law in the review of legality of EU law – is submitted were not fulfilled.

In its judgment of 3 January 2015, C-401/12P to C-403/12P, *Milieudefensie*[57], concerning the Aarhus Convention, the Court specified that the cases *Nakajima* and *Fediol*[58], where agreements not having direct effect could still be relied upon to contest the legality of a Union Act, were exceptions justified solely by the particularities of the cases. These were, respectively, the direct conferral in a Union act of a right to invoke the agreement in question and the fact that the basic regulation at stake implemented the relevant WTO position (C-401/12P to C-403/12P, paragraphs 56 to 59).

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS (QUESTIONS 16-21)

The Treaty of Lisbon introduced important modifications concerning the field of trade and investment protection and the questions of this chapter address a number of issues concerning the interpretation of the new provisions. Trade and investment protection is also perhaps the area, which has met the strongest opposition in the public debate in recent years. This must also be borne in mind when assessing in particular question 21. The questions in this chapter will all be addressed separately.

4.1. The scope of the concept of common commercial policy in the Treaty of Lisbon (Question 16)

The Treaty of Lisbon extended the material scope of the common commercial policy (CCP), as it was defined at Article 133(1) EC. The precise width of this

[56] Judgment of 7 May 1991, *Nakajima All Precision v Council of the European Union*, C-69/89, EU:C:1991:186, paragraphs 31-32.

[57] Judgment of 13 January 2015, *Council of the European Union and Others v Vereniging Milieudefensie and Sichting Stop Luchtverontreinigung Utrecht*, Joined Cases C-401/12P to C-403/12P, EU:C:2015:4.

[58] Judgment of 22 June 1989, *Fediol v Commission*, C-70/87, ECLI:EU:C:1989:254.

extension was, until recently, still unclear in several areas, particularly concerning the commercial aspects of intellectual property and foreign direct investment. In its Opinion 2/15[59], the Court of Justice clarified a number of issues, thereby providing interpretation of the scope of the common commercial policy post-Lisbon in the area of transport services, intellectual property rights, investment protection and commitments on trade and sustainable development.

Before turning to a succinct description of the scope of the common commercial policy as defined by the Court in Opinion 2/15, it should be recalled that the areas, which are found to fall outside the common commercial policy, might still fall under an implied exclusive competence under Article 3(2) TFEU.

4.1.2. *The common commercial policy in general*

The Court noted that it was settled case-law that an EU act falls within the common commercial policy if it relates specifically to trade with third countries, in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it (Opinion 2/15, paragraph 36). The mere fact that an EU act is liable to have implications for trade with one or more third States is not enough for it to be classified as falling within the CCP. Only the components of the envisaged agreement that display a specific link with trade between the EU and Singapore fall within the field of CCP (Opinion 2/15, paragraph 37).

In a number of areas of the agreement, it was not controversial that the provisions were intrinsically part of the common commercial policy defined in Article 207(1) TFEU. This was the case of provisions relating to trade in goods, trade remedies, technical barriers to trade, sanitary and phytosanitary measures, customs and trade facilitation, services, establishment and electronic commerce (with some exceptions concerning transport services), non-tariff barriers to trade and investment in renewable energy generation, government procurement and competition.

Clarification was, on the other hand, given by the Court on the precise scope of the post-Lisbon common commercial policy with regard to commitments in transport services, intellectual property rights, investment protection, including dispute settlement mechanisms, and trade and sustainable development.

4.1.3. *Transport policy*

One of the particularly controversial issues has been the exclusion of international agreements in the field of transport under Article 207(5) TFEU. The Court found

[59] Opinion of 16 May 2017, *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion 2/15, EU:C:2017:376. Of other cases of great interest should be noted for instance in respect of intellectual property the judgment of 18 July 2013, Daichi Sankyo and Sanofi-Aventis Deutschland, C-414/11, EU:C:2013:520.

that the exception concerns all modes of supply of transport services, limited however to those services that are inherently linked to a physical act of moving persons or goods from one place to another by a means of transport (Opinion 2/15, paragraph 61). Therefore, services of aircraft repair and maintenance during which an aircraft is withdrawn from service, selling and marketing of air transport services and computer reservation system services are not to be considered as transport services; these auxiliary services fall within the scope of the common commercial policy (Opinion 2/15, paragraph 66).

4.1.4. *Intellectual property rights*

Concerning the commercial aspects of intellectual property, the Court held, already in the judgment in the case C-414/11, *Daiichi Sankyo*[60], that the rules in the TRIPs Agreement present a specific link to international trade and that they are therefore capable of falling within the scope of Article 207(1) TFEU. The Court found in Opinion 2/15 that provisions that contribute to the participation of entrepreneurs from the Union and the relevant third country on an equal footing in the free trade of goods and services between the Parties and that combat unlawful trade are intended to govern the liberalisation of trade between the Union and Singapore (Opinion 2/15, paragraph 122)[61].

4.1.5. *Sustainable development*

As to commitments in the field of sustainable development, Article 207(1) TFEU provides that "*the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action*". Those principles and objectives are specified in Article 21(1) and (2) TEU and relate inter alia to sustainable development linked to preservation and improvement of the quality of the environment and the sustainable management of global natural resources (Opinion 2/15, paragraph 142).

The Court pointed out that the obligation on the European Union to integrate those objectives and principles into the conduct of its common commercial policy is apparent from the second sentence of Article 207(1) TFEU, read in conjunction with Article 21(3) TEU and Article 205 TFEU. Having regard also to Articles 9 and 11 TFEU, the Court concluded that "*the objective of sustainable development henceforth forms an integral part of the CCP*" (Opinion 2/15, paragraphs 143, 146 and 147).

[60] Judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520.

[61] See also a confirmation that an international agreement in the area of appellations of origin and geographical indications falls within the common commercial policy in the judgment of 25 October 2017, *European Commission v Council of the European Union*, C-389/15, ECLI:EU:C:2017:798.

The Court also noted that a commitment to respect existing conventions in these fields reduces the risk that trade is encouraged through lowered levels of social and environmental protection, as well as of major disparities between the costs of production and thereby contribute to ensuring an equal footing for entrepreneurs from both parties. Thereby, such a commitment has direct and immediate effects on trade (Opinion 2/15, paragraphs 158 to 160). The link to trade is also specific because under the Vienna Convention a breach of these obligations would allow the other party to terminate or suspend the liberalisation provided for in other provisions. On the other hand, the exclusive competence under the CCP cannot be exercised to regulate levels of social and environmental protection (Opinion 2/15, paragraphs 164 to 166).

4.1.6. *Investment protection*

As to investment protection, the Court clarified that the Union has exclusive external competence under Article 3(1) TFEU to conclude agreements on foreign direct investments (FDI) and that this competence covers the admission of such investments as well as the measures for the protection of such investments. The provisions on equal treatment, fair and equitable treatment, prohibition of arbitrary expropriation, transfers, recognition of subrogations, etc., all contribute to legal certainty of investors and are intended to promote trade (Opinion 2/15, paragraphs 87 to 95).

The Court also underlined that provisions allowing Member States to assess compatibility with public order and security and other public objectives do not lay down commitments but derogations (Opinion 2/15, paragraphs 97 to 104). Article 345 TFEU expresses neutrality of the Union towards the Member States' systems for property ownership but does not mean that those rules are not subject to the fundamental rules of the Union (Opinion 2/15, paragraph 107). These provisions thus fall within the scope of Article 207 TFEU to the extent that they concern FDI.

However, the use of the words "*foreign direct investment*" in Article 207(1) TFEU is an unequivocal expression of the intention to exclude other foreign investment from the common commercial policy (Opinion 2/15, paragraph 83). Direct investment refers to 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 in order to carry out an economic activity (Opinion 2/15, paragraph 80). This type of investment is directly linked to trade and falls within the CCP (Opinion 2/15, paragraph 84). Commitments concerning investments, which are not direct, do not fall within the CCP.

As to investor to state dispute settlement in the context of investment protection, it follows from the Court's reasoning that it is outside the scope of the

common commercial policy (Opinion 2/15, notably paragraphs 276, 291, 292, see also paragraph 303).

4.1.7. *Institutional provisions including ISDS*

Dispute settlement was assessed in a separate analysis of the institutional provisions of the EUSFTA, together with other forms of dispute settlement, transparency, exchange of information, notification, verification cooperation, mediation and decision-making. With the exception of investor-state dispute settlement, the Court found that such provisions aim at ensuring the effectiveness of the substantive provisions. Such provisions are ancillary to the substantial provisions and follow the competence for the latter (Opinion 2/15, paragraph 276).

According to the Court, investor-state dispute settlement, on the other hand, removes disputes from the jurisdiction of the courts of the Member States and can therefore not be seen as being of an ancillary nature. It requires the Member States' consent and falls under a shared competence of the EU and the Member States (Opinion 2/15, paragraphs 290 to 293). It should be underlined that the Court considered that a dispute is removed from the national courts although the legal basis for the claim before the national court and the arbitral tribunal would be different. Importantly, it is the same facts that allegedly breach the provisions on investment protection or that sustain, under domestic law, actions based on contractual or non-contractual liability. It is also important to note that for instance under the investment arbitration rules in EUSFTA, these actions must be withdrawn before the investment protection claim is submitted[62].

4.2. The relationship between Union agreements and bilateral investment agreements (Question 17)

The relationship between bilateral investment treaties of the Member States (BITs) and free trade agreements of the Union (FTAs) is ruled by the principles of the conferral of powers laid down in Article 5 TEU, Article 207 TFEU, Article 351 TFEU where applicable and Regulation (EU) No 1219/2012[63]. According to Article 3 of Regulation (EU) No 1219/2012, BITs are, under certain conditions, maintained in force until the Union concludes an agreement with the same third country.

The European Union has acquired exclusive competence for foreign direct investment under the Treaty of Lisbon. In Opinion 2/15, the Court of Justice confirmed that this means not only that the EU alone can conclude new

[62] EUSFTA, Article 9.17

[63] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, p. 40.

international agreements in this field, but also that it has the power to terminate bilateral investment treaties concluded by the Member States (Opinion 2/15, paragraphs 249 and 252).

The question of the compatibility with EU law of an intra-EU BIT, is brought up in case C-284/16, *Slovak Republic v. Achmea BV,* concerning a preliminary ruling from a German court. At the time of writing, the judgment is not yet available, but Advocate General Wathelet delivered his Opinion on 19 September 2017[64]. According to him, the arbitration clause in the investment protection agreement concluded between the Netherlands and Slovakia does not constitute discrimination on grounds of nationality, is compatible with the preliminary ruling mechanism and does not undermine either the allocation of powers fixed by the Treaties or the autonomy of the EU legal system. It is therefore compatible with EU law.

4.3. Dispute settlement mechanisms in free trade agreements (Question 18)

The European Parliament has, in the context of the negotiations on the TTIP, called on the Commission to negotiate a dispute settlement system for resolving disputes, where potential cases are treated in a transparent manner by publicly appointed independent professional judges and which includes an appellate mechanism. [65]. This call was later to a large extent on endorsed by the Commission[66], which negotiated the ICS with Canada in CETA.

On 15 February 2017, the European Parliament gave its consent to the conclusion of the CETA. The latter agreement contains a mechanism on the so-called Investment Court System (ICS), which the European Parliament has thus approved. In addition, Statement No 36 to the CETA, made by the Commission and the Council, lays down commitments to improve the ICS, pending the establishment of a permanent multilateral investment court. Parliament has also indirectly approved such a commitment, as laid down in Article 8.29 CETA.

In the context of the State of the Union speech by Mr Juncker, the Commission on 13 September 2017 presented a recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.[67] This initiative aims at setting up "*a framework for the resolution of international investment that is permanent,*

[64] Opinion of Advocate General Wathelet of 19 September 2017, *Slowakische Republic v. Achmea BV,* C-284/16, EU:C:2017:699.

[65] European Parliament Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), P8_TA(2015)0252, point (2)(d)(xv).

[66] Commission's Concept Paper, "Investment in TTIP and beyond – the path for reform".

[67] Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM(2017)493 final.

independent and legitimate; predictable in delivering consistent case law; allowing for an appeal of decisions; cost effective; transparent and efficient proceedings and allowing for third party interventions (including for example interested environmental and labour organisations)". At the time of writing, it remains to be seen what this recommendation will lead to.

At present, it also remains to be seen what clarifications the request for an opinion of the Court under Article 218(11) TFEU by Belgium, Opinion 1/17, concerning the compatibility of the dispute settlement in the CETA can bring. The European Parliament has not submitted any observations. The Council has.

In conclusion, the field of investment dispute settlement is currently in a phase of intensive development and, by 2018, there may well have been further developments.

4.4. Union and Member States liability for breach of trade agreements (Question 19)

FTAs containing provisions on investment protection may provide for rules on the determination of the respondent in disputes involving the European Union or the Member States[68].

In the EU legal system, rules on the identification of the respondent and the apportionment of the financial liability are laid down in Regulation (EU) No 912/2014[69].

4.5. The relationship between Article 207(1) TFEU and Article 21 TEU (Question 20)

In Opinion 2/15, the Court considered that the Union has the obligation to integrate the objectives and principles of Article 21(1) and (2) TEU in the common commercial policy (Opinion 2/15, paragraph 143). Consequently, provisions of FTAs on trade and sustainable development fall within the exclusive competence of the Union in the common commercial policy, provided that these provisions govern trade between the parties (Opinion 2/15, paragraphs 166 and 167). However, it is important to underline this condition. Sustainable development is not as such covered by the common commercial policy, but the objective of sustainable development shall be pursued in the trade-related measures taken under this policy (Opinion 2/15, paragraphs 143, 146 and 147). This topic is also

[68] See Article 8.21 CETA and Article 9.15(2) EUSFTA.

[69] Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is a party, OJ L 257, 28.8.2014, p. 121.

commented in more detail in respect of the common commercial policy under question 16 above.

It would appear that a perception that issues like sustainable development were not taken into account in the common commercial policy has had some importance in the recent initiatives against the free trade in general and certain agreements like CETA and TTIP in particular. It would therefore seem that the clarifications by the Court offer an opportunity to address at least one of the issues behind the scepticism.

4.6. The procedure for negotiating and concluding international agreements regarding common commercial policy, including those referred to in Article 207(4)(2) and (3) TFEU (Question 21)

4.6.1. *The scope of the common commercial policy*

Opinion 2/15 has provided important clarifications as to the scope of the Union competence under Article 207 TFEU as well as to where there is an implied exclusive competence within the meaning of Article 3(2) TFEU (see answer to question 16). As a consequence, it is now clear that the vast majority of areas concerned by a free trade agreement indeed fall under the competence of the Union for the common commercial policy. It is also clear that other areas, such as transport, are excluded, but may, depending on the specific provisions, fall under the implied exclusive competence under Article 3(2) TFEU. As far as investment protection is concerned, there remains the fact that it is limited to foreign direct investment, that portfolio investment is excluded, and that no implied competence applies. In addition, it is now clear that investor-state dispute settlement falls under shared competence.

4.6.2. Mixity and unanimity

The case of CETA illustrates that opposition to an agreement could arise not only in the EU on a more general level, but also within each Member State. A negative opinion in one Member State, which is not shared across the EU as a whole, could thus prevent the conclusion of an agreement. This certainly affects the efficiency of the EU's common commercial policy, but is inevitable if it is not possible to conclude free trade agreements within the boundaries of the common commercial policy and the applicable implied competences in accordance with Article 3(2) TFEU.

By contrast, the specific cases referred to in Article 207(4)(2) and (3) TFEU, which require unanimity in Council, do not seem to have attracted the same interest. It should be noted, concerning the second and third subparagraphs, that the areas of trade in cultural and audio-visual services have specifically been excluded from the scope of negotiations of the recent free trade agreements (CETA).

As far as we are aware, free trade agreements concluded and being negotiated contain specific language to preserve the specificities and organisation of social, education and health services.

4.6.3. The recent criticism of free trade agreements

In addition to the divergence of views on the question of mixity and as mentioned above in the answer to question 11, the negotiations on certain recent negotiations on free trade agreements, like CETA and TTIP, have given rise to criticism in some Member States. Several questions, which are legitimate in the context of the democratic debate, have been raised in respect of these agreements[70]. In particular, there is concern as to the democratic legitimacy of the procedures leading up to the conclusion of trade agreements, the concern that free trade agreements might weaken social, sanitary and environmental legislation and that investment protection and dispute settlement might threaten the public interest and the right to regulate.

In the case of CETA, this critical debate also came up at a very late stage, especially in one Member State. Because CETA is envisaged as a mixed agreement, the issue also led to doubts about whether it would actually be possible to conclude the agreement. This in turn led to some questioning of the EU as a reliable negotiation partner.

There might therefore be an interest in finding ways of ensuring that political debates on this matter reach the larger public at a much earlier stage, and perhaps even on a horizontal level as some issues may concern trade policy in general, thereby increasing the possibilities to meet concerns raised and explain the commitments envisaged.

4.6.4. Democratic scrutiny under current practice

The Treaty already foresees suitable forms of scrutiny in the debate in Parliament, following information under Article 218(10) TFEU, and in the Member States, by holding each government responsible as foreseen in Article 10 TEU before they take position in Council under Article 218 TFEU.

The European Parliament scrutinises the negotiations of FTAs on the basis of the information received in accordance with Article 218(10) TFEU, as interpreted by the Court in the cases C-658/11 and C-263/14 (see answer to question 11). The European Parliament has also raised several of the issues having given rise to criticism in the public opinion.

The Commission has, in the context of the negotiations on TTIP, taken an exceptional transparency initiative and made available the negotiating positions

[70] The so-called "Namur Declaration" of 5 December 2016 as well as the initiative "Stop TTIP and CETA" can be seen as expressions of this criticism.

during the negotiations. Most importantly, the Commission has to a very large extent taken into account the concerns raised in the critical debate in the negotiations by adapting the provisions on issues such as, notably, the right to regulate in relation to investment protection.

The Member States, for their part, have the possibility – not only in respect of mixed agreements, but also in respect of agreements concluded by the EU alone – to ensure an appropriate level of democratic accountability towards their parliaments or the publics in view of taking position in Council, as foreseen in Article 10(2), second subparagraph, TEU.

Nevertheless, it is unclear to what extent these measures taken by the institutions have reached a wider audience among the public.

4.6.5. The State of the Union speech and potential future developments

PLS members consider that the State of the Union speech on 13 September 2017 where Commission President Juncker announced the "*trade package*" containing "*initiatives for a balanced and progressive trade policy*" may represent a very interesting step towards a stronger democratic legitimacy of Free Trade Agreements.

More specifically, in the opinion of PLS members the commitment contained in the package to publish negotiation directives and to send them to the European Parliament, increases transparency and improves the conditions for a democratic scrutiny of the negotiations, contributing to a reinforced democratic debate at an early stage of the negotiations. CLS members consider that it corresponds solely to the institution authorising negotiations to decide on the publication or otherwise of the directives it issues to frame such negotiation.

From a legal point of view, it is possible to define the scope of free trade agreements in a way that stays within the exclusive competence of the EU, as clarified in Opinion 2/15. This would likely render the procedure for the conclusion more efficient, avoiding the risk that the EU's capacity to conclude free trade agreements is hampered by a complex procedure of ratifications; it might also strengthen the role of the European Parliament in the political debate. Doing so would require the separation of investment protection from the rest of the agreements. Recent proposals for mandates for the negotiations on Free Trade Agreements with Australia and New Zealand follow such a procedure.[71]

[71] It could also be discussed whether a further developed Union legislative framework on issues related to trade and investment could meet some of the concerns raised in the critical debate as the legislative procedure is particularly well suited for a deeper political debate. Such legislative acts could perhaps define how certain specific commitments taken would be implemented in the EU. In a wider sense, the recent legislative proposal on a regulation establishing a framework for screening of foreign direct investments into the European Union could be seen as an example. It is meant as a response to "*protect legitimate interests with regard to foreign direct investments that raise concerns for security or public order of the Union*

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION) (QUESTIONS 22-25)

The area of freedom, security and justice (FSJ) constitutes Title V of the TFEU. Chapter 2 of that Title contains the provisions relating to policies on border checks, asylum and immigration (BCAI) to which this chapter refers. In this chapter, only questions 22 and 25 will be answered.

The whole FSJ area is listed in Article 4(2)(j) TFEU as one policy area falling under shared competence and therefore one in which the pre-emption principle of Article 2(2) TFEU would in principle apply. However, the picture is rendered somewhat more complex due to the existence of specific provisions applicable in the field.

Indeed, Protocol No 23 on 'External relations of the Member States with regard to the crossing of external borders' establishes that "*The provisions on the measures on the crossing of external borders included in Article 77(2)(b) of the Treaty on the Functioning of the European Union shall be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements*"; Article 77(2)(b) TFEU is placed in Chapter 2 of Title V TFEU and its thus relevant for the current analysis.

On its part, Declaration 36 on 'Article 218 of the Treaty on the Functioning of the European Union concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice', according to which "*The Conference confirms that Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Chapters 3, 4 and 5 of Title V of Part Three in so far as such agreements comply with Union law*", does not affect Chapter 2 on the policies on border checks, asylum and immigration.

5.1. Exemption from short-term visas (Question 22)

As summarily seen above, the FSJ area, including BCAI provisions, are defined in the Treaties as an area of shared competence to which the principle of pre-emption generally applies in the terms established by Articles 2(2) and in which an exclusive competence may be established under Article 3(2) TFEU. It is however the case that Member States continue to conclude international agreements with third countries in the area. The question therefore arises as to whether such

or its Member States" Proposal for a Regulation of the European Parliament and of the Council establishing a framework for a screening of foreign direct investment into the European Union, COM(2017)487 final, explanatory memorandum, page 2.

exercise of external competence by Member States is compliant with the division of competences between them and the Union.

Concerning generally the personal checks in external borders mentioned in Article 77(2)(b) TFEU referred to in Protocol 23 (previously Protocol 31, which referred to Article 62(2)(a) EC), the Union has adopted a series of legal acts regulating many aspects of the matter. The most important of those is the Schengen Border Code, which lays down detailed harmonized rules governing border control of persons crossing the external borders of the Member States of the Union[72].

The practical effect of the Protocol 23 mentioned above is to restrict the application of the exclusive competence under Article 3(2) TFEU and the application of the pre-emption principle in this specific area as far as international agreements are concerned, which becomes one of parallel competence. As a result, Member States are allowed to continue to conclude international agreements covering the matter irrespectively of the internal exercise of the competence and of the level of harmonization, provided those agreements comply with the existing Union legislation and applicable international agreements in the field. It is thus clear that the Protocol n° 23 allows Member States to conclude international agreements and that it does not restrict the competence of the EU to do so.

When it comes to the specific issue of short-term visa exemption, the Union has adopted Regulation 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. This Regulation, adopted on the basis of Article 62, point (2)(b)(i) EC (currently Article 77(2)(a) TFEU), has operated a total harmonization on the matter and, as a consequence, the Union has fully exercised the competence in this policy area, situation in which a shared Union competence becomes externally exclusive.

Moreover, the Union has also concluded a series of international agreements with third states on visa facilitation, concluded under the same legal basis[73]. Finally, the exception of Protocol 23 is not relevant in this regard, as it refers to measures adopted under a legal basis different to that used for the adoption of Regulation 539/2001, and Declaration no 36 does also not apply to this policy area.

In this context there is no scope for Member States to conclude international agreements concerning short-term visa exemption. Member States remain however competent to reach agreements concerning other visa-related matters which are not fully harmonized.

[72] Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders.

[73] With Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Cape Verde, FYROM, Georgia, Moldova, Montenegro, Serbia, Russia and Ukraine.

5.2. Readmission agreements (Question 25)

The issue of *readmission agreements* is a matter on which rapporteurs do not entirely agree. The general Union competence is established by Article 79(2)(c) TFEU, according to which the Union legislature shall adopt measures concerning "*removal and repatriation of persons*". On that basis, the Union has adopted a series of legal acts[74].

External competence in the area is then explicitly conferred on the Union by Article 79(3) TFEU, which empowers the Union to "*conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States*". On that basis, the Union has so far concluded 17 readmission agreements[75] and has opened negotiations for another six[76].

Finally, neither Protocol 23 nor Declaration no 36 apply to this policy area. Therefore, on the basis of primary law, readmission is a policy field where the pre-emption principle applies in full.

The main Union legal act on this matter is the so-called Return Directive of 2008[77], which establishes "*common rules concerning return, removal, use of coercive measures, detention and entry bans*", as specified in its recital (20). The Union has therefore exercised its shared competence by adopting common rules on this matter, and the only remaining question is therefore whether, as a consequence, the external Union competence has become exclusive in accordance with Article

[74] These include Regulation (EU) 2016/1953 on the establishment of a European travel document for the return of illegally staying third-country nationals, Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, Council Decision 2004/573/EC on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, Council Decision 2004/191/EC setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals, Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network, Council Directive 2003/110/EC on assistance in cases of transit for the purposes of removal by air, Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals, Council Decision 97/340/JHA on the exchange of information concerning assistance for the voluntary repatriation of third-country nationals, and Council Decision 96/749/JHA on monitoring the implementation of instruments adopted by the Council concerning illegal immigration, readmission, the unlawful employment of third country nationals and cooperation in the implementation of expulsion orders.

[75] With Cape Verde, Turkey, Azerbaijan, Armenia, Georgia, Pakistan, Moldova, Montenegro, Serbia, former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, Ukraine, Russian, Albania, Sri Lanka, and the Special Administrative Regions of Macao and Hong Kong.

[76] With Belarus, Nigeria, Tunisia, Jordan, Morocco and Algeria.

[77] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

3(2) TFEU, so that Member States would in principle be prevented from concluding bilateral agreements in the field.

However, the provisions of the Return Directive establish in its Article 4(1) that "*This Directive shall be without prejudice to more favourable provisions of (...) bilateral or multilateral agreements between one or more Member States and one or more third countries.*" Article 4(3) establishes in turn that "*This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive*". Finally, according to its recital (7), "*The need for Community and bilateral readmission agreements with third countries to facilitate the return process is underlined*".

This system sets a minimum level of protection while leaving untouched the competence of Member States to continue to adopt more favourable provisions including through the conclusion of bilateral agreements with third countries, provided the provisions therein are both compatible with, and more favourable than, those of the Directive.

Additionally, the objective of the Return Directive is to establish "*a horizontal set of rules,* applicable to all third-country nationals *who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State*" (recital (5), emphasis added). This objective is reflected in Article 2(1) concerning the scope and can only be achieved through "*international cooperation with countries of origin at all stages of the return process*" (recital 7, for which, and as mentioned above, there is a "*need for Community and bilateral readmission agreements with third countries to facilitate the return process*"). Hence, any such bilateral agreements of Member States with third states would not alter the scope of the rules contained in the Directive, as such scope covers <u>all</u> third-country nationals.

As a consequence, a situation where the Union does not have -or envisage to have- an agreement with a third country on readmission, and where at the same time Member States would be prevented from concluding themselves such an agreement, would gravely endanger the achievement of the objectives of the Directive. Admittedly, the EU can very well authorise Member States to act as has happened in other areas[78]. In the absence of Union agreements with a third country (or following such agreements), Member States agreements are thus lawful instruments to further the objectives of the Return Directive.

[78] In the area of air transport, see Article 1 of Regulation (EU) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, OJ L 157 of 30.04.2004, p. 7. In the area of foreign direct investment, see Article 1(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351 of 20.12.2012, p 40.

For the sake of completeness, it is worth mentioning that the readmission agreements concluded by the Union do equally not establish a harmonised set of rules that would entail the exclusivity of the Union's external competence. The content of those agreements is not identical and does simply apply the common rules established by the Return Directive to a given third state. Their only consequence is thus to prevent Member States to conclude agreements with the third country in question, except if in application of the EU agreement itself.

This situation leads to understand, in the view of CLS members, that an exclusive competence of the Union has not been established here, as the level of harmonisation in the area does not warrant the exclusivity of the Union's external competence. This could of course change if the Union legislature were to fully harmonise the system of return, but at this stage of development in Union law it can in the opinion of CLS members be concluded that there is no exclusivity in the field[79].

In the view of PLS members however, the agreements that Member States may be allowed to conclude are only those that would implement the Return directive or are otherwise authorised in the meaning of Article 2(1) TFEU. The fact that the return directive allows certain agreement under certain conditions does therefore not exclude that an exclusive competence has been established. Because full harmonisation is not a condition for exclusive competence but only one situation which may establish it, not only the Return directive but also other acts in this field must also be taken into account when assessing whether there is an exclusive competence.

[79] This is also the view of the Council, expressed in its *Conclusions on the return and readmission of illegally staying third-country nationals* adopted at its 3473rd meeting held on 9 June 2016. Paragraph 3 reads "*Noting that (...) for establishing readmission arrangements with third countries (...) Member States have a (...) range of instruments at their disposal (...), including readmission agreements*".

NATIONAL REPORTS



AUSTRIA

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CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

It is an undeniable consequence and incremental effect of the legislative activity of the EU that ever more policy fields are covered by increasingly detailed and complex rules of secondary Union law. In view of the automatic repercussions this development has in terms of transfer of external competences to the EU, we could talk about a constitutionally driven process of diminishing external competences of the EU Member States. The effects of these exclusive external competences of the EU which are "implicit" or (in the light of the explicit provisions in Art. 216 (1) and Art. 3 (2) TFEU now better:) "reflective" of internal legislative competences, are to be noticed across the board in all policy areas pursued by the national public authorities. While it is difficult to quantify, our impression

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is that the EU policy fields most affected by this phenomenon of progressive regulatory scope and density of secondary EU law are the harmonisation of rules concerning the placing on the market of goods and services, the civil and penal judicial cooperation as well as police cooperation, environmental policy and intellectual property. We hereby witness, at the external level, the somehow logical consequences of the latest rounds of Treaty reform by which the Member States have transferred considerably more internal policy fields to the category of shared (if not exclusive) competences and subjected them mainly to the ordinary legislative procedure and thus to qualified majority decisions in the Council.

Austria views the codification of the *ERTA* doctrine in Art. 3 (2) TFEU as a welcome expression of the need for the EU to assure an effective representation of its interests at the international level. However, it seems appropriate to voice a critical view on the broad interpretation by the CJEU of the concept of "affection" of internal rules. In its Opinion 1/13, for example, only two paragraphs[1] refer to the risk of undermining the uniform and consistent application of an EU regulation, thus establishing exclusive external competence for the EU to express the acceptance of the accession of further third states as contracting parties to the Hague Convention on the civil aspects of international child abduction. Also qualitatively, the reasons given by the Court why and how the EU-internal relations and rules applicable in the subject matter concerned are affected by third states joining a multilateral agreement are far from detailed enough. In this context, and with reference to the issues of portfolio investments in Q16, Austria particularly welcomes the Court's clarification that provisions of primary law (such as in this instance those providing for the complete liberalisation of capital movements) cannot lead to the *ERTA* effect.[2]

Question 2

Art. 216 (1) TFEU does not contain any information as regards the nature of the treaty-making competence. If this is not determined by the substantial provisions of the policy area concerned, the special rule of Art. 3 (2) TFEU applies.

Based on relevant case law of the CJEU, its codification in Art. 3 (2) TFEU provides for three alternatives where the Union would have an exclusive reflective (implied) competence for the conclusion of an international agreement:

- when its conclusion is provided for in a legislative act of the Union; or
- is necessary to enable the Union to exercise its internal competence; or
- in so far as its conclusion may affect common rules or alter their scope.

[1] Opinion 1/13, *Convention on the civil aspects of international child abduction – Accession of third States*, [2014] ECLI:EU:C:2014:2303, at para. 88 et seq.

[2] Cf. Opinion 2/15, *EU-Singapore Free Trade Agreement*, [2017] ECLI:EU:C:2017:359, at para. 235.

With regard to the 1st alternative, other than under Art. 216 (1) 3rd alternative, not only a "legally binding act", but a "legislative act" is required. It is only by the exercise of another (shared) competence that it becomes an exclusive one.[3] Strangely enough, while the derivate explicit competence created through a legislative act triggers exclusiveness, the primary explicit competence based on primary law does not.

The interpretation of the 2nd alternative, often referred to as the "Laying-up fund-variant", mainly pivots around the meaning of "necessity", as compared to the 2nd alternative of Art. 216 (1) TFEU. In our understanding, the necessity referred to in Art. 3 (2) TFEU exceeds the one mentioned in Art. 216 (1) TFEU with regard to the reflective original competence: Whereas the latter concerns the achievement of objectives of the EU within its policies, which could also be pursued internally but is (further) promoted by external action, the former presupposes a situation where – without entering into international rights and obligations – the EU would not be in a position at all to exercise a competence it has been given with regard to "internal" measures in the context of one of its policies.[4]

The 3rd alternative is usually referred to as the "*ERTA* -variant". Its wording is similar to the one of Art. 216 (1) 4th alternative, but – due to a lack of editorial accuracy – not identical: While the latter refers to a situation "where the conclusion of an agreement…is *likely to affect* common rules or alter their scope", the former would see the emerging of an exclusive competence only "…*in so far as* its conclusion may affect common rules or alter their scope". Would that difference in wording eventually entail the possibility that in such a case the Union's treaty-making power would only partly be an exclusive one?[5] In any case, the conditions for an exclusive competence must be subject to a strict test and the burden of proof falls to the party invoking it (i.e. normally the Commission).[6]

What if the third option is not exercised?

We assume that this question relates to the situation where a proposed "pipeline-acquis" ultimately is not realized by law-making. In view of effectiveness and

[3] Nettesheim calls it "subsequent exclusivity" ("nachträgliche Ausschließlichkeit"): Nettesheim, 'Art 3 AEUV', in E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäischen Union* (H.C. Beck 2017) EL 61 at para. 22.

[4] Constellation basically comparable to Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, [1977] ECLI:EU:C:1977:63.

[5] With Giegerich, 'Art 216 AEUV', in M. Pechstein, C. Nowak and U. Häde (eds), *Frankfurter Kommentar zu EUV, GRC und AEUV* (Mohr Siebeck 2017) at para. 139, we would not draw this conclusion.

[6] Case C-114/12, *Protection of neighbouring rights of broadcasting organisations*, [2014] ECLI:EU:C:2014:2151, at para. 74 and Opinion 1/13, *Convention on the civil aspects of international child abduction*, supra note 1, at para. 74.

a uniform application of the law we consider that in such a constellation the "pre-effects" would end and a treaty-making competence would not be established.

For the sake of completeness, it may be stated that Art. 3 (2) TFEU (cf. "The Union shall *also* have exclusive competence …") is only applicable to agreements falling under the provisions of those EU policies which are not assigned the quality of exclusive competences by virtue of Art. 3 (1) TFEU already. Furthermore, exclusiveness in the sense of this article only refers to agreements that would and could otherwise – were it not for the exclusiveness of EU competence – be concluded by the Member States with third countries or international organisations, and definitely not amongst Member States themselves.[7] This follows, apart from other systematic considerations, from the link described below between Art. 3 (2) and Art. 216 (1) TFEU dealing with external agreements and not intra-EU-agreements.

Finally: Can we think of the existence of implied exclusive competences in the field of application of Art. 3 (1), without referring to Art. 3 (2) TFEU?[8] Even though Art. 3 (2) appears as a comprehensive codification of CJEU case law regarding implied exclusive external competences, an argument in favour of the former position can be made on the basis of the Court's ruling in *Kramer*[9], because otherwise the parallelism of internal and external competences in fisheries would not be ensured. However, we would prefer the "less bold"[10] solution to equate an exclusive internal competence with the existence of a "common rule" in the sense of the *ERTA*-variant of Art. 3 (2) TFEU.

Question 3

The basic function of Art. 216 (1) TFEU could best be described as a general/meta-competence clause. According to one part of doctrine, to which the authors of this report would incline, Art. 216 (1) TFEU does not serve as a legal basis itself, but rather presupposes the existence of such a competence. Some would even go so far as to declare that Art. 216 (1) TFEU is of a purely declaratory

[7] The consideration of the CJEU in C-370/12, *Pringle v. Government of Ireland et al. (Pringle)*, [2012] ECLI:EU:C:2012:756, at para. 101 et seq. on whether the ESM-Agreement to be concluded amongst Member States could fall under exclusive competence derived from Art. 3 (2) TFEU, therefore lack any foundation.

[8] The idea has been raised and discussed inter alia by Mögele, 'Art 3 AEUV', in R. Streinz (ed), *EUV/AEUV: Vertrag über die Europäische Union und über die Arbeitsweise der Europäischen Union* (2nd edn., H.C. Beck 2012) at para. 20. Another interesting point has been made by Lorz/Meurers, *Außenkompetenzen der EU*, in von Arnauld (Hrsg), *Europäische Außenbeziehungen* (2014), § 2 at para. 28: According to Lorz/Meurers, it would suggest itself to apply the *conditions for exclusiveness* laid down in Art.3 (2) also to *explicit* treaty making competences not covered by Art. 3 (1) TFEU.

[9] Joined cases 3/76, 4/76 and 6/76, *Kramer,* [1976] ECLI:EU:C:1976:114, at para. 33.

[10] Mögele, supra note 8, at para. 20.

nature. Art. 216 (1) TFEU, shaped as a general provision, opens points of entry for external action by providing an exhaustive enumeration of the circumstances under which the EU has a competence to conclude international agreements with third parties. It, therefore, indisputably takes on constitutional importance. Another part of doctrine[11] would argue that Art. 216 (1) – as well as Art. 3 (2) – TFEU would provide a competence for treaty-making by itself, complemented by provisions concerning treaty-making in other Parts of Treaties, to which Art. 216 (1) and Art. 3 (2) TFEU are just referring. The effect of establishing a competence, however, would only arise in so far as these two provisions establish their own criteria. This approach, however, does not convince as it lacks telling examples of such cases.

Therefore, if none of the conditions set out in Art. 216 (1) TFEU is met in a concrete situation, the EU is precluded from entering into contractual relations under public international law. If one of the situations contemplated by this provision is present, however, the further legal implications need to be contemplated not based on Art. 216 (1) TFEU, but in the light of the other provisions providing for the material legal basis. These implications refer to the material scope that could be covered by an agreement, the nature of the EU competence (exclusive, shared, or other) and the procedural requirements, in accordance with mainly Art. 218 TFEU, for the authorisation of negotiations, the signature and the conclusion of the agreement.

As to the four triggers for an EU competence to conclude international agreements, the first one covers the explicit competence by virtue of primary law, since it is based on an empowerment contained in a Treaty provision. A classic example for such a *primary explicit competence* is provided by an agreement in the field of common commercial policy as referred to in Art. 207 (3) TFEU. The "core" exclusive competences by virtue of primary law are the ones listed in Art. 3 (1) TFEU. However, there are also (explicit) shared competences with an exclusive character which is due to the *nature of the agreement* itself (e.g. association agreements [Art. 217 TFEU], neighbourhood agreements [Art. 8 TEU], accession to the European Convention on Human Rights and Fundamental Freedoms [Art. 6 (2) TEU)].[12] Other explicit, but not exclusive competences for treaty-making provided for by primary law can be found in the following provisions:

[11] Häde, 'Art 3 AEUV', in M. Pechstein, C. Nowak and U. Häde (eds), *Frankfurter Kommentar zu EUV, GRC und AEUV* (Mohr Siebeck 2017) at para. 18.

[12] Cf. Obwexer, 'Art 3 AEUV', in H. von der Groeben, J. Schwarze and A. Hatje (eds), *Europäisches Unionsrecht*: *Vertrag über die Europäische Union – Vertrag über die Arbeitsweise der Europäischen Union – Charta der Grundrechte der Europäischen Union* (7th edn., Nomos 2015) at paras 66, 48, 46.

- Art. 79 (3) TFEU (readmission, shared competence);
- shared parallel competence: research and technological development (Art. 186 TFEU), environment (Art. 191 (4) TFEU), development cooperation (Art. 209 (2) TFEU), economic, financial and technical cooperation with third countries (Art. 212 (3) TFEU), humanitarian aid (Art. 214 (4) TFEU);
- exclusive but parallel: Member States may negotiate in international bodies and conclude international agreements as regards economic and monetary union, without prejudice to Union competence and Union agreements in the field (Art. 219 (4) TFEU);
- special explicit competences such as Art. 37 TEU (CFSP agreements).

The three other alternatives of Art. 216 (1) TFEU all refer to the (earlier: *implicit*, see Q1 above, now also denominated as) "*reflective original competence*": No explicit mention is made of agreements in the respective Treaty article laying down the measures the EU is empowered to take in a given policy. This holds true for most of the EU policies. Even if these legal bases only refer to internal or autonomous measures of the EU, Art. 216 (1) TFEU leads to an explicit entitlement of the EU to act externally.

According to these three alternatives, the Union may conclude an agreement with one or more third countries or international organisations under the following conditions:

- where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties (2nd alternative), or
- is provided for in a legally binding Union act (3rd alternative) or
- is likely to affect common rules or alter their scope (4th alternative).

In accordance with the principles of conferred competence and some kind of a limited "parallelism" between internal and external competences, the 2nd alternative materializes if the conclusion of an agreement is "necessary" to achieve one of the *objectives* referred to in the Treaties within the framework of the respective Union's *policies*. Despite its wording, that only refers to the "objectives", this alternative which is based on the "Laying-up fund for inland waterways vessels"-doctrine[13], nonetheless presupposes the existence of an internal competence in the policy area, as has been confirmed by the CJEU in Opinion 1/13[14]. This means, in other words, that the external competence only stretches as far as the

[13] Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, supra note 4.

[14] Opinion 1/13, *Convention on the civil aspects of international child abduction*, supra note 1.

material legal basis for the adoption of internal measures. Therefore, there exists a parallelism with regard to the material scope of the internal and the external reflective competences. However, in contrast to the situation described above as primary explicit competence to conclude international agreements, the reflective external competence is not an original one – as is the case of the internal competence – but is dependent on the proof of necessity for the achievement of otherwise and primarily internal policy objectives. Thus, there is no general parallelism of internal and external competences; this would not only amount to a "carte blanche" for extending competences, comparable to Art. 352 TFEU (which, however, may only be applied under very strict conditions); it would also constitute a contradiction to the system as a whole. The external competence thus, in our view, has rather to be understood as complementary to the internal competence.[15]

It is up to the EU institutions to assess – within their usually wide political margin of appreciation – the *necessity* of the conclusion of an agreement. This assessment resembles the one they have to undertake with regard to the necessity of adopting an internal measure. Necessity here – other than in the context of Art. 3 (2) TFEU – should be read as follows: Is the internal competence sufficient to achieve the objective led down by the Treaties in an optimal way, or is there – in light of the *effet utile*-principle – a need for a complementary external competence?[16] (As we have elaborated in our answers to Q2 above and Q4 below, Art. 3 (2) TFEU requires a stricter, narrower understanding of "necessity" when it comes to establishing an *exclusive* implied treaty-making power.)

In accordance with the findings of the CJEU in its Opinion 2/15 on the EU-Singapore Free Trade Agreement[17], the conclusion of an international agreement concerning non-direct foreign investment is, as EU law currently stands, "... not 'provided for in a legislative act of the Union', within the meaning of Art. 3 (2) TFEU" (para. 236); therefore, the competence of the EU when exercising this second variant in the case is "necessary" only in the sense of Art. 216 (1) 2nd alternative, and thus of a shared nature (para. 242).

The third alternative in point represents another example of a *de facto* explicit competence, this time generated *ad hoc* at the level of secondary Union law. It's a competence in principle laid down in primary EU law and just made explicit/concretized in view of the agreement to be concluded. We therefore propose to call it *derivative explicit competence*. In order not to undercut the first two constellations above and the general constitutional principles of distribution of

[15] See also Vöneky and Beylage-Haarmann, 'Art 216 AEUV', in E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäischen Union* (H.C. Beck 2017) EL 61, at para. 11.

[16] Cf. also Giegerich, supra note 5, at para. 101.

[17] Opinion 2/15, *EU-Singapore Free Trade Agreement*, supra note 2.

competences between the EU and its Member States, it is not an abstract one either. Above all, it must be made sure that the Union institutions do not misuse this enabling clause for a continuous self-empowerment. On the contrary, this provision needs to be understood in the sense that authorisation for the EU to enter into public international law obligations may be given in a legal act only if, and to the extent that, this proves necessary in order to effectively implement that act. In practice, a competence generated according to this alternative (which codifies WTO-case law of the CJEU) by a legally binding act is, in a first step, of a shared nature. If this act is a "legislative act" in accordance with the definition of Art. 289 (3) TFEU[18], the competence is always an exclusive one in the sense of Art. 3 (2) 1st alternative.

In addition, we would like to mention the fact that "binding legal act" covers all acts that qualify as such in the light of Art. 288 TFEU (regulations, directives and decisions), including CFSP and CSDP. In theory it could also be a delegated act; in fact, it cannot as the provision for the conclusion of an agreement undoubtedly would qualify as an "essential element" and therefore must be enshrined already in the legislative basic act (Art. 290 (1) (1) TFEU).

The fourth variant – the conclusion of an agreement is "likely to affect common rules or alter their scope" – has given rise to many questions.[19] We propose to offer a practical understanding of this second type of reflective competence, namely the *reflective derivative competence*, this time triggered by the *ERTA* doctrine. In our view, this case has been added to the list of Art. 216 (1) TFEU mainly in order to make it comprehensive and therefore eligible for exhaustiveness, as stated above. In the light of its terminological and conceptual proximity to Art. 3 (2) TFEU, this constellation almost automatically, and in almost all thinkable cases, leads to an exclusive reflective external competence of the EU. To put it the other way round: there can be no exclusive competence in the second step where there is not a competence of any kind already in the first step. Whenever an international agreement *"may"* affect common rules or alter their scope – thus falling under exclusive EU competence – it is definitely also one that *"is likely to"* affect such rules and thus falls under EU competence by virtue of Art. 216 (1) TFEU.

From *ERTA* and subsequent case law of the CJEU we may deduce the following elements for interpretation of this alternative: EU law is affected, if the area is "largely covered" by EU rules; Member States' agreements are forbidden even if there is no contradiction between their international legal obligations under the agreement and EU law; a "separation clause" that obliges the

[18] See also Q4 below.

[19] The wording is misleading as it is of course the conclusion of the agreement by *Member States* which may affect EU common rules or alter their scope.

Member States concerned to apply relevant Union law as between them instead of the agreement's provisions, would not be enough; there is, however, no affection if EU law only contains minimum standards and the agreement establishes higher ones. The "alteration of the scope" does not have an independent meaning, as the alteration of the scope would always automatically constitute an affection of the rule. We understand that the CJEU, in this context, uses the figure of putting the substance matter of Union law into a public international law context where it will be subject to different methods of interpretation, including by the third contracting partner, and will not remain within the legal and institutional autonomy of the EU and its Member States. When assessing the potential to affect or alter the scope of EU law, not only the scope and concrete content, but also possible perspectives of a further development of the norm in question must be taken into account.

The CJEU itself has given a concise summary of the core of its case law concerning what has now become the 4th alternative of Art. 216 (1) TFEU, which also can be seen as an expression of the principle of sincere cooperation (Art. 4 (3) TEU), in the "*Open Skies*-ruling":

> "107 It must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence.
>
> 108 According to the Court's case-law, that is the case where the international commitments fall within the scope of the common rules (ERTA judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26).
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> ...
>
> 110 The same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected within the meaning of the ERTA judgment if the Member States retained freedom to negotiate with non-member countries (Opinion 1/94, paragraph 96; Opinion 2/92, paragraph 33)."[20]

[20] Case C-476/98, *Commission v. Germany (Open Skies)*, [2002] ECLI:EU:C:2002:631, at paras 107, 108, 110.

Question 4

Starting off from the basic assertion made under Q3 above that any examination of EU contractual competences has to start out with looking at Art. 216 (1) TFEU, there exists an obvious link with Art. 3 (2) TFEU in three cases which are considered by both provisions from different angles. This concerns the variants one, two and three of Art. 3 (2) TFEU which each correlate, up to a certain extent, to variants three, two and four of Art. 216 (1) TFEU (see Q2 and Q3 above).

The link between Art. 216 (1) TFEU and Art. 3 (2) TFEU thus can be briefly summarized as follows: Art. 216 (1) TFEU states under which conditions the European Union may conclude an agreement, i.e. has treaty-making power (explicit or implied). The type of that competence – exclusive, shared or other – is determined either by the type of competence assigned by the Treaties to the respective policy (Art. 3 to 6 TFEU) or, failing that, with regard to exclusive competences, in the special rules for explicit exclusive (Art. 3 (1) TFEU) and for implied exclusive treaty-making power (Art. 3 (2) TFEU) respectively.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ART. 218 TFEU)

Question 5

In general, Austria considers that the interinstitutional balance is quite well achieved in the context of the procedures for the negotiation and conclusion of international agreements as laid down in Art. 218 TFEU. It goes without saying that the Member States attach particular importance to the role to be played by the special committee that is, in practically all cases, designated by the Council in accordance with Art. 218 (4) TFEU to assist the Commission during the conduct of negotiations. While there exists no misconception of the complexity of negotiations of international agreements, nor on the merely consultative function the special committee exercises, nevertheless the Member States quite often would prefer a closer cooperation by the Commission. This refers to advance information on positions to be defended on behalf of the EU, the short delays at which documents are transmitted to the committee, and in some cases even a certain reluctance by the Commission (or the High Representative) to transmit texts that have been handed over, received or even been provisionally agreed with the third party with which they are negotiating on behalf of the EU. In some instances, the Commission has even proceeded to the initialling of a final negotiation result before informing the special committee of its intention to do so or of the latest developments of the text to be initialled. Any such lack of information affects the possibility of the governments of Member States to keep the stakeholders at national level informed, and here particularly those governments

which have special constitutional obligations of information and consultation of their national parliaments, amongst them Austria. The same goes, by the way, *mutatis mutandis* for the trade policy committee established in accordance with Art. 207 (3) (3) TFEU.

Question 6

The main aspect to be observed in the context of provisional application of international agreements concluded by the EU as mixed agreements together with its Member States is a clear-cut division of competences. By its own constitution, provisional application of an agreement requiring parliamentary approval may only be declared by Austria after having obtained this approval. Provisional application of mixed agreements therefore must be strictly limited to those parts that fall under Union competences. If the provisional application of provisions falling under national competence is intended, this would not imply any gain in time comparing to the full authorisation procedure, due to the constitutional situation mentioned above. On the contrary, in lack of an explicit and appropriate provision on provisional application in the agreement itself, Austria sees itself obliged to issue a declaration to the abovementioned effect and make its own provisional application, starting from a later date, subject to a subsequent notification of the completion of the internal procedures.

With regard to the involvement of the European Parliament, Austria thinks that the present situation correctly reflects the difference in executive and in legislative functions that characterise the institutional triangle between Commission, Council and Parliament. While we do not ignore the fact that the Commission has promised to the Parliament, in their bilateral framework agreement concluded after the entry into force of the Lisbon Treaty, to propose provisional application of agreements only after the Parliament has given its consent to the conclusion of the agreement, Austria considers that consent of the Parliament to the conclusion of international agreements as a prerequisite for their definite entry into force seems sufficient democratic involvement. In the overwhelming number of cases, leaving apart single possibly more problematic cases of comprehensive and mixed agreements, the provisional application is only applied for a limited time between the signature and the conclusion.

Question 7

The consequences to be drawn if a Member State does not ratify a mixed agreement are mainly a question of considerations pertaining to legal policy. The answer to be given to this question therefore may vary considerably depending on the type of obstacle to ratification, the temporary or permanent nature of such obstacle, the type of agreement affected and the position and interests of the

other contracting party or parties involved and of the EU and its Member States. Normally, the final clauses of mixed agreements impede the definite entry into force in such a case. Whether an examination of the mutual benefits and overall balance of rights and obligations leads to a favourable assessment of the continued provisional implementation of certain parts of the agreement or not, will certainly influence the decision on whether to end provisional application or to continue with it. In the case of a trade agreement, for example, where those parts that fall under exclusive EU competence of the common commercial policy are provisionally applied, the effect of continuing the provisional application would resemble the conclusion, already in the first place, of an EU-only trade agreement in conformity with Art. 207 and Art. 3 (1) TFEU. A renegotiation with a view to concluding a revised agreement only by the EU without the participation of Member States might thus be a way out of the dilemma. But even in this case, and more so in other possible constellations, the respective rights and obligations of EU and Member States within the overall agreement will very probably be closely related and inseparable from each other. An example could be the chapter on comprehensive investment protection including non-direct (portfolio) investments and dispute settlement related to all types of investment. It might, therefore, prove difficult to achieve, on the premises of an EU-only agreement, a balanced result that would satisfy the other contracting party(ies). It might also seem of disadvantage to the EU to take out a chapter of an agreement to which itself attributes high value,22 expecting the other contracting party to improve trade and competition conditions as a result of being bound by the agreement. In order to come to a decision within the EU on the way forward after such a situation of ratification accident in a Member State occurs, the principle of loyal cooperation would call for an open and informed discussion amongst the Member States and with the Commission in the competent Council configuration. The European Parliament would have to be informed of the discussions and their outcome. It may be interesting to note that in the context of the Comprehensive Economic and Trade Agreement between the EU and Canada ("CETA"), a statement has been entered in the Council minutes, amongst many others, to the Council decision (EU) 2017/37 of 28 October 2016 authorising the signing of CETA, stating that the provisional application "must" and "will" be terminated in case of non-ratification by a Member State.[21]

[21] See Statement from the Council regarding the termination of provisional application of CETA No. 20 of 14 January 2017, OJ 2017 L 11/9: "If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures."

Question 8

The European Parliament is only involved in the procedure for the conclusion of an EU agreement when the procedure enters into the stage of EU-internal approval of the agreement (Art. 218 (6) TFEU). In view of agreements of five areas, the consent of the EP is required (Art. 218 (6) (a) (i-v) TFEU). If such an agreement later is amended, a renewed consent of the EP is only necessary if the amendment meets the criteria of Art. 218 (6) (a) TFEU too.[22] In the other cases the EP has to be consulted (Art. 218 (6) (b) TFEU).

According to the Treaties, there is still no (formal[23]) participation of the EP at all if the agreement relates exclusively to the common foreign and security policy. This corresponds to the very limited role the Treaties assigned to the EP in CSFP matters in general (cf. Art. 36 TEU). In view of the potential importance of such CSFP agreements, the total exclusion of the EP may be deplored from a democratic point of view.

There is no participation of the EP either with regard to agreements concerning monetary or foreign exchange regime matters (Art. 219 (3) TFEU), whereas for the conclusion of formal agreements on an exchange-rate system for the euro in relation to the currencies of third States the EP has to be consulted (Art. 219 (1) (1) TFEU).[24]

The EP, however, has to be "immediately and fully informed at all stages of the procedure", even if its consent is not required. The concrete measures derived from this obligation are laid down in detail in the Framework Agreement between the European Parliament and the European Commission.[25] The Framework Agreement establishes a graduated information policy, depending on whether for the conclusion of the agreement in case consent or just consultation of the EP is required.[26] In view of implementing para. 40 of the Interinstitutional Agreement on Better Law-Making concluded between the Parliament, the Commission and the Council in April 2016, negotiations have been started in order to reach a common understanding of these three institutions with a view to clarifying the role of the Parliament in the context of the negotiations and the conclusion of international agreements of the EU.

[22] Giegerich, 'Art 218 AEUV', in M. Pechstein, C. Nowak and U. Häde (eds), *Frankfurter Kommentar zu EUV, GRC und AEUV* (Mohr Siebeck 2017) at para. 101.

[23] However, one should not underestimate the influence the EP is able to exercise on CFSP via its budgetary power!

[24] Giegerich, *Ibid.*, at para. 94 et seq.

[25] Framework Agreement on relations between the European Parliament and the European Commission, OJ 2010 L 304/47 at paras 23-29 and its Annex III.

[26] *Ibid.*, Annex III at para. 5.

Active participation (consent) is required for the conclusion of „*agreements establishing a specific institutional framework by organizing cooperation procedures*"(Art. 218 (6) (a) (iii) TFEU). This may also apply to agreements on the accession of the Union to international organizations and the participation in the organs of the respective organization.

However, it is not clear how this institutional framework must be organized and which competences the bodies must be assigned to in the agreement in order to trigger the consent-requirement. In line with relevant case law of the CJEU[27] and Union practice too, we would support an approach according to which the need for consent would just depend on the *existence* of the institutional framework and structures and not necessarily on the right to adopt binding decisions.[28] In fact Art. 218 (6) (a) (iii) TFEU has only been of very limited relevance in practice because this type of institutional structure in most cases is provided for in association agreements, already covered by para. (6) (a) (i) TFEU.

The requirement of EP's consent to the conclusion of "*agreements with important budgetary implications*" (Art. 218 (6) (a) (iv) TFEU reflects the budgetary power of the EP which thereby extends to "pre-decisions of budgetary relevance"[29] via the conclusion of an agreement. The calculation of what would constitute an "important budgetary implication" over the whole duration period of the agreement, has to be established, according to case law of the CJEU[30], in relation not to the overall budget of the Union but, in view of the fact that appropriations allocated to external operations of the [then] Community traditionally account only for a marginal fraction of the budget, in relation to appropriations allocated specifically for external action measures. If the agreement concerns a specific sector, the expenditure for the sector of Union policy, too, should be taken into consideration. A percentage of only 1% at least would not constitute "important budgetary implications".

[27] See references for ambiguous case law where consent was not deemed mandatory even though the decision of the treaty body was binding whereas in other cases consent was required: Schmalenbach, 'Art 218 AEUV', in C. Calliess and M. Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (5th edn., C. H. Beck 2016) at para. 23.

[28] There are, however, voices which would advocate the application of the rule (only?) in cases where the body in question has power to adopt independently decisions by which the previous legal position could be amended: cf. Lorenzmeier, 'Art 218 AEUV', in E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäischen Union* (H.C. Beck 2017) 61. EL at para. 47.

[29] Giegerich, 'Art 218 AEUV', supra note 22, at para. 105.

[30] Case C-189/97, *EP v. Council (Sea fisheries agreement with Mauretania)*, [1999] ECLI:EU:C:1999:366, at para. 26 et seq.

Question 9

Art. 218 (9) TFEU provides for a simplified procedure for the suspension of the application of an agreement. Quite a good number of agreements concluded by the Union with third states include specific suspension clauses. Important examples of these are: Art. 96 of the Cotonou Agreement[31] as revised in 2010, with the ACP countries (suspension as a measure of last resort in case of a Party failing to meet the essential elements obligations); Art. 102 (5) European Economic Area Agreement[32] (provisional suspension of a part of an Annex to the agreement if in the EEA Joint Committee an agreement on an amendment to the Annex cannot be reached within a certain time period)[33]; or the human rights suspension clause in Art. 107 of the agreement on Partnership and Cooperation between the European Communities and their Member States and the Russian Federation of 1994.[34]

The suspension is meant to allow a swift reaction of the Union in case of severe violations of, for example, human rights (or other elements considered or declared as essential, such as non-proliferation of weapons of mass destruction, cooperation with the ICC, the fight against international terrorism) by the Parties. It is therefore, despite the obvious political importance of such a decision, that Art. 218 (9) TFEU does not provide for participatory rights of the EP; it has only to be "immediately and fully informed". Para. 8 of Annex III of the aforementioned Framework Agreement states that the Commission "shall inform the Council and the Parliament simultaneously and in due time of its intention to propose to the Council the suspension of an international agreement and of the reasons therefor."[35] Following the information, the EP than may invite the Council, the Commission or the Vice-President/High Representative to make a statement, following which there shall be a debate. Parliament may also issue recommendations, which "may include, in particular, a request to the Council not to provisionally apply an agreement until the Parliament has given consent."[36]

[31] Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317/3.

[32] Agreement on the European Economic Area, OJ 1994 L 1/3.

[33] Cf. Baur, '*Suspension of Parts of the EEA Agreement: Disputes About Incorporation, Consequences of Failure to Reach Agreement and Safeguard Measures*', in C. Baudenbacher (ed), *The handbook of EEA law* (Springer 2016), at 69.

[34] **Agreement on partnership and cooperation establishing a partnership between the European Communities** and their Member States, of one part, and the Russian Federation, of the other part, OJ 1997 L 327/3.

[35] Framework Agreement on relations between the European Parliament and the European Commission, OJ 2010 L 304/47, supra note 25.

[36] EP, Rules of Procedure, 8th parliamentary term, January 2017, Rule 109.

It is not clear how to proceed with the suspension of a mixed agreement. Based on the principle of sincere cooperation, one might assume that there is a duty to prior consultations between the Union and the Member States. Once the Union part has been suspended, the remaining rest may become obsolete for the Member States, too.[37]

Question 10

We are not aware of any examples of decisions in accordance with Art. 218 (9) TFEU that have been challenged before a tribunal. However, one decision establishing a Union position has recently been discussed at national level and has led to a negative vote in the Council by Austria. It concerned the definition, at the international level, of new psychoactive substances (NPS). The effect thereof is an obligation to put under criminal sanctions not only, amongst others, the production and trafficking of NPS, but also the mere possession. In accordance with Austrian law, however, the possession is only subject to administrative sanctions. Since the Council decision in accordance with Art. 218 (9) TFEU had as the legal basis Art. 83 TFEU on judicial cooperation in criminal matters that only covers areas of particularly serious crime with a cross-border dimension, Austria considered this situation an excess of competence.

Question 11

In the view of Austria, the rights of information of the European Parliament during the negotiations of international agreements stipulated in Art. 218 (10) TFEU are absolutely justified and indispensable since the directly elected Parliament is called to exercise democratic control at the European level. The Parliament is, through this upstream involvement, also put in a position to fully appreciate the content of the agreement against the commonwealth of the EU and its interests and to take a well-considered decision on whether to give its consent to its conclusion or not. This, however, is only corollary to the role the Council and the special committee designated by it have to play as executive bodies vis-à-vis the Commission (or High Representative). A legitimate expectation and claim by these representatives of the Member States is therefore to receive the same information at the same time as the Parliament, if not in advance. As already stated under Q5, the Austrian government is constitutionally obliged to constantly inform and be ready to consult with the national and regional parliaments on all matters concerning the EU and also on agreements that are negotiated by it

[37] Cf. Lorenzmeier, supra note 28, with reference to Tomuschat, 'Art 300 EG', in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (6th edn., Nomos 2003) at para. 62.

alone or as mixed agreements. The fulfilment of this task becomes very difficult if the information the government gets itself from the chief negotiator or head of the negotiating team is not timely or substantial enough. The double democratic representation, participation and political control by the European as well as by the national and regional parliaments is in full conformity with Art. 10 (2) TFEU.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

Q12 addresses the question whether there is national case law on the application and/or interpretation and/or validity of EU-only or mixed agreements.

A research into Austrian court's practice with regard to EU external action cases since Austria's accession to the European Union in 1995 has thrown up only three relevant cases (out of approximately 200 hits in general) concerning :

- In 1997, the Supreme Court of Justice (OGH), one of three judicial bodies charged with final appellate jurisdiction in the Republic of Austria, decided a case concerning the interpretation of Art. 5 No 2 (Special jurisdiction in matters relating to maintenance) of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention) 1988.[38] The Court ruled that in the interpretation of a provision of an international instrument, priority should be given to "autonomous interpretation" in view of a uniform interpretation of the convention by all parties to it; reference to the national legal order would only be justified in cases where it is manifest that the Parties to the agreement, with regard to certain parts of it, expressly wanted to rely on national legal traditions.
- In 2006, the Supreme Administrative Court (VwGH), ruled in a case concerning a provision of the Austrian "Law on the Employment of Foreign Nationals" against the background of Art. 44 of the Association Agreement [Europe Agreement] between the EC and their Member States and Poland (Establishment).[39] The Court decided that the economic activity of a Polish national as distributor of advertising media did not constitute "self-employment" in the sense of Art. 44 Europe Agreement.
- In 2009, the Supreme Administrative Court (VwGH) had to decide in a case regarding a provision of Austria's "Aliens' Police Act 2005". In this context the Court had to decide whether the interpretation of Art. 29 of the 1995 "Euro-Mediterranean Agreement establishing an association

[38] OGH 28.08.1997, 3Nd506/97.
[39] VwGH 30.11.2006, 2004/09/0093.

> between the European Communities and their Member States, of the one part, and the State of Israel, of the other part" (freedom of establishment and services) was clear enough so that, under the CILFIT doctrine of the CJEU, a request for preliminary ruling was not obligatory. The Court found that in the case the right application of Community Law was so obvious as to leave no scope for any reasonable doubt in the sense of the ECJ's CILFIT ruling.

The requests for preliminary rulings – which are not as such a subject of the questionnaire – may nevertheless serve as an indicator, too, as to what extent these agreements are subjects of national court proceedings.

Since 1995, 227 requests for preliminary rulings (record date 1 January 2017) were submitted to the CJEU by Ordinary Courts (not Administrative Courts), of which 215 have been answered by the CJEU.[40] In the period under review covered by the Decree (8 August 2014 through 30 November 2016), none of the requests concerned international agreements.

The CJEU database reports 15 preliminary rulings concerning requests originating from Austria on questions about external relations. The requests submitted concerned the Association Agreement EEC-Turkey (7), the Association Agreement EC-Bulgaria (1) and the Agreement between the EU and its Member States and the Swiss Confederation on the free movement of persons 3).[41]

Question 13

By way of example, certain problems for the application and the development of the national law with regard to entry, residence and integration measures caused by the CJEU jurisprudence on the direct effect of international agreements exist with regard to the standstill clause in Art. 41 (1) of the EU-Turkey Association Agreement and the related Art. 13 of the Association Council Decision No 1/13 on the rights of migrant workers. In the context of recent developments in connection with immigration policy, the direct applicability of the said provisions limit the room for manoeuvre for the national legislator to apply new methods or systems of measures fostering better integration into the Austrian society, enacted for the totality of newly arrived people, also to persons falling under the scope of the respective agreement.

[40] Ministerial Decree of the Federal Ministry of Justice „Erlass vom 2. Jänner 2017 über den Stand der von österreichischen ordentlichen Gerichten eingeleiteten Vorabentscheidungsverfahren mit Stichtag 1. Jänner 2017", BMJ-EU15116/0013-EU/2016, 2 January 2017.

[41] The other requests concerned autonomous measures of the EU.

Question 14

As mentioned under Q13, in the context of the correct application of the EU-Turkey Association Agreement certain problems have arisen that resulted in tensions between amendments to the national laws and the directly applicable provisions of the said agreement. Some of these problems have been subject to the allegation by the Commission against Austria of non-compliance with its obligations under Union law. The case in point is C-1/15, Commission against Austria, where certain provisions of the Austrian Law on Settlement and Residence („Niederlassungs- und Aufenthaltsgesetz") have been called into question. The case has been removed from the list of cases by a decision of the CJEU on 22 September 2016 after withdrawal by the Commission of its action.

Previously, isolated cases of allegation against Austria of non-compliance with its Union obligations have reached only the preliminary stages of infringement proceedings. These mainly concerned the correct implementation of previous CJEU judgements finding the non-respect by Austria, amongst other Member States, of the EU competences in certain fields (air transport, investment protection and implementation of restrictive measures directed against third countries) that had been covered, in the meantime, by provisions of secondary law that were affected by the conclusion of bilateral agreements of Member States with third countries. These proceedings therefore concerned alleged incompatibilities with internal provisions of Union law or the disrespect of the internal division of competences between the EU and its Member States and not directly non-compliance with obligations deriving from international agreements in force that have been concluded by the EU.

A preliminary ruling procedure started in recent times, however, may be mentioned as an example, again concerning the EU-Turkey relations. In the pending case C-629/16, *CX*, a question has been submitted by the Supreme Administrative Court (Verwaltungsgerichtshof) of Austria on whether a quota requirement under national legislation for goods transport undertakings established in the Republic of Turkey engaged in cross-border commercial carriage is compatible with the obligations deriving from the EU-Turkey Association Agreement, in particular Decision No 1/95 of the Association Council establishing the customs union.

Question 15

In Austria, no specifically dedicated mechanism exists for the supervision of compatibility of provisions of national law or bilateral agreements with third countries with its obligations under Union law. This type of compatibility scrutiny is fully integrated in the usual mechanisms of inter-ministerial consultation before the authorisation of negotiations (given by the head of state upon a proposal by

the council of ministers reached with unanimity) and during the negotiation process. Furthermore, the proposal for a council of ministers decision to ask the head of state for the full powers for signature of an agreement again is subject to a substantial scrutiny, such as the subsequent equivalent procedure leading to the submission to the Austrian parliament in order to obtain the authorisation for conclusion. Each of these texts submitted for approval is accompanied by a technical fiche as well as an exhaustive explanatory memorandum where as one of the main criteria for scrutiny features a section on the relationship of the substantial provisions with the Union Acquis. All this is not only being done by the line ministry primarily competent for the subject matter concerned but always also being checked by the two departments responsible for questions of Union law within the constitutional law service of the Federal Chancellery and the Office of the Legal Adviser of the Foreign Ministry.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16

The concept and the material scope of common commercial policy are primarily defined in Art. 206 (1) TFEU. It therefore covers all measures that contribute to the *effet utile* of the following matters: "..uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies (Art.207 (1) TFEU." The common commercial policy also includes the customs union (Art. 28 to 32 TFEU), which, in accordance with Art. 206 TFEU "shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers." In addition, general policy aims of the common commercial policy are to be found in Art. 3 (5) TEU ("free and fair trade"). The criterion established by the settled case law of the CJEU for the activation of Art. 207 TFEU as a legal basis for an autonomous or external EU measure of the common commercial policy reads as "commitments [that] are intended to promote, facilitate or govern ... trade and have direct and immediate effects on it", or in a more elaborate definition, as "... an EU act falls within that policy if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it".[42] In this context,

[42] Opinion 2/15, *EU-Singapore Free Trade Agreement*, supra note 2, at paras. 38 and 36 respectively.

also Art. 21 (2) (e) TFEU is worth mentioning, which defines as one of the major objectives of the EU's action on the international scene to "encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade." Thus, trade measures shall incidentally also pursue other major policy objectives of the external action of the EU in a coherent and consistent manner (see Q20). By the same token, also reversely Union measures adopted on legal bases falling under other EU policies in application of the "gravity test" contribute to the realisation of common commercial policy objectives.

In respect to the EU's common commercial policy's scope relating to investment, Austria has taken the view that in light of the textual limitation of Art. 207 (1) TFEU to foreign direct investments (FDI), portfolio investments are not covered by the EU's exclusive competences. This position has, by and large, been confirmed by the CJEU in Opinion 2/15 on the delimitation of EU competences to sign and conclude the envisaged EU-Singapore Free Trade Agreement which foresees an investment chapter covering both FDI and portfolio investments.

While the Court opined that FDI is an exclusive competence pursuant to Art. 3 (1) (e) TFEU and thus part of the common commercial policy (see para. 109), it rejected the view taken *inter alia* by the European Commission[43] that portfolio investments were covered implicitly by the EU's competences pursuant to Art. 3(2) TFEU (see paras 236, 237). Likewise, the Court stipulated that Art. 216 (1) TFEU does not form a basis for the conclusion of agreements covering portfolio investments (see para. 244) by the EU alone. We attribute the establishment by the Court of this competence "shared" between the EU and its Member States to the fact that the respective provisions of the internal market chapter concerning the liberalisation of capital movements lack a complete "legal basis" in the technical sense, i.e. providing for a procedure to adopt internal measures of the EU in view of a further liberalisation, for example with regard to portfolio investments (this is only the case for possible restrictions).

As to agreements in the field of transport, the situation is currently unclear from our point of view, especially in light of the position taken by the CJEU in Opinion 2/15. On the one hand, it is to be welcomed that the Court confirms the particularity of transport services, which do not fall under the common commercial policy but form an external aspect of transport policy which is of a shared

[43] See, e.g., Commission (EU), 'Towards a comprehensive European international investment policy' (Communication), COM (2010) 343 final at 8, reflecting on Art. 63-66 TFEU on capital and payments ('That chapter does not expressly provide for the possibility to conclude international agreements on investment, including portfolio investment. However, to the extent that international agreements on investment affect the scope of the common rules set by the Treaty's Chapter on capitals and payments, the exclusive Union competence to conclude agreements in this area would be implied [...].').

nature and subject to gradual and deliberative internal steps of liberalisation. On the other hand, the Court establishes a very delicate distinction, which might give rise to issues of controversial interpretation in the future, between so to say genuine transport services, to be interpreted narrowly, and non-related technical or other services subject to the common commercial policy. Furthermore, the Court's examination of existing EU rules in application of the *ERTA* doctrine and Art. 3 (2) TFEU as to which of them may be affected by the respective parts of the EU-Singapore Agreement seems rather summary and not detailed enough.

The concept of common commercial policy in Austria's view does not cover the entire TRIPs agreement, as competences with regard to criminal law remain with the Member States.

Question 17

For EU investors in third States, the framework of 1395 investment agreements (BITs)[44] concluded by Member States remains the most important source in contemporary investment law.

This notwithstanding, many of these treaties are no longer state of the art. Moreover, maintaining a large number of BITs without clear relationship to each other is not desirable and arguably contributes to the fragmentation of international law. Austria therefore welcomes efforts by the EU to negotiate modern investment agreements with a view to progressively replace the current fragmented system of Member States BITs.

In practice, the relationship between early Member States BITs and subsequent agreements with the same third States on the same subject matter concluded by the EU pertains primarily to the following questions: (i) Is there an obligation upon Member States to terminate their old BIT? (ii) Is the EU entitled to terminate earlier Member States BITs? Whereas the former question is one of an exclusive EU Law nature, the latter issue is also a matter of public international law.

The status of Member States' BITs with third States under EU Law is governed by the Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment treaties between Member States and third countries[45] ('grandfathering regulation'), which had been adopted in light of the EU's newly gained competences with regard to investment upon the entry into force of the Lisbon Treaty. Art. 3 of this regulation stipulates that BITs

[44] See UNCTAD Investment Policy Hub, available at <http://investmentpolicyhub.unctad.org/> accessed 21 August 2017.

[45] Regulation (EU) 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40.

concluded by Member States and notified to the European Commission 'may be maintained in force, or enter into force, in accordance with the TFEU and this Regulation, until a bilateral investment agreement between the Union and the same third country enters into force.' (emphasis added). This rule reflects the more general provision of Art. 351 (1) TFEU, which deals with incompatibilities with Union law regarding the substance matter of agreements of Member States with countries.[46] It follows that EU law imposes a general obligation upon Members States to terminate their BITs upon the conclusion of an agreement by the EU with the same third State.[47] In the absence of such EU agreement, Member States' BITs remain valid and in force subject to the requirement that they are in accordance with primary law.

The treaty law question as to whether the EU is in itself entitled to terminate Member States' BITs in view of the conclusion of a subsequent 'Post-Lisbon' treaty of the EU warrants a look at the 1969 Vienna Convention on the Law of Treaties (VCLT)[48], which is to a large extent declaratory of customary international law.

Under the VCLT, a treaty may terminate in conformity with its provisions[49], by consent of the parties to the treaty[50] or on the basis of the *lex posterior* rule contained in Art. 59 VCLT, which concerns termination implied by conclusion of a later treaty on the same subject-matter.

It is important to note that the personal scope of these provisions is limited to the parties to the agreement to be terminated.[51] In other words, all parties to an earlier BIT must also be parties to a later BIT in order to rely upon Art. 54 or Art. 59 VCLT. Hence, in order to invoke Art. 54 or 59 VCLT, the EU would have to automatically succeed to the BIT concluded by the Member States, to which it is not a party, upon the conclusion of its own BIT with the same third country and then terminate the earlier BIT.

[46] Art. 351(1) TFEU ('The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.').

[47] In cases, where the Commission establishes that one or more of the provisions of a BIT notified pursuant to Art. 2 of the regulation constitute a serious obstacle to the negotiation or conclusion by the Union of BITs with third countries, this obligation may be triggered at an earlier point in time. See Art. 6, supra note 45.

[48] Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[49] Art. 54 (a) VCLT.

[50] Art. 54 (b) VCLT

[51] Art. 54 (b) VCLT reads 'At any time by consent of all the parties after consultation with the other contracting States. States parties to successive treaties relating to the same subject-matter'; Art. 59 (1) VCLT reads: 'A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and [...]' (emphasis added).

In our view, public international law does not provide for such a rule. In the words of Advocate General Sharpston, '[s]uch a rule would constitute an exception to the fundamental rule of consent in international law-making.'[52]

Moreover, the above mentioned grandfathering regulation appears to adhere to the view expressed here, as the obligation to terminate earlier BITs must, if necessary, be exercised by the Member States.[53] This view is further supported by Art. 1 (1) and recital 3 of said regulation, which both unambiguously state that this regulation is without prejudice to the 'allocation of competences between the Union and its Member States in accordance with the TFEU'.

The CJEU has addressed the issue of termination of earlier Member States BITs in Opinion 2/15. Art. 9.10 of the underlying text of the envisaged EU-Singapore FTA contains a provision on the automatic termination of existing BITs of Member States.[54] It is fair to say that the Court has adopted an approach different to the position expressed above and contrary to Advocate General Sharpston[55]. It opined that '[...] the line of argument that a provision such as Art. 9.10 of the envisaged agreement cannot be included in an agreement concluded by the European Union since it falls within a competence of the Member States alone cannot succeed.'

Rather, the Court noted, the EU's competence to agree to a provision that intends to terminate earlier BITs of Members States, corresponds to that under the concept of common commercial policy.[56]

Thus, the reading that should be given, both taking into account Union law and public international law, to the Court's findings discussed above is as follows: In so far as subject matters covered by a previous Member State BIT with a third country fall within the definition of FDI as an element of the exclusive internal and external competence of common commercial policy, the EU has exclusive competence to enter into respective treaty obligations with that third country.

[52] Opinion 2/15, *EU-Singapore Free Trade Agreement*, supra note 2, Opinion of AG Sharpston, at para. 396.
[53] See Art. 3 of Regulation 1219/2012, supra note 45; see also Art. 6 which refers to 'appropriate' action to be taken by Member States.
[54] Art. 9.10 (1) of the EU-Singapore FTA reads as follows: 'Upon the entry into force of this Agreement, the agreements between Member States of the Union and Singapore listed in Annex 9-D including the rights and obligations derived therefrom, shall cease to have effect and shall be replaced and superseded by this Agreement [...].'. Furthermore, footnote 19 clarifies that 'the agreements between Member States of the Union and Singapore listed in Annex 9-D shall be considered as terminated by this Agreement, within the meaning of subparagraph 1 (a) of Art. 59 of the Vienna Convention on the Law of Treaties.'.
[55] See Opinion 2/15, *EU-Singapore Free Trade Agreement*, Opinion of AG Sharpston, supra note 52, at para. 398 ('I therefore conclude that the Member States enjoy exclusive competence to terminate bilateral investment agreements which they previously concluded with third States. As a result, the European Union has no competence to agree to Art. 9.10 of the EUSFTA.').
[56] Opinion 2/15, *EU-Singapore Free Trade Agreement*, supra note 2, at para. 256.

The EU has also the competence to require Member States to take the necessary formal steps to adjust their bilateral contractual relations with that third country in conformity with the new EU-rules applicable. We are talking about a mere material superseding of former Member State rules by applicable EU rules, however, not about a formal capacity entrusted to the EU to take the formal steps concerning the initial Member State BIT itself. To the extent that provisions related to investment other than direct investment (i.e. portfolio investments) are concerned, the Member States have retained their possibility to act and to enter inter into public international law obligations with third states.

Question 18

As indicated above, Austria believes that the current framework of Member States BITs is no longer state of the art and arbitral practice has highlighted some of its shortcomings. Against this background, Austria has been generally supportive of the European Commission's new approach to Investor-State Dispute Settlement (ISDS) and its novel, two-tier investment court system as foreseen in the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and the EU-Vietnam FTA.

The proposed Investment Court System has, however, raised questions as to the enforceability of its 'awards'[57]. Also, even though there is broad agreement among States about the need of reform of the current ISDS system[58], the experience of the EU's negotiations have shown that some States are inclined to take a different approach.[59] Moreover, in a number of Member States including Austria, in the internal political debate involving politicians, the media as well as the broader interested circles and civil society, fundamental questions have been raised as to the necessity of establishing a permanent adjudicatory body. In our view, it would be inappropriate to turn a blind eye to these obvious problems. In order to address these issues, some aspects of the novel approach on ISDS could require reconsideration.

[57] On this, see, e.g., A. Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' 19 *Journal of International Economic Law* (2016) at 761-786; N. Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' *Journal of World Investment & Trade* (Forthcoming).

[58] See, most recently, UNCITRAL's decision to continue work on the possible reform of investor-State dispute settlement, available at <http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html>.

[59] See, e.g., the 'Agreement in Principle' on the EU-Japan Economic Partnership Agreement of 6 May 2017, available at <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155693.doc.pdf>; It is telling that it does not cover ISDS: 'On investment, while some parts such as investment liberalisation were agreed in principle, there is still no agreement on the whole chapter, as the issue of investment dispute resolution remains fully open.'.

In the long term future, the EU should strive to replace the bilateral Investment Court Systems by a multilateral investment court.

Question 19

The question of liability for breaches of said agreements is governed by Regulation 912/2014[60], which applies to ISDS-cases based on an agreement 'to which the Union is party, or the Union and its Member States are parties, and initiated by a claimant of a third country.'

Under its Art. 3, the EU shall, in principle, bear the financial responsibility arising from treatment afforded by the institutions, bodies, offices or agencies of the Union. *Vice versa*, the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State unless such treatment was required by EU law.

We deem these criteria appropriate.

Question 20

Art. 207 (1) last sentence TFEU states that "The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." This needs to be understood as a reference back to the obligation of the EU stipulated in Art. 21 (1) and (3) TEU to pursue a common set of values and objectives throughout the very varied policies comprised by the category of "external action" that was introduced by the Lisbon Treaty (see Q16). The same importance is vested in Art. 205 TFEU which reiterates, by way of systematic clarification, the validity of Art. 21 TEU in the context of the definition and implementation of the specific policies of the EU's external action, amongst them the common commercial policy.

The effect of these provisions is twofold: first, a sort of mainstreaming of the common values and objectives of the EU also for its external action, including common commercial policy; second, a legal reinforcement of the overarching maxims of policy coherence and consistency of the EU's external action. CJEU Opinion 2/15 on the EU-Singapore Free Trade Agreement, para. 147 in Austria's view therefore quite rightly comes to the conclusion that it "FOLLOWS THAT THE OBJECTIVE OF SUSTAINABLE DEVELOPMENT HENCEFORTH FORMS AN INTEGRAL PART OF THE COMMON COMMERCIAL POLICY", for example. In its recent Communication "A Balanced and Progressive Trade Policy to Harness

[60] Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L 257/126.

Globalisation"[61], the European Commission, too, has stressed the need for the EU trade policy to contribute to promoting the universal values the EU adheres to and in particular by safeguarding high European standards of environmental, consumer, social and labour protection as well as fundamental rights without compromise.[62]

Question 21

Austria does not have any particular comments to add on the process of negotiation or conclusion of trade agreements. With regard to the internal steps to be taken in close cooperation by different EU institutions, the same remarks apply as those made in Q5. The representatives of the Member States constituting the special committee appointed by the Council in accordance with Art. 207 (3) (3) TFEU need to be regularly and comprehensively informed by the Commission as Union negotiator in order to be in a position to assess the progress of the negotiations and to be able to provide guidance to the Commission. One aspect that deserves further thorough reflection by the EU in this context is the policy of transparency with regard to the negotiating directives given by the Council to the Commission in order to allow for a genuine political debate involving the wider public and civil society at the EU and at the national levels. With regard to the list of cases where a unanimity requirement is established for the decision taking of the Council in matters of trade agreements, the impression of Austria is that the thresholds for triggering of this unanimity have been raised by the Lisbon Treaty in way that it has become quite difficult to prove that any of these situations is applicable in the context of a concrete trade agreement project.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

Austria has concluded several bilateral agreements with third countries concerning the implementation of visa requirements established by Union law. These are in conformity with Regulation 539/2001 and are necessary in order to establish vis-à-vis third countries, to which the Regulation obviously does not apply, the modalities for mutual visa free entry. It goes without saying that in view of the total harmonization of the visa requirement or waiving thereof through Regulation 539/2001, it is no longer up to the Member States to grant visa free travel

[61] Commission (EU), 'A Balanced and Progressive Trade Policy to Harness Globalisation' (Communication) COM (2017) 492 final, 13 September 2017.
[62] Ibid., at 4.

by themselves unilaterally or, in view of the *ERTA* effect, in an agreement with a third country. Without the bilateral agreements by Member States, visa free travel, however, would be a unilateral matter regulated only as an obligation of the Member States. Moreover, a number of bilateral agreements by Member States refer to visa free entry of holders of diplomatic passports, official-duty passports and other official passports, using the option offered to the Member States by Art. 5 (1) (a) of Regulation 539/2001. The EU did not have the sufficient capacities to negotiate and conclude visa agreements with all third countries immediately at the time of entry into force of the regulation and it still does not have. Therefore, Union agreements will only gradually replace Member States' bilateral agreements with third countries. Irrespective of the progressive conclusion of visa agreements by the EU with regard to other countries, these bilateral agreements by the Member States remain in force. With regard to Protocol (No 23) Austria is of the opinion that as soon as the Commission has a mandate for negotiations, the Member States are no longer allowed to start or proceed with bilateral negotiations with regard to the respective third country.

Question 23[63]

With regard to the lists of safe third countries, where often "safe countries of origin" are distinguished from safe third countries of transit, Austria is in favour of maintaining a national list even in case of the adoption of an EU list. The EU list would thus serve as a measure of minimum harmonization, providing for those countries which all EU Member States have to recognize. In addition, the national list could state further countries that the respective Member State considers a safe country.

In Austria there is a list of safe countries of origin[64], which includes the following states: EU Member States, Australia, Iceland, Canada, Liechtenstein, New Zealand, Norway and Switzerland. In addition, the Federal Government may establish, by way of regulation (§ 19 (5) of the same law), a list of other states as safe countries of origin. The list thus established[65] includes the six countries of the Western Balkans, Mongolia, Ghana, Morocco, Algeria, Tunisia and Georgia.

The concept of safe third country is enshrined in the Austrian asylum statute (§ 4(1) AsylG 2005). However, no further legislation in the form of a directive exists, setting up a list of safe third countries (as of October 2017). Answering to an official request in parliament in June 2016, the still incumbent Minister for

[63] The rapporteurs would like to thank Stefan Salomon of the Institute of International Law and International Relations, University of Graz, for his valuable contribution to answer this question.

[64] § 19 (4) BFA-Verfahrensgesetz, BGBl I Nr 87/2012 idF BGBl I Nr 24/2016.

[65] Herkunftsstaaten-Verordnung – HStV), BGBl. II Nr. 177/2009 idF BGBl II Nr 47/2016.

the Interior did not mention the creation of such a list.[66] Hence, the admissibility of every asylum claim is examined on a strictly individual basis. If access to protection in a safe third country exists, the application for international protection is deemed inadmissible. Access to international protection exists under the following cumulative conditions: (i) asylum proceedings can be accessed in either the safe third country or access to such proceedings is guaranteed by another state; (ii) the asylum seeker enjoys a right to residence during these proceedings and; (iii) the asylum seeker enjoys protection from refoulement to the country of origin.[67]

According to legal literature, it is not required that protection was already granted or an application for international protection has already been lodged in the safe third country. Rather, the literature deems *access* to asylum *proceedings* sufficient.[68] Unlike German asylum law, for instance, Austrian asylum law establishes the concept of safe third countries not as static, but as a prognosis that has to be reviewed by the asylum authorities on an individual basis.[69] The depth of judicial review depends on the objections proffered by the asylum seeker. These conditions equally apply if a safe third country already granted international protection to an asylum seeker.

The Supreme Administrative Court repeatedly held that an asylum application can only be deemed inadmissible, if protection can effectively be accessed. This presupposes that the asylum seeker must effectively have legal access to the territory of the respective safe third country, either voluntarily or by means of forced return.[70]

Austria doesn't use the concept of super-safe third country. In order to classify a third country as "safe", the ECHR and the Geneva Convention should set the standard (but not secondary EU law).

The concept of "super-safe third country" is regulated by the subsequent provision of the Asylum Statute (§ 4a AsylG 2005). The delimitation to the concept of safe third country is provided by the narrower wording of the respective provision: it applies only to a person who *has already been granted international protection* by another state of the *European Economic Area or by Switzerland*. At the same time, the threshold to rebut the presumption of protection in a super safe

[66] See, 8743/AB XXV. GP (22 June 2016), available at <https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_08743/imfname_542926.pdf>.

[67] § 4 (2) Austrian Asylum Statute (AsylG 2005).

[68] Schrefler-König, '§ 4 AsylG 2005', in A. Schrefler-König and W. Szymanski (eds), *Fremdenpolizei- und Asylrecht* (Manz 2015).

[69] E.g. BVwG W192 2013342-1, ECLI:AT:BVWG:2015:W192.2013342.1.00 (the Federal Administrative Court deemed the asylum application of a Syrian national who possessed a valid residence permit issued by Bosnia-Hercegovina inadmissible).

[70] VwGH 11. 11. 1998, 98/01/0284; VwGH 6.10.2010, 2008/19/0483.

third country is assumed to be higher than the rebuttal of the prognosis taken in regard to safe third countries.[71]

Question 24

Austria has concluded bilateral agreements with some African countries on matters such as police cooperation, anti-corruption, civil protection, readmission (Memoranda of Understanding as well as formal agreements). These agreements cannot, however, be regarded as examples for the launch of pacts between the EU and African countries. Austria has special relations with Western Balkan countries, but not with African countries. The new Partnership Framework should not replace the Global Approach (GAMM) – the latter concerns, inter alia, a dialogue on a global level, mobility and legal migration whereas the new migration partnerships focus on the fight against migrant smuggling, return and introduce the concept of "less for less".

Question 25

Art. 79 (3) TFEU provides the EU with the primary explicit competence (see Q3) to conclude readmission agreements. In accordance with Art. 216 (1) and Art. 4 (1) TFEU, this is a shared competence. As long as it has not been exercised by the Union, the Member States are therefore free to act. An exclusive external competence based on Art. 3 (2) TFEU could only be created if and to the extent to which the rules governing readmission of persons entering the or staying illegally in the EU are laid out in internal legal acts that could be affected in the sense of the *ERTA* doctrine.

As long as the Commission negotiates a return agreement with a third country, the Member States are not allowed to negotiate themselves bilateral agreements on the same matter with regard to the same country. However, in case of longstanding, unsuccessful negotiations by the Commission, the Member States should be allowed to continue the former bilateral negotiations or to start new negotiations. Despite the existence of an EU readmission agreement, bilateral arrangements for the implementation of the EU agreement should and could be concluded. It is in fact quite often the case, if not the rule, that readmission agreements concluded by the EU with third countries provide for instruments in the form of protocols to the EU agreement. These are to be concluded by the EU Member States with the third country in order to flesh out the practical details of the cooperation between the respective administrations. Apart from that, it is generally possible for the EU agreements to contain provisions on their relationship to bilateral agreements concluded previously or afterwards by the

[71] C. Filzwieser et al., *Asyl- und Fremdenrecht* (Neuer Wissenschaftlicher Verlag 2016), at 543.

Member States. Lastly, Art. 351 TFEU could be mentioned which regulates the legal consequences of previous Member States agreements being caught up by obligations under Union law in case of accession, competence transfers or subsequent developments in Union law.

BULGARIA

Svetlana Chobanova*

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

Pursuant to the ERTA principle, the EU enjoys implied exclusive competence to conclude international agreements where there is a risk that the Member States, acting outside the framework of the EU institutions, might assume international obligations affecting common rules or altering their scope.[1] The principle was developed by the CJEU taking into account the primary law requirement that the Member States take all appropriate measures to ensure fulfilment of their obligations in the Treaties or resulting from an action taken by the institutions and their duty to abstain from any measure capable of jeopardising the attainment of the Treaty objectives (which would circumvent the rules set out in the Treaties for implementing EU policies and would therefore be liable to call into question the very essence of the EU integration process). In line with this case law, Article 216(1) TFEU grants the EU competence to conclude, inter alia, any international agreement which "is likely to affect common rules or alter their scope". Under Article 3(2) TFEU this competence is exclusive.

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[1] Case 22/70 *Commission v. Council*, para. 22.

The ERTA effect has recently been discussed in Opinion 2/2015. The CJEU examined the question as to whether the commitments contained in Chapter 8 of the EU-Singapore FTA relating to the supply of services in the field of transport, despite not falling within the common commercial policy, nevertheless were likely to affect common rules or alter their scope. The Court found that commitments relating to maritime, rail and road transport fall within areas already largely covered by EU rules the scope of which may be affected or altered, thus determining the existence of exclusive EU competence to approve those commitments in the EU-Singapore FTA. At the same time, the EU did not have exclusive competence with respect to commitments concerning non-direct investment, in the absence of such EU rules.[2]

The Court took a similar approach in Opinion 3/2015, stating that the body of obligations laid down by the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled, fell within an area that is already covered to a large extent by common EU rules, although the EU legislation brought about only partial harmonization of the relevant IP rights. In particular, the CJEU distinguished the facts of that case from those in Opinion 2/91, in which the EU did not have exclusive competence because both the provisions of EU law and those of the international convention in question laid down minimum requirements.[3] This approach represents a somewhat broader application of the ERTA principle than the one advocated by the Member States and developed by AG Sharpston in the 2014 *Neighbouring Rights* case, which stated that the EU competence under this doctrine "depends on a detailed and comprehensive comparison between the areas covered by the envisaged international agreement and EU law" and engaged in an analysis at the level of the specific rules most likely to be included in the agreement at issue.[4]

Despite the position taken by the Court, it is unlikely that the Council and its Member States will change their position about mixity, a practice founded on the fundamental principle of conferral and which in their view has proven to be very useful. As concerns Bulgaria in particular, this controversy is exemplified by a recent referral (18 July 2017) of the text of CETA by the president of Bulgaria to the Bulgarian Constitutional Court.[5] The request is for interpreting the

[2] Opinion 2/2015, paras. 170-212 and 229-241.

[3] Opinion 3/2015, paras. 118-120. Instead, the Court held that "[t]hose provisions of Directive 2001/29 do not set a minimum level of protection of copyright and related rights while leaving untouched the Member States' competence to provide for greater protection of those rights. Rather, they introduce a derogation from the rights harmonised by the EU legislature, permitting the Member States to provide, subject to certain conditions, for an exception or limitation to those rights." (Ibid., para. 121).

[4] Opinion of AG Sharpston in case C-114/12 *Commission v. Council*, paras. 109-166.

[5] https://www.president.bg/news3862/prezidentat-sezira-konstitutsionniya-sad-za-seta.html

provisions of the Constitution relating to the conditions for the ratification and operation of such mixed international agreements (Articles 5(4) and 85(1)(9)), the participation of Bulgaria in the EU (Article 4(3)) and its economic development (Articles 19 and 20). Article 85(1)(9) provides for mandatory ratification by the National Assembly of international agreements conferring upon the EU powers that stem from the Bulgarian Constitution; Article 5(4) states that the international agreements that have been ratified, promulgated and entered into force for Bulgaria form part of its domestic law and take precedence over contradicting rules of domestic law; pursuant Article 19, the law shall create and guarantee equal legal conditions for economic activities to all physical and legal persons, shall prevent the abuse of dominant positions and unfair competition, and shall protect the consumer.

The Constitutional Court will have to determine whether some of the CETA provisions, such as the possibility for foreign investors to sue the state before supranational arbitral tribunals, do not contradict the constitutional provision.[6] This move by the president has been seen as political, rather than legal. At the same time, the removal of temporary resident visa requirements for Bulgarian citizens which was negotiated in the context of CETA has been widely regarded by the Bulgarian government as an important achievement.[7]

Question 2

The three options in Article 3(2) TFEU are a codification of the jurisprudence of the CJEU. The first option (the conclusion of an international agreement is provided for in a legislative act of the EU) reflects the reasoning of the Court in Opinion 1/94 that "[w]henever the [EU] has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts".[8] This provision applies subject to Article 4(3) and (4) TFEU, pursuant which the EU's competence to carry out activities (in particular to define and implement programmes, in the areas of research, technological development and space, and to carry out activities and conduct a common policy in the areas of development cooperation and humanitarian aid) "shall not result in Member States being prevented from exercising theirs".

[6] http://glasove.com/categories/vytreshni-glasove/news/prezidentyt-sezira-konstitucionniya-syd-za-seta

[7] https://news.bg/world/iztarguvahme-podkrepata-za-seta-balgari-i-rumantsi-bez-vizi-za-kanada.html

[8] Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property [1994] ECR I-5267, paragraph 95; see also Commission v Denmark, cited in footnote 39, paragraph 83; Commission v Germany, cited in footnote 39, paragraph 109.

The second option (the conclusion of an international agreement is necessary to enable the EU to exercise its internal competence) is in line with the Court's case law in Opinion 1/76, pursuant which the EU has exclusive external competence where the objectives of EU internal competences cannot be achieved without including third countries, through international agreements, into the binding legal framework regulating the situation.[9] In such specific cases, where the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules, there is no requirement of prior internal EU legislation for the exercise of the external competence. By contrast, where the EU wishes to further, on the external front, internal legislative goals the optimal use of which presupposes an external complement, but which could nonetheless be sufficiently attained with internal legislation only, the EU does not acquire exclusive external competence.[10]

The third option (the conclusion of an international agreement may affect common rules or alter their scope) has its origins in the ERTA doctrine pursuant which "to the extent to which [EU] rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the [EU] institutions, assume obligations which might affect those rules or alter their scope".[11]

The CJEU has held now that this third option does not apply to a situation where the EU rule referred to is a provision of the Treaties and not a rule adopted on the basis of those Treaties, i.e. if the EU's legislative competence has not been exercised internally.[12] This conclusion follows from the context of the ERTA judgment which presupposes that the EU, "with a view to implementing a common policy envisaged by the Treaty, adopts common rules", i.e. secondary law, in order for the Member States to lose their right "to undertake obligations with third countries which affect those rules".[13] Furthermore, in the light of the primacy of the Treaties over acts adopted on their basis, those acts, including agreements concluded by the EU with third states, derive their legitimacy from those Treaties and cannot have an impact on the meaning or scope of the Treaties' provisions. Those agreements accordingly cannot "affect" rules of primary EU law or "alter their scope", within the meaning of Article 3(2) TFEU.[14]

[9] See G. De Baere, *The Framework of EU External Competences for Developing the External Dimensions of EU Asylum and Migration Policy*, p. 11.

[10] See Opinion 1/94, para. 85 and Opinion 2/92, para. 32.

[11] Case 22/70 *Commission v. Council*, para. 22.

[12] Opinion 2/2015, paras. 230-238.

[13] Opinion 2/2015, para. 233, referring to case 22/70 *Commission v. Council*, para. 17.

[14] Opinion 2/2015, para. 235.

Question 3

Article 216(1) TFEU explicitly confirms the general capacity of the EU to conclude international agreements and thereby determines the *existence* of EU external competence, not its exclusive nature.

The first option under Article 216(1) ("where the Treaties so provide") concerns an explicit conferral of competence upon the EU to conclude international agreements by the Treaties. In the areas listed in Article 3(1), such as the common commercial policy for instance, where the EU enjoys exclusive competence, the EU will also enjoy exclusive external competence to conclude international agreements.[15]

The second option under Article 216(1) (the conclusion of an agreement "is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties") is a codification of the Court's case-law on implied external competences. However, the contrast between when the EU acquires external competence under Article 216(1) TFEU and when such competence becomes *exclusive* under Article 3(2) TFEU (when the conclusion of an agreement "is necessary to enable the Union to exercise its internal competence") is not very clear. In this regard, Article 216(1) seems to envisage a situation in which the EU's external action may be the optimal use of its internal legislative powers but is not indispensable for attaining their goals. In other words, this is not the narrow hypothesis "where the internal competence may be effectively exercised only at the same time as the external competence ..., the conclusion of the international agreement thus being necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules".[16] Thus, unless the requirements under one of the three options in Article 3(2) are met, the competence conferred under this option would be shared. The CJEU has confirmed that "[t]he competence conferred on the European Union by Article 216(1) TFEU in respect of the conclusion of an agreement which is 'necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties' is ... shared, since Article 4(1) TFEU provides that the European Union 'shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6'".[17]

The third option under Article 216(1) (the conclusion of an agreement "is provided for in a legally binding Union act") seems to correspond to the first option under Article 3(2) (the conclusion of an agreement "is provided for in a legislative

[15] See Opinion AG Sharpston, para. 66. De Baere, *supra*, p. 9.

[16] Case C-476/98 *Open Skies*, para. 83.

[17] Opinion 2/2015, para. 242.

act of the Union") conferring to the EU exclusive external competence. Yet, the difference in language between Articles 3(2) (legislative act of the Union) and 216(1) TFEU (a legally binding Union act) may imply that the exclusive nature of the external competence depends on the nature of the procedure by which the internal act granting that competence was adopted.[18]

The fourth option under Article 216(1) (the conclusion of an agreement "is likely to affect common rules or alter their scope") codifies the ERTA doctrine and corresponds to the final option under Article 3(2) (the conclusion of an agreement "may affect common rules or alter their scope"). As discussed above, exclusive external competence by the EU may be acquired in this manner if obligations under the agreement either fall within the scope of the common rules, or within an area which is already largely covered by such rules, even if there is no contradiction between those commitments and the common rules.

Question 4

See Answer to Question 3.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

The Article 218(4) TFEU obligation should be read in light of the Article 13(2) TEU requirement for the Council and the Commission to practice mutual sincere cooperation. In other words, it is the responsibility of the Commission to cooperate closely with the Council, including through the special committee, with a view to ensuring the conclusion of the agreement by the latter. In particular, the Commission may be required by the negotiating guidelines to provide the special committee designated by the Council with all the information necessary for it to monitor the progress of the negotiations (such as the general aims announced and the positions taken by the other parties throughout the negotiations), so that the committee can formulate opinions and advice relating the positions that the Commission must adopt in the negotiations. Thus, the negotiating directives set out by the Council may lay out not only strategic choices and substantive objectives to be defended during the negotiations, but also procedural arrangements governing the process for the provision of information, communication and consultation between the special committee and the Commission. The Commission may also be required to provide that

[18] De Baere, *supra*, p. 11.

information to the Council and not only to the special committee, in order for it to have clear knowledge of the course of the negotiations concerning the preparation of a draft agreement that will be submitted to it for approval.[19]

At the same time, as the negotiator, the Commission should have a certain margin of discretion, so that it can seek the best result for the EU's interests. In particular, the Court has recognised that the special committee cannot adopt positions which have binding effects on the Commission.

Question 6

Provisional application of international agreements or parts thereof is a common practice envisaged in Article 25 VCLT. Article 218(5) permits the EU to provisionally apply an agreement at the time of signature on the basis of a Council decision. In cases where the agreement never comes into force, it may operate on the basis of provisional application for many years, which may have the effect of bypassing normal democratic controls on treaty making.[20] Thus, the provisional application of treaties may lead to a conflict between international and constitutional law or may be a subterfuge aimed at evading the domestic legal requirements for its approval and subsequent ratification for the sole purpose of avoiding domestic policy situations that make it inconceivable for the competent legislative body to approve the treaty.[21] At the same time, mixed agreements, requiring ratification by each Member State in accordance with its constitutional requirements (including ratification by regional parliaments or national referenda), significantly prolong the duration of the ratification process which causes a great amount of legal uncertainty for both governments and businesses in the EU, as well as for EU treaty partners.[22] In this sense provisional application ensures the effectiveness of the EU external action.

In order not to circumvent the right of national and regional parliaments to ratify mixed agreements, those provisions which fall within the competences shared between the EU and the Member States (listed in Article 4(2) TFEU)

[19] Case C-425/13 *Commission v. Council*, paras. 66-67, 77-78. For instance, the negotiating directives could provide that the Commission shall inform the Council of the anticipated schedule and the issues to be negotiated and shall forward the relevant documents as early as possible, in order to allow the members of the special committee reasonable time to prepare themselves properly for the forthcoming negotiations; the Commission shall report to the Council on the outcome of the negotiations after each negotiating session, and shall inform the Council and consult the special committee on any major problem that may arise during the negotiations; for the Commission to seek guidance from special committees subject to the prior authorisation of the special committee. (Ibid., paras 81-83)

[20] L. Bartels, "Withdrawing Provisional Application of Treaties: Has the EU made a Mistake", *Cambridge Journal of International and Comparative Law* 1(2012), p. 112.

[21] International Law Commission, First report on the provisional application of treaties, p. 9.

[22] D. Kleimann and G. Kübek, p. 11.

should not be applied provisionally, unless *all* Member States have agreed to it separately. In this regard, it must be noted that the *Bundesverfassungsgericht* (BVerfG) the provisional application for areas that remain subject to the competence of the Federal Republic of Germany cannot be approved.[23] Decisions on the provisional application of a mixed agreement in its entirety usually include a statement clarifying that Member States have given their agreement with respect to their competences.[24] For instance, with regard to CETA chapters on trade and sustainable development, labour, and environment, the Council decision[25] includes wording that allows for provisional application of those chapters respecting the allocation of competences between the EU and the Member States. Furthermore, novel issues to be included in trade agreements which require national debate at Member State level (e.g. the provisions on Investment Court System, as well as certain provisions relating to financial services and taxation in CETA), or issues that are particularly sensitive for the Member States (e.g. criminal enforcement of intellectual property rights and cultural cooperation in the EU – Korea FTA) are not suitable for being applied provisionally at all. It must be observed that, in line with past practice, the fact that Member States support the provisional application of certain treaty parts should not prejudge their position as to the nature of the related competences (shared or Member States' exclusive).

Concerning the participation of the European Parliament, by omitting a reference to its approval or consent, Article 218 arguably still reflects the notion of an executive prerogative of nation state governments, as provided for in Article 25 VCLT.[26] Nevertheless, it has been the practice of the Council to obtain the Parliament's consent pursuant to Article 218(6)(a) before authorising the provisional application of singed international agreements. Thus, for instance, the Council adopted the decisions on the signature and provisional application of CETA and the signature of the Agreement at the EU-Canada Summit on 30 October 2016. However, CETA was provisionally applied only after the EP gave its consent on 15 February 2017.[27] This working assumption, albeit not provided

[23] Bundesverfassungsgericht, "Applications for a preliminary injunction in the CETA proceedings unsuccessful", Press Release No. 71/2016 of 13 October 2016.

[24] European Parliament, "A guide to EU procedures for the conclusion of international trade agreement", p. 7.

[25] Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

[26] Kleimann and Kübek, *supra*, p. 16.

[27] Answer to a question of the European Parliament given by Ms Malmström on behalf of the European Commission. At: http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-008912&language=EN; European Commission Press Release: http://europa.eu/rapid/press-release_MEMO-17-271_en.htm

for in the TFEU, provides necessary democratic anchor to executive decision-making at the EU level and alleviates the Parliament from the additional pressure to approve an FTA, insofar as the relevant administrations would have started implementing the agreement and the economic operators would have started adapting their operations. At the same time, where the consent of the Parliament is not required pursuant to Article 218(6)(a) TFEU and sufficient consultation has been ensured in the process of negotiations pursuant to Article 218(6)(b), no additional steps may need to be taken.

Question 7

In principle, the provisional application of a treaty not yet entered into force constitutes a unilateral act done by one of the parties who may decide at any time to terminate said application. However, arguably, a single Member State, by acting as an independent party to an agreement, may not terminate the provisional application of a mixed agreement on behalf of the EU and all remaining Member States. Instead, pursuant to Article 218(9) TFEU, the decision to end the provisional application of an agreement under EU law has to be adopted by a qualified majority in the Council.

A mixed agreement can only enter into force fully and definitively when all EU Member States have ratified it in line with their national procedures. The Council Declaration accompanying CETA states: "If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures."[28] Therefore, whereas a Member State can trigger a process to terminate provisional application, a decision of the EU institutions can only be reversed by the same EU institutions.[29]

Thus, the fact that a Member State does not ratify a mixed agreement does not necessarily mean that its full entry into force would not occur. If, for example, opposition to the investment and dispute resolution provisions in CETA leads to its non-ratification by one or several national or regional parliaments, negotiations could still be carried out between the EU institutions and the relevant Member Stats, and with Canada, with a view to amending the provisions that have led to the failure of the ratification process. In particular, Member States can only reject the signature and conclusion of a mixed agreement for the parts

[28] Doc. 13463/1/16 REV 1, 27 October 2016.

[29] Answer to a question of the European Parliament given by Ms Malmström on behalf of the European Commission. At: http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-008912&language=EN

that fall under exclusive national competences, as well as shared competences that the EU has chosen not to exercise. The Commission could therefore argue on the basis of the duty of sincere cooperation under Article 4(3) TEU that the provisional application, which concerns EU competences only, should be maintained in order to allow renegotiation and to find a mutually acceptable solution. It has been argued that Article 4(3) prescribes a duty for Member States to fulfil their obligations resulting from the decisions of the Council: they are bound to sign and ratify the parts of a mixed agreement that fall under EU express and implied exclusive competence.[30] As for provisions relating to Member States' competences, a dissenting Member State could, in practice, formulate a reservation that specifies the provisions that will not apply on its territory.

Finally, it is also possible that the ratification process permanently fails and no renegotiation with all Member States and Canada is agreed upon, in which case the provisional application would have to be terminated (see e.g. Article 30.7(3)(c) CETA).

Question 8

As a matter of principle, the choice of legal basis should be determined by objective factors amendable to judicial review.[31] Article 218(6)(a)(iii) TFEU refers to agreements involving a cooperation procedure for purposes of whose functioning some sort of institutional framework needs to be established. Examples include acceding to international organisations (e.g. the Hague Conference on International Private law), concluding bilateral or regional cooperation agreements (e.g. CETA), or establishing bodies with decision-making powers (e.g. dealing with the mutual recognition of technical standards). CJEU has not yet clarified the scope of this sub-paragraph.[32] Some authors suggest that, given that most agreements involving a cooperation procedure establish some sort of institutional framework, this category should refer to international agreements setting up an institutional structure attaining a certain level of complexity, but nonetheless not concluded under the legal basis for association agreements.[33] Others consider that such agreements would cover the WTO Agreements or the EEA Agreement, and that the scope of this category is flexible enough to encompass an evolving understanding of the structures of international cooperation which are necessary to tackle increasingly complex policy realities.[34] A recent example where

[30] Kleimann and Kübek, *supra*, p. 24.

[31] See e.g. Case 45/86 *Commission v. Council*, para. 11.

[32] See case C-566/08 *Parliament v. Council*, which the Parliament withdrew after the entry into force of the Treaty of Lisbon.

[33] Barnard, Peers, "European Union Law", p. 743.

[34] Koutrakos, "EU International Relations Law", p. 150.

this legal basis was invoked was the Strategic Partnership Agreement concluded between the EU and Canada which aims to strengthen EU – Canada political ties and cooperation on foreign and security issues, and to advance cooperation on a number of policy areas besides trade and economics. The Agreement creates a Joint Ministerial Committee, which replaces the previous Transatlantic Dialogue, and a Joint Cooperation Committee with the objective of monitoring the development of the strategic relationship.[35]

With regard to Article 218(6)(a)(iv) TFEU, the CJEU has stated that, in order to assess whether an agreement has important budgetary implications, a comparison between the annual financial cost of an agreement and the overall EU budget is not appropriate, insofar as traditionally appropriations allocated to EU external operations account for a marginal fraction of the EU budget. Instead, the financial implications of an agreement should be examined in the context of the EU external relations. A comparison of the expenditure under an agreement with the amount of the appropriations designed to finance the EU external operations enables that agreement to be set in the context of the budgetary outlay approved by the EU for its external policy, and thus offers a more appropriate means of assessing the financial importance which the agreement actually has for the EU. This test should apply in a flexible manner, account being taken of the specific nature of the agreement and the circumstances surrounding its implementation. For instance, the fact that the expenditure under the agreement is spread over several years may contribute towards characterising an agreement as having important budgetary implications, since relatively modest annual expenditure may, over a number of years, represent a significant budgetary outlay. Moreover, where a sectoral agreement is involved, this analysis may be complemented by a comparison between the expenditure entailed by the agreement and the whole of the budgetary appropriations for the sector in question, taking the internal and external aspects together. However, since the sectors vary substantially in terms of their budgetary importance, that examination cannot result in the financial implications of an agreement being found to be important where they do not represent a significant share of the appropriations designed to finance the EU's external operations.[36] Importantly, the scope of this provision cannot be affected by the extent of the powers available to national parliaments when approving international agreements with financial implications. The Brexit agreement would constitute such an example.

[35] Commission Document JOIN(2016) 56 final, 23 November 2016.

[36] Case C-189/97 *Parliament v. Council*, paras. 29-33.

Question 9

A decision to suspend an international agreement is a highly political act in external relations. The absence of a role for the European Parliament in this regard signals the reluctance of the Treaty drafters to enable it to interfere with questions of general foreign policy. Reasons for the EU to suspend an agreement may relate to human rights violations or war situations in third countries.

One recent issue concerns the Netherlands' advisory referendum on the EU-Ukraine Association Agreement on 6 April 2016, which yielded a negative result. It should be noted that the referendum was of an advisory nature and as such has not put an end to the ratification procedure in the Netherlands. If ratification fails and entry into force of the treaty becomes impossible, suspension of the provisional application may have to be carried out in accordance with Article 218(9) TFEU. (See Answer to Question 7)

Question 10

A first issue concerns the question of whether the positions "on the Union's behalf" should be adopted in the context of "an agreement" to which the EU is a party. The CJEU has stated that pursuant to Article 218(9) TFEU the EU may adopt a decision establishing a position to be adopted on its behalf, even in a body set up by an international agreement to which it is not a party.[37] This is particularly so in matters relating to areas which are regulated for the most part by the EU legislature in the exercise of its competence, and thus fall within an EU competence. The fact that the EU has not taken part in the international agreement in question does not prevent it from exercising that competence by establishing, through its institutions, a position to be adopted on its behalf in the body set up by that agreement, in particular through the Member States which are party to that agreement acting jointly in its interest.[38] The Court has thus observed that the scope of Article 218(9) should be understood in light of the principle that, even if the EU is not a member of an international organization, a Member State, acting individually in the context of its participation in such an organisation, may not assume obligations likely to affect EU rules promulgated for the attainment of the objectives of the Treaty. This fact also does not prevent the EU's external competence from being in fact exercised, in particular through the Member States acting jointly in the EU interest.[39]

At the same time, Article 218(9) TFEU uses the same word "agreement" in relation to two different situations, providing first of all for "suspending

[37] Case C-399/12 *Germany v. Council*, para. 50.
[38] Case C-399/12 *Germany v. Council*, paras. 51-52.
[39] Case C-45/07 *Commission v. Greece*, paras. 30-31.

application of an agreement" and then for the establishment of positions in a body set up by an agreement. It must be assumed that the same word is intended to have the same meaning, and the first reference can only be to EU agreements. Furthermore, Title V concerning "International Agreements" deals with agreements concluded by *the EU* and Article 218(1) TFEU concern the procedure for negotiation and conclusion of agreements "between the Union and third countries". Since Article 218(9) is a *lex specialis* simplifying the procedure for the conclusion of agreements, it cannot be applied to agreements to which the EU's procedure for concluding agreements is not applicable anyway. Article 218(9) is therefore intended, to make it possible, in the context of international agreements, to adopt acts capable of being established at EU level by means of a simplified procedure, without upsetting the institutional balance. According to this view, its scope too, like Article 218(1), must then be limited to agreements to which the EU is a party.[40]

A second issue relates to the notion "acts having legal effects". The CJEU has clarified that this notion includes acts that have legal effects by virtue of the rules of international law governing the body in question, as well as instruments that do not have a binding effect under international law, such as recommendations, but that are capable of decisively influencing the content of the legislation adopted by the EU legislature, in particular by reason of their incorporation into EU law.[41]

However, it may be argued that Article 218(9) refers to acts having legal effects which a body set up by an agreement "is called upon to adopt" and thus makes clear the close relationship between the action *of the body* and the outcome of that action. The *body* would thus be called upon to adopt acts which have legal effects *ab origine*, and the provision would not therefore concern cases where acts without legal effects acquire them for all intents and purposes only *ex post facto*, through the internal law of a contracting party. Moreover, the fact that Article 263 TFEU contains, in the expression "intended to produce legal effects", a concept which is similar to that of "having legal effects", and which is linked to the settled case-law of the CJEU to the effect that an action for annulment is admissible only against measures whose "legal effects" are "binding", might support an interpretation of the concept of "having legal effects" as meaning that those effects must be binding (in this case, in international law). Finally, the purpose of Article 218(9) to create a *lex specialis* as compared with the general procedure for concluding agreements supports an interpretation of the expression as referring to effects binding in international law. [42] In particular, commentators have

[40] Opinion of AG Cruz Villalón in case C-399/12 *Germany v. Council*, paras. 67, 73-75, 80 and 82.
[41] Case C-399/12 *Germany v. Council*, paras. 61-64.
[42] Opinion of AG Cruz Villalón in case C-399/12 *Germany v. Council*, paras. 89-92.

observed that this simplified decision-making procedure, introduced in the Nice Treaty, took account of the case law, according to which the status and effects, in the EU legal order, of decisions of organs created by an international agreement concluded by the EU were essentially the same as those of the agreement itself.[43] Such decisions however need to have legal effects binding in international law, such as for instance decisions of an Association Council which are directly connected with the Association Agreement to which they give effects.[44]

Question 11

The Treaty of Lisbon has enhanced the role of the European Parliament in the negotiation and conclusion of international agreements, in particular by requiring the Parliament's consent in a number of cases. For these cases, providing sufficient and timely information to the Parliament is essential for ensuring the success of the negotiations. The information requirement under Article 218(10) TFEU, which also covers CFSP agreements, ensures more generally that the Parliament is in a position to exercise democratic scrutiny of the EU's external action and, more specifically, to verify that its powers are respected precisely in consequence of the choice of legal basis for a decision concluding an agreement. The CJEU has stated that this procedural rule constitutes an essential procedural requirement within the meaning of Article 263(2) TFEU and its infringement leads to the nullity of the measure thereby vitiated, since the Parliament's involvement in the decision-making process is the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly.[45]

With respect to the scope of the information obligation covered by that provision, it must be stated that the procedure for negotiating and concluding international agreements laid down in Article 218 TFEU includes, *inter alia*, the authorization to open negotiations, the definition of the negotiating directives, the nomination of the Union negotiator and, in some cases, the designation of a special committee, the completion of negotiations, the authorization to sign the agreement, where necessary, the decision on the provisional application of the agreement before its entry into force and the conclusion of the agreement. The requirement also extends to the intermediate results reached by the negotiations, including the text of the draft agreement.[46]

[43] J. Heliskoski, Case note on case C-37/07 *Commission v. Council*, 48 CMLR at p. 558; A. Dashwood, External Relations Provisions of the Amsterdam Treaty, 35 CMLR at p. 1026.

[44] Case C-192/89 *Sevince*, para. 9.

[45] Case C-658/11 *Parliament v. Council*, paras. 79-81.

[46] Case C-263/14 *Parliament v. Council*, paras. 76-77.

As for the role of national parliaments, Article 218 TFEU does not prescribe specific information obligations. However, insofar as mixed agreements require ratification by each Member State in accordance with its constitutional requirements, including ratification by regional and national parliaments, the provision of sufficient and timely information to these parliaments may be important for the successful outcome of the negotiations.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

Other than the recent referral of the text of CETA by the president of Bulgaria to the Bulgarian Constitutional Court (see above answer to Question 1), no such national case law exists.

Question 13

In respect of the question of the direct effect of international agreements, the CJEU has ruled that when that question has not been addressed in the agreement itself, it is for the Court to resolve it. In such circumstances, a provision in an agreement concluded by the EU with a non-Member State must be regarded as having direct effect where, regard being had to its wording and to the purpose and nature of that agreement, the provision lays down a clear and precise obligation which is not subject, in its implementation or its effects, to the adoption of any subsequent measure.[47] Thus, two criteria need to be met: (i) the purpose and nature of the agreement must lead to the conclusion that it is meant to confer rights on individuals, and (ii) the terms of the agreement must be sufficiently clear, precise, and unconditional.

Apart from the Court's consistent case law denying the existence of direct effect to multilateral agreements (notably the WTO), the purpose and nature of a bilateral agreement has never prevented the CJEU from accepting direct effect of provisions of bilateral association agreements, partnership and cooperation agreements, and trade agreements, insofar as these provisions are clear and unconditional.[48] The Court has recognised the direct effect of provisions prohibiting tax discrimination in respect of imported goods in the EEC-Portugal

[47] See e.g. C-63/99 *Gloszczuk*, para. 30, C-171/01 *Wählergruppe Gemeinsam*, para. 54, C-265/03 *Simutenkov*, para. 21, and C-97/05 *Gattoussi*, para. 25.

[48] M. Maresceau, "The Court of Justice and Bilateral Agreements". In: Rosas A et al (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (the Hague, 2013) p. 716; F. Jacobs (2008), "Direct Effect and Interpretation of International Agreements in the Recent Case-law of the European Court of Justice". In: Dashwood A, Maresceau M (eds) *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge, 2008), p. 32.

Free Trade Agreement[49], prohibiting discrimination in the workplace on grounds of nationality in association, partnership and cooperation agreements concluded with European countries (Bulgaria, Czech Republic, Poland, Russia and Slovakia) and the Magreb states (Algeria, Morocco and Tunisia)[50], or prohibiting discrimination regarding the access to education and educational benefits by children on grounds of nationality a decision of the Association Council under the EEC-Turkey Association Agreement[51]. It appears that a clear link exists between the Court's case law recognising the direct effect of non-discrimination provisions enshrined in EU bilateral agreements and the effective realisation of the EU equality and non-discrimination principles.[52] This trend has been confirmed by recent judgments. For instance, the Court has stated that Article 34 of the EC-Tunisia Agreement on the free movement of capital relating to direct investments in Tunisia "lays down a precise obligation to produce a specific result, which may be relied on by an individual to apply to a national court to set aside the provisions at the origin of an obstacle to the free movement of capital or to apply, in its regard, the rules whose non-application is at the origin of that obstacle to the free movement of capital, without any further implementing measures being required for that purpose", and that such a finding "is not at odds with the object and purpose of that agreement".[53]

At the same time, the Court has taken a more cautious approach towards multilateral agreements, in particular the GATT 1947 and the WTO Agreements[54],

[49] Case 104/81 *Kupferberg*.

[50] This judicial trend. In the context of the Europe Agreement between the European Communities and Bulgaria, see case C-235/99 *Kondova*, case C-327/02 *Panayotova and Others*, and case C-101/10 *Pavlov and Famira*.

[51] Case C-374/03 *Gürol*. The Court, however, has not recognized the direct effect of the provisions on workers' rights set forth in the EEC-Turkey Association Agreement itself. (see case 12/86 *Demirel*)

[52] F. Casolari, "The Acknowledgement of the Direct Effect of EU International Agreements: Does Legal Equality Still Matter?". In: L.S. Rossi, F. Casolari, *The principle of Equality in EU law* (Springer, forthcoming).

[53] Case C-414/11 paras. 100 and 103. See also ibid., paras. 130-133 regarding the EC-Lebanon Agreement.

[54] Joined cases 21 to 24/72 *International Fruit*, para. 21 stating that the GATT 1947, "which, according to its preamble, is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements' is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties". See also case C-149/96 *Portugal v. Council*, para. 45 stating that "the lack of reciprocity in [recognising direct effect] on the part of the Community's trading partners, in relation to the WTO agreements which are based on 'reciprocal and mutually advantageous arrangements' and which must *ipso facto* be distinguished from agreements concluded by the Community ... may lead to disuniform application of the WTO rules".

but also UNCLOS[55], the Aarhus Convention[56], and the Kyoto Protocol[57]. In line with this approach, the CJEU accords greater deference to the EU political institutions in implementing such international agreement. At the same, the Court applies the principle of consistent interpretation by virtue of which national rules should be interpreted and applied, as far as possible, in the light of the wording and purpose of the relevant international obligations.

It should be noted that a new trend in the diplomatic and legislative practice of the EU political institutions comes in, consisting in explicitly denying the direct effect of international agreements entered into by the EU.[58] Such clauses, stating that an agreement "shall not be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law", have been inserted in almost all recent EU trade agreements, including the Economic Partnership Agreement (EPA) with the Southern African Development Community, EU-Central America Association Agreement, EU-Vietnam FTA, EU-Singapore FTA, CETA, etc. In other cases, an explicit preclusion of direct effect is contained in the Council Decision authorising the signing and provisional application of the agreement only, e.g. the EPA with the Eastern African Community.

It is likely that this trend is at least partly due to the openness shown by the Court in recognizing direct effect of bilateral agreements, thereby constraining the room for manoeuvre of the EU political institutions. Whereas recent denial of direct effect in EU agreements may reflect the wish of those institutions to claim back policy space, the views of the legislator should be clearly expressed in the text of the agreements, in order to ensure legal certainty in the application of their provisions. This is because, to the extent that a Council Decision authorising signing and provisional application of an agreement falls within the category of EU secondary law, it may not preclude the direct effect of stemming from the provisions of the international agreement itself.

[55] Case C-308/06 *Intertanko*, para. 64 stating that "UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State".

[56] Case C-240/09 *Lesoochranárske zoskupenie*, para. 45 stating that "the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals." (see also Joined Cases C-401/12 P to C-403/12 P, para 55, and Joined Cases C-404/12 P and C-405/12 P, para 60)

[57] Case C-366/10 *Air Transport Association of America*, paras. 76-77 stating that "even though the Kyoto Protocol imposes quantified greenhouse gas reduction commitments with regard to the commitment period corresponding to the years 2008 to 2012, the parties to the protocol may comply with their obligations in the manner and at the speed upon which they agree", and that, in any event, Article 2(2) thereof cannot be considered to be unconditional and sufficiently precise.

[58] Casolari, p. 14.

Question 14
It appears that no such actions are currently pending against Bulgaria.

Question 15
Pursuant to Article 26 of the Law on International Agreements of the Republic of Bulgaria, obligations ensuing from an international agreement in force to which the Republic of Bulgaria is a party shall be performed in good faith, regardless of the competent authority that has given consent for the agreement's conclusion. State authorities may not invoke provisions of domestic law as grounds for non-compliance with such an international agreement. Furthermore, pursuant to Article 28 of that Law, the control over the implementation of the international agreements of the Republic of Bulgaria is exercised by the Council of Ministers. The ministers who are in charge of the implementation of the international agreement, in accordance with its subject and provisions, are responsible for ensuring compliance with the obligations arising therefrom. The Minister of Foreign Affairs monitors the implementation of the international agreements, informs the Council of Ministers of cases of non-compliance, and may propose measures for their elimination.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16
After the entry into force of the Lisbon Treaty, the common commercial policy (CCP) covers trade in goods and services, commercial aspects of intellectual property and foreign direct investment (FDI). Specifically with regard to intellectual property, in case *Daiichi Sankyo* the Court confirmed the TRIPs agreement is now covered by the concept of the CCP.[59]

In respect of investment, the Court held in Opinion 2/15 that, pursuant to Article 207(1) and Article 3(1)(e) TFEU, the EU has exclusive competence to approve any commitment vis-à-vis a third State relating to investments made by natural or legal persons of that third State in the EU and vice versa which enable effective participation in the management or control of a company carrying out an economic activity (i.e. direct investment). At the same time, the use, by the framers of the TFEU, of the words "foreign direct investment" in Article 207(1) TFEU is an unequivocal expression of their intention not to include other foreign investment in the CCP, so that commitments vis-à-vis a third State relating to other foreign investment (e.g. portfolio investment) do not fall within the exclusive

[59] Case C-414/11, *Daiichi Sankyo*. Regarding services, see case C-137/12, *Commission v. Council (European Convention on Conditional Access Services)*.

competence of the EU. Thus, if the conclusion by the EU of an international agreement relating to non-foreign direct investment proves "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties", within the meaning of Article 216(1) TFEU, such competence would be shared between the EU and the Member States.[60]

As for agreements in the field of transport, Article 207(5) TFEU excludes the negotiation and conclusion of such agreements from the CCP. In particular, the concept of services "in the field of transport" encompasses not only transport services in themselves, but also other services, provided, however, that the latter are inherently linked to a physical act of moving persons or goods from one place to another by a means of transport.[61] The Court held in Opinion 2/2015 that neither aircraft repair and maintenance services during which an aircraft is withdrawn from service nor services for the sale, marketing or reservation of air transport services, whether they are supplied by travel agencies or by other commercial service-providers, are inherently linked to transport services. These services consequently do not fall within Article 207(5) TFEU and are among the services covered by Article 207(1) TFEU.[62] Other commitments in international agreements relating to transport services may still however fall within the exclusive competence of the EU pursuant to Article 3(2) TFEU (see ERTA doctrine discussed above).

Question 17

Following the entry into force of the Lisbon Treaty, FDI falls under the CCP and has become exclusive competence of the EU, so that only the EU may legislate and adopt legally binding acts within the area. At the time, Member States had entered into approximately 1200 bilateral investment agreements (BITs) with third countries (extra-EU BITs) which remain binding on those Members and will progressively be replaced by investment agreements of the EU. Those BITs provide for divergent standards of treatment.

In order to manage the conditions for their continuing existence and relationship with the EU's investment policy, Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries was adopted. The Regulation stipulates that Member States' BITs signed before 1 December 2009 can be maintained in force or enter into force until replaced by an investment agreement of the EU. Member States are obliged to notify the Commission of those extra-EU BITs, which the Commission

[60] Opinion 2/2015, paras. 81-83 and 226-244.
[61] Case C-168/14 *Grupo Itevelesa and Others*, paras. 45-46.
[62] Opinion 2/2015, paras. 66-68.

then assesses "whether one or more of their provisions constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries, with a view to the progressive replacement of the bilateral investment agreements". Where the Commission establishes that such obstacles exist, it enters into consultations with the Member States and may indicate appropriate measures to be taken by the Member State. What such "serious obstacles" are can be assessed by reference to the Court's case law in the infringement proceedings introduced by the Commission against Austria, Finland and Sweden in 2006-2007.[63] The investment agreements in question were considered contrary to EU law, insofar as they did not contain any provision reserving the possibility for the EU to restrict the free movement of capital connected with investments and allowing the Member States to give effect to the restrictive measures which could be adopted by the Council against third parties in connection with investments. It may also be useful to look at the Commission's original proposal which referred to four criteria for not allowing Member States to maintain existing BITs, including where an agreement conflicts with EU law other than the incompatibilities arising from the allocation of competence; overlaps with an agreement of the EU in force with that third country and this specific overlap is not addressed in the latter agreement; or constitutes an obstacle to the development and the implementation of the EU policies relating to investment.[64]

Regulation 1219/2012 also lays down conditions under which the Member States are empowered to amend or conclude and/or maintain in forces BITs signed between 1 December 2009 and 9 January 2013, and to amend or conclude BITs after 9 January 2013, by in particular foreseeing an authorisation procedure and attributing to the Commission a potential right of participation in the negotiations with the third country.

As to BITs concluded between the EU Member States (intra-EU BITs), they have been consistently criticized by the Commission for having a discriminatory effect inconsistent with Article 18 TFEU and fragmenting the single market by conferring rights to some EU investors on a bilateral basis, insofar as their investor treatment standards vary from treaty to treaty. On 29 September 2016, the Commission requested Austria, the Netherlands, Romania, Slovakia and Sweden, by way of reasoned opinion, to terminate their intra-EU BITs. This constitutes the second stage in infringement proceedings under Article 258 TFEU, after which the issue will be brought before the CJEU. Furthermore, on 3 March 2016, the

[63] Case C-205/06 *Commission v. Austria*, case C-249/06 *Commission v. Sweden*, and case C-118/07 *Commission v. Finland*.

[64] Commission Proposal, COM(2010) 344 final, 7 July 2010.

German Federal Court of Justice ("BGH") requested the CJEU to issue a preliminary ruling on the compatibility with EU law, in particular Articles 344, 267 and 18 TFEU, of arbitration agreements concluded in intra-EU BITs.[65] On 19 September 2017 AG Wathelet concluded that the BIT, and specifically its dispute resolution mechanism, is not incompatible with those provisions.[66]

In parallel with these developments, in April 2016, the delegations of Austria, Finland, France, Germany and the Netherlands presented a "non-paper" to the EU Council's Trade Policy Committee with a compromise solution for the future: a single agreement between all Member States consisting of two elements: the "phasing-out of existing intra-EU BITs" and an appropriate "investment protection after the phasing-out of intra-EU BITs". Most recently, in July 2017 the Commission published an inception impact assessment of its initiative "Prevention and amicable resolution of investment disputes within the single market" with the general objective to improve the investment climate in the EU by providing (i) dispute prevention tools and (ii) tools for the effective amicable resolution of intra-EU investment disputes with the help of an independent third party.[67] In particular, the Commission proposes creating an EU legal framework for mediation, enabling mediation between investors and the relevant national authorities and ensuring minimum standards of quality and transparency for the mediation process, as well as creating permanent agencies in each Member State or a single EU wide Mediation agency to administer the mediation services or act as mediators.

As concerns Bulgaria, currently it has BITs in force with most EU Member States (including Austria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden), all of which pre-date Bulgaria's accession to the EU. In 2011 the Commission sent a letter to the Bulgarian Permanent Representative to the EU asking for information on its intra-EU BITs and the government's position on its readiness to end them. The position of Bulgaria has been that, since the termination of some of those BITs retains the possibility of discrimination against investors from other Member States and in order to guarantee the rights of all investors, their termination should be negotiated together with all the Member States.[68] In view of the developments discussed above, the usefulness of the Commission's initiative for ensuring legal certainty and consistent application of EU law should be

[65] Case C-284/16 *Achmea*.

[66] See Opinion of AG Wathelet in case C-284/16 *Achmea*.

[67] European Commission, Inception Impact Assessment, Ref. Ares(2017)3735364 – 25 July 2017.

[68] At: http://www.mediapool.bg/ek-nastoyava-da-sprem-dvustrannite-dogovori-za-investitsii-news180828.html.

recognised. Nevertheless, before any such initiative proceeds, we should await the judgment of the CJEU.

Question 18

Investment protection and investor-to-state dispute settlement (ISDS) are important for investment flows and such agreements are so far considered to have worked relatively well. However, the outcomes of certain recent cases, as well as the ever-so-important role of the state as the guardian of social interests and non-economic values reveals the need for a better balance between the right of the state to regulate and the need to protect investors, as well as to making sure the arbitration system itself is above reproach (including issues, such as transparency and arbitrator appointments). In this respect, the approach to investment protection envisaged in the new generation of FTAs, such as CETA, aims to ensure protection of these values by (i) including an explicit reference to the right of governments to regulate in the public interest and clearer and more precise investment protection standards, i.e. rules removing ambiguities that made these standards open to abuses or excessive interpretations; and (ii) creating an independent investment court system, consisting of a permanent tribunal and an appeal tribunal competent to review decisions of the tribunal, where dispute settlement proceedings will be conducted in a transparent and impartial manner.

With respect to the dispute settlement mechanism in particular, CETA constitutes a significant departure from the traditional approach provided for in most of the existing BITs and contains features of an investment court-like dispute settlement institution. Positive developments in comparison to the old system constitute:

i. Creation of a permanent investment Tribunal and an Appellate Tribunal: the Tribunal will be composed of members nominated by the EU and Canada and not by arbitrators nominated by the investor and the defending state; the Appellate Tribunal will review decisions of the Tribunal based on clearly defined grounds of review; the Members of the Tribunal and Appellate Tribunal will have the same qualifications as for the International Court of Justice and will have to be beyond reproach in terms of ethics.
ii. Establishing strict rules of ethical behaviour for the Members of the Tribunal which guarantee their full independence and impartiality: situations where a Member of the Tribunal can act as a counsel or an expert in pending or new investment disputes are prohibited; a binding code of conduct for the Members of the Tribunal based on the ethical rules of the International Bar Association; the decision to replace a Member of the Tribunal who does not comply with the code is taken by an independent

outside party – the President of the International Court of Justice – and not by the remaining Members of the division of the Tribunal hearing the case as is often the case in existing agreements.

iii. Introduction of full transparency in ISDS proceedings: all documents (submissions by the parties, decisions of the tribunal) will be publicly available on an UN website; all hearings will be open to the public; interested parties (NGOs, trade unions) will be able to make submissions.

iv. Others: prohibition of parallel proceedings; rules preventing fraudulent or manipulative claims; awards cannot require the repeal of a measure in the EU, a Member State or Canada; mediation for amicable solution; and right for the EU and Canada to adopt binding interpretations and to make submissions when they are not defendants as a safety valve in the event of errors by the tribunals.

Opinions have also been expressed in the Bulgarian media that the inclusion of an ISDS mechanism is unnecessary in an agreement between rule-of-law countries, such as the EU and the US in the context of the TTIP, and that foreign investors would be sufficiently and adequately protected within the national courts system.[69]

Question 19

Regulation 912/2014 establishes rules concerning the apportionment of financial responsibility between the EU and its Member States, provides specific criteria for allocating financial responsibility and it identifies in which cases the EU and/or the Member States can act as respondents in ISDS, settle disputes, and be liable to pay damages to investors. International responsibility for treatment subject to dispute settlement should follow the division of competences between the EU and the Member States (see answer to Question 16). As a consequence, in principle, the EU is responsible for defending claims alleging a violation of rules in an agreement which fall within the EU's exclusive competence, irrespective of whether the treatment at issue is afforded by the EU or the Member States.[70]

Regulation 912/2014 aims to determine financial responsibility as an internal EU law matter, decided irrespective of international responsibility. At the same time, financial responsibility is directly linked to international responsibility, in that Member States participate in arbitration proceedings, settle a dispute and are required to pay damages in cases where financial responsibility arises from

[69] See Online public consultation on investment protection and ISDS in the TTIP, responses by the Bulgarian newspaper "Duma": http://trade.ec.europa.eu/consultations-archive/isds/index.cfm?id=00012851846131811 4&type=2.

[70] Recital 3 of Regulation 912/2014.

treatment afforded by them. As an exception, the EU would act as a respondent where the financial responsibility is shared between the EU and Member States or the EU would bear at least part of the financial responsibility; similar claims are also raised in WTO dispute settlement; or the Member States has declined to act as a respondent. In order to safeguard the allocation of financial responsibility between the EU and the Member States and the determination of respondent status in ISDS and settlement, the Regulation includes a system of check and balances requiring that the Commission and the Member States consult each other and cooperate tightly, not only in cases where they share responsibility, but even in cases where responsibility clearly lies with one of them.

As a matter of international law, however, a number of issues may arise. In particular, with respect to mixed agreements, such as CETA, international law requires that both the EU and its Member States assume full rights and obligations over the whole breadth of a mixed agreement that they conclude jointly.[71] The existence of EU exclusive competence over FDI indicates that only the EU has assumed obligations related to FDI, but it is unclear who bears responsibility for violations of FDI-related provisions resulting from Member State measures, especially when the latter are not related to EU law.[72] CETA attempts to address this problem by laying down a procedure for the determination of the respondent for disputes with the EU or its Member States, and requiring the Commission to inform the investor, within 50 days of its notice requesting a determination of a respondent, as to whether the EU or a Member State shall be the respondent. If the investor has not been informed of the determination within 50 days, the Member State shall be the respondent, if the measures in the notice are exclusively measures of that Member State, and the EU shall be the respondent, if the measures include measures of the EU. Neither the EU, nor the Member State may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise object to the claim or award on the ground that the respondent was not properly determined.[73] Presumably, the identified respondent would also bear the financial responsibility in accordance with the rules of Regulation 912/2014. The inclusion of such clauses EU agreements is therefore important, in order to guarantee legal certainty regarding the involvement of the EU in ISDS and the apportioning of financial responsibility as a matter of international law.

[71] Bleckmann, "The mixed agreements of the EEC in public international law" in O'Keeffe and Schermers (Eds.) *Mixed Agreements* (Kluwer, 1983), p.159.

[72] A. Dimopoulos, 'The involvement of the EU in investor-state dispute settlement: A question of responsibilities", 51(6) *Common Market Law Review* 2014, p. 1688.

[73] Article 8.21(4) and (6) CETA.

Question 20

Article 21 TEU is a reflection of the attempts of the Lisbon drafters to create a more integrated legal framework for external action by describing the EU's objectives for its external actions as a whole, as opposed to the specific CFSP objectives set out by the previous version of the TEU. Some authors argue that this means that the scope of the CFSP can no longer be determined by reference to the objectives pursued.[74] This has to be qualified by noting that at least the objective of Article 21(2)(c) (to "preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders ") relates specifically to the CFSP.

The Court has consistently stated that "the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review", which include in particular the aim and the content of the measure.[75] If examination of a EU measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component. By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases.[76]

The explicit insertion of the CCP into the context of the principles and objectives of the EU's external action may influence the interpretation of the scope and objectives of the CCP, and thereby the Court's analysis of the proper legal basis for the adoption of EU measures. Notably, Article 21(2) includes objectives, such as fostering the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; encouraging the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; or helping develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development. The Court has for instance recognised the link between development and common commercial policy, *inter alia* because "Article [207]

[74] C. Herrmann, "Much Ado about Pluto? The 'Unity of the Legal Order of the European Union' Revisited". In: M. Cremona and B. de Witte (eds), *EU Foreign Relations Law – Constitutional Fundamentals* (Hart Publishing, 2008), p. 47.

[75] Case C-269/97 *Commission* v *Council* , para. 43.

[76] Opinion 2/00, para. 23.

lists among the objectives of commercial policy the aim of contributing 'to the harmonious development of world trade', which presupposes that commercial policy will be adjusted in order to take account of any changes of outlook in international relations."[77] Such considerations may also have an impact on delineating the scope of the common commercial policy and that of the environmental policy, as reflected in the reasoning of the Court in Opinion 2/00 or the *Rotterdam Convention*[78].

Authors have also argued that, in view of the new formulation of Article 40 TEU[79], the Court's analysis as to the proper legal basis may also be influenced with respect to measures, such as the control of trade in dual use goods, where objectives of the CFSP and of the common commercial policy may be intertwined.[80] However, Article 40 which protects both the scope of the TFEU procedures and the powers of the EU institutions and the scope of the CFSP, may also be seen as a confirmation of the logic in the *SALW* case. There the Court reached the conclusion that, taking into account its aim and content, the contested decision implementing a Joint Action with a view to a EU contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons "contains two components, neither of which can be considered to be incidental to the other, one falling within Community development cooperation policy and the other within the CFSP".[81]

Question 21

Article 207(4) TFEU normally requires qualified majority but it specifies that the Council must take its decision by unanimity for certain measures:

i. In the field of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules

   This is another formulation of the parallelism between internal and external decision-making procedures in order to avoid circumvention of

[77] Case 45/86 *Commission v. Council*, para. 19.

[78] Case C-94/03 *Commission v. Council*.

[79] Article 40(1) TEU states that "[t]he implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union." Article 40(2) adds that "[s]imilarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter."

[80] P. P. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge, 2010), p. 280.

[81] Case C-91/05 *Commission v. Council (SAWL)*, para. 99.

unanimity in the internal rules via external relations agreements. However, the impact of this provision may be rather limited. There are few internal legal bases requiring unanimity in these fields. Article 118 TFEU requires unanimity only for regulations establishing language arrangements for European intellectual property rights, whereas qualified majority remains the rule under the same Article 118 TFEU for measures establishing the creation of measures for the "uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements". Other internal market provisions requiring unanimity include: Article 113 TFEU on tax harmonisation, Article 115 TFEU on approximation of laws and Article 64(2) TFEU on the introduction of restrictions to capital movements. If the agreement in question incorporates provisions covering one of these types of measure then unanimity will be required.

ii. EU actions in the field of trade in cultural and audiovisual services where there is a risk of prejudicing the Union's cultural diversity
This provision has a rather limited impact on the conclusion of trade agreements. Unanimity only applies if there are measures related to trade in cultural and audiovisual services and where there is risk of prejudicing the EU's cultural diversity. The EU has sometimes omitted the field of cultural and audiovisual services from negotiations in its entirety (*exception culturelle*), as is the case of TTIP (where the audiovisual sector is excluded from the negotiating mandate). Other agreements include a protocol on cultural cooperation aiming for instance to implement, in the context of those agreements, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Still, even in those agreements where provision is made for cultural cooperation, cultural and audiovisual services are carved out from the services commitments or are included in specific reservations so that there can be no risk of prejudicing cultural diversity.

iii. EU actions in the field of trade in social, education and health services where there is a serious risk of disturbing the organisation of these services at national level.
These social, education and health services are subject to several reservations in the Treaties so as to prevent trade agreement commitments from having any negative impact on them.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

With the Amsterdam Treaty, immigration, asylum and civil law matters were transferred to the EC Treaty which implied also "communitarization" of the external competences in those areas. Following the entry into force of the Lisbon Treaty, the area of freedom, security and justice (AFSJ) appears as the second Treaty objective in Article 3 TEU and is defined as shared competence (Article 4(2) TEU). However, specific external competences may only be found in relation to immigration policy (Article 79(3) TFEU). At the same time, the general legal basis for the conclusion of international agreements, Article 216 TFEU, does not exclude the AFSJ. Article 3(2) also extends the ERTA doctrine to areas of cooperation previously falling under the non-Community pillars.

The AFSJ is highly sensitive and may have national constitutional implications, yet one in which the Member States clearly allow the EU to play a normative role. Protocol 23 in particular indicates that the Member States are not willing to transfer completely their external competences to the EU, and should be perceived as a necessary compromise between Article 3(2) TFEU and the competence of Member States to conclude agreements with third countries, as long as they are in conformity with EU and international law. The possibility for a State to act "unilaterally" by concluding such an agreement does not necessarily mean that this agreement is detrimental to the EU. But the exercise of this competence is subject first of all, to the duty of loyal cooperation. At the same time, Article 3(2) implies that the Member States have competence, insofar as the EU has not exercised its own or has ceased to do so, as well as that Member States cannot sign international agreements which would affect any acts adopted under Title V TFEU.

Given that Bulgaria is not part of Schengen but part of its border is an external border of the EU with Serbia, Macedonia and Turkey, the issues with the effective control at the external borders, the fight with the illegal immigration are of great importance. Bulgaria has entered into several related agreements, including an Agreement between the Government of the Republic of Bulgaria and the Government of Romania in relation to the Bulgarian-Romanian State Border Regime, Cooperation and Mutual Assistance on Border Affairs; Agreement between the Government of the Republic of Bulgaria and the Government of the Republic of Macedonia on the Measures to Prevent and Resolve Border Incidents at the Bulgarian-Macedonian State Border; and Agreement between the Government of the Republic of Bulgaria and the Government of the Republic of Turkey on Visas. In 2016 Bulgaria also concluded a trilateral agreement with

Turkey and Greece for the establishment and functioning of a Police and Customs Cooperation Centre in Kapitan Andreevo, Bulgaria.

Question 23

The "safe third country" concept is used in article 13(2)3 of the Bulgarian Law on the Asylum and Refugees (LAR) which stipulates that „the procedure for the grant of international protection does not start, and the one which has already started is discontinued, when the foreigner comes from a safe third country on the condition that he or she will be admitted in it." At least one case by the Supreme Administrative Court discusses this concept. It confirms a decision by the lower court and states: *Regarding the conclusion on the absence of grounds for applying a humanitarian status to [the foreigner] under Article 9 of the LAR*[82]*, the lower court has accepted that the decision of the administrative body is also lawful in this part. It is established beyond doubt that the foreigner was not forced to leave its country of origin because of a real danger of torture, inhuman or degrading treatment, death penalty or execution or other serious harm under Article 9(1) of the LAR, nor was he in danger of such attacks upon his return to Mali and Ghana, respectively. Also, in view of the reported refugee history and references to the situation in the country of origin and in Ghana, as a safe third country, part of the case file, it has not been determined that [the foreigner] has been subjected to grave assault, a serious and personal threat to his life and health, no interference with his personal sphere has been identified as a result of ruthless violence resulting from armed conflict that would justify the granting of humanitarian status within the meaning of Article 9(1) of the LAR.*

The literature considers that the recent introduction of a long list of "safe third countries" in countries such as Hungary and the pressure on Greece to implement the concept after the EU-Turkey deal is contrary to the practice in those Member States in which the notion of a "safe third country" in asylum procedures is well-developed. Countries with longer experience and case-law in implementing the "safe third country" concept have made it clear that an asylum seeker cannot be considered to be sufficiently connected with a third country solely on the basis of transit or short stay.[83]

The "safe third country" concept was codified in 2005 in the Asylum Procedures Directive (APD). After the Directive was passed, UNHCR said that it "may lead to breaches of international refugee law if no additional safeguards are introduced, and make it harder for refugees to have their asylum claims properly

[82] Stating that humanitarian status is granted to a foreigner who does not qualify for refugee status and who cannot or does not wish to receive protection from his/her home country as he/she may be exposed to a genuine danger of serious harm.

[83] See http://www.bghelsinki.org/bg/novini/press/single/dopustimost-otgovornost-i-sigurnost-predostavyane-na-ubezhishe/.

heard in Europe." The March 2016, EU agreement with Turkey states that such returns of refugees will take place "in full accordance with EU and international law". The agreement cites the APD, and suggests that asylum requests from Syrians, Iraqis, Afghans, and others arriving irregularly by boat from Turkey will be ruled inadmissible because Turkey will be identified as a "safe third country" or as a "first country of asylum" to which asylum seekers can be returned with less than full examination of their asylum claim. Authors have observed however that Turkey falls short of the APD criteria. Importantly, any Syrian, Iraqi, or Afghan returned to Turkey would not be allowed to request refugee status there because Turkey excludes non-Europeans from qualifying for refugee status. Syrians have access to temporary protection in Turkey offering some access to assistance and more recently to the labor market, though, in practice significant barriers remain. But Iraqis, Afghans, and other nationalities of asylum seekers are not even eligible for temporary protection. The directive also requires the safe third country to respect the principle of non-refoulement, the prohibition on the forced return of refugees. In any event, it appears that externalization has become part of EU migration policy, as also emphasized by the European Commission in June 2016 announcing a new Migration Partnership Framework.[84]

Question 24

As to the practical impact of the Global Approach to Migration and Mobility (GAMM), the most elaborated bilateral cooperation frameworks under it are the Mobility Partnerships (MP) and the Common Agendas for Migration and Mobility (CAMM). They both offer a political framework for comprehensive, enhanced and tailor-made dialogue and cooperation with partner countries (covering all four GAMM objectives), including a set of targets and commitments as well as a package of specific support measures offered by the EU and interested Member States. Both address mobility issues, including where appropriate visa issues, as well as the need to facilitate return and readmission of irregular migrants. However, there are two particular differences: (1) establishing a MP would include the negotiation of visa facilitation and readmission agreements, whereas a CAMM would not, and (2) an MP is mainly used vis-à-vis neighbourhood countries, whereas a CAMM should mainly be used for other third countries. Nine MPs have been signed so far: with Cape Verde, the Republic of Moldova, Georgia, Armenia, Morocco, Azerbaijan, Tunisia, Jordan and Belarus. Two CAMMs have been signed with Ethiopia and Nigeria.

[84] See: https://www.hrw.org/news/2016/12/06/impact-externalization-migration-controls-rights-asylum-seekers-and-other-migrants

The Partnership Framework does not appear to displace the Global Approach but rather to further develop particular aspects of this overarching framework of the EU external migration and asylum policy. Rather, it deploys further tools with a view to increasing the rate of returns to countries of origin and transit, and enabling refugees and migrants to stay close to home (in the short term), and reducing the root causes of irregular migration and forced displacement by addressing political, social and economic factors (in the long term). To this end, the Partnership Framework would build on the measures that are already in place, such as the partnerships at bilateral level (Morocco, Tunisia, Nigeria, and Ethiopia), regional level (policy dialogues with countries along the western migratory route (Rabat Process) and the eastern migratory route (Khartoum Process)) and continental level (African Union) level in the context of the Global Approach, but also other established partnerships, including Turkey.

Bulgaria does not have special relations with African countries but, together with Greece and Turkey, is a key country in the Balkans regulating the migration flows into continental Europe.

Question 25

To begin with, the conclusion of such agreements does not necessarily go against the principles of the TFEU or the specific rules of the common asylum and migration policy. The practice of Member States' concluding readmission agreements appears is notably in line with Directive 2008/115 (the Return Directive) which aims to ensure that the return of third-country nationals without legal grounds to stay in the EU is carried out effectively, through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned. A series of ECJ rulings have clarified a number of key aspects of the Directive (e.g. detention), with a significant impact on Member States' implementation of the Directive itself.

It is true that the European Commission considers that "[r]eturn policy alone cannot deal effectively with the management of irregular migration flows to the EU but needs to be part of a more comprehensive approach, including the GAMM". However, for the ERTA doctrine to apply and for the EU to enjoy exclusive external competence to conclude readmission agreements, one would have to find that there is a risk that the Member States, acting outside the framework of the EU institutions, might assume international obligations affecting common rules or altering their scope. Such common rules are the Return Directive and the EU readmission agreements. It is undisputable that a common policy on readmission agreements would more easily sustain a high level of human rights protection in the implementation of these agreements at Member State level. However, as the EU law stands now, it appears difficult to argue that the conclusion

of readmission agreements by Member States with third countries which the EU does not have agreements with would fall within an area already largely covered by EU rules the scope of which may be affected or altered. We recall that "common rules" cannot be interpreted as rules in primary EU law, such as Article 79(3) or 3(2) TFEU. Furthermore, the Return Directive pertains to common standards and procedures to be applied within Member States. Finally, the EU has only concluded readmission agreements with a handful of priority countries.

At the same time, it is problematic if certain Member States still use their bilateral arrangements which existed before the EU readmission agreements entered into force. The inconsistent application of EU readmission agreements undermines greatly the credibility of the EU Readmission Policy towards the third countries, which are expected to apply those agreements correctly. More seriously, human rights and international protection guarantees in EU readmission agreements may be ineffective if Member States do not return irregular migrants under their provisions.

Bulgaria has become the first EU Member State to sign a protocol for implementing an agreement for readmission of irregular migrants by Turkey. The protocol was not a separate readmission agreement but was an instrument implementing the prior EU-Turkey agreement. Also, Bulgaria has concluded readmission agreement with Serbia.

CROATIA

Dunja Duić*
Mislav Mataija**

To provide answers for this questionnaire, the rapporteurs approached the national administration to collect the required information. On 10 May 2017, the Directorate for International Legal Affairs at the Ministry of Foreign and European Affairs of the Republic of Croatia answered the questions they believed fall under their scope in an official statement at the request of Dunja Duić. The Directorate primarily stressed that "the mentioned areas are not within the explicit and immediate scope of the Directorate and therefore the opinions presented are those the Directorate was able to present given the immediate experience and competence of the Directorate." The Directorate answered additional questions on 14 September 2017. Input on additional questions was received by Mislav Mataija from the Directorate for Economic Affairs and Development Cooperation at the Ministry of Foreign and European Affairs.

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Questions 1 and 2

The Directorate for International Legal Affairs stated that the external competence of the EU in relations with third countries (the AETR effect) and

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All views are personal.

subsequent shared competence between Member States (MS) and the EU is a complex legal issue only starting to be discussed at the level of the Republic of Croatia, keeping in mind that Croatia is the youngest MS and the brevity of time it had to develop a more systematic practice in interpreting this legal issue. Namely, Croatia had not been involved from the beginning in the conclusion of the vast majority of draft international agreements between the EU and third countries or international organizations that are being discussed or are the subject of discussion simply due to not having been an EU member. For this reason, there was no opportunity to deal with this issue systematically through partaking in the discussion on the decisions to start negotiations, when the issue of exclusive/shared competence was in fact first opened. Nevertheless, the Directorate stresses that discussion on this legal issue is gaining momentum at the level of certain Ministries of the Republic of Croatia. However, it is difficult to argue that at this point there exists a general stance on the issue of the AETR effect at the level of the Republic of Croatia. Rather, the issue of exclusive/shared competence for concluding international agreements with third countries or international organizations is being considered depending on the subject (content) of each individual international agreement, in line with the relevant case law of the CJEU.[1] Thus, for example, in the Case C-114/12 – *European Commission v Council of the European Union*, the CJEU found that the European Union has conferred powers only; any competence, especially where it is exclusive, must have its basis in conclusions drawn from a specific analysis of the relationship between the envisaged international agreement and the EU law in force, from which it is clear that such an agreement is capable of affecting the common EU rules or of altering their scope.[2]

Article 3(2) TFEU presents the EU's implied competence to conclude international agreements under three specific circumstances: when its conclusion is provided for in a legislative act of the Union (as defined in Opinion 1/94), when it is necessary to enable the Union to exercise its internal competence (as defined in Opinion 1/76), and in so far as its conclusion may affect common rules or alter their scope (AETR principle).[3] The Directorate for International Legal Affairs at the Ministry of Foreign and European Affairs of the Republic of Croatia is of the opinion that Art 3(2) TFEU does not give the EU "the absolute right of exclusive competence" in the sense that only the EU (without Member States)

[1] Email of 10/05/2017.

[2] Case C-114/12, Commission v. Council EU:C:2014:2051 , par. 74.

[3] See more on the scope of Article 3I(2) TFEU in: Panos Koutrakos, *EU Law of International Relations*, Second Edition (Hart Publishing ,2015) 126-129 ; P P Craig (2010), T*he Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford University Press, 2010) 164-167; P P Craig and Grainne de Burca, *EU Law, Text, Cases and Materials, Sixed Edition* (Oxford University Press, Oxford, 2015) 81-83.

has the ability to conclude an international agreement with third countries or international organizations "*in so far as its conclusion may affect common rules or alter their scope*" if the content of the respective international agreement to a certain extent would also enter the competence of the EU Member States. The Directorate believes that Croatia will have the opportunity in the coming period to acquire further experience and to form its own interpretation of this extremely complex but also interesting legal issue.[4]

Question 3

The scope of Art 216(1) is quite broad, as it aims to capture all of the EU's competences to conclude international agreements, whether exclusive or shared. It covers both express ("where the Treaties so provide", as well as "where the conclusion of an agreement is... provided for in a legally binding Union act") and implied (*ERTA* doctrine) external powers.

Unfortunately, the scope and relationship of the various provisions dealing with external competences is not entirely clear from the drafting of the Treaties. The provisions partly overlap (see, for example, Art. 216 and Article 3(2) TFEU) and are scattered across the Treaties. However, when Art. 216 is read in light of the case law, it shows certain essential points which cannot, in the view of the authors, be contested. The EU can have both express and implied external powers. External powers can flow both from a specific Treaty provision, such as Art. 207 TFEU on common commercial policy, and from a more general Treaty provision such as Art. 216. It could equally flow from an explicit conferral in EU legislation, or be implicit in the existence of internal legislation in a certain field, even when that legislation is silent on external action. Finally, it could also flow from the need to achieve a certain objective of the Treaties, even in the absence of explicit provisions. On top of all this, one should always keep in mind that the existence of EU powers is a distinct issue from whether that power is exclusive or shared with the Member States.

Question 4

The two provisions should be read together, and indeed they partly restate the same concepts (for example, the concept of agreements that "may affect common rules or alter their scope"). The key difference is that Art 216 defines EU external competence in general terms – whether exclusive or shared – while Art 3(2) defines only some of the EU's *exclusive* external competences.

Even though, as already pointed out, whether the EU has a competence is a distinct issue from whether that competence is exclusive, the debate is often

[4] Email 10/05/2017.

conflated. This is perhaps understandable, since treaty negotiators (in particular, the Commission) have an incentive to seek the most direct way of concluding a treaty, which means asserting exclusive competence. The conflation of the issues is also apparent in the legally dubious but practically often correct argument that, if the EU only has shared competence, the agreement must be mixed. While one often hears such arguments from the Member States, it was even suggested by the Court of Justice: in Opinion 2/15, it noted that portfolio investment falls within a shared competence and that "it follows that [the relevant section of the agreement] cannot be approved by the European Union alone".[5] If this is the position, it becomes at least practically less relevant whether something is exclusive Member State competence or a shared competence, since in either case the agreement must be mixed; in those circumstances, the debate will naturally focus on whether there is exclusive competence or not.

The fact that Art 3(2) is only about exclusive competence and therefore covers a subset of what Article 216(1) covers may help explain why it is, in some respects, narrower and more specific. For instance, when addressing express conferral of external competences by an internal act, Art 3(2) speaks of a "legislative act of the Union" while Art 216(1) only refers to a "legally binding Union act".

However, the authors also recognise that there are numerous uncertainties with respect to the interpretation of these two provisions and their relationship with the case law they supposedly codify.[6] For instance, if Art 3(2) is the narrower provision, one would expect the requisite link between the envisaged agreement and EU common rules to be stronger than in the case of the broader provision of Art 216(1), but the opposite is true: Art 3(2) says "may affect/alter", while Art 216(1) says "is likely to affect/alter".[7] More broadly, as Koutrakos points out, there is no cross-reference between these provisions in the Treaties, nor is there "any indication of their application within the same substantive context", and it is not clear what the implications of the differences in wording are.[8]

[5] Opinion 2/15 of 16 May 2017, Paras. 243-244.

[6] See Panos Koutrakos, EU International Relations Law, 2nd ed., (Hart, 2015) 126-129; Allan Rosas, 'Exclusive, Shared and National Competence in the Context of EU External Relations: Do such Distinctions Matter?', in: Inge Govaere, Erwan Lannon, Peter van Elsuwege, Stanislas Adam (eds.), The European Union in the World: Essays in Honour of Marc Maresceau (Brill, 2013) 23.

[7] This was noted, for example, by AG Sharpston in Case C-114/12 European Commission v Council of the European Union, ECLI:EU:C:2014:2151, para. 88, pointing out that there are differences between the two provisions and that, paradoxically, "in many but not all language versions those differences appear to suggest that it might be easier to establish exclusive external competence under Article 3(2) TFEU than competence under Article 216(1) TFEU. "

[8] Koutrakos, op.cit., 128.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

Negotiations on international agreements between the EU and third countries or international organizations and their conclusion is carried out in accordance with the procedure prescribed under Article 218 TFEU. A special committee within the meaning of Article 218(4) TFEU is usually a relevant working group within the configuration of the Council of the EU, competent for (predominantly) the area regulated by the relevant international agreement. In this sense, the Directorate is of the opinion that there could be no existence of a uniform approach or uniform practices in terms of negotiator-special committee cooperation to speak of, given that in the case of each individual international agreement the cooperation will depend on a number of elements, inter alia on the areas regulated by the international agreement and in this respect on the issue of exclusive or shared competence. In addition, the said cooperation certainly depends on the partial interests of member states, either in relation to the area regulated by an international agreement or in regard to a third country or international organization with which the international agreement is being concluded etc. As previously noted, given that Croatia is the youngest member of the EU and that it had not taken part in the process of concluding of the majority of the international agreements concluded thus far from the very beginning (it was largely included either once the negotiations had already been concluded or near the very end), due to the lack of own experience in the negotiation process, Croatia is unable to evaluate the previous cooperation between the negotiators and special committees. However, given that the member states are represented in the working groups through their delegates who are usually experts in relevant fields (from the competent authorities of the Republic of Croatia), Croatia certainly welcomes the possibility provided for in 218(4) TFEU that the Council of the EU designate the special committee since in that way it has the opportunity to be actively involved in the negotiation process and thus protect and promote its own interests

Question 6

As regards the provisional application of international agreements by the EU, it should be noted that contracting such provisions in international agreements is also the result of negotiations conducted in accordance with the procedure laid down in Article 218 UFEU, whereby provisions that would fall under the provisional application regime are discussed within the framework of the relevant

EU Council working group. At that, the issue of competency for individual areas (exclusive/shared) is especially taken into account, depending on whether the international agreement provides for provisional application only in relations of the EU and third countries, i.e. international organizations or whether it also includes provisional application between member states and third countries, i.e. international organizations. At the same time, the decision on provisional application of provisions of international agreements is made by the Council of the EU; through participation of their delegates in the work of the Council preparatory bodies member states thus also actively participate both in the discussion and the decision on temporary application of provisions of international agreements in the wider sense.[9]

Question 7

The legal basis for the provisional application of international agreements concluded by the EU is Article 218(5) TFEU. In light of the recent issues with the application of mixed agreements (EU-Ukraine Association Agreement in Holland and the Walloon objection to sign CETA), Van der Loo and Wessel stress these important arguments: there is no deadline on the provisional application and only the Union can terminate the provisional application of the agreement. They find that even though there are no procedural rules for the Union's termination of the provisional application of an international agreement, the Union should follow the procedure for the adoption of the provisional application set out in Article 218(5) TFEU.[10] It may be inferred that even though the Union is suffering under said recent issues with the application of the mixed agreement, the possibility of provisional application should not be terminated, bearing in mind that there are still more examples where provisional application was functional and useful for the Union, the MSs and third parties.

Question 8

Article 218(6) (a) (iii) and (iv) TFEU is no news within the EU legal framework given that the same provision can be found in the Nice EC Treaty Article 303(3) second subparagraph, which required that consent of the European Parliament be obtained for the same matters.[11] The focus of literature and practice today is the new power of the European Parliament provided for in Article 218(6) (v) TFEU, which stipulates that consent of the European Parliament is required for

[9] Email 10/05/2017.

[10] Guillaume Van der Loo, Ramses A. Wessel, *The Legal Consequences of Non-ratification of Mixed Agreements*, Draft – to be published in Common Market Law Review, 2017, 19-22 (https://www.utwente.nl/en/bms/pa/research/wessel/wessel123.pdf)

[11] Article 300(3) TEC (Nice).

agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure.[12] This provision gives the EP in general more power than does the practice of national parliaments in national contexts. This new power has been widely elaborated in literature, gathering that it is the redefinition of inter-institutional relations that increases the substantial power of the Parliament, but with many procedural gaps (e.g. Commission is obliged to brief the Parliament on the developments in international negotiations, but MEPs cannot attend Council working group meetings).[13] What should be concluded regarding interpretation of Article 218(6) (a) (iii) and (iv) TFEU is that with the introduction of Article 218(6) (v) they lose their relevance if keeping in mind the fact that most EU policies are subject to either the ordinary legislative procedure or the special legislative procedure. In light of this, we can expect that the European Parliament will exercise its power of consent on the basis of Article 218(6) (a) (iii) and (iv) TFEU on limited occasions.

Question 9
Not applicable.

Question 10
Not applicable.

Question 11
In terms of the role of the Croatian Parliament (Croatian: Hrvatski sabor) regarding EU relations and the negotiation and conclusion procedure in terms of international agreements, we can say that the Office for International and European Affairs performs professional tasks of advising, organizing, translating, coordinating and administering in order to assist the Croatian Parliament, in particular the Speaker, Deputy Speakers, chairpersons of parliamentary committees and commissions and heads of delegations in their work related to international and European affairs. The Office counts the Representative of the Croatian Parliament to the European Parliament as staff, whose office is at the European Parliament in Brussels and in Strasbourg during the plenary session of the European Parliament. The Representative represents the Croatian Parliament at staff level and performs a wide range of tasks in providing support to the Croatian Parliament

[12] Article 218(6) (v) (Lisabon).

[13] See more in literature: AP van der Mei, *EU external relations and inter-institutional conflicts: the battlefield of Article 218 TFEU*, Maastricht Journal of European and Comparative Law, 23(6) [2016] 1051-1076. ; Stelios Stavridis, Daniela Irrer, The European Parliament and its International Relations; (Routledge 2015) 94-96; Jan Frederik Braun, E*U Energy Policy under the Treaty of Lisbon Rules Between a new policy and business as usua*l, Working paper No 31 [2011].

and its working bodies, primarily to the Representative's central Office for International and European Affairs and the European Integration Committee, in matters pertaining to the European Union.[14] Furthermore, the Committees of Croatian Parliament include the European Affairs Committee. Among other competences, the European Affairs Committee is authorized to consider the documents of the European Union and the positions of the Republic of Croatia in relation to the documents of the European Union and adopt conclusions thereon, and consider the reports of the Government on the meetings of the Council of the European Union.[15] Lastly, there are competences of the Croatian Parliament pertaining to the negotiation and conclusion procedure regarding international agreements. Pursuant to the Constitution of the Republic of Croatia, law and rules of international law, international agreements may be concluded by the Croatian Parliament, the President of the Republic or the Government of the Republic of Croatia depending on the nature and content of the international agreement.[16] The Croatian Parliament ratifies all international agreements that require the adoption of amendments to laws, international agreements of military and political nature, and international agreements which give rise to financial commitments for the Republic of Croatia.[17] The above shows that the powers of the European Parliament pursuant to Article 218(10) TFEU ("*The EP shall be immediately and fully informed at all stages of the negotiation and conclusion procedure regarding international agreements.*") are significantly greater than that of the Croatian Parliament.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

The authors are not aware of any such case law.

Question 13

The authors are not aware of any such academic or policy discussions. The issue has not been publicly raised.

As a general matter, it could be pointed out that the Court's case law on the direct effect of international agreements as a matter of EU law is considerably more complex than the legal position in Croatia with respect to the direct effect

[14] Office for International and European Affairs Croatian Parliament http://www.sabor.hr/Default.aspx?sec=5428

[15] Committees of Croatian Parliament – European Affairs Committee http://www.sabor.hr/european-affairs-committee-9

[16] Article 139 to the Constitution of the Republic of Croatia, Official Gazette No. 05/14.

[17] Article 140 to the Constitution of the Republic of Croatia, Official Gazette No. 05/14.

of international agreements under the Croatian Constitution. Under Art 134 of the Constitution, agreements that are concluded and ratified in accordance with the Constitution, published and in force, are part of Croatia's internal legal order and have primacy over domestic laws. The Constitutional Court has not attached any "strings" to the ability of such agreements to be applied as part of domestic law.[18] On the other hand, the ECJ has developed a rather elaborate theory on the conditions for direct effect of international agreements.[19]

Question 14

No such case was ever submitted to the Court. However, in November 2016, the Commission decided to refer Croatia to the Court because of its failure to ratify the Protocol of Accession of the EC to the Eurocontrol International Convention relating to the Safety of Air Navigation.[20] Croatia ratified the Protocol soon afterwards, and the Commission closed the infringement case in April 2017.

Question 15

To the authors' knowledge, and taking into account the response of the Directorate for International Legal Affairs,[21] no particular control measures are in place. Such agreements would presumably be treated as part of EU law.

One issue may pose itself in the implementation of EU-only agreements, to which Croatia is not itself a party. Under the Croatian constitution, it is not clear if such agreements would be treated as agreements "concluded and ratified in accordance with the Constitution" which are therefore a part of Croatia's internal legal order (Art 134 of the Constitution), or as just another part of EU law, for which the Constitution states more vaguely that they must be "applied in accordance with the European Union *acquis*" (Art 141.c(2)). In the latter scenario, Croatian authorities – especially, for example, courts dealing with a dispute between private parties – may be reluctant to directly apply such agreements, and may not

[18] The Constitutional Court found, for example, that the Statutes of the International Committee of the Red Cross (U-I-5969/2011, decision of 8 Nov 2016, paras. 11-12) and the Geneva Conventions of 1949 (U-III-4150/2010 i dr, decision of 12 Jan 2015, para. 79.1) fall within the scope of Art. 134 of the Constitution, and that treaties concluded by Croatia such as the UN Convention against Corruption can, on the basis of Art 134, supplement the definition of a crime in Croatian legislation (U-III-4149/2014, decision of 24 July 2015, para. 332).

[19] For example, C-366/10, ATAA and Others, ECLI:EU:C:2011:864, paras. 50-54. For more details, see Koen Lenaerts, 'Direct Applicability and Direct Effect of International Law in the EU Legal Order', in: Inge Govaere, Erwan Lannon, Peter van Elsuwege, Stanislas Adam (eds.), The European Union in the World: Essays in Honour of Marc Maresceau (Brill, 2013).

[20] European Commission press release IP/16/3650 of 17 November 2016, 'Aviation: Commission refers Croatia to the Court of Justice for failing to ratify EU accession to Eurocontrol international convention'.

[21] E-mail of 14 September 2017.

be aware of the fact that Croatia is bound by them by virtue of EU law (Article 216(2) TFEU), much less of the Court's case law on their direct effect. In such cases, it will be up to interested parties to bring this to the authorities' attention, also pointing out that, according to Art 141.c of the Constitution, "the exercise of rights ensuing from the European Union acquis shall be made equal to the exercise of rights under Croatian law" (meaning that, arguably, the implementation of an EU-only agreement should not differ from the implementation of an agreement to which Croatia is itself a party) and "Croatian courts shall protect subjective rights based on the European Union acquis".

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16

These questions were most recently addressed in Opinion 2/15, the details of which are currently exhaustively debated and need not be repeated here. As the Court has made clear, the concept of FDI, at least for the purpose of defining the scope of the common commercial policy, does not include portfolio investments;[22] the content of the TRIPs agreement falls within the common commercial policy, as the Court had indeed already held in *Daiichi Sankyo*;[23] transport services are not covered by common commercial policy, but largely fall within EU exclusive competence for other reasons covered by Article 3(2) TFEU.[24]

As for Croatia's views, the authors contacted the Directorate for Economic Affairs and Development Cooperation at the Ministry of Foreign and European Affairs.[25] The Directorate pointed out that, in the context of Opinion 2/15, Croatia argued that neither portfolio investment nor investor-State dispute settlement (ISDS) fall within the common commercial policy; it considers that its position was vindicated with respect to both issues. It also argued that transport services fall outside EU exclusive competence, but the Court disagreed. Croatia took no position with respect to intellectual property issues.

Question 17

Prior to accession, Croatia has concluded a number of bilateral investment agreements, both with current EU Member States and third countries. The extra-EU BITs concluded by Croatia are subject to Regulation 1219/2012. As that Regulation

[22] Opinion 2/15, paras. 80-109.

[23] Case C-414/11, Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon, EU:C:2013:520, paras. 45-61: Opinion 2/15, paras. 111-130.

[24] Opinion 2/15, paras. 56-68, 168-224.

[25] The Directorate provided a response to a set of questions on 9 July 2017 (on file with the authors). This concerns questions 16 – 19.

was adopted prior to Croatia's accession, the Directorate for Economic Affairs and Development Cooperation stated that Croatia "had no opportunity to define its position"; however, in recent discussions within the EU it has advocated that its old BITs should be entirely replaced by new EU investment agreements.

When it comes to mixed agreements like CETA, the Directorate considers the position to be relatively clear: for example, with the entry into force of CETA, Croatia's BIT with Canada should cease to have effect. However, the Directorate considers the Court's view in Opinion 2/15 that provisions terminating existing BITs fall within EU exclusive competence to the extent that the content of the new agreement falls within EU exclusive competence[26] to be somewhat unclear.

The Directorate also pointed out that lengthy ongoing EU negotiations on an investment treaty (e.g. TTIP), or even the mere existence of an EU negotiating mandate (e.g. Egypt or Tunis), prevent Croatia from bilaterally modernising some rather outdated extra-EU BITs. They consider that, given all the controversies surrounding investment protection and ISDS, this problem is likely to continue even if the negotiation of future FTAs is split into parts that are exclusive EU competence and those that are not. Overall, the Directorate is still analysing the Court's position on these issues.

As for intra-EU BITs, they have become a prominent topic in Croatia for a different reason: investors from EU Member States have increasingly relied on them to start ISDS proceedings against Croatia. For example, such legal challenges were brought or threatened by Austrian and Italian banks against Croatian legislation on the mandatory conversion of Swiss franc-pegged mortgage loans to euros (the Consumer Credit Act). Challenges based on intra-EU BITs were also brought, for example, by a Dutch investor because of Croatia's alleged failure to liberalize postal services, and by a Belgian investor on the basis of a real property dispute.[27] Croatian authorities and commentators have argued that, since intra-EU BITs go against EU exclusive competences and are thus illegal from an EU law point of view, the legal basis of such arbitral proceedings is questionable.[28]

Intra-EU BITs also came up as an argument in a constitutionality review case against the mortgage loans conversion legislation brought to the Croatian Constitutional Court. Certain claimants argued that the law violates Croatia's BITs with Austria and France, and therefore also Article 134 of the Constitution, which

[26] Paras. 255-256.

[27] See http://www.telegram.hr/politika-kriminal/hrvatska-bi-se-mogla-naci-u-ozbiljnim-problemima-zbog-skupih-arbitraznih-sporova-kaze-dinko-cvitan/

[28] See, for example, a statement by the Office of the State Attorney extensively reported on in media (https://www.vecernji.hr/premium/dramatican-cvitanov-apel-stranci-prijete-s-10-arbitraza-teskih-6-5-milijardi-kuna-1171024), and a detailed comment on the issue at https://www.tportal.hr/vijesti/clanak/banke-protiv-hrvatske-sljedeca-faza-sage-o-svicarcima-20161031.

provides that treaties concluded and ratified[29] according to the Constitution form part of Croatia's internal legal order. Interestingly, the Court pointed out that those BITs were never subject to ratification by Parliament, but were concluded by the government alone. While this does not make the BITs unconstitutional, the Constitutional Court believes that the lack of parliamentary ratification takes them outside the scope of Article 134 – meaning that they do not form part of Croatia's legal order, i.e. do not have direct effect.[30]

Question 18

In general terms, the Directorate for Economic Affairs and Development Cooperation stated that Croatia supports the approach of these agreements on the substance of investment protection, clarifying the relevant standards, and is amending its own model BIT with similar provisions. The procedural aspect of investment protection is also considered to be a clear improvement on the existing system. However, a multilateral court or at least an institutionalised appeal jurisdiction should be the ultimate objective; separate tribunals in each bilateral agreement would be unsustainable and lead to even greater fragmentation of international investment law.

Indeed, while the approach has been criticised, the EU's attempt to first institutionalize and, later on, multilateralize ISDS has clear advantages. It would make investment disputes more transparent, in particular with respect to the appointment of arbitrators; in the long run, it could increase coherence across various BITs; it would respond to some of the major criticisms of the current system. Of course, its success is highly dependent on finding a critical mass of third countries that agree to such an approach.

Question 19

The Directorate for Economic Affairs and Development Cooperation has expressed Croatia's support for the division of responsibilities as laid down in Regulation 912/2014, but is somewhat concerned as to the future application of that Regulation after Opinion 2/15.

On that point, the authors note that the Court does not explicitly mention that Regulation in its conclusion that ISDS falls outside EU exclusive competence, even though both the Commission and AG Sharpston touched upon it: the Commission used it as an argument for exclusive competence, and the AG

[29] The English translation of the Constitution available, for example, on the website of the Constitutional Court (https://www.usud.hr/sites/default/files/dokumenti/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_CROATIA_-_consolidated_text.pdf), uses the word "ratified"; the Croatian version is, however, less precise than that, using the word "confirmed".

[30] U-I/3685/2015 i dr., decision of 4 April 2017, para. 36.3.

concluded that the sharing of financial burdens does not take away from the ancillary nature of ISDS (i.e. for areas that are substantively EU exclusive competence, ISDS would also be EU exclusive competence, even if some of the financial burden is allocated to Member States).[31] It is true, as some commentators have noted,[32] that the Court's conclusion that ISDS "removes disputes from the jurisdiction of the courts of the Member States"[33] sits uneasily with the proposition that, under Regulation 912/2014, the EU is by default responsible under international law for any breaches of an EU investment treaty.

Question 20

There is no doubt that the common commercial policy falls within the more general concept of EU external action, and that it is fully subject to the principles and objectives outlined in Article 21 TEU. Like Art 207/1 TFEU, Art 21/3 TEU cross-refers to Part Five of the TFEU, which includes common commercial policy; Art 21/4 TEU requires the Council and the Commission to ensure consistency across the different areas of external action. A further –and quite specific – coherence requirement is contained in Art 207/3 TFEU, which instructs the Council and the Commission to ensure that the agreements negotiated are compatible with internal Union policies and rules.

Of course, the objectives of Art 21 TEU are set at a high level of generality. This makes it unlikely that a given CCP action will conflict with them. For example, most trade or investment agreement can plausibly be said to "encourage the integration of all countries into the world economy". New-generation EU trade agreements also contain specific provisions or sections that pursue sustainable development or environmental protection, in line with Art 21/2 (d) and (f) TEU. Controversies are always possible. For instance, the very fact that CCP is being used to pursue bilateral trade deals could be questionable from the point of view of the requirement to pursue "multilateral" cooperation (Art Art 21/2 (h)). However, legal challenges on this point seem improbable.

Question 21

The negotiation of agreements falling under CCP follow the general pattern of negotiation outlined in Art 218. There are, however, certain important particularities. The negotiator is always the Commission; a specific consultative

[31] Opinion of AG Sharpston, Opinion 2/15, paras. 514-535.

[32] Giorgia Sangiuolo, A Comment on Opinion 2/15 and Investor State Dispute Resolution. The Price of Preserving the Division of Powers, KSLR Commercial and Financial Law Blog, https://blogs.kcl.ac.uk/kslrcommerciallawblog/2017/08/25/a-comment-on-opinion-215-and-investor-state-dispute-resolution-the-price-of-preserving-the-division-of-powers/.

[33] Opinion 2/15, para. 292.

committee appointed by the Council is always involved; that committee as well as the European Parliament must be informed of the progress of the negotiations. There are also specific rules on the decision-making by qualified majority, and in some instances unanimity, in the Council.

These issues have not been raised in the public debate in Croatia, and the authors have received no specific comments on this point from public authorities.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

As of 1 April 2013, the visa system of the Republic of Croatia is fully compliant with the visa policy of the EU. The Decision of the Government of the Republic of Croatia established the application of Decision no. 565/2014/EU. Decision 565/2014/EU introduces a simplified regime for the control of persons at the external borders whereby Bulgaria, Croatia, Cyprus and Romania may recognise unilaterally as equivalent to their national visas for transit through or intended stays on their territory not exceeding 90 days in any 180-day period the documents referred to in Article 2(1) and Article 3 of said Decision issued to third-country nationals subject to a visa obligation pursuant to Regulation (EC) No 539/2001.[34] Specifically, the travel document which a third-country national is using to enter Croatia must be valid for at least another three months after the planned departure from Croatia and issued within the previous 10 years.[35] Bearing this in mind, we can say that Croatia has not entered into agreements on this matter since the entry into force of the Protocol (No 23) on the external relations of the Member States with regard to the crossing of external borders. As regards the relation of Article 3(2) TFEU and Protocol (No 23), as already noted, Article 3(2) TFEU presents EU's implied competence to conclude international agreements under three specific circumstances and it does not preclude Member States from concluding agreements with third countries as long as they comply with Union law and other relevant international agreements. Considering the fact that the field of the area of freedom, security and justice is a matter of shared competence of the Member States and the Union, the principle of subsidiarity (Article 5(3) TEU) should be respected here: "*The Union shall act only if and in so far*

[34] Decision No 565/2014/EU of the European Parliament and of the Council of 15 May 2014 introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by Bulgaria, Croatia, Cyprus and Romania of certain documents as equivalent to their national visas for transit through or intended stays on their territories not exceeding 90 days in any 180-day period and repealing Decisions No 895/2006/EC and No 582/2008/EC.

[35] http://www.mvep.hr/hr/konzularne-informacije/informacije-o-putovanjima/opce-informacije/

as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." Moreover, in accordance with this principle, once the Union has regulated a matter, as it has with Regulation No 539/2001, Member States may not introduce opposite legal solutions.

Question 23

There is no relevant national case law on the interpretation and application of the safe third country concept, and the term has not been elaborated in national literature. There are some older scientific articles dated prior to Directive 2013/32/EU that concern this matter, but they can be considered non-relevant given the new legal regulation in the Union and in Croatia.[36] The Act on International and Temporary Protection is the national law regulating matters of international protection in Croatia.[37] The Act introduces new concepts to the Croatian asylum legislation, such as safe country of origin, safe third country, and European safe third country to ensure alignment with Articles 33, 36, 37, 38 and 39 of Directive 2013/32/EU. Article 45 of the Act defines the safe third country concept: "A safe third country is a country where the applicant is safe from persecution as referred to in Article 20, or the risk of suffering serious harm as referred to in Article 21 of this Act, and where he/she enjoys the benefits stemming from Article 6 of this Act, and the possibility exists of access to an effective procedure of being granted protection, pursuant to the 1951 Convention".[38] Article 46 defines the European safe third country: "A European safe third country is a country that has ratified and applies the provisions of the 1951 Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms, including standards on effective remedy, and has established an effective procedure for the approval of protection pursuant to the 1951 Convention".[39] Legal stipulations in the Act on International and Temporary Protection are in line with the Directive; what is missing is the list of safe third countries. The Act contains conditions for the list of safe countries of origin and one such list has already been adopted in Croatia, but it does not anticipate the adoption of a list of safe third countries.[40] Interestingly, the previous Act on Asylum did anticipate

[36] Goranka Lalic, *Međunarodni i europski standardi u zaštiti tražitelja azila: prihvat i pristup sustavu azila*, Hrvatska javna uprava, No. 3., [2009] 749–772; Goranka Novak Lalic, *Europeizacija hrvatskoga sustava azila: mehanizmi i instrumenti utjecaja Europske unije na javne politike i institucije*, Društvena istraživanja : časopis za opća društvena pitanja, Vol.22 No.2 [2012] 237-255.

[37] Zakon o međunarodnoj i privremenoj zaštiti, NN 70/15 (The Act on International and Temporary Protection, Official Gazette No 70/15) http://www.refworld.org/pdfid/4e8044fd2.pdf

[38] Article 45 The Act on International and Temporary Protection, Official Gazette No 70/15

[39] Article 46 The Act on International and Temporary Protection, Official Gazette No 70/15.

[40] http://www.propisi.hr/print.php?id=14241

the adoption of the list of safe third countries and safe countries of origin;[41] the fact that the new Act on International and Temporary Protection does not anticipate a list of safe third counties is a step back.

Question 24

The Global Approach to Migration and Mobility (GAMM) has been the framework of the EU external migration and asylum policy since 2005, and – as the name says – has taken a global approach to migration. Moreover, in November 2011 Commission launched a new and more consolidated, second phase of the GAMM.[42] Nonetheless, it seems this global approach to migration did not have great practical effect considering the fact that only 11 implementation bilateral mechanisms have been established (nine Mobility Partnerships have been signed (Cape Verde, the Republic of Moldova, Georgia, Armenia, Morocco, Azerbaijan, Tunisia and Belarus) and Two Common Agendas on Migration and Mobility (Ethiopia and Nigeria)),[43] and that the EU has experienced (and is experiencing) unthinkable migration crises. In reaction to the latter, the Commission has proposed a new Partnership Framework with third countries in the context of the European Agenda for Migration [Communications of 7.6.2016, COM(2016) 385 final and of 18.10.2016, COM(2016) 700 final].

Furthermore, we can view the new Partnership Framework with third countries as an amendment to the Global Approach to Migration and Mobility (GAMM). Partnership Frameworks are targeted tailor-made partnerships with key third countries of origin and transit using all policies and instruments at the EU's disposal to achieve concrete results. The GAMM and Partnership Framework with third countries under the European Agenda on Migration[44] are built on the same basic ideas: bringing order into migratory flows, reducing irregular migration and saving lives. We can say that Partnership Frameworks are Global Approach to Migration and Mobility Level 3.0. – upgraded, targeted and with more focus.

Croatia has no relations with third countries "reflecting political, historic and cultural ties fostered through decades of contacts, [which] should also be

[41] Article 99, Zakon o azilu, Act on Asylum, Official Gazette No 143/13.

[42] Report on the implementation of the Global Approach to Migration and Mobility 2012-2013 , COM(2014) 96 final, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/international-affairs/general/docs/gamm_report_1_2012_2013_en.pdf

[43] Global Approach to Migration and Mobility < https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en>

[44] Communication of the Commission on establishing a new Partnership Framework with third countries under the European Agenda on Migration COM(2016) 385 final < http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0385/COM_COM(2016)0385_EN.pdf>

exploited to the full for the benefit of the EU" and/or "the most developed bilateral relationships with a particular partner country", and it has not concluded bilateral or multilateral pacts with African countries which could serve as an example for the launch of the pacts between the EU and the priority African countries.

Question 25

Article 79 (3) TFEU provides that the Union may conclude agreements with third countries for readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.[45] Readmission Agreements (EURAs) have reciprocal obligations for the European Union and non-EU countries to facilitate the return of people residing irregularly in a country. They are negotiated and concluded by the Union, but enforced by member states. There are 17 EURAs in force today.[46] The application of EURAs is complicated since some Member States continue to use bilateral readmission agreements (claiming that there are no corresponding bilateral implementing protocols and that they only use EURAs if they facilitate returns).[47] This creates legal insecurity caused by the parallel existence of EURAs and bilateral migration agreements of EU Member States. According to the Union division of competence, Article 79(3) TFEU (being part of area of freedom security and justice) falls under shared competence, and thus the principle of subsidiarity (Article 5(3) TEU) should be respected here. This would leave Member States the option to regulate aspects that are not regulated by the Union and the obligation to respect what is regulated or in this sense to comply with agreements that the Union has concluded despite existing bilateral agreements. The second possible interpretation is in light of Article 3(2) TFEU where some authors consider that in order to achieve effectiveness, there is a need for complete harmonization on readmission, meaning that the Union shall under AERT principle have exclusive competence in this matter.[48] The authors of this report lean more toward the first interpretation and the compliance of the principle of subsidiarity in this matter.

[45] Article 79 (3) TFEU.

[46] Council list of Agreement between the European Union and third countries http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/search-results/?dl=EN&title=readmission&from=0&to=0

[47] Communication of the Commission on Evaluation of EU Readmission Agreements COM(2011) 76 final p. 4. < http://ec.europa.eu/transparency/regdoc/rep/1/2011/EN/1-2011-76-EN-F1-1.Pdf>

[48] Marion Panizzon, *Readmission agreements of EU member states: a case for EU subsidiarity or dualism?* Refugee Surv Q 31(4) [2012] 101–133; Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Leiden, Martinus Nijhoff Publishers, 2009) 84-85, Mariagiulia Giuffré, *The European Union Readmission Policy after Lisbon*, Interdisciplinary Political Studies Journal Vol 1, [2011] 7-19. Sergio

Given that Croatia is a new Member State, the question of concluding readmission agreements after entry into force of the Treaty of Amsterdam and of being bound by readmission agreements containing "problematic clauses" (such as the one providing for the repatriation of irregular migrants through simplified procedures, which was found to be contrary to the ECHR by the Strasbourg Court (Khlaifia and Others v. Italy, application no. 16483/12, § 45)) is not applicable. There is a list of bilateral agreements that Croatia singed with EU countries and Western Balkan countries prior to its accession, comprising a total of 33 readmission agreements.[49]

Carrera, *Implementation of EU Readmission Agreements -Identity Determination Dilemmas and the Blurring of Rights* (Springer, 2016).

[49] List of Agreement between Croatian and third countries on readmission http://digured.srce.hr/webpac-hidra-murh2-pregled/?f=SubjectIndexHR;filter=hidra-murh;PAGER_offset=1;v=prihvat%20stranaca%20004081;rm=results

CZECH REPUBLIC

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CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

We will elaborate on the ERTA effect more in detail while commenting on Art. 3 (2) TFEU and Art. 216 (1) TFEU. Here we shall limit ourselves to giving some examples from past months or years where we have observed effects of this competitive exclusion principle: (i) IPR, namely rights of broadcasting organizations (C-114/12[1], opinion 3/15[2]); (ii) accession of third states to the *Convention on the Civil Aspects of International Child Abduction* (opinion 1/13[3]); (iii) transport (opinion 2/15[4]); (iv) sustainable development (opinion 2/15).

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[1] C-114/12 *Commission v. Council*, ECLI:EU:C:2014:2151.
[2] Opinion 3/15 (Marrakesh Agreement), ECLI:EU:C:2017:114.
[3] Opinion 1/13, ECLI:EU:C:2014:2303.
[4] Opinion C-2/15 (EU-Singapore Free Trade Agreement), ECLI:EU:C:2017:376.

Most of the problems caused by the shift of competences pertain to the exclusion of our national Parliament from the procedure (*political* problem) and to the fact, that the Czech Republic alone is party to the relevant international agreement while the Union is not. Hence, it is our responsibility to live up to the commitments assumed not the Union´s, same as our full right to take part in the process of modernization of such commitments or to take decision on any opt-out or termination of the commitments in question (*legal* problem).

Question 2

The new provision inserted in Art. 3 (2) TFEU by the *Treaty of Lisbon* (2007) is very much like Hayao Miyazaki´s Faceless man in his famous, many awards winning animated fantasy film Spirited away[5] – its scope is constantly increasing, the more areas it touches upon now, the more areas it will need to touch upon in the future.

Its option 1 (*... its conclusion is provided for in a legislative act of the Union*) is rather self-explanatory and there is no need to dwell upon it.

With option 2 (*... is necessary to enable the Union to exercise its internal competence*) it gets more interesting. Evidently, it is a subcategory to option 2 in Art. 216 (1) TFEU (*where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties).* But here the objective is more compelling – without an international agreement the Union would be blocked in achieving one of its objectives set in the Treaties and that objective *could not* be attained by adopting *internal* measures first.[6] The devil is hidden in what does it exactly mean "*necessary*" in this context (?). This ground for the exclusive external competence is used very rarely; the scope of the "necessity" criterion therefore still waits for its clarification by the Court of Justice of the European Union (hereinafter "CJEU"). The court will get chance to deal with it pretty soon – in the course of the proceedings C-600/14 *Germany v. Commission*. Advocate Szpunar assigned to this case devoted in his opinion (04/2017) several paragraphs to this issue (even though in the broader context of Art. 216 TFEU). We are looking forward to the judgment which is expected to come soon.

The more interesting it gets with option 3 *(... in so far as its conclusion may affect common rules or alter their scope*), which stems from a fairly broad understanding of the AETR-ERTA principle. According to the CJEU case-law, there is a risk that common EU rules might be adversely affected by an international agreement, or that the scope of those rules might be altered, where the commitments

[5] Hayao Miyazaki: Sen to Chihiro no Kamikakushi, 2001.

[6] Opinion 1/76 (*Inland Waterways Vessels*), ECLI:EU:C:1977:63.

stemming from the agreement simply fall within the *scope* of those rules,[7] or, in any event, within an *area* which is already *largely covered* by such common EU rules.[8] The areas covered by the international agreement and those covered by the EU rules do not need to coincide fully[9] and, it does not matter if there is *no possible contradiction* between the international agreement and the common EU rules.[10] Moreover, it is necessary to take into account not only the *status quo* of the common EU rules but also their *future development*, insofar as it is foreseeable.[11]

Even if the risk of influencing the common EU rules is rather *hypothetical*, such as when a number of legal solutions are under consideration of a diplomatic conference and only one of them would be capable of altering, in a horizontal manner, the scope of the common EU rules in the area concerned, the exclusive external EU competence shall be deemed established.[12]

And the CJEU went on further: even if the common EU rules define the scope of a legal right narrowly (yet *exactly*) as to concern *only one* from all the options possibly thinkable in that area, an international agreement which intends to *broaden* the scope of that right has to fall into an exclusive EU competence.[13] This is problematic since even *minimal* harmonization may already serve as a source of an exclusive external EU competence. Yet Judge Rosas explains it otherwise: *"[t]he definition of a basic concept is (...) not a minimum requirement [in the sense of Opinion 2/91] but a limitation of the scope of the concept which will inevitably be altered if the international agreement foresees another definition"*.[14] It may sound logical. From a more general point of view, however, it gives rise to serious systemic questions. Is it in line with the principle of conferred powers? This approach shows absolute disrespect to political will of the Member States who may have limited the scope of the internal EU rule because (i) they *did not want* to go further with the harmonization or (ii) they *did not find common ground* if and/or how to go further.

[7] Judgment 22/70, ECLI:EU:C:1971:32 (p. 30); C-467/98 *Commission v. Denmark*, ECLI:EU:C:2002:625 (p. 82); C-114/12 *Commission v. Council*, ECLI:EU:C:2014:2151 (p. 68).

[8] Opinion 2/91, ECLI:EU:C:1993:106 (p. 25); C-467/98 *Commission v. Denmark*, ECLI:EU:C:2002:625 (p. 82); Opinion 1/03, ECLI:EU:C:2006:81 (p. 120, 126); C-114/12 *Commission v. Council*, ECLI:EU:C:2014:2151 (p. 70).

[9] Opinion 1/03, ECLI:EU:C:2006:81 (p. 126); C-114/12 *Commission v. Council*, ECLI:EU:C:2014:2151 (p. 69).

[10] Opinion 2/91 (p. 25, 26); C-467/98 *Commission v. Denmark* (p. 82); C-114/12 *Commission v. Council*, ECLI:EU:C:2014:2151 (p. 71).

[11] Opinion 1/03, ECLI:EU:C:2006:81 (p. 126).

[12] C-114/12 *Commission v. Council*, ECLI:EU:C:2014:2151 (p. 98, 99).

[13] C-114/12 *Commission v. Council*, ECLI:EU:C:2014:2151 (p. 91, 92).

[14] Rosas Allain: EU External Relations: Exclusive Competence revisited, Fordham International Law Journal, Vol. 38: 1073, 2015 (page 1090).

Yet, the Union has already acquired this way full right to regulate on this aspect externally (sic!).

How far will it go? How far may it even go? Does really *every* touching upon an EU rule give rise to exclusive *external* EU competence? Is it necessary to block the Member States to build basically *any* "superstructures" to existing EU law? Isn´t it weird when internally, in the field of shared competence, an EU regime and (even a number of) national regime(s) may coexist peacefully next to each other? Take protected geographical indications (PGIs) for instance. EU runs common framework for protection of PGIs in agriculture while a number of Member States run their own (different) national framework for protection of the non-agri PGIs. And still, externally, at least the Commissions claims it, the EU shall have competence to negotiate on international agreements concerning *all* PGIs. We shall see soon enough, judgement in proceedings C-389/15 *Commission v. Council* is due approximately in autumn or at the turn of this year at the latest. Or maybe not. Advocate General, Y. Bot, assigned to this case advices the CJEU to decide that the PGIs in fact belong to Commercial aspects of intellectual property and thus the EU enjoys in this area EU exclusive competence based on Art. 3 (1) e) TFEU (read together with Art. 207 (1) TFEU). The Czech Republic does not share this view.

There is probably not much need to say that we appreciate that the CJEU at least confirmed in its opinion 2/15 (while assessing the nature of competence relating to the investment chapter of the *Free Trade Agreement with Singapore*) that the AETR effect relates only to the cases where the *secondary law* may be affected and not the primary law itself.

Finally, the CJEU broadened the scope of Art. 3 (2) TFEU in its opinion 2/15 on the FTA with Singapore by saying that even if there is *no* internal EU legislation which could be affected, the commitments in this policy field may fall into exclusive external EU competence if they are of *extremely limited scope*[15] and appear marginal as compared to the rest of the chapter / agreement which is otherwise covered by the EU exclusive competence.

Here we come to another question: what if the third option is not exercised internally? In that case, we believe, the Union should not jump straight forward into the international commitment. It should first prepare internally for the future application of the international agreement in question. In other words, the Union should not deposit its instruments of ratification without having in place internal measures that will allow it to live up to the newly assumed international commitment. The Commission is nevertheless not always of the same

[15] Opinion 2/15, ECLI:EU:C:2017:376 (p. 216, 217). CJEU hinted this already in its opinion 1/08, ECLI:EU:C:2009:739 (p. 166), however in the opinion 2/15 it appears more striking.

opinion. For example, in the case of *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled* the Commission wished to go ahead with the approval on the EU side in order to send strong signal to the groups of people concerned and leave the complex discussion on the copyright reform for later. The Member States disagreed. The Commission did not explain how the Union would proceed in situation where the existing EU legislation[16] did not offer any instruments. In fact, the EU legislation left intentionally space for the Member State to regulate if they wished to do so. And indeed, some of them did, and they built their own national regimes which differ one from each other. Under these circumstances, how could the Union secure streamlined application of the newly assumed international commitments (after having put in the showcase its qualified promise that it certainly will secure it)??? This is why we cannot agree with the Council Legal Service that going for an EU-only agreement, in case the Union has not exercised its shared competence as yet, is just a matter of political choice.

Another problem is that the Commission often does not bother to cite precisely which part of Art. 3 (2) TFEU it uses as legal bases for its proposal for a Council decision. Some deliberations may be found in its Explanatory Memorandum accompanying the proposal, however, this is rarely detailed enough and, what is more, it is separated from the legal act after its formal adoption. This does not contribute to transparency of the procedure and *ex post* control of the legality of the Union acts. In this context, we would like to recall the CJEU's assumption that basically *any* [external] EU competence, especially where it is exclusive, must have its basis in conclusions drawn from a *specific analysis* of the relationship between the envisaged international agreement and the EU law in force.[17] For the sake of possible future judicial review, the analysis should find its expression in the legal act itself.

Question 3

Option 1 (*where the Treaties so provide*) requires no further clarifications. Option 3 (*is provided for in a legally binding Union act*) should systematically rather be inserted directly after the Option 1 and is, in general, limited by the scope of the EU law. Option 2 (*where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*) remembers us pretty much of the wording of Art. 352 TFEU (flexibility clause), but

[16] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10.

[17] Opinion 1/03, ECLI:EU:C:2006:81 (p. 124); C-114/12 *Commission v. Council*, ECLI:EU:C:2014:2151 (p. 74).

this time *expressis verbis* for the sake of an external action in the form of an international agreement. For us, the most problematic is option 4 (*is likely to affect common rules or alter their scope*) because of the broad sense the CJEU gives to it notwithstanding the opposite approach of the Member States as the fathers (and the masters) of the Treaties.

Art. 216 (1) TFEU was subject to examination by the Czech Constitutional Court in the course of its constitutional scrutiny of the *Treaty of Lisbon* before its ratification.[18] Czech Government pleaded in favour of its constitutional conformity by saying that this provision is *not a competence norm* and does nothing more than codify the AETR doctrine of implied powers. The Constitutional Court adopted this approach and confirmed that Art. 216 TFEU is not a norm of competence that would expand the powers of the Union. In its view, Art. 216 TFEU only expands the catalogue of instruments that the Union may use within the framework of its competences. Thus, the EU may exercise the transferred powers both internally and externally, and the Czech Constitution does not form an insurmountable obstacle to the transfer of powers to conclude international agreements. Nonetheless, the Constitutional Court noted that Art. 216 TFEU, due to its vagueness, *is on the borderline of compatibility* with the constitutional requirement of a legal norm to be certain enough, or, in any case, with the constitutional requirement that the transfer of powers to the EU shall be determinable; however, this vagueness does not reach the intensity necessary to declare Art. 216 TFEU inconsistent with the constitutional order of the Czech Republic.

Question 4

The structure of the Treaties might be of some help. *A rubrica,* Art. 3 (2) TFEU defines a *category* (i.e. exclusive) and an *area* (i.e. external relations) of the Union competence. While Art. 216 (1) TFEU should, due to Art. 2 (6) TFEU, determine the *scope* of and *arrangements* for *exercising* of the Union competence to conclude international agreements (be it exclusive, shared or other). The question is whether this systematic approach brings us *in practice* any further …

It stands out that the wording of these two provisions is very similar and still, it differs slightly. Some perceive Art. 216 (1) TFEU as a *lex specialis* to Art. 3 (2) TFEU. But this doesn't sound right. The scope of Art. 216 (1) TFEU is seemingly broader and does not alter/narrow the purportedly general rule enshrined in Art. 3 (2) TFEU in any way.

There *should* be a link between the two of them, indeed. But how was it meant exactly, only God knows.

[18] Judgment of the Czech Constitutional Court Pl. ÚS 19/08.

It does not seem that within the CJEU reigns a clear idea of how these two provisions should work together either. To this end see i.e. the most recent opinion of the advocate general H. Saugmandsgaard Øe on the case C-687/15 *Commission v. Council (ITU)* in which he uses the two provisions concerned in a very variable way (p. 50).

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

In short, one might simply say: it´s about people. There are Commission representatives who are co-operative in this regard and there are those who are not. For example, interaction with people from the DG Trade works traditionally pretty well. On the other hand, information sharing and mutual trust in the course of negotiations of large political agreements (such as AAs, PCAs and similar) limp woefully now and then. *Treaty of Lisbon* made it worse. Despite Art. 16 (1) TEU the Commission feels now well-versed in the general *policy making* and hence less interested in deeper co-operation with the special committee.

In this regard, the CJEU was not much of help either. In its judgment C-425/13 *Commission v. Council (ETS Australia)* it confirmed on the one hand that: *"...the Commission must provide the special committee with all the information necessary for it to monitor the progress of the negotiations, such as, in particular, the general aims announced and the positions taken by the other parties throughout the negotiations. It is only in this way that the special committee is in a position to formulate opinions and advice relating to the negotiations*" (p. 66). On the other, it underlined that these opinions and advice do not have basically *any* legal quality, i.e. they are not meant to be able to steer the negotiations (p. 88-90).[19] The Council may therefore comment on the draft text as it likes but ultimately it is doomed to wait for the final product of the negotiations. And then it ends up in the take-it-or-leave-it situation.

It has happened several times that the Commission initialled an international agreement before even presenting the final text to the Council.[20] The initialled text is authentic in the sense of Art. 10 of the *Vienna Convention on the Law of Treaties* (1969) and may instantly become subject to ratification by the other party. This means that the Commission has created a legal situation in the external relations without even letting the Council know (!) Another story is initialling a text before

[19] *„(...) Article 218(4) TFEU authorises the Council to draw up negotiating directives, it does not, on the other hand, (...), invest that institution with the power to impose 'detailed negotiating positions' on the negotiator."*

[20] E.g. Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part.

discussion on the nature of the intended agreement (EU-only v. mixed) between the Council and the Commission did come to its end.[21] This is pretty awkward too since the legal nature of the agreement has to be reflected in its content.[22]

May we really subsume initialling under "external representation" within the meaning of Art. 17 (1) TEU? Alternatively, should the said competence stem from the authorization to open negotiations under Art. 218 (2-3) TFEU as the Commission tried to claim? We do not think so.

Question 6

In the case of the EU-only agreements it is rather a political question what parts of international agreement we *wish* to apply on provisional basis. Ultimately, the reciprocity is the key. As regards the mixed agreements, *legal issues* must be considered as well. There are many Member States whose Constitution does not provide for provisional application or foresees significant limitations to it. Under such circumstances, as a rule, nothing more than the EU-only parts of international agreements are applied provisionally. Nevertheless, legally, even there we are not on the safe ground. There are always lively discussions whether the EU may provisionally apply provisions covered by shared competence not yet exercised by the Union internally. The Commission thinks that these are already EU competences, i.e. why not. The Council Legal Service ponders that it is possible if the Council explicitly agrees to it. On the contrary, the Czech Republic thinks it is problematic since this would mean that the EU accepts an international obligation without having *any* internal instrument how to live up to it. For all practical purposes, the principle of loyal / sincere cooperation, enshrined in Article 4 (3) TEU, might not be of much help here.

Concerning the participation of the EP, we do not see reason why to pave the way for it. There is certain logic behind why and how the competences are divided among the EU institutions. It should be recalled that under Art. 13 (2) TEU each EU institution is to act "*within the limits of the powers conferred on it by the Treaties, and in conformity with the procedures, conditions and objectives set out in them*". This rule reflects the principle of *institutional balance*.[23] Any kind of political (say gentleman's) agreement would alter the Treaties as the basic *rules of play* the Member States agreed among themselves (and their Parliaments gave their consent to

[21] E.g. Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part.

[22] We recall the general rule that a determination of the legal nature of an agreement must be made before initialling, which was previously confirmed by consensus of Member States at the level of COREPER II (at the meeting on 4 February 2015).

[23] See judgments C-409/13 *Council* v *Commission,* ECLI:EU:C:2015:217 *(p. 64) and C-425/13 Council* v *Commission, ECLI:EU:C:2015:483 (p- 69).*

it) and in itself it would represent a bypass to and legal erosion of Art. 48 TEU. We believe that a significant delay in provisional application caused by pending EP consent would have to be grounded *expressis verbis* in the Treaties. Venturing into the grey zone beyond the Treaties in the case of CETA[24] opened Pandora's box.

Question 7

Hard question, indeed. It depends on the subject matter of the agreement. In a very limited number of cases it is not necessary to have all the Member States on board. In that case the provisional application will be terminated *only with respect to* the Member State who notified the other parties of its intention not to become a party to the agreement.[25] However, roughly some 99% of the international agreements require all the Member States to become parties to it (the subject matter concerns the whole EU and there is a clear need to have a single legal regime). Then it is evident that such an agreement will never enter into force and its only chance for survival is its renegotiation into the EU-only format.

In theory, we can imagine a situation where a Member State who is not in position to ratify an agreement *will not* notify the EU of this fact. However legally bold this might sound, we are of the opinion that then the EU *may continue* to apply the *EU-only parts* of the agreement on the provisional basis *ad infinitum*. Yet we agree, as far as the internal politics is concerned, that the government in question would experience hard times while defending such a position vis-à-vis its national Parliament.

This question has come to light recently in relation to the Association Agreement with Ukraine.[26] Eventually, the Dutch found their way to make it up. Currently, the future destiny of CETA is in the stars.

Question 8

We are not aware of any jurisprudence defining what does it mean "*agreements establishing a specific institutional framework by organising cooperation procedures*". According to common practice so far this point concerns large agreements establishing complex structure of common institutions and setting up detailed procedural rules such as Association Agreements or Partnership and Cooperation Agreements[27] concluded in the framework of ENPI as foreseen in Art. 8 TEU.

[24] *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part.*

[25] See Art. 25 of the *Vienna Convention on the Law of Treaties* (1969).

[26] *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part.*

[27] Whatever their actual name is. In last decade, the EU has a tendency to signalize that it has started to negotiate a new generation of international agreements by giving them names like "enhanced" (e.g.

As regards the notion of "*agreements with important budgetary implications*", it follows from the judgment C-189/97 *European Parliament v. Council* that financial importance which the agreement actually has for the EU should be mainly (but not exclusively) assessed as ratio of the expenditures under the foreseen agreement to the whole amount of the appropriations designed to finance the EU external operations or, as the case may be, a concrete sector in the EU external relations.

Question 9

The suspension of application of an international agreement / a part thereof is *ultima ratio* way of a dispute settlement and *per se* an international sanction. The EU international agreements allow for it only if and when a party is in breach of an *essential element* of the agreement. Nevertheless, in practice, the Union does not make use of this cliff edge scenario. In fact, we do not recall *any* recent suspension case.

Still, there is a specific remark to be made concerning Art. 218 (9) TFEU. It is very unfortunate that this provision mixes two completely different things: (i) suspension of an international agreement, and (ii) establishment of common positions to be adopted on the Union's behalf in a body set up by an agreement. Both these notions would deserve a separate paragraph and, above all, a more detailed wording. We could spare ourselves a lot of disputes over their interpretation – *in claris non fit interpretatio*!

Question 10

This provision is an eternal source of conflict between the Council (and/or the Member States) and the Commission. At national level, we usually undergo a heated discussion while preparing an instruction for COREPER II. The stumbling block is very often the same – different answer to two simple questions: (i) is legally necessary to adopt a common EU position (?); (ii) if so, are the conditions of Art. 218 (9) TFEU met, or else, do we need a legally binding Council decision or simple Council conclusions would do (?). Most of the cases end up ultimately before the CJEU.[28] Though, there are still a number of cases which do not. This concern, for instance, the Action Plans,[29] Political Priorities[30] and

EPCA with Kazakhstan, 2015), "strategic" (e.g. *SPA with Canada*, 2016), "comprehensive" (e.g. *FACPC Indonesia*, 2009; *FACPC Viet Nam*, 2012; *FACPC Mongolia*, 2013;) etc.

[28] E.g. C-399/12 *Germany v. Council* (OIV), ECLI:EU:C:2014:2258, or C-687/15 *Commission v. Council* (WCIT/ITU), pending.

[29] E.g. Relations with Jordan Approval of the position to be adopted by the European Union and its Member States within the Association Council established by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, with regard to the adoption of a Recommendation on the implementation of the EU-Jordan ENP Action Plan; Council doc. 7685/1/12.

[30] E.g. Council decision on the position to be taken on behalf of the European Union within the Cooperation Council established by the Partnership and Cooperation Agreement between the European

other implementing acts to the ENP Association agreements. The Commission proposes to adopt the EU position on the basis of Art. 218 (9) TFEU. We oppose since these implementing acts are, as to their content, usually *political* programming documents adopted in the form of a *recommendation* of the respective Association Council. The hypothesis of Art. 218 (9) TFEU ("*acts having legal effects*") is thus not fulfilled. Though, we acknowledge the necessity to have *some* common EU position in this respect. Nevertheless, simple Council conclusions (or, in some cases *joint* conclusions of the Council *and* the representatives of the Member States within the Council[31]) should do.

Question 11

In general, CZ holds a rather restrictive view on how to apply Art. 218 (11) TFEU. First, being "*immediately and fully informed at all stages of the negotiation*" does not mean the same as to have *direct access* to any negotiating document on the table (especially, negotiating directives). It is functionally unnecessary and it would increase the risk of leakage of truly sensitive documents. Such leakage would bring the other party to the future agreement unjustified negotiating advantage and has potential to endanger the achievement of the EU goals. All the EP questions shall be basically answered in a timely manner. But still, a simple, even *oral* debrief shall do.

Second, it is clear from the structure of Art. 218 TFEU and the division of tasks / competences therein that the EP shall *not* have at any stage *more information* from the negotiator than the Council (special committee).

Third, according to the Treaties, the EP shall be informed and not *consulted*. Treaties in this regard adopt rather traditional approach according to which it is the *executive* who *prepares* the text of an international agreement. The parliament is traditionally given the floor first at the stage of *approval* of an agreement. Thus, legally there is no need to wait for the EP until it has its say on the debrief.

Having regard to paragraph 40 of the Interinstitutional Agreement on Better Law-Making signed on 13 April 2016, the question how far reaching is the information duty vis-à-vis EP should be dealt with in the more or less near future in *Practical Arrangements for Cooperation and Information-Sharing on the Negotiation and Conclusion of International Agreements within the Framework of the Treaties*.[32] Current draft of the Arrangements concerns Council decisions (and proposals for

Communities and their Member States, of the one part, and the Republic of Armenia, of the other part, with regard to the adoption of the EU-Armenia Partnership Priorities; Council doc. 11258/17.

[31] Council conclusions are so called „floating format", purely political act having no express grounding in the Treaties. Thus, the CJEU case-law against the *hybrid acts* does not concern them.

[32] While Council aims at creating rather informal practical arrangements, the EP had greater ambitions than that. It would prefer another legally binding interinstitutional agreement.

such decisions), negotiating directives, conduct of negotiations and provisional application. The discussion among the Member States and dialogue with the EP is still pending.

On the role of the Parliament of the Czech Republic: at the very beginning, it receives via EXTRANET EU first draft of the mandate. If it concerns a mixed agreement, the government provides the Parliament with its *written opinion* on the draft as well. Any time later, the Parliament may request another governmental written opinion on the progress in the negotiations. The government is *obliged* to provide the Parliament with an up-dated written opinion when (i) the originally approved mandate has changed substantially or when (ii) the ultimate text of a draft mixed agreement substantially differs from the mandate. The Parliament enjoys full right to express its opinion on the negotiating procedure. However, the government is not legally bound thereby. Yet, unfinished scrutiny within the Parliament compels the government to keep parliamentary scrutiny reservation in the Council and its preparatory bodies. One may ask why we are so generous to our Parliament and so mean to the European one. It is all about the basic game rules. Our Constitution compels us to proceed this way (Art. 10b) while the Treaties are rather humble in this regard.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

The case law of Czech courts touches upon the application of the (Aarhus) *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*[33] ("the Aarhus Convention") which is a mixed agreement. The finding of the Constitutional Court of the Czech Republic from 19/11/2008 (PL ÚS 14/07) as well as the previous decision of the Supreme Administrative Court from 13/3/2007 (3 Ao 1/2007-44) dealt with the necessity of making a court review of territorial plans[34] possible. In this context, the courts discussed the effects of the Aarhus Convention in the Czech legal order. The Constitutional Court emphasized that the provisions of national law must be interpreted in conformity with the law of the European Union (the Aarhus Convention being part thereof).

Last but not least, as already mentioned before, there is also a case law of the Czech Constitutional Court which confirms the compliance of the Treaty of Lisbon

[33] Council decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, 17/5/2005, OJ L 124, p. 1.

[34] Plans endorsed in accordance with Act. No. 50/1976 on landscape planning and building regulations.

with the constitutional order of the Czech Republic.[35] However, there is no case law – other than the findings concerning the Aarhus Convention – related to mixed agreements or agreements concluded solely by the European Union.

Question 13

There have been numerous discussions between the ministries concerned in relation to the direct effect of international agreements concluded as mixed ones or solely by the European Union. On the one hand, we acknowledge the tradition of "no direct effect provisions" in commercial agreements which draw from WTO rules and such notions as reciprocity, flexibility within the framework of dispute settlement etc. The recent case law of the CJEU[36] is reflected in the newest agreements on free trade. It seems that all of them contain a "no direct effect" provision whose wording, however, slightly differs from case to case.[37]

On the other hand, exclusion of direct effect may not be the right direction in case of the newest agreements which involve an investment chapter with own mechanism for settlement of disputes between states and investors.[38] Even the most recent case law concerns traditional commercial agreements that do not foresee concrete possibilities for investors to claim their rights. When there are such rights explicitly granted by an agreement, the exclusion of direct effect by a typical "no direct effect provision" does not make much sense. In fact, it would mean that CETA with Canada and other modern free trade agreements are necessarily no-self executing agreements and need further legislation so that individuals may benefit from them. In this regard, it is worth reminding that according to the opinion 2/15, the settlement of disputes between states and investors falls under the shared competence between the European Union

[35] Finding of the Constitutional Court of the Czech Republic from 28/11/2008, Pl. ÚS 19/08, and finding of the Constitutional Court of the Czech Republic from 3/11/2009, Pl. ÚS 29/09.

[36] Judgment C-308/06 *Intertanko,* ECLI:EU:C:2008:312 or judgement in joined cases C-659/13 and C-34/14 *C & J Clark International,* ECLI:EU:C:2016:74.

[37] *CETA with Canada*, Art. 36.1: „*For greater certainty, nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.*"
FTA with Singapore, Art. 17.15: "*For greater certainty, nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law.*"
FTA with Japan, Art. X.16: "*For greater certainty, nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law.*"
FTA with Vietnam, Art. X.19: "For greater certainty, nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law. Vietnam may provide otherwise under Vietnamese domestic law."

[38] Previously known as „ISDS" (Investor-State Dispute Settlement); however, in the most recent free trade agreements a similar system has been – after a profound reform – introduced as „ICS" (Investment Court System).

and its Member States. At which level would it be most efficient to adopt measures which will enable the investors to use the dispute settlement mechanism foreseen by the agreement? Seemingly at the European one, but so far, there is apparently a lack of discussion on these issues which would, in our view, deserve much more attention.

In its judgement 104/81 *Kupferberg* CJEU emphasized that when considering direct effect of an international agreement, it is necessary to take into account all specific characteristics of the agreement. In the given context, it is, in our view, necessary to take into account the inclusion of the ISDS / ICS mechanism into the agreement, the result of which is that reasoning by the desirable flexibility of dispute settlement mechanisms (within the meaning of judgements C-24/72 *International Fruit* and C-149/96 *Portugal v. Council)* is no more possible. On the contrary, in the framework of the ISDS / ICS mechanism, such flexibility is – with regard to the protection of investors´ rights and legitimate expectations – absolutely unwanted.

The second part of "no direct effect" provision as contained in CETA with Canada (*"nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties"*) is, from our point of view, problematic also as it comes to access to justice by smaller investors. While the domestic courts are able to review the measures of the state concerned under domestic rules, they are not allowed to assess the conformity of such measures with the given agreement. This is, in our view, a significant gap in the efficient legal protection. Of course, the ICS mechanism provides investors with a full range of legal protection; however, the costs of ICS will probably be higher than costs of submitting a dispute to a domestic court. In this regard, it is crucially important that the implementing rules to the agreements concerned ensure that the ICS mechanism is easily accessible even to small and medium size investors whose financial resources are rather limited, too.

Question 14

There are a few cases which touch upon the commitments of the European Union or the Czech Republic to third countries or international organizations. Out of four internationally-relevant cases, two concern aviation agreements (with Russia and with the United States of America) and one concerns aviation navigation services in connection with an interstate agreement establishing the *Functional Airspace Block Central Europe* ("FAB CE").

Proceeding 2005/2039 concerns aviation agreement between the governments of the Czech Republic and the United States of America and despite being a very old case it is still ongoing. According to the European Commission, the agreement is in breach of EU law and the Czech Republic did not use appropriate measures to remove the incompatibilities. Proceeding 2011/2015 is also about

the alleged incompatibilities between the aviation agreement between the governments of the Czech Republic and Russia and EU law [Art. 49 TFEU, Art. 4 (3) TEU in connection with Art. 101 TFEU].

In proceedings 2014/2104 the Czech Republic maintains the position that it has not failed to fulfil its obligations under regulation (EC) No. 550/2004 on the provision of air navigation services in the single European sky and regulation (EC) No. 549/2004 laying down the framework for the creation of the single European sky and that it took all the measures necessary to implement the FAB CE established by the interstate agreement signed on 5/5/2011.

Proceeding 2017/2042 concerns the alleged lack of transposition of the Commission implementing directive 2014/111/EU, amending Directive 2009/15/EC with regard to the adoption by the International Maritime Organization of certain Codes and related amendments to certain conventions and protocols. According to the European Commission, legal acts presented by the Czech Republic as transposition acts were adopted already before the adoption of the implementing directive and do not contain a proper reference to the mentioned directive.

Question 15

According to Art. 1 (2) of the Constitution, the Czech Republic adheres to its obligations resulting from international law. According to Art. 10 of the Constitution, promulgated international agreements, to ratification of which the Parliament has given its consent and by which the Czech Republic is bound, form an integral part of the legal order. Art. 10 of the Constitution further states that if an international agreement provides something else than a law, the rules of the agreement shall apply.

According to Art. 95 of the Constitution, judges of our national courts – when exercising their decision-making powers – are bound by laws and international agreements which are part of the legal order (which is the case of international agreements negotiated by the European Union, as explained above). The courts may also review the compatibility of legislation of a lower legal force than laws with laws and international agreements, and possibly abolish such acts or relevant parts thereof. Laws can be abolished only by the Constitutional Court and only because of contradiction with the constitutional order of the Czech Republic.[39] If a law is exceptionally in breach of an international agreement, such a situation is governed by Art. 10 of the Constitution, as explained above. Provisions of a law which are in contradiction with an international agreement (including those negotiated by the European Union) will not be applied and the rules laid down in the international agreement will prevail.

[39] For example, the Constitutional Court by its finding from 24/6/2003 (Pl. ÚS 44/02) abolished a provision of a law because of its breach of the *European Convention On Human Rights*.

The two paragraphs above concern the so-called mixed agreement to which the Czech Republic is a party. The effects and primacy of agreements under the exclusive competence of the European Union are governed by the EU law. These agreements concern matters in relation to which the Czech Republic has transferred the necessary competences on the European Union on the basis of Art. 10a of the Constitution. In this respect, there is a case law of the Constitutional Court[40] saying that such a transfer of competences – made in accordance with Art. 10a of the Constitution[41] – is not absolute and that the Czech Republic may take a later action in this respect if these competences are carried out in a way which could interfere with the so-called „material core of the constitutional order"[42] of the Czech Republic.

To avoid any violation of international agreements that are binding on the European Union, every proposal of a legal act which is to be adopted by the Czech Parliament is screened by relevant institutions of the Czech Republic. During this process, the proposals are screened *inter alia* by:

i. the substantially competent line ministry which should be well aware of possible inconsistencies between the proposed act and related international agreements;
ii. the EU Law Department and the International Law department at the Ministry of Foreign Affairs of the Czech Republic; and
iii. the Compatibility Department at the Office of the Government of the Czech Republic whose primary responsibility is to safeguard the compatibility of national legislation with EU law.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16

The scope of common commercial policy has recently been, in the opinion of the Czech Republic, interpreted in a very broad manner. Under the recent case law, an agreement is considered to fall under the common commercial policy if it has a specific link to trade with the third country concerned.[43] Such a specific link is present when a cumulative requirement of aim and effect is fulfilled: the provisions of the agreement must be essentially intended to promote, facilitate

[40] Finding of the Constitutional Court of the Czech Republic from 8/3/2006, Pl. ÚS 50/04.

[41] International agreements resulting in a transfer of competences to international organizations (like the Treaty on Accession to the EU) need to be adopted by a specific procedure defined in Art. 10a and 39 (4) of the Constitution. Art. 39 (4) of the Constitution requires a higher threshold of supportive votes in both chambers of the Parliament (3/5).

[42] The most important values and principles of the constitutional order.

[43] Opinion 2/15, ECLI:EU:C:2017:376 or judgement in C-414/11 *Daiichi Sankyo,* ECLI:EU:C:2013:520.

and govern such trade and have direct and immediate effects on it. Although the specific link has been described by the two cumulative criteria, its contours are still rather vague and enable to find a "specific link" in a very large number of cases. Such a situation was not, in our view, foreseen by the authors of the Treaties.

16.1. On foreign direct investments

As regards the foreign direct investments, the Czech Republic has shared the view that the explicit reference to them in Art. 207 makes them clearly part of the common commercial policy, which was confirmed by the opinion 2/15. As regards the portfolio investments, we welcome the CJEU´s conclusion that in their case, external competence of the European Union may be derived neither from Art. 3 (1) nor from Art. 3 (2) TFEU. However, in para 240 of the opinion 2/15 the CJEU states that the conclusion of an agreement on portfolio investments may be *necessary* for the fulfilment of the goals of the EU in sense of Art. 216 (1) TFEU.

Let´s mention here that the advocate general Szpunar in his opinion on the already mentioned case C-600/14 *Germany v. Commission*[44] advocates *inter alia* the concept of *political willingness* of the Council as a decisive tool for determination whether an agreement will be mixed or not. The Czech Republic is very cautious about this approach. Let´s repeat here what we keep emphasizing before the Court over and over again – it is more than risky for the European Union to accept commitments towards international partners in areas where it *has no internal mechanisms* which could guarantee that the European Union can actually fulfil such commitments.

16.2. On transport

On the one hand, we welcome the fact that in the opinion 2/15 the CJEU rejected the Commission's submission that transport services provisions relating to establishment fall under the common commercial policy. On the other hand, the CJEU then applies a very broad reading of "largely covered area" and concludes that the fields of maritime transport services, rail transport services and road transport services are areas already largely covered by common rules. What is even more astonishing, and we have already mentioned it as a striking example of a pioneering approach, in the case of internal waterway transport the CJEU does not refer to *any* EU legislation at all but finds that the commitments in this field as contained in the Singapore agreement are "*of extremely limited scope*" and thus marginal. As a result, it concludes that the European Union has an exclusive external competence regarding transport services as regulated in the Singapore agreement in their entirety.

[44] See our answer to the question No 2.

The Czech Republic cannot understand how the CJEU may have taken such a superficial approach – especially when compared to the detailed analysis of advocate general Sharpston in the same case. Such an approach will cause problems in the implementation of the commitments concerned as the European Union does not currently have internal rules which could guarantee that it can actually fulfil those commitments towards third countries. As the Czech Republic pointed out in its written observations on the 2/15 case, regulation 4055/86, which the Court considers as a common rule in the field of maritime transport, for example, concerns only nationals of EU countries and explicitly does not apply to nationals of third countries [see Art. 1 (1) and (2) thereof].

However, the CJEU conclusions about the marginal nature of provisions concerning internal waterway transport as contained in the Singapore agreement show us that not all future agreements in the field of transport will necessarily have to fall under the exclusive competence of the European Union. *A contrario* to what the CJEU concludes in paras 213-217 of the opinion 2/15, an agreement whose aim will be to create detailed commitments in the field of the internal waterway transport will probably not fall under the exclusive competence of the European Union.

16.3. On intellectual property

As regards the TRIPS agreement, there was a discussion during the oral hearing in 2/15 case whether the CJEU conclusions on exclusive competence of the European Union in C-414/11 *Daiichi Sankyo* relate to Art. 27 of TRIPS agreement only or to the TRIPS agreement as a whole. In the opinion 2/15, the CJEU then just reaffirmed its "specific link" case law and concluded that such a link was present in the case of the Intellectual Property Chapter in the Singapore agreement. Some Member States argued that the chapter covered also non-commercial aspects of intellectual property rights, notably in Art. 11.4 which contained a reference to multilateral conventions which include provisions on moral rights. This was, however, for the Court not sufficient to conclude that the Intellectual Property Chapter goes beyond the scope of Article 207 TFEU.

This makes us a little bit sceptical as regards the possibility to claim that the TRIPS agreement as a whole is not under the exclusive competence of the European Union. Even our reading of C-414/11 *Daiichi Sankyo* judgement suggests that the CJEU conclusions on exclusive competence of the European Union relate to the TRIPS agreement as a whole (p. 53: "*That is the case of the rules in the TRIPS Agreement. Although those rules do not relate to the details, as regards customs or otherwise, of operations of international trade as such, they have a specific link with international trade. The TRIPS Agreement is an integral part of the WTO system and is one of the principal multilateral agreements on which that system is based.*") The importance

assigned to the link between the TRIPS agreement and the WTO system by the CJEU is particularly interesting when compared to the opinion of advocate general Bot in C-389/15 *Commission v. Council*, in which he states that „*the institutional context in which the agreement is negotiated is not (...) decisive. In particular, and as is already clear from the case-law of the Court of Justice, it is not necessary, in order for it to fall under that policy, for an agreement to be negotiated under the aegis of the WTO or, more generally, in any particular institutional context (...)*". The opinion that not only agreements negotiated as part of the WTO system may fall under common commercial policy seems perfectly logical; nevertheless, the role of the institutional framework should not be underestimated either.

In conclusion, it cannot certainly be said that *any* rules on intellectual property in international agreements negotiated by the European Union will always be part of the common commercial policy. After all, this view has been confirmed by the CJEU opinion 3/15[45] regarding the so-called *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*. The CJEU clearly stated that an agreement, the main purpose of which is of *uncommercial* nature, does not form part of the common commercial policy.

Question 17

This question apparently concerns the so-called bilateral investment treaties (hereinafter "BITs") with third countries only[46] which are governed by the regulation (EU) No. 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries[47] ("Grandfathering regulation"). Now after the CJEU opinion 2/15, which *de facto* states that the investment chapters of free trade agreements negotiated by the EU are the only reason why agreements containing them have to be mixed (and thus undergo the lengthy ratification procedure in each Member State), the necessity of the inclusion of those investment chapters in free trade agreements may be questioned. Especially when taking into account the public disagreement regarding those chapters, the solution may be not only to remove them from the general free trade agreements and negotiate them as separate mixed agreements, as proposed by the European Commission, but also to entrust the negotiation of investment agreements back to individual Member States. The Czech Republic has always supported comprehensive free trade agreements negotiated

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

[46] Not the intra-EU BITs which are currently subject to the Court´s assessment in 5 infringement procedures as well as in C-284/16 *Achmea* case.

[47] Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20/12/2012, p. 40.

by the European Union; however, we are open to discuss the best way forward in this regard.

Question 18

The Czech Republic considers the mechanisms of ISDS / ICS[48] to be useful complementary tools for the protection of investor´s interests. Nonetheless, the investors should, in our view, have a choice whether to use these mechanisms or to proceed via national courts instead. As described in our reply to question No. 13, the costs of ISDS / ICS are relatively high for small and medium size investors and thus could impede their access to justice as guaranteed by the constitutional principles of the European Union (see Art. 47 of the *Charter of Fundamental Rights of the European Union*) and its Member States. Even if the costs of ISDS / ICS were substantially lowered for this type of investors through the rules implementing the free trade agreements, maintaining the possibility to use the national courts instead seems to be as an easier and less costly option to us.

Further, we are not fully convinced that there is no risk that the CJEU may rule (possibly in its opinion regarding CETA following the request lodged by Belgium) that ISDS / ICS as contained in agreements negotiated by the European Union is not permissible as a whole. The CJEU in its opinion 2/15 said that the ISDS / ICS mechanism limits the jurisdiction of national courts (and considered it to be the reason why Member States have to participate in the Singapore agreement). In the opinion 1/09 it said that depriving the CJEU and national courts of part of their competencies in the field of application and interpretation of EU law touches upon the very essence of the competencies as governed by the Treaties and is therefore impermissible.[49]

The changes which have been recently introduced by the European Commission into the provisions on applicable law in ISDS / ICS chapters lower the risk of such a negative outcome. However, we are still not convinced about the concept of treating domestic law (including the EU law) as a "matter of fact". In our view, the tribunals will have to interpret EU law even for this sole purpose – for finding out what the "matter of fact" looks like. Thus, competences of the CJEU as regards the interpretation of the EU law may be endangered. From the purely legal point of view, it would be safer if the protection of investors was granted by national courts together with the CJEU. Only this way the aim of Art. 267 TFEU as well as the uniform effect of the EU law in the sense of the opinion 1/09 would be, *under all circumstances*, secured.

[48] See footnote No. 38.

[49] The same was confirmed in the opinion 2/13 on the Accession of the European Union to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454.

Question 19

This field is governed by the Regulation (EU) No 912/2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.[50] The Czech Republic does not have any remarks in this regard.

Question 20

We fully support the general principle that the common commercial policy cannot be pursued without taking into account the general principles and objectives of the external action of the European Union. However, where there are clear commitments e.g. regarding environment, these should be considered as equal standing commitments. The occurrence of such commitments should result in the need for a separate legal basis and possibly cause that the agreement will not fall under the exclusive competence of the European Union.

This question is also closely connected to the fact that, in our view, the CJEU in its opinion 2/15 applies a very broad interpretation of the common commercial policy. For example, as explained in the written observations of the Czech Republic on the 2/15 case, we still do think that the provisions of the Singapore agreement regarding the compliance with ILO Conventions should not fall under the common commercial policy. At least, we welcome the CJEU statement in para 164 of the opinion 2/15 that the competence under the common commercial policy cannot be exercised with the aim of regulation of the level of the social or environmental protection in the area of the contracting parties.

Question 21

First, we are not fully convinced about the suitability of the proposals[51] to divide the current free trade agreements into two – a general one and a second one dealing with the investment protection. While still considering the possible ways forward, we should be aware of the following risks of the proposed division:

i. Negotiation of comprehensive agreements gives the European Union space for negotiating manoeuvres; do we really want to limit this space by dividing the agreements into two? The linkage between the two agreements could theoretically work in a similar manner, however, the political circumstances may cause that the negotiating process of one agreement may be significantly delayed or even disrupted and then the linkage could hardly work.

[50] Regulation (EU) No. 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L257, 28/8/2014, p. 121.

[51] See reply to question No. 17.

ii. Should the free trade agreements not be subject to consent of national parliaments in individual Member States, not only the official engagement of Member States in the whole process will be reduced, but also the weight of their comments / observations may decrease as there will be less pressure on the European Commission as the EU negotiator to accept the Member States´ recommendations.
iii. The legal framework for the investment protection should be closely linked to the legal framework for the access of investments to the market. The market access will be fully used only if the investors can rely on a certain level of legal protection in the respective country.

Second, we do not support the European Commission´s ambition to make negotiating mandates public immediately after their adoption. In our view, the negotiating process is a very sensitive one and we should always consider on a case by case basis whether the need of transparency overweighs the advantages of keeping our negotiating strategy unrevealed to our negotiating partners. Making negotiating mandates *automatically* available could weaken the negotiating position of the European Union, if made without proper consideration of all relevant aspects. In this regard, we are deeply concerned with what stated the President of the European Commission, J. – C. Juncker in his State of the Union address delivered on 13/09/2017: "*From now on, the Commission will publish in full all draft negotiating mandates we propose to the Council. (...) I call on the Council to do the same when it adopts the final negotiating mandates.*"[52] First, the Commission decides on its own something which should be dealt with as an *interinstitutional* issue. Second, does this really prove that "*we are not naïve free traders*" and will it indeed help the Union to "*defend its strategic interest*"?[53] Have you ever seen anyone to win a card game with all his cards laying face up on the table?

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

The Protocol No. 23 on the external relations of the Member States with regard to the crossing of the external borders, is giving Member States the possibility to negotiate and conclude agreements with third countries as long as they respect the Union law and other relevant international agreements.

[52] Http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.
[53] Quoting the following lines of the Speech, http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

The scope of the Protocol 23 should be seen in connection with provisions of Article 4 (2)(j) TFEU, which gives the Union a shared competence with Member States in the area of freedom, security and justice. The details of its objectives and the methods for its exercise are set out in Title V, Part 3 TFEU, for the area of crossing of external borders concretely in the provisions of Article 77 (1) (b) and 77 (2) (b) TFEU which state that the Union shall develop a policy with a view of "*carrying out checks on persons and efficient monitoring of the crossing of external borders*".

Protocol 23 is specifying the details of the aspect of external competence of the Member States in the area of the crossing of their external borders, led by the aim expressed in the Protocol, which is the assurance of effective control at their external borders.

Since the Union's competence in the area of freedom, security and justice is a shared one, the checks on persons and efficient monitoring of the crossing of external borders belong also to the shared competence.

The Protocol 23 is giving Member States an option to conclude international agreements, as a part of shared competence, but Member States can do so only in the case where the EU has not exercised its competence or has explicitly ceased to do so at one side and at the other side, according to Protocol 23, as long as they respect Union law and other relevant international agreements.

If we look at the provision of Protocol 23, it is specifying that Member States may conclude agreements, but only for the area which is specifically covering the crossing of external borders (but not when it comes to the crossing of internal borders). Secondly, the Member States may conclude an international agreement as long as they respect the EU law and other relevant international agreements.

Let's have a look at the angle and the condition imposed by the Protocol 23 on the Member States, which is the respect of the EU law and relevant international agreements.

Common measures on the crossing of internal borders by persons and border control at external borders should reflect the Schengen *acquis* as incorporated in the Union Framework. Schengen *acquis*, as a set of rules and legislation, integrated into Union law, regulates the abolishment of border controls at the internal borders within the Schengen Area and the strengthening of controls at the external borders.

The Schengen Area requires also common policy on external border management. The main legal instrument in this area is the Regulation No. 2016/399 on a Union Code on the rules governing the movement of persons across borders (hereinafter "Schengen Borders Code"),[54] which in its Article 1 states that this

[54] Regulation No. 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, OJ L 77, 23/3/2016, p. 1.

legislation "(...) *lays down rules governing border control of persons crossing the external borders of the Member States of the Union*."

When we look at the area of EU law related to the crossing of external borders, besides Schengen Borders Code we will find also the regulation No. 1931/2006 laying down rules on local border traffic at the external land borders of the Member States (hereinafter "Local border traffic Regulation").[55]

The local border traffic regime constitutes derogation from the general rules governing the border control of persons crossing the external borders of the Member States of the European Union which are set out by the Schengen Borders Code.

Provisions of the Local border traffic Regulation, concretely its para 9) deals specifically with the possibility of Member States to conclude bilateral agreements, in relation to the local border traffic regime.[56] The provision of Article 13 of this regulation goes even further and states in paragraph 1 that "*For the purposes of implementing the local border traffic regime, Member States shall be authorised to conclude bilateral Agreements with neighbouring third countries in accordance with the rules set out in this Regulation*."

The last part of this provision is crucial – Member States are authorised to conclude bilateral agreements but the regulation brings clear rules for the Member States what shall they do *before* concluding them[57] and also contains conditions under which the Member States may maintain their existing bilateral agreements with neighbouring third countries, with the aim to assure that the agreements will be compatible with this respective Regulation.[58]

Therefore, the scope of the Protocol 23 and the competence of the Member States to negotiate or conclude bilateral agreements with regard to the crossing of external borders has to be seen also in the frame of the conditions imposed by the Protocol itself – Member States may negotiate or conclude the

[55] Regulation No. 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, OJ L 405, 30/12/2006, p. 1.

[56] "*For the implementation of the local border traffic regime, Member States should be allowed to maintain or conclude, if necessary, bilateral Agreements with neighbouring third countries, provided that such Agreements comply with the rules laid down in this Regulation*."

[57] Art. 13 (2): "*Before concluding or amending any bilateral Agreement on local border traffic with a neighbouring third country the Member States concerned shall consult the Commission as to the compatibility of the Agreement with this Regulation. If the Commission considers the Agreement to be incompatible with this Regulation, it shall notify the Member State concerned. The Member State shall take all appropriate steps to amend the Agreement within a reasonable period in such a way as to eliminate the incompatibilities established*."

[58] Art. 13 (1): "*Member States may also maintain existing bilateral Agreements with neighbouring third countries on local border traffic. To the extent that such Agreements are incompatible with this Regulation, the Member States concerned shall amend the Agreements in such a way as to eliminate the incompatibilities established*."

agreements only, when the EU law is respected. This condition will be fulfilled when the requirements as imposed by the Local border traffic Regulation are met.

One can ask a question that the Local border traffic Regulation is covering only one type of the external borders – the *land* borders, but not the sea or air borders. We are of the opinion that in the case of the latter ones it would hardly reflect the substance and intentions of the provision of the Protocol – the main aim of the local border traffic arrangements is the easing of border crossing for border residents having legitimate reasons to frequently cross an external border- that would not be the case of air borders. For the sea borders, practically it would be just impossible to set up specific border crossing points open only to border residents since there is no case in the EU where the border residents would live *on the sea* (qualified distance of 30 – 50 km from the sea border).

To conclude, Member States may thus negotiate agreements on local border traffic with neighbouring non-EU countries enabling border residents of well – defined areas to cross the EU *external* borders under specific conditions.

As far as the Czech Republic is concerned, due to its geographical position, there are *no* bilateral agreements with neighbouring non-EU countries with regard to crossing of external (land) borders.

Question 25

In our opinion, the practice when readmission agreements are concluded *also* by Member States is indeed *correct*.

The Declaration (No. 36) on Article 218 of the Treaty on the Functioning of the European Union concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice, annexed to the final Act of the Intergovernmental Conference which adopted the *Treaty of Lisbon*, does not apply here since it concerns only areas covered by Chapters 3, 4 and 5 of Title V of Part Three TFEU.

The *Treaty of Lisbon* confers upon the Union an explicit external competence concerning illegal immigration. According to Article 79 (3) situated in Chapter 2 of Title V of Part Three TFEU, "*the Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.*"

Since the Union's competence in the area of freedom, security and justice is a shared one according to the Art. 4 (2) (j) TFEU, and in the absence of a specific reference in Art. 79 (3) TFEU, its competence to conclude readmission agreements is also shared. That means that it is not out of the question for readmission agreements to be concluded by the Member States.

As far as the relationship between the readmission agreements concluded by the EU and a third country (hereinafter "EURAs") and the readmission agreements concluded between a Member State and the same third country is concerned, the applied rule is that *EURAs prevail over bilateral agreements* of Member States. The latter continue to apply if / as far as they do not contradict EURAs (they usually fill-in regulatory gaps).

In the case when the Member State is negotiating a bilateral readmission agreement with a third country and the Commission has received in the meantime a mandate from the Council to start negotiations of an EURA with the same third country, then the Member State shall withhold the negotiations since the Union is exercising its competence in the area of shared competence and thus the Member State must not conclude (or even initiate) the negotiations in respect to that third country.

There were situations where the Commission was already given a mandate from the Council to negotiate a readmission agreement with a particular third country but the conclusion of an EURA was unreachable during a long period of time – some negotiation mandates were given to the Commission now more than 10 year ago (e.g. negotiations with Morocco which started in 2003 are stalled and negotiations with Algeria have not been opened despite the negotiating mandate dates back to 2002).[59]

There were cases when Member States found themselves in a difficult situation as they wished to progress more in the area of readmission with the respective third country but may not do so due to an existing mandate given to the Commission. Because the Union has exercised (or was about to exercise, depending on the angle of view) its competence, they were not allowed to make any steps at the bilateral level. Though, to have a readmission agreement with particular third country may be for a Member State of vital importance (for instance, for Spain in relation both to Morocco and Algeria).

The *Czech Republic is bound by seven bilateral readmission agreements* with third countries in total, six of them were concluded after the Treaty of Amsterdam entered into force (except for the readmission agreement with Canada). For comparison, the EURAs were concluded with the same countries in two cases, namely in the case of Armenia and Moldova. Just for a comparison with the EURAs, according to the latest information from the European Commission, there are *17 EURAs altogether* and the Commission has made recently progress on the negotiations of new readmission agreements – negotiations with Belarus are almost closed, while new ones were launched with Nigeria, Tunisia and

[59] Commission Communication on a more effective return policy in the European Union – a renewed Action Plan, COM (2017) 200 final, 2/3/2017, p. 12.

Jordan.[60] According to the information published or made available by the respective Czech authorities, the bilateral readmission agreements of the Czech Republic *do contain* a clauses such as the one providing for the repatriation of irregular migrants through a *simplified procedures*.

[60] Ibid.

FINLAND

Dr. Joni Heliskoski*

Introduction

This report addresses recent developments of the Union's external relations law on the basis of the questionnaire submitted to national rapporteurs by the general rapporteurs. The analysis is structured according to the questionnaire with the aim of *collecting and providing information* to the general rapporteurs on the questions identified by the latter. For the obvious reason of limitations in terms of space, a number of topical issues that would have merited attention – ranging from themes such as the new case law of the Court of Justice (CJEU) concerning the Court's jurisdiction in the field of the Common Foreign and Security Policy to the implications of exit of the United Kingdom from the Union for the architecture of the Union's external relations – are not addressed.

As regards the questions covered by the questionnaire, two introductory remarks are called for.

First, the limitations of space do not do justice to the scope of a number of questions identified by the general rapporteurs. Hence, particular care should be taken in drawing more general conclusions from the analysis for other areas not specifically addressed in the text.

Secondly, it has been decided to exclude from the scope of the report the questions concerning the interpretation and application of international agreements in domestic courts (questions 12 to 15). In that regard, it is the impression, based on the practical experience of the rapporteur, that questions of principle relating to the status in EU or domestic law of international agreements concluded

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by the Union have only very seldom given rise to either references for a preliminary ruling pursuant to Article 267 TFEU[1] or other litigation before Finnish domestic courts. Nor does there exist academic literature addressing the matter from a specifically Finnish perspective.

Finally, while the rapporteur is an official of the Finnish Ministry for Foreign Affairs and the Agent of the Government before CJEU, the views expressed in the report are expressed in his personal capacity and should therefore not be attributed to either the Ministry for Foreign Affairs or any other branch of the Government of Finland. If, exceptionally, there has been an intention to convey an official position of the authorities, this is always indicated through a reference to official documentary. That being said, the rapporteur has benefited from discussions with members of the Finnish civil service as well as the judiciary, to whom he wishes to express his sincere gratitude. However, any mistakes of either fact or presentation are solely the fault of the rapporteur.

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Questions 1 and 2

It is more appropriate to deal first with the interpretation of Article 3(2) TFEU (question 2) and thereafter the practical significance of the AETR principle (question 1).

Out of the three situations in which an exclusive external competence of the Union may arise under Article 3(2) TFEU the third one – that is, the situation where the conclusion of an international agreement "*may affect common rules or alter their scope*", that phrase being subject to interpretation in the light of the Court's AETR judgment and the case-law developed as from that judgment[2] – is clearly the most important in terms of both the actual practice and the Court's jurisprudence.[3] The other two situations covered by Article 3(2) – one arising

[1] For a recent example, see however Case C-15/17, *Bosphorus Queen Shipping*, a request for a preliminary ruling from the Supreme Court of Finland lodged on 13 January 2017 concerning the interpretation of the United Nations Convention on the Law of the Sea (pending).

[2] See Case 22/70, *Commission v Council*, EU:C:1971:32, and Case C-114/2, *Commission v Council*, EU:C:2014:2151, paras 66-67.

[3] In addition to Case C-114/2, *Commission v Council*, above n 2, paras 64-103, see Opinion 1/13, Convention on the civil aspects of international child abduction, EU:C:2014:2303, paras 69-90; Case C-66/13, *Green Network*, EU:C:2014:2399, paras 24-74; Opinion 3/15, Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, EU:C:2017:114, paras 102-130; Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore, EU:C:2017:376, paras 168-238. See also Opinion of Szpunar AG in Case C-600/14, *Germany v Commission*, EU:C:2017:296 , paras 122-155.

when the conclusion of an international agreement "*is provided in a legislative act of the Union*" and being originally based on the Court's Opinion 1/94[4] and the other consisting of the conclusion of an agreement being "*necessary to enable the Union to exercise its internal competence*" and being based on Opinion 1/76 as interpreted by the Court in Opinion 1/94[5] – haven proven to be of a much more limited relevance in the light of the actual practice. Hence, the following will focus on the third situation of Article 3(2) TFEU, hereafter referred to as the "exclusivity aspect of the AETR effect".

As regards the third situation the general impression in Finland is that the exclusivity aspect of the AETR effect has been construed in a broader and broader manner by the Court of Justice in a development that started in Opinion 1/03 on the Lugano Convention.[6] Before, in the period covering notably Opinion 1/94 on the WTO Agreement and so-called Open Skies cases, the Court appeared to be much more careful in circumscribing the reach of the AETR effect. Regarding, for instance, the provisions on transport services of the WTO Agreement, it rejected the Commission's claim on an exclusive Community competence by reminding that "*[o]nly in so far as common rules have been established at internal level does the external competence of the Community become exclusive*" – which was not the case in respect of "*all transport matters*" covered by the Agreement.[7] Notably, the Court also pointed out that an (economic) effect of the conclusion of an international agreement was not in itself sufficient to confer an exclusive external competence to the Community.[8] A similar test was followed by the Court in the Open Skies cases: again, exclusive Community competence was denied by the Court, pointing out that "*[s]ince the international commitments in issue do not fall within an area already covered by Regulations Nos 2407/92 and 2408/92, they cannot be regarded as affecting those regulations on the ground relied upon by the Commission.*"[9] Therefore, the AETR test was applied by the Court through a careful comparison of the respective scopes of application of the agreements in question on the one hand and that of the common rules adopted by the Community on the other. While the so-called Opinion 2/91 principle – that is, the principle that an exclusive competence arises once the agreement concerned falls within "*an area already*

[4] Opinion 1/94, competence of the Community to conclude international agreements concerning services and the protection of intellectual property, EU:C:1994:384, para 95.

[5] Opinion 1/94, above n 4, paras 85-86 and Opinion 1/76, Agreement on the establishment of a European Laying-up Fund for Inland Waterway Vessels, EU:C:1977:63, paras 3-4. See also Case C-468/98, *Commission v Sweden*, EU:C:2002:626, paras 53-61.

[6] Opinion 1/03, New Lugano Convention, EU:C:2006:81.

[7] Opinion 1/94, above n 4, para 77 (emphasis added).

[8] Ibid, paras 78-79.

[9] See, eg, Case C-468/98, *Commission v Sweden*, above n 5, para 93 (emphasis added).

largely covered" by Community rules[10] – was relied upon by the Commission, it was not regarded as being decisive in either Opinion 1/94 or the Open Skies cases.

The trend in the case law changed in Opinion 1/03 on the Lugano Convention. Not only did the Court reaffirm and apply the Opinion 2/91 principle[11] but it also introduced two novel and potentially highly significant principles capable of considerably widening the exclusivity aspect of the AETR effect. First, by relying upon what had clearly been an *obiter dictum* statement in the original AETR judgment, the Court referred to the possibility of the conclusion of an agreement being "*incompatible with the unity of the common market and the uniform application of Community law*"[12] as *a basis* for an exclusive Community competence. Secondly, it was, in the assessment of exclusivity aspect of the AETR effect, "*necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis.*"[13]

The above trend of a broad construction of the exclusivity aspect of the AETR effect has continued, through the entry into force of the Treaty of Lisbon, up to the present day. Indeed, ever since, the Court has not in a single case failed to recognize the existence of exclusive Union competence based on the AETR case law and, under the TFEU, Article 3(2) thereof.[14] The principal device employed by the Court in that regard has been the Opinion 2/92 principle[15] that has enabled the Court to establish an exclusive Union competence whenever the relevant "*area*" is deemed to have been covered "*to a large extent*" by common rules either at the time of the assessment or in the light of its "*foreseeable future development*". In the era of the Lisbon Treaty the Court has also construed another tool of reasoning that is closely related to the Opinion 2/91 principle: for those circumstances

[10] Opinion 2/91, Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work, EU:C:1993:106, paras 25-26.

[11] Opinion 1/03, above n 6, para 126.

[12] Ibid, para 122.

[13] Ibid, para 126.

[14] It may be noted that in Opinion 1/08, Agreements modifying the Schedules of Specific Commitments under the GATS, EU:C:2009:739, the Court's conclusion that the agreements in question fall within a shared competence of the Community and the Member States was not based on the prerequisites for the exclusivity aspect of the AETR effect not being satisfied but on the interpretation of Article 133(6) EC. That provision was however repealed the day after delivery of the opinion by virtue of the entry into force of the Treaty of Lisbon.

[15] See Case C-114/2, *Commission v Council*, above n 2, paras 84 and 102; Opinion 1/13, above n 3, paras 78 and 83; Case C-66/13, *Green Network*, above n 3, paras 61; Opinion 3/15, above n 3, paras 129; Opinion 2/15, above n 3, paras 181-182, 197-202; 206-210 and 224. In Case C-114/2, *Commission v Council*, the Court roundly rejected the claims of some of the Member States who had argued that the Opinion 2/91 no longer applied under the Treaty of Lisbon (paras 52 and 72). The Court also held that Protocol (No 25) on the exercise of shared competence, annexed to the TEU and the TFEU, does not seek to limit the scope of the exclusive external competence of the Union in the cases referred to in Article 3(2) TFEU (para 73).

where the scope of the relevant international commitments is broader than that of the common rules enacted by the Union, the conclusion of those commitments by Member States could none the less give rise to "*a horizontal effect on the scope of the body of common EU rules*"[16], so that scope of those common rules could be altered in a "*horizontal manner*"[17]. This was also the device that enabled the Court to conclude in Opinion 2/15 that the provisions on maritime transport services in the Free Trade Agreement with Singapore fell within the Union's exclusive competence on the basis of Article 3(2) TFEU: the fact that the commitments contained in the Agreement were broader than the rights granted to third-country nationals and companies in the Union legislation did not lead to the conclusion that the relevant competence is shared between the Union and its Member States but rather to the finding that the commitments contained in the envisaged agreement "*affect, or even alter, considerably, as regards maritime transport services between the European Union and the Republic of Singapore, the scope of those common rules established by Regulation No 4055/86.*"[18] While the basic situation was very similar to the one at issue in Opinion 1/94, the outcome in terms of the existence of an exclusive Union competence in Opinion 2/15 was the opposite.

The Court's broad understanding of the Opinion 2/91 principle, together with acknowledgement of the relevance of a "*a horizontal effect on the scope of the body of common EU rules*" in cases where the given international commitments do not fall within an area already covered by those rules, is problematic in the light of certainty. For a Member State, it will be difficult to estimate whether an international agreement may legitimately be concluded by the Member State in its own right or whether an authorization to do is required from the Union. Finland, too, has specific national interests in fields such as transport, environment or judicial cooperation where bilateral cooperation with third States is required. In the context of participation in the work of international organizations, too, the Court's broad approach to the construction of the exclusivity aspect of the AETR effect makes it difficult to estimate whether, in a given case, a Member State is entitled to act.

From practical point of view of the Finnish administration the AETR effect has had, and continues to have, considerable significance in a number of policy fields such as, for example, transport, environment as well as judicial cooperation in both civil law and criminal law matters. In most cases concerning the perceived application of Article 3(2) TFEU, the principal interest of Finland has been to preserve the possibility of concluding bilateral agreements with countries

[16] Case C-114/2, *Commission v Council*, above n 2, para 87.
[17] Ibid, para 87.
[18] Opinion 2/15, above n 2, para 189.

such as the Russian Federation in areas where some EU legislation exists. In multilateral contexts, Finland has been, generally speaking, more inclined to accept the Commission's claims for an exclusive competence of the Union based on Article 3(2) TFEU.[19]

In the area of transport, the Commission has instituted infringement proceedings against Finland in respect of the bilateral "open skies" agreements with the United States of America.[20]As regards air transport in particular, the prevailing view in the administration is that while a significant body of EU legislation exists, there is no basis for an exclusive competence of the EU by virtue of Article 3(2) TFEU in respect of the central issue concerning traffic rights. In transport matters, exchanges with the Commission have also taken place in respect of rail transport as well as in the context of the negotiations on the Agreement between Finland and the Russian Federation on Transport of Dangerous Goods by Rail[21], to name a few examples.

As regards the AETR effect in the field of environment, the best example from the actual practice is perhaps the issue concerning the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, currently subject to preparatory work under the auspices of the United Nations (the so-called "BBNJ process"). In that regard, Finland is currently intervening in support of the Council in Case C-626/15 *Commission v Council*[22] and Case C-659/16 *Commission v Council*[23] in both of which the Commission argues that the creation of marine protected areas and special study areas under the Convention on the conservation of Antarctic marine living resources[24] falls within the exclusive competence of the Union either on the basis of Article 3(1) TFEU or, in the alternative, on the basis of Article 3(2) TFEU.

As an example concerning judicial cooperation in civil law matters, bilateral agreements governing international child abduction could be mentioned.[25] That question, however, is now settled by virtue of the Court's Opinion 1/13

[19] The Commission has also instituted infringement proceedings (2011/2127) against Finland alleging an infringement of, *inter alia*, Article 3(2) TFEU, in the context of voting in the International Organization of Wine. The letter of formal notice issued on 30 September 2011 has however had no follow-up so far.

[20] See Case C-469/98, *Commission v Finland*, EU:C:2002:627.

[21] Cf Annex II, Section II.2, paragraph 8 of Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods, [2008] OJ L 260/13.

[22] [2016] OJ C 59/5 (pending).

[23] [2017] OJ C 38/20 (pending).

[24] [1981] OJ L 252/27.

[25] In a letter submitted on 2 April 2013 in the context of the EU Pilot procedure (an informal procedure preceding the launch of the procedure provided for in Article 258 TFEU) the Commission claimed that by accepting the accession of the Russian Federation to Hague Convention Finland had breached Article 3(2) TFEU. Formal infringement proceeding have not been instituted, however.

concerning the Convention on the civil aspects of international child abduction.[26] Regarding criminal law matters, a recent example of the application of Article 3(2) TFEU relates to the negotiation and signing of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) and of the Additional Protocol to the Convention. The Commission claims that the Additional Protocol is within the exclusive competence of the Union in its entirety by virtue of Article 3(2) TFEU in the light of the measures adopted by the Union in the area covered by the Protocol.[27]

Questions 3 and 4

In contrast to Article 3(2) TFEU, which governs the question as to how the Union's implied *exclusive* external competence arises, Article 216(1) TFEU governs the (logically prior) question of the *existence* of the Union's external competence to conclude international agreements.

Under Article 216(1), the Union has external competence in four situations: first, this is case where a power-conferring provision (legal basis) in the Treaties expressly authorizes the conclusion of an international agreement on behalf of the Union. Secondly, such competence exists "*where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*". In other words, even when a given legal basis in the Treaty does not expressly authorize the conclusion of an international agreement as an instrument of pursuing one of the Union's policies, the Court has held that the Union's external competence follows, by implication, from the legal basis in question provided that the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties.[28] The second situation in Article 216(1) represents the codification of this case law.[29] Thirdly, the Union's external competence may

[26] Above n 3.

[27] See notably Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, [2017] OJ L 88/6. Cf. Council Decision (EU) 2015/1914 of 18 September 2015 on the signing, on behalf of the European Union, of the Additional Protocol, [2015] OJ L 280/24, asserting that "*[t]he Member States retain their competence in so far as the Protocol does not affect common rules or alter the scope thereof.*"

[28] See Opinion 2/91, above n 10, para 7 and Opinion 2/94, Accession of the Community to the ECHR), EU:C:1996:140, para 26. It should be noted that under the second ground of Article 216(1) TFEU, the test of whether "*the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*" should be interpreted in the light of the criteria that apply in the context of the relevant (internal) legal basis. Under the second ground Article 216(1), therefore, the Union's external competence always arises *in conjunction* with the relevant (internal) legal basis.

[29] It should be pointed out that the "necessity test" under Article 216(1) TFEU is different from and not as strict as the one to be performed under the second situation governed by Article 3(2) TFEU.

arise when the conclusion of an international agreement "*is provided for in a legally binding Union act*", and fourthly, when this "*is likely to affect common rules or alter their scope*". The third and fourth situations, which are closely related, are deemed to be of a much more limited relevance: they seek to cater for the (relatively rare) situation that arose in the context of the Court's Opinion 1/94 on the WTO,[30] that is, the case where the objectives of Treaties (such as the ones governing the provision of services between the Member States) are not intended to pursue external objectives (such as provision services between the Member States and third States) but where an implied external competence of the Union to conclude an international agreement may none the less arise through the adoption of Union legislation – that is, through the "existence aspect" of the Court's AETR case law.

As explained above, Article 216(1) TFEU and Article 3(2) TFEU govern two distinct questions: Article 216(1) determines the *existence* of EU external competence while Article 3(2) (and 3(1) determines whether that competence is *exclusive* or not.[31] The link between the two provisions relates to the fact that, in spite of certain differences in various linguistic versions, the third situation in Article 3(2) on the one hand and the fourth situation in Article 216(1), are couched in a similar language.[32] Hence, showing that an external competence of the Union *exists* under the fourth ground under Article 216(1) automatically means that that competence is *exclusive* in nature under Article 3(2).[33]

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

No comprehensive survey has been carried out on the experience in the administration concerning the interaction between the negotiator and the special committee of Article 218 (4) TFEU. In general, there is a great deal of variation from sector to sector as regards both the intensity of control exercised by the special committee upon the Commission and the level of sharing of information on the negotiations by the Commission with the special committee. In some areas such as air transport, agreements are negotiated relatively independently by the

[30] Opinion 1/94, above n 4, paras 81 and 95.

[31] See Opinion of Sharpston AG in Opinion 2/15, EU:C:2016:992, para 64, and Opinion of Szpunar AG in Case C-600/14, *Germany v Commission*, above n 3, para 80.

[32] Notably, the French versions of the relevant phrases are identical («*est susceptible d'affecter des règles communes ou d'en altérer la portée* »). See Opinion of Sharpston AG in Opinion 2/15, above n 31, footnote 27, and Opinion of Szpunar AG in Case C-600/14, *Germany v Commission*, above n 3, footnote 53.

[33] See Opinion of Sharpston AG in Opinion 2/15, above n 31, para 70.

Commission, the provision of information being limited mostly to oral statements in the relevant committee. In the context of negotiations conducted under the auspices of international organizations (such as the Council of Europe), the Members to which only include the Member States, the involvement by the latter in the negotiations is greater.

The overall impression is that since the entry into force of the Treaty of Lisbon the stance of the Commission towards protecting its prerogatives under Article 218 TFEU has become stronger. This trend is also reflected by the cases brought by the Commission before the Court: while in the past questions of the respective powers of the Council and the Commission in the context of negotiating international agreements gave rise to no litigation, the Commission recently brought two actions for annulment concerning decision of the Council relating to the authorization of the opening of negotiations and/or the issuing of negotiating directives.[34]

Questions 6 and 7

As a rule, the practice is to limit the scope of the provisional application to those provisions of the agreement that are considered to fall within the Union's *exclusive* competence such as trade provisions falling under Article 207 TFEU. There have, however, been exceptions to this rule both to the effect of excluding even trade provisions from the scope of the provisional application of agreement as in the case of the Association Agreement with Ukraine[35] and to the effect of including provisions that were not conceived of as falling within the Union's exclusive competence as in the case of various provisions of the Comprehensive Economic and Trade Agreement (CETA).[36]

As, however, the decision by the Council to provisionally apply an agreement on behalf of the Union is usually not accompanied by corresponding decisions of all of the Member States,[37] the question arises as to how the parts of the agreement

[34] See Case C-114/12, *Commission v Council*, above n 2, and Case C-425/13, *Commission v Council*, EU:C:2015:483.

[35] See Article 4 of Council Decision (2014/295/EU) of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof, [2014] OJ L 161/1.

[36] See Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the 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 L 11/1080, and the statements and declarations entered into the Council minutes on the occasion of the signature of the Agreement, [2017] OJ L 11/9.

[37] Some Member States are constitutionally not in a position to apply international agreements on a provisional basis. In those (exceptional) cases where a mixed agreement is, in principle, applied

falling within the scope of the provisional application by the Union are defined. Sometimes, there is no explicit definition at all.[38] For those cases where the parts to be applied provisionally are explicitly are defined there are two principal techniques for identifying the relevant provisions. First, the agreement itself may identify the provisions that are subject to provisional application.[39] Secondly, the agreement may provide for the possibility of either full *or partial* provisional application and leave it to the parties to determine and notify which of the provisions are applied provisionally.[40] While it would normally be the understanding that those provisions that are not covered by the provisional application of an agreement by the Union fall within the competence to be exercised by the Member States, the practice is not to include – either in the agreement or in

provisionally by the Union and all of its Member States, some caveat is therefore made to cater for the domestic legislation concerned. See, eg, Article 3 of the Decision of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 20 December 2012 (2013/398/EU) on the signing, on behalf of the European Union, and provisional application of the Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part, and the Government of the State of Israel, of the other part ([2013] OJ L 208/1) providing that "... *the Agreement shall be applied on a provisional basis by the Union and by its Member States, in accordance with their internal procedures and/or domestic legislation as applicable, from the date of signature of the Agreement.*" (emphasis added). For those Member States unable to apply international agreements on a provisional basis, a full ratification forms part of the "internal procedures". In Finland there are no specific provisions in the Constitution or other legislation on the procedure to be followed the decision-making on provisional application of international agreements. As a rule, a decision on provisional application is taken by the President of the Republic or, in the case of decisions taken by the Representatives of the Member States meeting within the Council, the plenary session of the Government. If an agreement contains provisions the adoption of which is the prerogative of the Parliament, the agreement will have to be adopted by the Parliament through the normal procedure followed in the ratification of international agreements. Therefore, Finland may not be able to apply such provisions of the agreement as of the date of its signature.

[38] An example is the Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part. The agreement was applied provisionally by the Union by virtue of the Council Decision (2013/40/EU) of 10 May 2010 ([2013] OJ L 20/1) as of 10 May 2010 and by Spain as of 3 February 2011 and by Slovakia as of 16 March 2011. The extent to which the Agreement applies in the remainder of the Member States is not defined.

[39] See, eg, Article 117 of the Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part (OJ 2012 L 204/20), providing for the provisional application of Article 2, and Titles II, III and V of this Agreement between the EU and Iraq.

[40] See, eg, Article 330(3) of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part ([2012] OJ L 354/3). Pursuant to Council Decision (2012/375/EU) of 31 May 2012 the Agreement, with the exception of Arts 2, 202(1), 291 and 292 thereof, has between applied between the EU and Peru as of 1 March 2012 and between the EU and Colombia as of 1 August 2013. See also Article 15.10(5) of the Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part ([2011] OJ L 127/6) that provides for an elaborate procedure for defining the scope of the provisional application.

the Council decision on the signature and provisional application thereof – any express reasoning to that effect in the decision of the Council.

The question of the implications of non-ratification by a Member State of a mixed agreement for the provisional application usually only arises in the context of "bilaterally-structured" mixed agreements – that is, mixed agreements concluded between the EU and its Member States, of the one part, and a third State (or a group of third States), of the other part (such as trade, cooperation, or association agreements). As a rule, such agreements may only enter into force once all of the parties have notified each other of the completion of the internal legal procedures, it being a common practice to apply them provisionally as between *the Union* and the third State (or States) pending the completion of ratification procedures in each Member State.

Should a Member State make clear its intention not to ratify a mixed agreement, the treaty-obligations based on the agreement would cease to have effect *as a matter of public international law* insofar as concerns the Member State in question and the agreement could not, in principle, enter into force as between the parties. However, it follows from Article 216(2) TFEU that the treaty-obligations covered by the decision of the Union to apply the agreement would continue bind the Member State concerned *qua* Member State of the EU. In principle, the provisional application of the agreement as between *the Union* and the third State (or States) could continue until either of those parties gives a notification of its intention to terminate the provisional application. Whether there should be such a notification in the event of a non-ratification of the agreement by a Member State depends on the political decision of the Union and the third State (or States), respectively. Neither EU law nor public international law poses definitive obstacles to the continued provisional application of the agreement as between *the Union* and the third State (or States). Insofar as concerns the Union, the decision to terminate the provisional application should be taken in accordance with the same decision-making procedure that was applied for the initial decision to apply the agreement provisionally.

As regards the definitive entry into force of the agreement in the event of a declaration of a Member State not to ratify the agreement there are basically three alternative courses of action. First, the agreement (amended, if appropriate) could be concluded as a "pure" Union agreement without the participation of the Member States. Secondly, the agreement could be amended as a mixed agreement if the amendments had the effect of changing the position of the recalcitrant Member State. Finally, a legal (or political) act other than an amendment to the agreement – for example, clarifying the interpretation of some of its provisions – might be sufficient in that regard – as demonstrated by the Decision of the Heads of State or Government of the 28 Member States

designed to persuade The Netherlands to ratify the Association Agreement with Ukraine.[41]

Question 9

In Finland, the possibility of suspending a bilateral trade, cooperation or association agreement concluded by the Union is considered an important means of ensuring compliance with the agreement especially insofar concerns the provisions constituting so-called "essential elements" of the agreement, typically covering respect for fundamental human rights as well as disarmament and non-proliferation of weapons of mass destruction.[42]

The experience from the application of the decision-making procedure provided for by Article 218(9) TFEU for the suspension of the application of international agreements is however limited given the fact that it has only been applied twice, in both cases in respect of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic.[43] A much more commonplace feature of the practice of suspending international commitments in the context of EU's international agreements has been the suspension development aid pursuant to Article 96 of the Cotonou Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part.[44] These decisions however are not covered by Article 218(9) TFEU since the aid is not funded from the EU budget but from the European Development Fund based on an agreement concluded between the Member States.

Question 10

There have been no decisions of the Council concerning the establishment of positions to be adopted on behalf of the EU in bod set up by an international agreement that would have proven contentious to a degree that Finland would have contemplated challenging them before the Court of Justice.

[41] For the text of the Decision, see http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-euco-conclusions-ukraine/.

[42] See the Report of the Government to the Foreign Affairs Committee of the Parliament on the policy of Finland in regards to international treaties (UTP 18/2011 vp) p. 15.

[43] See Council Decision (2011/523/EU) of 2 September 2011 partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, [2011] OJ L 228/19, and Council Decision (2012/123/CFSP) of 27 February 2012 amending Decision 2011/523/EU partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, [2012] OJ L 54/18.

[44] [2000] OJ L 317/3.

Questions 6, 8 and 11

In most cases the Council does not wait for the consent of the European Parliament (required in the course of the procedure concerning the conclusion of an agreement) before deciding on the provisional application of the agreement. As a general proposition, there is currently no support in Finland for formally involving the Parliament in the decision-making on provisional application beyond the duties of keeping the Parliament "*immediately and fully informed at all stages of the procedure*" flowing from Article 218(10) TFEU. Of course, there could be circumstances where the prior involvement of the Parliament might be desirable in the light of a prospect of the Parliament otherwise failing to give its consent to an agreement at the stage of its conclusion.

The criterion concerning "*agreements establishing a specific institutional framework by organising cooperation procedures*", currently provided for in Article 218 (6) (a) (iii) TFEU, has been applied to the conclusion of a variety of international agreements establishing international organizations or bodies, ranging from regional fisheries organizations to the World Trade Organizations, or providing for the accession of the Union to existing international organizations or bodies, such as the Hague Conference on Private International Law. It has not however been interpreted by the Court of Justice.

In contrast, the criterion "*agreements with important budgetary implications for the Union*" set out in Article 218 (6) (a) (iv) TFEU, inspired by the central role of the European Parliament the adoption of the Union's budget has, to the knowledge of the present author, never been applied in practice. In a case relating to the conclusion of fisheries agreement with Mauritania, the Court has laid down certain criteria for assessing whether budgetary implications of an agreement are deemed to be "significant" within the meaning of Article 218 (6) (a) (iv).[45]

The interpretation of neither of the two provisions has received specific attention in Finland.

Article 218(10) TFEU is considered to provide an adequate basis for involving the European Parliament in the decision-making during the various stages covered by Article 218.

In Finland, Sections 96 and 97 of the Constitution govern the involvement of the Parliament in the negotiation, signature and conclusion of agreements *to be concluded by the European Union*.

Under Section 96 of the Constitution the Government shall, without delay after receiving notice of *a proposal* for an act, agreement and other measure that is to be decided in the European Union and which otherwise, according to the Constitution, would fall within the competence of the Parliament, communicate

[45] Case C-189/97, *Parliament v Council*, EU:C:1999:366.

the proposal to the Parliament. This obligation applies as soon as there is *a sufficiently advanced draft of the agreement (or a part thereof)* to enable the Parliament to establish a position. The moment of communication should be chosen in such a way that the Parliament would still have effective means of influencing the negotiations by determining its position. In the Parliament, the proposal is considered in the Grand Committee and ordinarily in one or more of the other Committees that issue statements to the Grand Committee. Where necessary, the Grand Committee or the Foreign Affairs Committee may issue to the Government a statement on the proposal. In addition, the Speaker's Council may decide that the matter be taken up for debate in plenary session, during which, however, no decision is made by the Parliament. If necessary, the communication may have to be complemented by further communications in the course of the negotiations. In principle, the Government should not commit itself to the outcome of the negotiations before the Parliament has had an opportunity to determine its position on matters falling, according to the Constitution, to its competence.

A recommendation by the Commission (or the High Representative of the CFSP) to the Council for a decision authorising the opening of negotiations under Article 218(3) TFEU, of a decision of the Council based on such a recommendation, does not yet constitute "a proposal for agreement" within the meaning of Section 96 of the Constitution. However, under Section 97 of the Constitution the Government is under an obligation to *inform* the Parliament of such decisions of the Council including, if applicable, the negotiating directives addressed by the Council to the Commission or the High Representative. If necessary, supplementary information may be provided in the course of the negotiations even before they have advanced to a stage when the obligation to issue a communication under Section 96 of the Constitution becomes applicable, or in case of agreements to which Section 96 does not apply.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Questions 16, 20 and 21

In the context of Opinion 2/15 relating to the Free Trade Agreement between the EU and Singapore,[46] it was submitted by Finland, first, that the concept of foreign direct investment in Article 207(1) TFEU does not cover portfolio investments and, secondly, that the provision of transport services is governed by Title VI of Part III of the TFEU on the Common Transport Policy. The Court reached the same conclusion on both questions.

[46] Opinion 2/15, above n 3.

It follows from *Daiichi Sankyo* that the TRIPS agreement falls, in its entirety, within the scope of the common commercial policy.[47]

The last sentence of 207(1) TFEU provides essentially a "cross-reference" to Article 21(3) TEU: according to the latter provision, "*[t]he Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 [of Article 21 TEU] in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.*" As the Court of Justice has confirmed in Opinion 2/15, it follows from the combined reading of those provisions and of Article 205 TFEU that there is an obligation to "integrate" the objectives and principles set out in paragraphs 1 and 2 of Article 21 TEU into the conduct of the Union's common commercial policy.[48] In that regard, the above provisions play a role that is essentially similar to provisions such as Article 6 of the EC Treaty that, while being "scattered" around the former Treaties, laid down "cross-sectoral obligations"[49] which were to be taken into account in all the other policies of the Community, thus including the common commercial policy.

Opinion 2/15 also sheds light on the implications of Article 21 TEU for the scope of Article 207 TFEU as a legal basis. According to the Court, measures designed to ensure that the principles and objectives set out in paragraphs 1 and 2 of Article 21 TEU are respected and pursued in the context of liberalization of trade may be adopted pursuant to Article 207 TFEU.[50] This includes measures intended to ensure that parties of a trade agreement comply with (other) international agreements to which they are party in fields such as social protection and environmental protection.[51] This may contribute to a broader understanding of the reach of Article 207 TFEU as a legal basis. However, in Opinion 2/15 the Court, referring to Article 207(6), was careful to point out that the Union's competence in the field of the common commercial policy does not prevail over other provisions (legal bases) of the TFEU and, in particular, "*... cannot be exercised in order to regulate the levels of social and environmental protection in the Parties' respective territory.*"[52] Therefore, whenever the predominant purpose or component of a measure relates to one of the principles or objectives set out in Article 21 TEU rather than the conduct of the common commercial policy, a legal basis

[47] C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para 56. See also, in this sense, Opinion of Sharpston AG in Opinion 2/15, above n 31, para 430.

[48] Para 143.

[49] See Opinion of Kokott AG in Case C-178/03, *Commission v Parliament and Council*, EU:C:2005:312, para 32.

[50] Para 163.

[51] Para 152.

[52] Para 164.

other than Article 207 will have to identified in the Treaty for the authorization of the adoption of the measure in question by the Union.

In practice, negotiation mandates for, as well as decisions on signature, provisional application and conclusion of, trade agreements concluded by the Union are always adopted by "consensus" within the Council. This is due partly to a "tradition" followed within the framework of the common commercial policy of not forcing issues to a vote and partly to the fact that broad trade agreements – such as, for instance, the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part,[53] or CETA[54] – have, in any event, been concluded as mixed agreements. This practice of aiming at reaching a consensus has both positive and negative implications for the conduct of the common commercial policy. On the positive side, each Member State is "getting on board" of the decisions reached. However, an obvious trade-off is the negative implications for the efficiency of decision-making within the Council. In general, Finland is, and has traditionally been, in favour of a more frequent application of qualified majority voting in the Council.

It is worth to note that the second and third subparagraphs of paragraph 4 of Article 207 TFEU – whereby the Council decides by unanimity – have, to the knowledge of the present author, never been applied in practice. It will be interesting to see, if the possible "splitting" of trade agreements to Union agreements on the one hand and Member State agreements on the other hand, currently being contemplated in regard to the Free Trade Agreement with Singapore as well other new free trade agreements,[55] brings with it calls from Member States for a more frequent recourse to the provisions of Article 207(4) requiring unanimity.

Questions 17, 18 and 19

The relationship between bilateral investment agreements and the agreements concluded by the European Union in this area is governed by Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries[56] (the so-called "Grandfathering regulation"). While there was, in the course of the legislative procedure, a degree of disagreement between the European Parliament on the one hand and Member

[53] [2012] OJ L 354/1.

[54] [2017] OJ L 11/1 and 1080.

[55] Notably by the DG TRADE of the Commission. See http://www.politico.eu/article/juncker-proposes-fast-tracking-eu-trade-deals/. The issue was however not mentioned in President Juncker's "State of the Union" speech before the European Parliament on 13 September 20017.

[56] [2012] OJ L 351/40.

States on the other hand as to the scope of the freedom to be granted to the latter for the purposes of maintaining their existing bilateral investment agreements and negotiating new ones, the proposal of the Commission did not become subject to either a political or a legal debate in Finland. The principal objective of the Government was to avoid a legal lacuna, that is, to ensure that the existing agreements remain in force until they are replaced by Union agreements, new agreements concluded by Member States or through some other arrangements.[57]

While the Government has broadly recognized the need for effective dispute settlement mechanisms in the context of new free trade agreements such as TTIP and CETA, the inclusion of an ISDS mechanism in such agreements has given rise to some discussion and controversy in the Parliament and mainly critical reactions from the academia and the civil society. The essence of the criticism has been three-fold: first, it has been questioned whether there is, from the perspective of providing for adequate legal protection for investors, a need for an ISDS mechanism in trade treaties between parties whose legal systems are sufficiently developed. For instance, in respect of the TTIP, the Grand Committee, the Foreign Affairs Committee as well as the Constitutional Law Committee of the Parliament have queried as to "*why disputes between an investor and State authorities under a treaty between parties proving for adequate judicial protection through a system of independent courts should be resolved elsewhere than in domestic courts of the parties*."[58] Secondly, there has been a concern that ISDS arbitration might either curtail the legislative prerogatives of the States or provide a means for foreign investors of lowering regulatory standards in fields such as labour, environment or consumer protection.[59] Thirdly, criticism based on the lack of predictability, accountability and transparency has been raised against the features of the ad hoc arbitration mechanism originally envisaged for the TTIP.[60]

The above concerns relating to the features of ad hoc arbitration have to some extent been eased by the proposals from the Commission for the establishment proposal of the Commission for an Investment Court System for TTIP and other EU trade and investment negotiations (16 September 2015) – now also reflected also in the final version of CETA: important elements in this regard include the enhanced transparency of the procedure, the increased legitimacy and permanence of the jurisdiction, the inclusion of an appeal system as well as the role

[57] See the Government Communications U 14/2011 vp (1 June 2011) and UM2012-00381 (6 March 2012).
[58] Report of the Constitutional Law Committee PeVL 31/2016 vp. See also the reports of the Grand Committee SuVL 5/2016 vp and the Foreign Affairs Committee UaVL 4/2016 vp.
[59] See, eg., the reports of the Finance Committee 3/2014 vp and the Environmental Committee YmVL 14/2016 vp.
[60] See the reports of the Foreign Affairs Committee UaVL 1/2014 vp and the Grand Committee SuVL 1/2014 vp.

provided for domestic courts.[61] The dispute settlement mechanisms contained in CETA have proven acceptable to the Government[62] while, however, the parliamentary proceedings are still pending. As regards TTIP, the assessment of the corresponding mechanisms is waiting for the eventual resumptions of the negotiations between the US and the EU – an issue that is, as everybody knows, very much in the dark for the time being.

Insofar as concerns the liability of the Union and of the Member States resulting from a breach of an agreement to which the Union is party, or the Union and its Member States are parties, Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party[63] applies. As regards investment treaties to which only Member States are parties, international responsibility resides with the Member State to whom the breach of an obligation is attributable.

In the negotiations leading to the adoption of the Regulation Finland generally recognized the need for such an instrument as well as the main features for the arrangement proposed by the Commission.[64] The most controversial issue during the negotiations was whether, given the limitation of the scope of application of Article 207 TFEU to, inter alia, "*the conclusion of tariff and trade agreements relating to ... foreign direct investment*" (paragraph 1) and to "*measures defining the framework for implementing the common commercial policy*" (paragraph 2), that provision provided an adequate legal basis for the Regulation. Finally, the disagreement concerning the legal basis was resolved through maintaining Article 207 as the sole legal basis while, at the same time, re-drafting of Article 1 of the Regulation as well as an amendment to Article 2 concerning the definition of an "agreement"[65] to which the Regulation applies. Accordingly, in the context of Opinion 2/15, Finland pleaded before the Court of Justice that the scope of application of the Regulation is limited to foreign direct investment. The Court did not pronounce on this question, nor has the scope of the application of the Regulation been tested in practice so far.

[61] See especially the Government communication of 8 October 2015 (UM2015-01287) and the report of the Legal Affairs Committee LaVL 6/2016 vp.

[62] See the Government Communication of 30 March 2016 (UM2016-00370).

[63] [2014] OJ L 257/121.

[64] See the Government communication U 56/2012 vp (20 september 2012).

[65] According to Article 2(a), of the Regulation "'*agreement' means any international agreement covering provisions on foreign direct investment to which the Union is party, or the Union and its Member States are parties, and which provides for investor-to-state dispute settlement;*" (emphasis added). According to the corresponding provision of the Commission's proposal (COM(2012) 335 final) "agreement" was defined as meaning "*any international agreement to which the Union is a party ...*"

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

According to Protocol 23 – originally annexed to the TEU and the TEC by the Treaty of Amsterdam, and carried over by the Treaty of Lisbon – aims to preserve the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements. It therefore pursues a function similar to Article 191, paragraph 4, second subparagraph, TFEU on environment as well as Article 209, paragraph 2, second subparagraph, TFEU on development cooperation as well as Article 219, paragraph 4, TFEU on agreements regarding the economic and monetary union. The essential question is, and has always been, whether Protocol 23 and the other corresponding provisions have a bearing on how an exclusive external competence arises according to the Court's AETR case law, now codified by Article 3(2) of the TFEU.[66] In other words, the question is whether Member States are precluded from entering into international commitments concerning measures on the crossing of external borders covered by Article 77(2)(b) TFEU in so far as this may affect common rules adopted by the Union's institutions through secondary legislation, or alter their scope.

Insofar as concerns the above provisions on environment, development cooperation and economic and monetary policy, the answer should, in principle, be in the affirmative. Indeed, at the time of their adoption, a declaration was annexed to the Final Act of the 1992 Intergovernmental Conference providing that "*... the provisions of Article 109(5) [economic and monetary policy], Article 130r(4), second subparagraph [environment], and Article 130y [development cooperation] do not affect the principles resulting from the judgment handed down by the Court of Justice in the AETR case.*" Another matter is that in the case of development co-operation the Court has held that, insofar as concerns development aid, "*[t]he Member States are ... entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community*",[67] that case law now being reflected by Article 4(4) TFEU regard development cooperation and humanitarian aid more generally.[68] On the other hand, regarding economic and monetary policy as well as environment there has never been a suggestion that the AETR case law would not apply.[69]

[66] See above Section 2.1.

[67] Case C-316/91, *Parliament v Council*, EU:C:1994:76, para 26.

[68] Article 4(4) TFEU, provides that "*[i]n the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.*"

[69] In any event, monetary policy for the Member States whose currency is the euro falls *a priori* within the exclusive competence of the Union by virtue of Article 3(1)(c) TFEU.

As regards the position of Protocol 23 no conclusive judicial authority exists, however.[70] In the Finnish Government Bill concerning the ratification of the Amsterdam Treaty it was explained that the Protocol authorizes Member States to conclude international agreements on standards and procedures to be followed in carrying out checks on persons at their external borders *even after the adoption of rules on the matter by the Community*, provided that such agreements as long as those agreements respect those rules and other relevant international agreements such as the Convention relating to the Status of Refugees.[71] Therefore, in the view of the Government, the authority of the Member States to conclude agreement would appear depend on whether those agreements comply, *in the light of their substantive provisions*, with any existing Union legislation.[72] It was further explained that insofar as concerns agreements entered in to prior to the entry into force of the Amsterdam Treaty, Article 351 TFEU would apply. Finally, the practical importance of the Protocol to Finland – one of its proponents at the 1996-7 Intergovernmental Conference – was highlighted, with reference to bilateral cooperation on issues relating to checks on person on the border with the Russian Federation.[73]

As an example of an agreement considered to fall within the scope of application of Protocol No 23 one could mention the Agreement of 9 August 1994 between the Government of the Republic of Finland and the Government of the Russian Federation in the field of civil protection.[74] In Article 11 the Agreement provides for simplified procedures for the crossing of the border by rescue personnel as well as their equipment. The provision is conformity with the Schengen Borders Code[75], Annex VII, paragraph 7, authorizing Member States to

[70] In her opinion in Case C-254/11, *Shomodi*, EU:C:2012:773, Cruz Villalón AG notes (*obiter dictum*) that "*... in accordance with Protocol No 23 on external relations of the Member States with regard to the crossing of external borders, annexed to the EU Treaty and the TFEU, if, in the absence of provisions adopted on the basis of Article 77(1)(b) TFEU, Member States retain a competence to negotiate and conclude agreements with third countries, they may do so only provided they respect European Union law and other international agreements.*" (footnote 55, emphasis added).

[71] Government Bill 245/1997 vp p. 146.

[72] Normally, the AETR effect gives rise to an exclusive external competence for the Union irrespective of whether there is any contradiction between a given international agreement on the one hand and the common rules established by secondary legislation on the other hand. See, eg., Case C-467/98, *Commission v Denmark*, EU:C:2002:625, para 101.

[73] Government Bill 245/1997 vp p. 146.

[74] Sopimus Suomen tasavallan hallituksen ja Venäjän federaation hallituksen välillä yhteistyöstä onnettomuuksien ehkäisemiseksi ja niiden seurausten torjumiseksi, SopS (Finnish Treaty Series) 52/1996.

[75] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016] OJ L 77/1.

conclude bilateral agreements with third countries on the entry and exit of those categories of persons rescue services, police, fire brigades and border guards. There appears to exist no agreements concluded on the basis of Protocol No 23 that would not be in conformity with the Schengen Borders Code.

Questions 23, 24, 25

In Finland the concept of safe third country is defined in Section 99 a of the Aliens Act (30.4.2004/301) (as amended by the law 6.3.2015/194) as a country which has ratified, without a geographical reservation, the United Nations Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in which the applicant could have received protection provided for in Sections 87 and 88 of the Aliens Act or otherwise adequate protection. A decision is always taken on case-by-case basis having regard to the individual circumstances of the applicant. Emphasis is placed on an assessment as to how the given third country complies with the above conventions in practice; the mere fact of the country having adhered to them is not considered to provide a sufficient guarantee that they are actually complied with. As a rule, the country concerned should receive the applicant. However, no acknowledgement of reception is needed in an individual case.

In practice, the Finnish Immigration Service has applied the concept of safe third country in two cases only. One (in December 2015) concerned the return of an Iranian national to South Korea and the other (in May 2016) the return of an Iraqi national to Georgia. In both cases, the spouse of the applicant resided in the third country concerned in which the applicant also had a valid residence permit. In addition to the compliance with the conventions provided for in Section 99 a of the Aliens Act, importance was attached to the fact that no grave human rights violations have taken place in the countries concerned. In the case of South Korea it was also emphasized that the county is a stable democracy with an independent judiciary that complies with the principles of a fair trial. As regards Georgia it was held that the most significant problems relating to the respect of human rights relate to the restriction of the freedom of speech, the freedom of the media, the freedom of assembly as well as the independence of the judiciary.

As regards national case law on the interpretation and application of the safe third country concept, reference may be made to the decision of 20 April 2016 of the Supreme Administrative Court[76] in respect of the Dublin III Regulation[77]

[76] KHO:2016:53.

[77] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an

in a situation where it could be possible that another Member State (Hungary) would return the applicant to a third country (Serbia) that it regards a safe third country. The decision marked, for the time being, an end to returns of applicants under the Dublin system from Finland to Hungary.

Finland does not apply the procedure provided for in Article 39 of Directive 2013/32/EU.

The massive and controlled arrival of applicants seeking protection in the European Union has burdened asylum procedures of the Member States and the common asylum system of the Union. It is important that solutions to control migration flows and the refugee crisis are sough at the level of the Union. The link actually established by the Member States between, on the one hand, the policies and practices relating to the concept of a safe third country and, on the other hand, the extraterritorial control of immigration is crucial in this respect. If there is no workable concept of a safe country, combined with a procedure for a speedy or immediate return of applicants, there is no possibility of controlling the migration flows. The Union should be able to provide a signal of an efficient and uniform asylum procedure, based on uniform criteria established at the Union level.

The Global Approach to Migration and Mobility (GAMM) is considered to be a much-desired political tool. However, the different procedures set out in the GAMM have different backgrounds and different objectives and, consequent, there are also differences in their practical impact. Regrettably, some of the results have proven relatively modest in practice. The Partnership Approach as such does not remove the need for the GAMM. The former has its own distinct objectives one of which is the promotion of returning of asylum seekers.

Finland does not maintain special relations envisaged in COM(2016) 385 final, p. 9, nor has it concluded bilateral or multilateral pacts with African countries.

Finland considers that the principal responsibility of concluding readmission agreements falls upon the European Union. If the Union does not act, it is important that Member States may conclude bilateral agreements with third countries without Article 79 (3) or Article 3 (2) TFEU posing obstacles to Member States for doing so. If there is a readmission agreement concluded between the EU and a third country, on the one hand, and between a Member State and the same third country, on the other hand, the EU agreement should prevail.

Finland has concluded bilateral readmission agreements with Romania, Switzerland and Kosovo. The agreements do not contain "problematic clauses" referred to in the question.

application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L 180/31.

FRANCE

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CHAPITRE 1: RÉPARTITION DES COMPÉTENCES ENTRE L'UE ET LES ETATS MEMBRES[1]

1. Effet AETR

1.1. *Introduction*

L'arrêt AETR[2], dans ses deux dimensions – existence et nature de la compétence externe – a été constitutionnalisé par le traité de Lisbonne, respectivement aux articles 216 §1 TFUE et 3 §2 TFUE. *L'effet AETR* qui entraine le dessaisissement des Etats membres de leur compétence pour conclure un accord international lorsqu'il est susceptible d'affecter des règles communes ou d'en altérer la por-

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[2] CJCE, 31 mars 1971, affaire 22/70, *Commission/Conseil*, ECLI:EU:C:1971:32.

tée constitue la troisième hypothèse de compétence exclusive visée à l'article 3 §2 TFUE. Contrairement à la situation d'origine où seules étaient concernées les situations de compétences implicites, c'est-à-dire celles où la conclusion d'un accord n'est pas expressément prévue par les traités, *l'effet AETR,* tel que codifié à l'article 3 §2 TFUE, ne comporte pas une telle limitation. Conformément à ce qui résultait déjà de la déclaration nº10 annexée au traité de Maastricht et de l'avis 2/00 de la Cour[3], il joue aussi bien lorsque la compétence externe est implicite que lorsqu'elle expressément prévue par le TFUE, comme par exemple en matière d'environnement.

1.2. *Domaines dans lesquels l'effet AETR a été perçu récemment*

Par son libellé renvoyant à des «règles communes» et l'absence de précision donnée sur les domaines susceptibles d'être concernés, l'article 3 §2 TFUE, troisième hypothèse, a vocation à s'appliquer dans tous les domaines relevant d'une compétence partagée[4], sauf dispositions réservant la compétence des Etats[5]. *A contrario*, la question de *l'effet AETR* ne se pose pas dans les domaines de compétence exclusive par nature de l'Union (art 3 §1 TFUE)[6], ni pour les catégories de compétences où ne peut jouer la préemption : PESC[7] et compétences auxiliaires (appui, coordination, complément)[8].

L'examen de la pratique – décisions du Conseil, propositions de la Commission, jurisprudence de la CJUE – illustre la variété des domaines où *l'effet AETR* a été perçu : transports, ELSJ, environnement, marché intérieur, politique sociale, et, au-delà des domaines cités à l'article 4 §2 TFUE, protection des données[9].

[3] Avis 2/00 du 6 décembre 2001 sur le protocole de Cartagena sur la prévention des risques biotechnologiques, ECLI:EU:C:2001:664.

[4] Article 4 §2, TFUE.

[5] Article 4 §3 et §4, TFUE et Protocole 23 en matière de franchissement des frontières extérieures, voir *infra*.

[6] Si une question dépasse le champ d'application de ces domaines, *l'effet AETR* est potentiellement d'application. Il en par exemple ainsi des accords de libre échange pour les dispositions relatives aux transports (Voir avis 2/15 du 16 mai 2017 sur l'accord de libre-échange UE-Singapour). En matière de ressources biologiques, voir C-659/16, *Commission/Conseil*, pendante devant la Cour, concernant le CCAMLR.

[7] Voir Déclaration nº 13 sur la PESC.

[8] Article 2 §5 TFUE. Notons qu'à propos de certaines questions, éclatées entre plusieurs catégories de compétence (santé par exemple), la question de *l'effet AETR* peut ressurgir, en lien avec des problèmes de base juridiques.

[9] Voir l'accord USA -UE sur la protection des informations à caractère personnel traitées à des fins de prévention et de détection des infractions pénales, d'enquêtes et de poursuites en la matière**,** JOUE 2016 L154, p.1. Sur la première utilisation de l'article 16 TFUE en matière externe, voir C. Billet, «L'«accord-cadre» sur l'échange de données transatlantiques en matière répressive», *RTD. Eur.* 2016, p. 621.

L'éventail des situations dans lesquelles *l'effet AETR* est susceptible d'être perçu dans ces domaines est large : il peut surgir tant aux stades d'élaboration des accords que de leur mise en œuvre, et joue tant pour les accords bilatéraux[10] que pour les conventions multilatérales, y compris lorsque l'Union ne peut elle-même en être partie et où ses Etats membres sont autoriser à y adhérer dans son intérêt[11]. L'examen de la motivation des décisions du Conseil et propositions de la Commission fournit des indications sur le jeu de *l'effet AETR*[12].

Au stade de la négociation, on cherche à éviter les discussions épineuses sur la répartition des compétences, la Commission pouvant être désignée comme négociatrice unique [13]. Mais tel n'est pas toujours le cas, notamment pour les conventions multilatérales : en dépit des tentatives de la Commission[14], les solutions retenues s'inspirent souvent des arrangements généraux de 2011[15] et «la théorie du partage», en lien avec *l'effet AETR*, fréquemment retenue pour la désignation du négociateur (Commission/Etats membres)[16] .

L'effet AETR se manifeste tout spécialement aux stades de la signature, éventuellement assortie d'une application provisoire de l'accord[17], et de la conclusion dans la mesure où il a des conséquences directes sur la présence, ou pas, des Etats membres comme signataires et parties contractantes aux côtés de l'Union (mixité). Le nombre d'avis portés devant la Cour depuis l'entrée en vigueur du traité de Lisbonne et abordant *l'effet AETR*, témoigne de l'importance et des

[10] Voir par exemple l'accord économique et commercial global entre l'UE et ses Etats membres et le Canada (JO 2017 L 11) ou l'accord de libre-échange avec Singapour ayant fait l'objet de l'avis 2/15 précité.

[11] Cas notamment à l'OMI et à l'OIT, voir la décision du Conseil autorisant les États membres à signer ou ratifier l'accord du Cap de 2012 sur la sécurité des navires de pêche, ou à y adhérer, JOUE 2014 L106 p. 4.

[12] Voir par exemple, les considérants 5 et 6 de la décision du Conseil relative à la conclusion du protocole contre la fabrication et le trafic illicites d'armes à feu, de leurs pièces, éléments et munitions, qui font directement référence à l'effet AETR, JO 2014 L 89, p 7. Parfois, les motivations sont moins explicites, se référant à la compétence (non qualifiée) et aux règles adoptées (sans mention d'affectation).

[13] Cas à l'OMC ou pour les accords de libre-échange, alors que les questions ne relèvent pas toutes de la PCC.

[14] Voir la recommandation de la Commission relative à sa participation aux négociations de la convention Mercure, SEC(2009)983 du 15 juillet 2009, où elle sollicitait une autorisation de négociation qui lui a été refusée.

[15] Doc. 15901/11 du 24 octobre 2011. Sur la question, voir C. Flaesch-Mougin, «Représentation externe et compétences de l'UE: quelques réflexions à propos des arrangements généraux du Conseil relatifs aux déclarations de l'UE dans les organisations multilatérales», in C. Boutaieb (dir.), *Mélanges en l'honneur du professeur Masclet*, Publications de la Sorbonne, Paris, 2013, p 571-591.

[16] A. Roger, *L'action environnementale extérieure de l'UE, Les accords mixtes*, L'Harmattan, 2010, p. 44. Pour une illustration récente, voir la décision du Conseil autorisant la Commission européenne à négocier, au nom de l'Union européenne, des amendements à apporter à la convention de Vienne pour la protection de la couche d'ozone et au protocole de Montréal, JOUE 2015 L 127, p. 19).

[17] En dépit d'autres considérations, *l'effet AETR* peut jouer pour déterminer les dispositions concernées (v. *infra*).-

enjeux du sujet[18]. La référence *à l'effet AETR* est également très présente lorsqu'il s'agit de rédiger les déclarations de compétences que l'Union est souvent obligée de fournir pour pouvoir, en tant qu'organisation d'intégration économique régionale, être partie à des conventions[19] ou membre d'organisations internationales[20].

L'impact de *l'effet AETR* est susceptible de se prolonger au stade de la mise en œuvre des accords. Il est ainsi au cœur de la rédaction des arrangements adoptés pour définir les modalités d'expression ou de vote dans les instances prévues par les conventions ou organisations internationales en cas de participation conjointe de l'Union et de ses Etats membres[21]. Sa prise en compte pour l'adoption des positions à défendre par l'Union dans les instances internationales est une question qui fait actuellement débats et plusieurs recours pendants[22] visent à faire préciser par la Cour si l'article 218 §9 TFUE s'applique même lorsque les positions à arrêter ne relèvent pas d'une compétence exclusive de l'Union.

1.3. *Position de la France et problèmes soulevés au niveau national*

Excepté, assez curieusement, pour les deux premières décisions portant spécifiquement sur l'article 3 §2 TFUE[23], la France a toujours pris position lorsque la compétence de l'Union a été examinée par la Cour au prisme de *l'effet AETR*[24]. Elle est aussi partie intervenante dans des affaires pendantes où la question est abordée incidemment[25].

– L'effet AETR est accepté dans son principe par la France. Ses positions devant la Cour, de même que les nombreux accords ou conventions s'y référant et auxquels elle ne s'est pas opposée, confirme «en creux» cette acceptation qui est d'ailleurs partagée par les autres Etats membres[26]. La France trouve dans l'effet AETR un argument pour tenter de circonscrire les interventions de l'Union. Par

[18] Avis 1/13 du 14 octobre 2014 sur l'adhésion d'Etats tiers à la convention de La Haye, ECLI:EU:C:2014:2303 ; avis 2/15 précité ; avis 3/15 du 14 février 2017 relatif au traité de Marrakech sur l'accès aux œuvres publiées.

[19] Bien que non spécifiques à ce domaine, elles sont systématiques pour les conventions environnementales, voir pour la convention de Minamata sur le mercure, la déclaration faisant référence au risque d'affectation des règles communes adoptées par l'Union, JOUE 2017 L 142, p. 4.

[20] Voir décision du Conseil relative à la signature et à la conclusion de l'accord entre l'UE et l'OTIF concernant l'adhésion de l'UE à la convention relative aux transports internationaux ferroviaires (COTIF), JOUE 2013 L 51, p. 8.

[21] V. pour les travaux au sein de la COTIF, JOUE L 51 précité.

[22] C- 697/15 (UIT), C-659/16 (CCAMLR), C- 600/14 (OTIF).

[23] C-114/12, *Commission/Conseil*, ECLI:EU:C:2014:2151, et C- 66/13, *Green Network*, ECLI:EU:C:2014:2399.

[24] Avis 1/13 ; 2/15 et 3/15, précités et C-137/12, *Commission/Conseil*, ECLI:EU:C:2013:675.

[25] C-687/15, C-600/14, et C-659/16 précitées.

[26] V. Michel, «Les compétences externes implicites : continuité jurisprudentielle et clarification méthodologique», *Revue Europe*, octobre 2006, p. 4 à 8.

exemple, elle cherche à privilégier une base juridique où cet effet peut jouer si les conditions d'affectation sont satisfaites[27], plutôt qu'une disposition relevant de la compétence exclusive par nature qui la dessaisit automatiquement de sa compétence[28]. A défaut de pouvoir le faire, elle cherche au moins à invoquer la nécessité de recourir à des bases juridiques complémentaires susceptibles de justifier la mixité de l'accord, comme pour l'accord de libre-échange avec le Canada ou celui avec Singapour[29]. L'effet AETR est aussi utilisé par la France pour imposer les conditions d'une compétence exclusive de l'Union, alors même que les traités, notamment l'article 218 TFUE, ne l'imposent pas, comme pour la désignation du négociateur, le champ de l'application provisoire et l'adoption de positions à défendre dans les instances d'un accord. La France, partie intervenante dans l'affaire C-687/15, a ainsi défendu la thèse selon laquelle l'Union doit avoir une compétence exclusive pour pouvoir adopter une position à défendre dans une instance internationale[30]. Elle dénie au Conseil le droit d'adopter une position pour la conférence de l'UIT , estimant que l'Union ne dispose pas d'une compétence exclusive au sens de l'article 3 §2 TFUE[31].

– Cette posture illustre le souci de garder une présence des Etats aux côtés de l'Union. Au modèle du fédéralisme substitutif, la France préfère incontestablement celle du fédéralisme associatif[32]. Dans le cadre de sa stratégie de «mixisation»[33], elle cherche à neutraliser l'effet AETR en avançant des arguments liés à l'existence d'une compétence nationale, comme la défense de la sécurité publique, pour exclure la compétence de l'Union[34]. La France estime être ainsi en situation de mieux faire valoir ses positions. Certes, la décision de

[27] Conditions dont elle cherche à donner une interprétation stricte (v. question 2).

[28] Voir C-137/12 précitée où la France défendait comme base juridique de la convention sur les services à accès conditionnel, l'article 114 TFUE plutôt que l'article 207 TFUE qui sera retenu par la Cour. Dans le même sens, C-389/15, *Commission/Conseil*, actuellement pendante, où elle s'est portée partie intervenante aux côtés du Conseil, défendant le recours à l'article 114 TFUE comme base juridique de la décision d'ouverture des négociations relatives à un arrangement de Lisbonne révisé concernant les indications géographiques.

[29] Y. Monjal, «Compétences externes de l'Union européenne. L'accord de libre-échange avec la République de Singapour devant la Cour de Justice», *Revue du Droit de l'Union européenne*, nº 1/2017, p. 147-165, sp. p.155.

[30] Thèse défendue par l'Allemagne dans l'affaire C-600/14 (point 92 des conclusions Szpunar, ECLI:EU:C:2017:296).

[31] Point 35 des conclusions de l'avocat général Saugmandsgaard (ECLI:EU:C:2017:645), qui soutient, quant à lui, que la nature de la compétence n'a aucune incidence sur l'application de l'article 218 §9 TFUE.

[32] Sur ces notions, voir E. Dubout, «L'avis 2/15 de la CJUE : quelles conséquences pour le CETA et le Brexit?», https://blogdroiteuropeen.files.wordpress.com/2017/07/conf-avis-215-version-finale.pdf

[33] Voir P-Y Monjal, «Compétences externes de l'UE», préc. p. 155.

[34] Voir par exemple l'argument présenté par la France au point 26 de l'avis 2/15, mais rejeté par la Cour (pts 101-108), ou encore dans l'affaire C-687/15, points 50-52 des conclusions Saugmandsgaard précitées.

la Cour sur les actes hybrides a réintroduit la nécessité de respecter les règles de vote prévues dans les traités, y compris la majorité qualifiée, et a écarté le consensus jadis appliqué au niveau du Conseil concernant les accords mixtes[35]. Toutefois, une pratique dite du consentement préalable (qui pourrait être interprétée comme une résurrection du compromis de Luxembourg) semble s'être instaurée, permettant à tout Etat de défendre, si besoin, ses intérêts[36]. Par ailleurs, la France, comme démontré à propos du CETA, se dit aussi soucieuse de sauvegarder, grâce à la mixité, les droits de son Parlement dans le cadre du processus de ratification (voir infra).

– Au-delà de la défense des intérêts nationaux, la France se montre également préoccupée par le risque de perte de poids de «l'entité européenne» dans les enceintes internationales qui est en lien direct avec *l'effet AETR*. Au-delà de la crainte, toujours latente, de perdre une visibilité internationale à laquelle elle est traditionnellement attachée[37], et de «ne pas être en mesure d'exercer une quelconque influence au cours (d'une) conférence diplomatique»[38], la France a exprimé son inquiétude face à des situations où l'Union, en raison d'une compétence devenue exclusive, siègerait seule, sans ses Etats membres, comme partie contractante ou membre d'une organisation. Cette question n'est pas nouvelle et explique que la France ait toujours cherché à assurer sa présence dans les Organisations Régionales de Pêche (où l'Union est seule présente) grâce à la juridiction qu'elle exerce sur certains territoires d'outre-mer[39]. Avec l'amélioration de l'acceptation de l'Union en tant qu'organisation d'intégration économique régionale et le développement de ses règles communes au plan interne, cette crainte de la France semble renforcée. Par exemple, suite à l'avis 3/15, l'Union a été reconnue seule compétente pour conclure, en vertu de *l'effet AETR,* le traité de Marrakech. En conséquence, elle en sera partie contractante, mais pas ses Etats membres. Or, la France pointe la question du vote à l'assemblée, dans la mesure où le nombre de voix d'une organisation d'intégration économique régionale partie à la convention est déterminé par rapport à celui de ses Etats membres

[35] C- 28/12, *Commission/Conseil*, ECLI:EU:C:2015:282.

[36] Pour la convention sur la manipulation des évènements sportifs, la Commission, face à l'opposition de Malte, a préféré rechercher le consensus avant le vote au Conseil, Doc COM (2017) 386 final du 27 juillet 2017, p. 3.

[37] Voir G. Cahin, F. Poirat, S. Szurek, *La France et les organisations internationales*, Paris, Pédone 2014, p. 179.

[38] Formule visant les 7 États membres parties à l'arrangement de Lisbonne, dont la France. Voir motivation de la décision de la Commission (C(2015) 4576 final, 7 juillet 2015) relative au recours en annulation contre la décision du Conseil autorisant l'ouverture des négociations concernant l'arrangement de Lisbonne révisé (C-389/15).

[39] C. Flaesch-Mougin, «La participation de la Communauté aux organisations régionales de pêche», in D. Charles-Le Bihan, C. Flaesch-Mougin, C. Lequesne (dir) *La politique européenne de la pêche : quelle durabilité ?*, Apogée, 2003, p. 243.

qui le sont également[40]. L'absence d'Etats membres en tant que parties annihilerait donc son droit de vote. Cette crainte de perte d'influence dans les enceintes internationales explique aussi l'intervention de la France aux côtés du Conseil, dans le recours concernant l'arrangement de Lisbonne révisé et sa volonté d'éviter la reconnaissance de la compétence exclusive de l'Union pour les matières qu'il couvre[41].

2. Article 3 §2 TFUE

2.1. *Portée et perception de l'article 3 §2 TFUE*

L'article 3 §2 TFUE qui offre, par rapport aux domaines visés à l'article 3 §1 TFUE, une source supplémentaire de compétence exclusive de l'Union, consacre la jurisprudence découlant de l'arrêt AETR et les trois hypothèses où la compétence de l'Union pour conclure un accord international devient exclusive. Dans l'affaire C-114/12 où était en cause la troisième hypothèse relative au risque d'affectation, la Cour a précisé que les termes de l'article 3 §2 TFUE «doivent (...) être interprétés à la lumière des précisions fournies à leur égard par la Cour dans l'arrêt AETR et dans la jurisprudence développée à partir de cet arrêt»[42], soit notamment les avis 1/76, 2/91, 1/94, 1/03 et les arrêts «ciel ouvert» du 5 novembre 2002. Toutefois, cette jurisprudence ayant parfois été floue, voire fluctuante, les dispositions de l'article 3 §2 TFUE ont prêté à discussions, les Etats cherchant à réduire la portée de leur dessaisissement. La Cour, dans cette première affaire le concernant, a tranché en faveur d'une interprétation large de l'article 3 §2 TFUE, dans la ligne de son avis 1/03 qui traduisait, après les arrêts ciel ouvert, «une conception plus ouverte de la notion d'affectation»[43]. Elle a notamment écarté la position du Conseil et de certains Etats se prévalant du protocole 25 sur l'exercice des compétences partagées pour défendre «une conception prétendument plus restrictive, depuis l'entrée en vigueur du traité de Lisbonne, en matière de compétence externe exclusive de l'Union»[44]. Ce protocole qui circonscrit le champ d'application de l'exercice de la compétence de l'Union aux *seuls éléments* régis par l'acte (et pas au domaine) et incarne «une appréciation minimaliste des compétences partagées»[45], vise en effet, selon la Cour, «à préciser la portée de l'exercice par l'Union d'une compétence partagée avec les

[40] Article 13 du Traité de Marrakech.

[41] C- 389/15 précitée.

[42] C-114/12, précitée, pt 67.

[43] Point 48 des conclusions de l'avocat général Bot dans l'affaire C-66/13, Green Network, ECLI:EU:C:2014:156.

[44] C-114/12, précité, point 72. Cette thèse était soutenue par le Conseil, les Pays-Bas et le Royaume-Uni.

[45] S. de la Rosa, «Le traité de Lisbonne et la répartition des compétences entre l'Union et les Etats membres : clarification ou régression ?», *Annuaire de droit européen*, volume IV, 2006, Bruylant, 2008, p. 110.

États membres qui lui a été attribuée par les traités, et *non à limiter la portée de la compétence externe exclusive de l'Union* dans les cas de figure visés à l'article3, paragraphe2, TFUE»[46]. La France, tout en défendant une interprétation stricte des conditions énoncées par la Cour pour apprécier le risque d'affectation des règles communes par les engagements internationaux (v. infra), ne remet pas en question cette jurisprudence post-Lisbonne concernant l'article 3 §2 TFUE. Mais, un flou plane sur l'interprétation qui est donnée de cette disposition en lien avec l'article 2 §2 TFUE relatif à la compétence partagée.

Aux termes de certains entretiens, il est apparu que ces deux dispositions étaient appréhendées de façon séparée, en quelque sorte autonome. L'article 2 §2 TFUE ne porterait, s'agissant des domaines de compétence partagée, que sur l'exercice de la *compétence interne*, alors que l'article 3 §2 TFUE qui prévoit des exigences renforcées pour que l'effet préemptif puisse jouer, ne disposerait que pour l'exercice de la *compétence externe* dans ces domaines. Il n'y aurait donc de compétences externes qu'exclusives. Cette interprétation n'a certes pas d'incidence sur l'effet préemptif, sauf dans l'hypothèse d'une cessation de l'exercice de la compétence de l'Union prévue à l'article 2 §2[47]. En revanche, les conséquences de l'étanchéité des deux dispositions se feraient sentir dans l'hypothèse où les conditions d'affectation prévues à l'article 3 §2 TFUE ne seraient pas satisfaites : avec cette conception, la notion de compétence partagée à l'externe disparaît. A défaut d'existence d'une compétence exclusive par exercice dans un domaine de compétence partagée, la compétence resterait nationale. Cette interprétation ne semble toutefois pas unanimement partagée, notamment par le Conseil constitutionnel dans sa décision relative à l'Accord économique et commercial global entre le Canada, d'une part, et l'UE et ses États membres, d'autre part[48]. Suivant, en cela, les observations déposées par le Gouvernement, il y reconnait, dans la ligne de l'avis 2/15 relatif à l'accord de libre-échange UE-Singapour, *l'existence de compétences partagées entre l'Union et les Etats* pour conclure le chapitre 8 en matière d'investissement. Cette position nous semble plus conforme à la lettre du traité – l'article 2 TFUE ayant un caractère général et ne distinguant pas compétence interne ou externe – et à la jurisprudence de la CJUE[49].

[46] Point 73 de l'affaire précitée. Souligné par nos soins.

[47] Avec cette approche, il n'y aurait pas de répercussion sur l'exclusivité de la compétence externe de l'Union, alors que cette question est discutée dans le cadre de l'approche habituelle des rapports entre les deux articles. Voir C. Blumann et L. Dubouis, *Droit institutionnel de l'Union européenne*, LexisNexis, 6ème édition, 2016, p. 461, nº 586.

[48] Voir point 42 de la décision du Conseil constitutionnel nº 2017-749 DC du 31 juillet 2017, JORF 2017 nº 0187.

[49] Voir avis 2/91 relatif à la convention nº 170 de l'OIT, ECLI:EU:C:1993:106, ou avis 2/00 précité, pt 47.

2.2. *Interprétation des trois cas visés à l'article 3 §2, TFUE*

Les trois cas visés se présentent de manière indépendante les uns des autres et constituent des options alternatives, et non cumulatives, pour démontrer l'existence d'une compétence exclusive de l'Union.

– *La première hypothèse est celle de la clause habilitante*, celle où «la conclusion d'un accord est prévue dans un acte législatif de l'Union». Elle a été reconnue par la Cour de justice dans l'avis 1/94[50] et confirmée par la suite dans une formule plus souple faisant disparaître le «expressément» prévu[51]. La nature législative des actes-support de la clause habilitante est reprise mais cette condition, dans le contexte du traité de Lisbonne, exclut notamment les actes PESC qui prévoit parfois la conclusion d'accords avec des Etats tiers[52]. Cette exigence d'un acte législatif est toutefois spécifique à l'article 3 §2 TFUE, et le différencie sur ce point de l'article 216 §1 TFUE. Lors des entretiens menés, aucune observation particulière n'a été faite sur cette clause qui permet de rallier, dès l'adoption de l'acte interne, un consensus institutionnel sur la possibilité pour l'Union de s'engager seule au plan externe[53], à condition, toutefois, que l'accord à conclure corresponde bien à l'objet de cette habilitation[54].

– *La deuxième hypothèse prévue à l'article 3, §2, TFUE concerne la situation où «la conclusion d'un accord (par l'Union) est nécessaire pour lui permettre d'exercer sa compétence interne»* (critère de nécessité). La possibilité, découlant d'une compétence interne, de conclure un accord nécessaire à la réalisation d'un des objectifs de la Communauté avait été reconnue par la Cour dans l'avis 1/76[55], sans distinguer toutefois fondement et nature de la compétence. La clarification est intervenue par la suite, mais en imposant des conditions renforcées pour prouver l'exclusivité de la compétence sur la base du critère de nécessité. L'avis 1/03, définit cette hypothèse comme celle «où la compétence interne ne peut être utilement exercée qu'en même temps que la compétence externe, la conclusion de l'accord

[50] Avis 1/94 relatif aux accords OMC, ECLI:EU:C:1994:384, point 95 où sont évoqués des actes législatifs internes incluant des clauses «(conférant) expressément aux institutions une compétence pour négocier avec les pays tiers».

[51] Point 33 de l'avis 2/92 relatif à la troisième décision révisée de l'OCDE relative au traitement national, ECLI:EU:C:1995:83.

[52] Voir par exemple les articles 9 et 10 de la décision du Conseil relative à la mission PSDC de l'UEau Mali (EUCAP Sahel Mali), JOUE 2014 L 113, p. 21.

[53] Il n'est pas exclu que la Commission propose une telle clause, sans être suivie par le Conseil et le Parlement. Voir la décision relative aux menaces transfrontières graves sur la santé où l'article prévoyant la possibilité de conclure des accords internationaux figurant dans la proposition de la Commission a disparu, la version finale n'évoquant plus cette question que dans sa motivation, JOUE 2013 L 293, p. 1.

[54] Question discutée pour le règlement nº 216/2008 dans les conclusions Sharspton sur l'avis 2/15, points 221-224.

[55] Point 4 de l'avis 1/76 relatif au projet d'accord relatif à l'institution d'un fonds européen d'immobilisation de la navigation intérieure, ECLI:EU:C:1977:63.

étant ainsi nécessaire pour réaliser les objectifs du traité qui ne pouvaient être atteints par l'établissement de règles autonomes»[56]. Le TFUE, bien qu'avec une formulation propre, se situe dans la continuité de cet avis, ne reprenant pas l'exigence antérieure selon laquelle la réalisation des objectifs du traité devait être «indissolublement liée»[57] à l'exercice de la compétence externe et comme cela avait d'ailleurs été suggéré dans l'une des versions du traité constitutionnel[58]. Toutefois, l'article 3 §2 TFUE n'apporte pas d'éléments concrets pour apprécier la nécessité, en tant que critère d'exclusivité. Il est vrai que, «fondée sur la nature des choses et indépendante de la volonté de l'Union»[59], elle apparaît difficile à systématiser et, comme par le passé, sa concrétisation devrait rester exceptionnelle. L'enjeu actuel pour la France est de savoir si l'interprétation du critère de nécessité, au sens de l'article 3 §2 TFUE doit être également celle retenue pour définir la nécessité visée à l'article 216 §1 TFUE à propos de l'existence, et non de la nature, de la compétence externe de l'Union (v. infra).

– *La troisième hypothèse prévue à l'article 3 §2 TFUE est celle où l'Union dispose d'une compétence externe exclusive «dans la mesure où (la conclusion d'un accord) est susceptible d'affecter des règles communes ou d'en altérer la portée»* (critère d'affectation dégagé dans l'arrêt AETR[60]). Cette hypothèse est en pratique la plus fréquemment avancée par la Commission pour défendre la compétence exclusive de l'Union en matière externe, et celle qui a été en cause dans les décisions de la Cour portant sur l'article 3, §2, TFUE[61]. Les conditions d'affectation des règles communes ou d'altération de leur portée qui, à elles seules, permettent de conclure à l'exclusivité de la compétence externe de l'Union ont été discutées par les Etats. La France, quant à elle, les accepte mais cherche à en circonscrire la portée.

L'article 3, §2, TFUE consolide la jurisprudence de la Cour, ce que la France a expressément reconnu[62]. Mais sa ligne jurisprudentielle sur la notion d'affectation ayant été plus ou moins fluctuante selon les périodes[63], il importait de

[56] Point 115 de l'avis 1/03 relatif à la nouvelle convention de Lugano, ECLI:EU:C:2006:81.

[57] Point 86 de l'avis 1/94, précité.

[58] A. Berramdane et J. Rossetto, *Droit de l'Union européenne*, Paris, précité, p. 290, note 55.

[59] E. Neframi, *L'action extérieure de l'Union européenne. Fondements, moyens, principes*, Paris, LGDJ, 2010, p. 71.

[60] Affaire 22/70, précitée, point 22.

[61] Voir les arrêts et avis précités : C-114/12, *Commission/Conseil* ; avis 1/13 relatif à la convention de La Haye; avis 2/15 relatif à l'accord de libre-échange avec Singapour ; 3/15 relatif au traité de Marrakech. Dans l'affaire C-66/13, *Green Network*, ECLI:EU:C:2014:2399, la Cour a estimé que, compte tenu de la date des faits, elle ne pouvait pas répondre à la question préjudicielle sur l'interprétation même de l'article 3, §2, TFUE.

[62] Point 113 des conclusions de l'avocat général Kokott (ECLI:EU:C:2013:441) dans l'affaire C-137/12, précitée.

[63] Sur les grandes étapes de cette évolution, voir conclusions Bot précitées dans l'affaire C-66/13.

préciser «la signification de l'expression inscrite au traité»[64] et de savoir si «sa conception plus ouverte» résultant de l'avis 1/03 serait confirmée. Tel a été le cas, la jurisprudence post-Lisbonne confirmant sa grille d'analyse des conditions d'affectation et sa démarche pour évaluer le risque d'affectation des règles communes ou d'altération de leur portée par les engagements internationaux.

Dans un premier temps, il convient en effet de définir le domaine de l'accord et de vérifier si des règles communes existent dans ce domaine. A ce propos, la Cour a confirmé que le domaine ne doit pas nécessairement être couvert dans son intégralité et que l'on ne saurait exiger «une concordance complète entre le domaine couvert par les engagements internationaux et celui couvert par la règlementation de l'Union»[65]. Il suffit, contrairement à ce qui a pu être avancé[66], que le domaine soit «déjà couvert en grande partie par des règles communes», celles-ci pouvant résulter d'un même texte ou de plusieurs instruments de l'Union[67]. Reprenant par ailleurs une conception neutre de l'affection, la Cour a réaffirmé que celle-ci peut exister, «même en l'absence de contradiction possible entre (les engagements internationaux) et les règles communes de l'Union»[68]. La France, dans l'avis 1/13, a cherché à écarter l'exclusivité de la compétence de l'Union en contestant l'existence d'une affectation car, de son point de vue, le chevauchement entre la convention et le règlement nº 2201/2003 n'était que partiel au regard des relations régies et des personnes auxquelles les instruments sont applicables[69]. On serait en présence de mécanismes étanches, la convention de La Haye étant moins ambitieuse que le système intra-européen qui était fondé sur la confiance mutuelle, mais cet argument n'a pas été retenu par la Cour.

Dans une seconde étape du raisonnement, il faut confronter les deux ensembles de règles, engagements internationaux et règles communes. En procédant à une analyse globale et concrète de la relation entre l'accord envisagé et le droit de l'Union, il s'agit d'évaluer l'impact de la conclusion de l'accord sur les règles communes. Les dispositions de l'accord et les règles internes dans les domaines couverts doivent être examinées dans leur état actuel, mais également

[64] Point 85 des conclusions de l'avocat général Sharpston (ECLI:EU:C:2014:224) dans l'affaire C-114/12 précitée.

[65] Point 69 de l'arrêt C-114/12 préc.; Confirmations aux points 106 de l'avis 3/15 et 181 de l'avis 2/15, précités.

[66] Dans l'affaire C-114/12 précité, le Royaume-Uni et les Pays-Bas prétendaient que «les signataires du traité de Lisbonne ont (...), entendu codifier la jurisprudence développée dans l'arrêt AETR, telle que clarifiée par l'avis 1/03, *en se refusant à consacrer le critère du «domaine déjà couvert en grande partie par les règles du l'Union»*» (point 52).

[67] Point 82 de l'arrêt rendu dans l'affaire C- 114/12 précitée.

[68] Point 71 de l'arrêt rendu dans l'affaire C-114/12 précité, et plus récemment, point 113 de l'avis 3/15 précité.

[69] Point 63 de l'avis 1/13 sur l'adhésion d'Etats tiers à la Convention de La Haye, précité.

«compte tenu de leurs perspectives d'évolution, lorsque celles-ci sont prévisibles au moment de cette analyse (...)»[70]. Sans remettre en cause cette projection vers l'avenir, la France entend toutefois s'assurer de perspectives d'évolution suffisamment réelles et veut éviter toute dérive qui permettrait d'invoquer, pour prouver le risque d'affectation, un texte qui n'est encore qu'à l'état de projet, – livre blanc, livre vert, proposition de la Commission -, sur lequel le législateur n'aurait pu s'exprimer. Il en va notamment, pour elle, de la pleine jouissance des pouvoirs législatifs du Parlement européen en raison de la supériorité des accords sur le droit dérivé. Dans l'avis 3/15 où cette question a été soulevée, la France a considéré que la perspective d'adoption des textes rendant obligatoires certaines exceptions aux droits d'auteur visées au traité de Marrakech pouvait être prise en compte car le Conseil avait lui-même demandé à la Commission de lui soumettre une proposition en ce sens[71].

Dans l'analyse de la relation entre l'accord et les règles communes, il convient également de prendre en considération leur nature et leur contenu, toujours pour vérifier si l'accord en question «est susceptible de porter atteinte à l'application uniforme et cohérente des règles de l'Union et au bon fonctionnement du système qu'elles instituent»[72]. L'existence de prescriptions minimales dans les deux instruments (convention et directive) avait jadis abouti à dénier l'exclusivité de la compétence de la Communauté pour conclure la convention nº 170 de l'OIT[73]. Dans l'avis 3/15, la marge de manœuvre des Etats pour mettre en œuvre la directive sur le droit d'auteur a été invoquée pour écarter le risque d'affectation, mais cet argument n'a pas été retenu par la Cour compte tenu de l'encadrement des Etats pour l'exercer[74].

2.3. *Situation dans laquelle la compétence n'est pas exercée au plan interne*

Cette option peut, à notre avis, recouvrir trois situations.

– La première est celle du deuxième cas de figure visé par l'article 3 §2 TFUE, celui de la nécessité (v. supra) : en effet, contrairement aux deux autres hypothèses de l'article 3 §2 TFUE où la compétence a été déjà exercée (acte législatif prévoyant la conclusion d'un accord ou adoption de règles communes), il n'existe pas encore, dans ce cas, d'acte ayant été adopté au plan interne. C'est seulement la conclusion de l'accord qui permettra d'exercer la compétence interne et rendra l'adoption d'un tel acte possible ; l'accord en est la condition.

[70] Point 126 de l'avis 1/03, précité, confirmé par la suite, voir point 74 de l'avis 1/13, précité.
[71] Point 151 des conclusions de l'avocat général Wahl dans l'avis 3/15, ECLI:EU:C:2016:657.
[72] Point 74 de l'avis 1/13 précité.
[73] Avis 2/91
[74] Points 119-126 de l'avis 3/15 précité.

– La deuxième situation renvoie à la thèse soutenue par la Commission, mais contestée par la France, dans l'avis 2/15, selon laquelle la notion de «règles communes» englobe des règles de droit primaire. La Commission défendait ainsi, en se fondant sur une affectation de l'article 63 TFUE, une compétence exclusive de l'Union en matière d'investissements indirects. Cette thèse a été écartée par la Cour, la jurisprudence AETR envisageant les règles communes au sens du droit dérivé, et la primauté des traités sur les actes adoptés sur leur fondement, ne permettant pas de considérer qu'un accord puisse porter atteinte à une règle de droit primaire[75].

– La troisième situation est celle où la compétence a été exercée mais *au plan externe* : l'accord conclu par l'Union peut comporter des règles communes susceptibles d'être affectées par des engagements internationaux de l'Union. Cette possibilité, avancée en doctrine[76], semble confirmée par la Cour dans l'avis 2/15, lorsqu'elle oppose les règles de droit primaire qui ne peuvent être affectées par des accords, aux autres actes adoptés sur le fondement des traités, en précisant «y compris les accords conclus par l'Union avec des Etats tiers»[77].

3. Article 216 §1 TFUE

3.1. *Portée de l'article 216, §1 TFUE*

Avant le traité de Lisbonne, il n'existait aucune disposition générale prévoyant les cas où l'Union disposait d'une compétence pour conclure un accord externe. Les fondements de cette compétence devaient être recherchés dans les dispositions (éparses) des traités et dans la jurisprudence de la Cour. L'article 216 TFUE, placé en tête du titre V «Accords internationaux» de la nouvelle partie consacrée à l'action extérieure de l'Union, fait œuvre de rationalisation en «opérant la synthèse des textes, de la pratique et de la jurisprudence antérieurs (et en donnant) une base juridique générale à la compétence conventionnelle de l'Union»[78]. Cette disposition, bien que la suggestion en ait été faite[79], ne constitue pas une base juridique des accords, au sens traditionnel de base procédurale et matérielle, et n'apparaît jamais dans les visas. L'article 216 §1 TFUE distingue quatre situations dans lesquelles l'Union peut conclure un accord, dissociant compétence externe expresse et compétence externe implicite. La formulation retenue n'est toutefois pas exempte d'ambiguïtés, surtout abordée en relation avec l'article 3 §2 TFUE.

[75] Points 233 à 235 de l'avis 2/15 précité.

[76] F. Elbacher, "Recent Case Law on External Competences of the European Union : How Can Member States Embrace Their Own Treaty", *CLEER Papers, 2017/2*, p. 27.

[77] Point 235 de l'avis 2/15 précité.

[78] C. Blumann et L. Dubouis, *Droit institutionnel de l'Union européenne*, précité, nº 236, p. 195.

[79] Points 44-45 des conclusions J. Kokott dans l'affaire C-137/12, Commission/Conseil, ECLI:EU:C:2015:729.

– La première situation est *celle où les traités prévoient la conclusion d'un accord :* elle n'appelle pas de remarque particulière, si ce n'est que l'insertion d'une compétence externe dans les dispositions relatives aux politiques et actions internes de l'Union (troisième partie du TFUE) est loin d'être systématique et ne répond à aucune logique juridique apparente. La raison se situe au niveau politique, comme en témoigne le refus persistant des Etats de prévoir, à l'instar du traité CEEA, un parallélisme des compétences internes et externes, ou leur parcimonie à accepter la conclusion d'accords dans des domaines sensibles (ELSJ), voire leur opposition à la prévoir dans des domaines à fortes implications externes (énergie).

– A défaut de compétences expresses, l'article 216 §1 TFUE envisage **d'**autres sources de la compétence externe qui sont rassemblées dans un même «bloc». L'Union a tout d'abord *la possibilité de conclure un accord lorsque celui-ci «est nécessaire pour réaliser, dans le cadre des politiques de l'Union, l'un des objectifs visés par les traités».* Les termes utilisés font écho à la jurisprudence de la Cour relative aux compétences implicites : dans l'avis 1/76, elle a estimé que si la compétence interne existait mais n'avait pas été exercée, un accord pouvait néanmoins être conclu s'il s'avérait nécessaire pour réaliser l'un des objectifs du traité[80]. Mais, on retrouve aussi dans l'article 216 §1 TFUE des termes proches de ceux de l'article 352 TFUE, relatif aux compétences supplétives (clause de flexibilité), confirmant les parentés entre compétences supplétives et compétences implicites[81]. Toutefois, comme il est aussi inconcevable de circonscrire l'article 216 TFUE aux seules compétences supplétives[82], que de ne pas tenir compte de la jurisprudence relative au critère de nécessité[83], il semble judicieux de se rallier à l'opinion de M. Blanquet pour qui les formules générales de l'article 216 §1 TFUE peuvent s'appliquer aux deux cas de figure[84]. Cette lecture de l'article 216 §1 TFUE semble de plus en pleine adéquation avec son objet, à savoir le fondement de la compétence externe de l'Union, et non sa nature. Elle est toutefois fortement contestée par la France qui envisage la nécessité au prisme de la jurisprudence issue de l'avis 1/76.

– La deuxième hypothèse envisagée au titre des compétences implicites est celle où *la conclusion d'un accord est prévue dans un acte contraignant de l'Union*. La formulation, qui n'exige pas, comme pour l'article 3 §2 TFUE, un acte législatif, ouvre un champ de possibilités plus étendu : la clause habilitante peut être

[80] Avis 1/76 précité points 3 et 4.

[81] Voir conclusions Tizzano dans les arrêts «ciel ouvert», ECLI:EU:C:2002:63, point 48, et, dans le contexte post-Lisbonne, les conclusions Szpunar dans l'affaire C-600/14, ECLI:EU:C:2017:296, point 106.

[82] L'ordre d'examen des fondements de la compétence confirme ce point de vue, le recours aux compétences supplétives n'étant possible qu'à défaut de compétences spécifiques expresses ou implicites pour conclure un accord (voir avis 2/94 relatif à l'adhésion de la CE à la CEDH, ECLI:EU:C:1996:140, pt 28).

[83] Auquel il est également fait référence, bien qu'en des termes différents, dans l'article 3 §2 TFUE.

[84] M. Blanquet et G. Isaac, *Droit général de l'Union européenne*, Sirey, 10ème édition, 2012, p. 259.

prévue par des actes dont l'adoption n'obéit pas à une procédure législative ou encore par des actes auxquels cette qualification ne s'applique pas[85]. Elle pourrait également résulter d'un accord externe de l'Union. Quant à son insertion dans des actes d'exécution, elle n'est pas interdite mais semble hypothétique.

– La troisième hypothèse prévue au titre des compétences implicites est celle où *la conclusion de l'accord est susceptible d'affecter des règles communes ou d'en altérer la portée*. L'identité des termes retenus dans cet article – concernant l'existence de la compétence – avec ceux de l'article 3 §2 TFUE relatif à sa nature prête le flanc à la critique. En effet, si une compétence existe sur cette base, elle est automatiquement exclusive et l'article 216 §1 TFUE n'a dans ce cas aucun effet utile. De plus, en entretenant la confusion entre existence et nature de la compétence, on anéantit les efforts entrepris par la Cour pour distinguer deux situations qui, ici, se superposent. L'interprétation des conditions d'affectation donnée au titre de l'article 3 §2 TFUE semble donc logiquement intégralement transposable à l'article 216 §1 TFUE[86].

3.2. *Lecture faite par la France de l'article 216 §1 TFUE*

Les éléments recueillis lors des entretiens font ressortir que l'attention de la France est focalisée sur le critère de nécessité prévu à l'article 216 §1 TFUE (deuxième hypothèse). Pour elle, le cœur du débat est le rapport entre cette disposition et l'article 3 §2 TFUE. Elle défend que, en dépit d'une rédaction différente, une même interprétation doit être donnée, dans les deux cas, de la nécessité, à savoir que l'Union dispose de la compétence pour conclure un accord «lorsque celui-ci est nécessaire pour lui permettre d'exercer sa compétence interne» (termes utilisés à l'article 3 §2 TFUE) et pas seulement, comme le prévoit l'article 216 § 1 TFUE, «pour réaliser l'un des objectifs visés par les traités». Cette exigence renforcée assimile, comme dans le cas du risque d'affectation ou d'altération des règles communes, les situations prévues dans les deux articles. Il en résulte qu'il ne peut, là encore, exister de compétence partagée dans cette hypothèse, la satisfaction du critère de nécessité répondant à des conditions identiques : soit la compétence externe est exclusive, soit elle n'existe pas sur la base de l'article 216 §1 TFUE. Cette lecture «assimilatrice» de l'article 216 §1 TFUE nous semble toutefois contestable au regard de la lettre du traité et, aujourd'hui, de la jurisprudence de la Cour. Dans l'avis 2/15, les deux hypothèses ont été dissociées. Confrontée à la question de savoir si l'Union disposait d'une compétence externe exclusive en matière d'investissements autres que directs, la Cour a répondu par la négative, écartant les hypothèses d'exclusivité prévues

[85] Sur ces actes, voir C. Blumann et L. Dubouis, *Droit institutionnel de l'UE*précité p. 364, nº 465.

[86] Voir conclusions précitées de l'avocat général Saugmandsgaard dans l'affaire C-687/15, points 49-50.

à l'article 3 §1 TFUE. Mais, après avoir affirmé l'absence de compétence exclusive sur le fondement du critère de nécessité, la haute juridiction reconnait «en revanche» qu'un accord sur de tels investissements «peut se révéler nécessaire pour réaliser dans le cadre des politiques de l'Union, l'un des objectifs visés par les traités, au sens de l'article 216 §1 TFUE»[87], à savoir la libre circulation des personnes, des services et des capitaux. La France a exprimé des réserves sur le raisonnement «inversé» suivi de façon inhabituelle par la Cour (examen de la nature de la compétence avant son existence). Sur le fond, la motivation est certes succincte et les termes prudents mais surtout, pour la France, le raisonnement de la Cour apparaît inabouti, celle-ci ne précisant pas les modalités d'exercice de la compétence partagée dans une telle situation. L'arrêt qui sera prononcé dans l'affaire C-600/14 devrait permettre de préciser l'interprétation de l'article 216 §1 TFUE. L'Allemagne, en l'espèce, conteste la compétence de l'Union pour arrêter les positions à prendre en son nom lors de la session de la commission de révision de l'OTIF, en ce qui concerne certaines modifications de la convention et de ses appendices. Le Conseil, soutenu par la Commission se prévaut pour justifier cette décision de la compétence «potentielle» dont jouit l'Union dans un domaine de compétence partagée ; des positions pourraient ainsi être établies dès lors qu'elles servent l'intérêt de l'Union, même s'il n'existe pas de règles communes relatives à la matière concernée[88]. C'est cette situation de vide législatif, déjà présente dans l'avis 2/15, qui est particulière[89] et conduit à s'interroger sur le critère d'actualisation de la compétence potentielle. Abordant la question sous l'angle de la nécessité au sens de l'article 216 §1 TFUE, l'avocat général en défend une interprétation large, indépendante de celle du critère de nécessité visé à l'article 3 §2 TFUE. Il estime que, dans ce cas, «le critère de la nécessité pourrait même être vu comme une simple confirmation à caractère déclaratoire des principes de subsidiarité et de proportionnalité» et qu'il «sert avant tout à exclure une compétence externe de l'Union dans les cas où l'action externe de l'Union ne permet pas d'atteindre les objectifs du traité FUE»[90]. Tel n'est pas le cas en l'espèce puisque les modifications litigieuses s'inscrivent, selon lui, dans la réalisation des objectifs de la politique des transports.

Cette notion de compétence potentielle est fortement contestée par la France, qui soutient l'Allemagne dans cette affaire, car elle remet en cause sa lecture de l'article 216 §1 TFUE et par voie de conséquence l'assimilation souvent faite à

[87] Point 239 de l'avis 2/15 précité.

[88] Points 93 et 94 des conclusions Szpunar dans l'affaire C-600/14, précitées.

[89] Dans l'avis 1/13, la Cour examine l'existence de la compétence en lien avec la nécessité visée à l'article 216 §1 TFUE, mais en se référant à l'exercice de la compétence interne et au règlement nº 2201/2003, points 67-68.

[90] Points 101 et 102 des conclusions Szpunar précitées.

l'externe entre compétence et compétence exclusive. En consacrant la possibilité pour l'Union de conclure un accord sans que celui-ci procède pour autant de sa compétence exclusive, on reconnaît l'existence d'une compétence partagée entre l'Union et les Etats dans le domaine externe. En conséquence, si l'Union décide d'exercer sa compétence, l'accord devra en principe être conclu conjointement par l'Union et ses Etats membres, mais il pourrait l'être également par elle seule[91]. En effet, la situation de mixité, en cas de compétence partagée (ou parallèle) n'est pas inéluctable[92] et le législateur pourrait en décider ainsi en vertu de son large pouvoir d'appréciation et sur la base du principe de subsidiarité qui, d'application générale, peut aussi jouer à l'externe[93].

4. Articulation entre les articles 216 §1 TFUE et 3 §2 TFUE

Ces dispositions ayant été analysées précédemment, sous un angle souvent comparatif, du point de vue de leur objet, de leur ordre d'examen, de leurs conditions de mise en œuvre et des configurations d'acteurs auxquelles peut aboutir la conclusion d'un accord, elles ne seront pas reprises ici.

CHAPITRE 2: QUESTIONS EN RELATION AVEC LA NÉGOCIATION ET LA CONCLUSION DES ACCORDS EXTERNES[94]

5. Négociations des accords internationaux: interaction entre le négociateur et le comité spécial de l'article 218 § 4 TFUE / positions et perception des Etats membres

C'est au Traité de Maastricht que l'on doit la codification d'une pratique antérieure permettant au Conseil d'encadrer la Commission par la présence de comités spéciaux qu'elle doit consulter au cours de négociations des accords internationaux[95]. Par la suite, le traité de Nice a renforcé le rôle du comité en matière de politique commerciale (comité 133) en prévoyant que la Commission devait

[91] Situation inconcevable dans le cas où la mixité résulterait de la cohabitation au sein de l'accord de dispositions relevant d'une compétence réservée des Etats et de compétences (exclusives ou partagées) de l'Union.

[92] Voir point 119 des conclusions précitées de l'avocat général Wahl dans l'avis 3/15 relatif au traité de Marrakech.

[93] I. Bosse-Platière, «L'application du principe de subsidiarité dans le cadre de l'action extérieure de l'Union européenne», in E. Neframi (dir.), *Constitutional Issues of UE External Action*, à paraître.

[94] Chapitre rédigé par Isabelle Bosse-Platière (questions 5 à 7) et Cécile Rapoport (questions 8 à 11).

[95] C. Flaesch-Mougin, «Le Traité de Maastricht et les compétences externes de la Communauté: à la recherche d'une politique externe de l'Union», *Cahiers de droit européen*, nº 3/4, 1993, pp. 351-398; A. De Walsche, «La procédure de conclusion des accords internationaux», in *Commentaire Mégret. Relations extérieures*, Ed. de l'ULB, 2005, pp. 77-111.

lui faire «régulièrement rapport» de l'état d'avancement des négociations[96]. Le traité de Lisbonne reprend, quant à lui, en son article 4 TFUE, ces éléments en tenant compte des modifications introduites aux paragraphes 2 et 3 de l'article 218 TFUE concernant le négociateur des accords. La France a toujours été très attentive, dans le cadre de la négociation et de la conclusion des accords, au respect de l'équilibre institutionnel prévu par le traité: on rappellera ainsi qu'elle a été à l'origine d'une des premières affaires dans laquelle la Cour a été amenée à préciser la répartition des pouvoirs entre la Commission et le Conseil[97] dans ce contexte. S'agissant plus précisément de l'interaction entre le négociateur (le plus souvent la Commission) et le comité spécial, celle –ci a été abordée par la CJUE dans son arrêt du 16 juillet 2015[98]. La France dans cette affaire, à l'instar de la plupart des Etats intervenants au soutien du Conseil, a défendu la position selon laquelle l'article 218 TFUE ne prévoit aucune restriction à l'adoption des directives de négociation, celles-ci pouvant prévoir des modalités assez précises, tant procédurales que matérielles, de consultation du comité spécial par la Commission. Elle y voyait là une concrétisation du principe de coopération loyale entre les institutions consacrée par l'article 13 § 3 TFUE. La Cour donne partiellement raison au Conseil et aux Etats membres dans la mesure où elle valide, au nom du principe de coopération loyale, les «modalités procédurales régissant le processus d'information, de communication et de consultation entre le comité spécial et la Commission»[99]. Mais parallèlement, elle considère que le Conseil ne peut, au nom du respect de l'équilibre institutionnel[100], établir et imposer à la Commission des «positions de négociations détaillées»[101]. Même si la position de la Cour est au final assez subtile[102], elle est jugée par la France, comme étant assez équilibrée et constitutive d'un bon compromis entre la marge de manœuvre de la Commission au titre de l'article 17 TUE en tant que négociatrice des accords[103] et la nécessité, considérée comme essentielle, d'une implication des Etats au cours

[96] E. Neframi, «La politique commerciale commune après le traité de Nice», *Cahiers de droit européen*, nº 5/6, 2001, pp. 605-646.

[97] C-327/91, *France / Commission*, Rec. 1994 I-3641 (ECLI:EU:C:1994:305).

[98] C-425/13, *Commission / Conseil*, ECLI:EU:C:2015:483. V. Michel, «Ouverture des négociations et équilibre institutionnel», comm. 359, *Europe*, oct. 2015, pp. 16-17.

[99] Idem, point 78.

[100] F. Finck, «L'évolution de l'équilibre institutionnel de l'UE sous le prisme des relations extérieures depuis l'entrée en vigueur du traité de Lisbonne», *RTD. Eur.* 2012, pp. 594 et suiv.

[101] Idem, point 90.

[102] I. Bosse-Platière, «A la lumière des principes d'équilibre institutionnel et de coopération loyale, la Cour précise – trop? – subtilement la marge de manœuvre de la Commission dans la négociation des accords internationaux», *RTD. Eur.* janv.-mars 2016, pp. 4-6.

[103] I. Bosse-Platière, «Les pouvoirs de la Commission en matière d'action extérieure: surmonter le repli institutionnel par l'optimisation fonctionnelle?», in J. Auvret-Finck (dir.), *La Commission européenne en voie de redynamisation?*, Pédone, 2017, pp. 163-192.

du processus de négociation, auquel ils ne participent pas et ce, afin de ne pas être «mis devant le fait accompli» au terme de la négociation.

La position française est assez critique sur la manière dont la Commission exécute son obligation de consultation à l'égard du comité spécial et considère que la communication des informations n'est pas optimale. Il peut ainsi arriver que la France soit mieux informée, de l'état d'avancement des négociations, directement par les Etats tiers avec lesquels elle entretient des liens étroits que par la Commission elle-même. Ont également été évoquées des transmissions tardives par la Commission de résultats intermédiaires de négociations avec un délai très court laissé aux membres du comité spécial pour réagir. A cet égard, la grande utilité d'un service comme le SGAE a été soulignée dans la mesure où il permet d'assurer l'unité de la position française dans la transmission des instructions aux membres des comités spéciaux. Il subsiste donc une marge d'amélioration de la relation entre la Commission et les comités spéciaux dans le cadre la procédure de négociation des accords externes, notamment en matière commerciale, qui devrait figurer dans les «modalités pratiques» envisagées par le point 40 de l'accord interinstitutionnel «Mieux légiférer»[104] et actuellement en cours de négociation.

6. Application provisoire des accords internationaux

6.1. Tout d'abord, la *question de la détermination du champ de l'application provisoire*[105] d'un accord externe se pose en termes différents selon qu'il s'agit d'un accord signé par l'Union seule ou, cas plus fréquent, d'un accord mixte. Dans la première hypothèse et sauf cas particulier, l'intégralité de l'accord est appliquée provisoirement, ce qui ne pose pas de difficulté particulière pour les Etats membres. En revanche, la situation est plus délicate s'agissant des accords signés conjointement par l'UE et ses Etats membres. A cet égard, il ressort des différents entretiens conduits que la France semble défendre la position de principe selon laquelle le champ de l'application provisoire devrait être limité aux seules compétences exclusives de l'Union européenne. La pratique est plus nuancée et empreinte de pragmatisme, en fonction des intérêts en cause,[106] puisque certains accords mixtes sont mis intégralement en application provisoire, y compris pour les

[104] JOUE 2016 L 23, p. 1. Le point 40 de l'accord stipule que «Les trois institutions reconnaissent qu'il importe de veiller à ce que chaque institution puisse exercer ses droits et remplir ses obligations dans le cadre de la négociation et de la conclusion d'accords internationaux, tels qu'ils sont consacrés dans les traités et interprétés par la CJUE».

[105] Sur l'application provisoire, voir C. Flaesch-Mougin et I. Bosse-Platière, «L'application provisoire des accords de l'Union européenne», in I. Govaere, E. Lannon, P. Van Elsewege, S. Adam, *The European Union in the World. Essays in Honour of Marc Maresceau*, Martinus Nijhoff Publishers, 2014, pp. 293-323.

[106] C'est le cas, par exemple, des accords de transports aériens. Voir L. Grard, «Ciel ouvert» entre l'Union européenne et les Etats-Unis. Enfin! Déjà? Bientôt...», *RMCUE* 2009, nº 526, p. 145-153.

dispositions relevant des compétences des Etats membres, retenues ou partagées avec l'UE[107]. La décision du Conseil constitutionnel français relative à l'AECG[108] ne renseigne guère sur la position française à cet égard: il ne se prononce pas sur l'étendue de l'application provisoire mais se borne à constater que, dès lors qu'elles ne portent que sur des domaines relevant des compétences exclusives de l'UE, les dispositions concernées n'affectent pas les conditions essentielles d'exercice de la souveraineté nationale. Néanmoins, cela signifierait *a contrario* que si l'accord portait sur des domaines relevant de compétences partagées entre l'UE et ses Etats membres, *a fortiori* de compétences des Etats membres, il pourrait y avoir une telle atteinte

Lors des entretiens, il a également été avancé que l'application provisoire des accords externes est susceptible de soulever un problème au regard du droit constitutionnel français. La technique de l'application provisoire ne serait en effet pas compatible avec l'article 53 de la Constitution française du 4 octobre 1958[109]. Plus précisément, c'est la dernière phrase de cette disposition, en vertu de laquelle les accords «*ne prennent effet qu'après avoir été ratifiés ou approuvés*» qui serait problématique puisque l'application provisoire d'un accord, si elle ne permet pas son entrée en vigueur, entraîne naturellement sa «prise d'effet». Cette position, qui n'est pas partagée par la totalité de nos interlocuteurs, interroge à plus d'un titre. Tout d'abord, elle n'est pas conforme à la longue pratique de mise en application provisoire des accords externes de l'UE qui n'a pas, jusqu'à une date récente, suscité de débats d'ordre constitutionnel en France, pas plus dans les institutions qu'en doctrine. En outre, le Conseil constitutionnel n'a pas été interpellé sur cette question par les députés auteurs de la saisine et il ne l'aborde donc pas dans sa décision AECG. Cet argument est apparu récemment dans le contexte difficile de la négociation des nouveaux accords de libre-échange avec l'Amérique du Nord. Dès lors, il semble surtout obéir à des considérations politiques et n'a pas forcément vocation à être exploité. Enfin, il n'est pour autant pas totalement dénué de fondement ni d'intérêt, car il pose incidemment la question de savoir sur quoi porte exactement la ratification nationale d'un accord mixte. En effet, si l'on considère que la ratification porte sur la totalité de l'accord, la «prise d'effet» anticipée de certaines de ses dispositions peut effectivement poser un problème au regard de l'article 53 de la Constitution. En revanche, si l'on considère que formellement la ratification couvre bien la totalité de l'accord mais que

[107] C. Flaesch-Mougin et I. Bosse-Platière, «L'application provisoire…», préc., spéc. pp. 311-317.

[108] Décision 2017-749 DC du 31 juillet 2017, préc.

[109] Il prévoit que «*Les traités de paix, les traités de commerce, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'État, ceux qui modifient des dispositions de nature législative, ceux qui sont relatifs à l'état des personnes, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu'en vertu d'une loi. Ils ne prennent effet qu'après avoir été ratifiés ou approuvés*».

matériellement, elle ne porte que sur les dispositions relevant des compétences des Etats membres (partagées avec l'UE ou retenues)[110], la mise en application des dispositions relevant des compétences exclusives de l'UE n'affecterait pas les dispositions constitutionnelles nationales. C'est notamment ce qui pourrait être déduit de la position retenue par le Conseil constitutionnel s'agissant de l'AECG,lorsqu'il détermine l'étendue de son contrôle au regard de la répartition des compétences respectives des Etats membres et de l'Union[111]. Ceci dit, la position du Conseil constitutionnel est plus subtile puisqu'il réserve l'hypothèse d'une mise en cause par les stipulations de l'accord relevant des compétences exclusives de l'UE d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France[112].

6.2. S'agissant ensuite de la *procédure d'adoption de la décision de signature et d'application provisoire* d'un accord, il est patent que l'article 218 §5 TFUE ne prévoit pas, en l'état, l'implication du Parlement européen. Ce dernier bénéficie uniquement d'un droit à une information pleine et immédiate à ce «stade de la procédure», conformément à l'article 218 § 10 TFUE, ce qui lui permet, par le biais d'une résolution d'initiative, d'exprimer ses vues, voire ses réserves, sur la conclusion future de l'accord. Cette situation héritée des traités antérieurs n'est guère satisfaisante d'un point de vue démocratique compte tenu, d'une part, du caractère de plus en plus fréquent du recours à l'application provisoire d'accords comportant des enjeux sociétaux importants et d'autre part, de l'extension du champ de l'approbation parlementaire pour leur conclusion.

Même si le Parlement européen conteste, de longue date, son manque d'implication lors de l'adoption de la décision d'application provisoire d'un accord externe[113], cette question ne semble pas à l'ordre du jour des discussions en cours sur la concrétisation des «modalités pratiques» envisagées par le point 40 de l'accord interinstitutionnel «Mieux légiférer»[114]. Selon la France, une telle question excèderait le cadre de ces discussions, voire dépasserait la lettre du traité. Il n'est donc pas question de prévoir une implication du Parlement européen à ce stade de la procédure. Certes, la France ne s'est pas opposée à la pratique inaugurée avec

[110] Voir les conclusions Sharpston relatives à l'avis 2/15 préc, spéc point 568. Elle considère que si le refus d'un Etat membre de ratifier un accord est lié aux stipulations relevant des compétences exclusives de l'UE, cet Etat violerait le droit de l'UE.

[111] Points 12 à 15 de la décision du Conseil constitutionnel préc.

[112] *Idem*, point 14.

[113] G. Garzon-Clariana, «L'application provisoire des accords internationaux de la Communauté», in P. Demaret, I. Govaere, D. Hanf, *30 ans d'études juridiques européenne au Collège d'Europe. Liber Professorum 1973-2003*, 2005, P. Lang, pp. 479-492.

[114] JOUE 2016L 23, p. 1.

l'accord de libre-échange avec la Corée du sud[115] et consistant à décaler le début de l'application provisoire, de manière à donner ainsi au Parlement européen le temps d'approuver l'accord[116]. Mais il ne semble pas question de l'inscrire dans les «modalités pratiques» précitées. Il semble que les réflexions actuellement en cours en France, concernant le cas spécifique des accords de libre-échange susceptibles d'être mixtes, portent davantage sur une meilleure transparence et implication du parlement français[117] au stade de la négociation des accords[118].

7. Conséquences sur l'application provisoire de la non-ratification par un Etat membre d'un accord mixte

En principe, compte tenu du caractère globalisant de la mixité[119] et dans le cas où un accord ne peut entrer définitivement en vigueur, il devrait y avoir cessation anticipée de l'application provisoire, notamment si un Etat membre n'est pas en mesure de ratifier l'accord[120]. Par analogie, cette situation s'est produite à plusieurs reprises, s'agissant d'accords conclus par l'UE seule, suite à un refus d'approbation d'un accord par le Parlement européen[121]. A chaque fois, le Conseil a adopté une décision mettant fin à l'application provisoire de l'accord[122]. La situation ne devrait pas nécessairement être différente dans le cas où l'impossibilité pour un accord mixte d'entrer en vigueur découle de la volonté d'un Etat membre. D'un point de vue théorique, il faudrait donc faire cesser l'application provisoire de manière anticipée, ce qui impliquerait, parallélisme des formes oblige, l'adoption par le Conseil d'une décision mettant fin à l'application provisoire sur le fondement de l'article 218 § 5 TFUE. C'est d'ailleurs ce que prévoit le texte même de certains accords[123]. En conséquence, cela pourrait conduire à

[115] Décision du Conseil relative à la signature, au nom de l'Union européenne, et à l'application provisoire de l'accord de libre-échange entre l'UEet ses Etats membres d'une part et la République de Corée d'autre part, JOUE 2011 L 127, p. 1.

[116] Voir C. Flaesch-Mougin, I. Bosse-Platière, «L'application provisoire des accords externes», *op. cit.*, pp. 306-309.

[117] Mise en œuvre du CETA: Plan d'action du gouvernement, 25 octobre 2017, spéc. p. 5. http://www.gouvernement.fr/partage/9656-aecgceta-plan-d-action-du-gouvernement.

[118] Voir *infra* question 11.

[119] Affaire 181/73, *Haegeman*, ECLI:EU:C:1974:41

[120] Voir E. Neframi, *Les accords mixtes de la Communauté européenne. Aspects communautaires et internationaux*, Coll. Thèses, Bruylant, 2007, 711 p.

[121] Ce fut le cas pour l'accord SWIFT entre l'UE et les Etats-Unis que le PE refusa d'approuver le 11 février 2010 (P7_TA(2010)0029) et pour un protocole à l'accord UE-Maroc fixant les possibilités de pêche qui a fait l'objet d'un refus d'approbation le 14 décembre 2011 (P7_TA(2011)0569).

[122] Par exemple, la décision du Conseil abrogeant la décision relative à la signature et l'application provisoire du protocole entre l'UE et le Maroc fixant les possibilités de pêche, JOUE 2012 L 6, p. 1.

[123] Voir, par exemple, l'article 30.7 c) de l'AECG UE-Canada. La référence aux «parties» dans cette disposition pose la question de savoir si, du point de vue européen, cela concerne l'Union seule ou également ses Etats membres.

une renégociation de l'accord en tenant compte des motivations pour lesquelles l'Etat a rejeté la ratification de l'accord. Dans la déclaration nº 20 inscrite au procès-verbal du Conseil parallèlement à l'adoption des décisions de signature et de mise en application provisoire de l'AECG[124], il est précisé que l'impossibilité pour un Etat de procéder à la ratification de l'accord – pour des raisons constitutionnelles internes – doit faire l'objet d'une «notification officielle par le gouvernement de l'Etat concerné» et devra conduire à une dénonciation de l'application provisoire., sans autre précision. Bien que la déclaration se réfère aux procédures de l'UE, elle n'exclut pas qu'une telle dénonciation soit aussi le fait des Etats. Par ailleurs, il ressort des entretiens que la France ne serait pas hostile à ce qu'une telle déclaration soit généralisée ou au moins aux accords de libre-échange comportant des enjeux sociétaux importants.

Quoiqu'il en soit, il ne semble pas y avoir réellement de réflexion dans les instances décisionnelles en France sur les conséquences de la non-ratification d'un accord mixte. S'agissant, par exemple, de l'AECG qui a fait l'objet de nombreux débats citoyens, l'hypothèse d'un refus de ratification par l'Assemblée nationale et le Sénat n'est pas sérieusement envisagée et toutes les initiatives visant à s'opposer à l'application provisoire de l'accord ont échoué[125]. Certains interlocuteurs semblent cependant considérer que l'application provisoire ne concernant que des domaines relevant des compétences exclusives de l'UE et le parlement national ne se prononçant que sur les aspects relevant des compétences nationales (réservées ou partagées avec l'UE), le refus de ratification n'affecterait donc pas ces compétences. Il serait alors possible d'en maintenir l'application jusqu'à ce qu'une solution commune soit trouvée. C'est également ce qu'on pourrait déduire de la position retenue par le Conseil constitutionnel s'agissant de l'AECG[126].

En pratique, la question des conséquences du refus par un Etat membre de ratifier un accord mixte déjà mis en application provisoire devrait se régler de manière essentiellement politique, sans forcément conduire à une cessation de l'application provisoire de l'accord, ainsi qu'en atteste le traitement des conséquences du référendum consultatif organisé aux Pays-Bas s'agissant de l'accord d'association UE-Ukraine[127] et les perspectives d'une non-ratification de l'accord par cet Etat. En pratique, les exemples tirés de l'accord d'association UE-Ukraine

[124] JOUE 2017L 11, p. 15.

[125] Voir les propositions de résolution européenne nº 4071 rejetée par l'Assemblée nationale le 23 octobre 2016 et nº 862, rejetée par la commission compétente du Sénat le 13 octobre 2016.

[126] Voir la réponse à la question précédente.

[127] Voir décision des chefs d'Etat ou de gouvernement réunis au sein du Conseil relative à l'accord d'association UE-Ukraine, annexée aux conclusions du Conseil européen, doc. EUCO 34/16, 15 décembre 2016, pp. 9-11. A. Hervé, «Les résistances des Etats membres au développement des relations conventionnelles de l'UE: quels enseignements tirer de la conclusion de l'accord UE-Canada et de l'accord d'association UE-Ukraine?», *RTD. Eur.*, janv.-mars 2017, pp. 119-123.

ou de la position des parlements belges à l'égard de l'AECG témoignent d'une prise en compte politique en amont d'un risque de refus de ratification par un Etat membre, afin d'éviter une telle situation. On peut néanmoins imaginer que le traitement politique d'un refus de ratification par un Etat membre pourrait être sensiblement différent en fonction du contexte juridique national, selon que le refus découle d'un vote parlementaire ou d'une décision d'une Cour constitutionnelle nationale. Dans le premier cas, le traitement politique serait plus aisé alors que, dans le second, une solution constitutionnelle nationale devrait vraisemblablement être trouvée. Au regard du droit constitutionnel français, c'est d'ailleurs ainsi que l'on peut interpréter, au sein de la déclaration nº 20 précitée s'agissant de la dénonciation de l'application provisoire de l'AECG, la condition du caractère «définitif» de l'échec de la ratification de l'accord[128]. En effet, aux termes de l'article 54 de la Constitution, une décision d'inconstitutionnalité prononcée par le Conseil constitutionnel ne conduit pas à un échec définitif du processus de ratification mais ouvre la voie à une révision constitutionnelle. Tout dépend des motivations ayant présidé à la non-ratification de l'accord mixte mais la référence au caractère définitif de l'échec permet d'envisager un laps de temps au cours duquel une solution politique ou constitutionnelle pourrait être trouvée.

8. Approbation du PE et interprétation de l'article 2018 § 6, a) TFUE

L'entrée en vigueur du traité de Lisbonne a fait évoluer de manière importante l'équilibre institutionnel en matière conventionnelle, particulièrement s'agissant de l'implication du Parlement européen. Comme par le passé ce dernier est selon les accords, simplement informé (accord PESC), consulté ou donne son approbation préalablement à la conclusion des accords de l'Union. Toutefois, les hypothèses d'approbation sont en pratique devenues les plus fréquentes. Ceci tient tout d'abord à la quasi-généralisation de la procédure législative ordinaire pour l'adoption des actes internes qui, par le jeu de l'article 218, § 6, lettre a), v), généralise mécaniquement l'approbation parlementaire, plaçant sous l'égide de cette procédure des domaines de l'Union pour lesquels la conclusion d'accords est fréquente comme en matière commerciale ou d'ELSJ. L'utilité de l'article 218, § 6, lettre a), iii) et iv) s'en trouve fortement réduite, aucun accord n'ayant été conclu sur le fondement de ces dispositions depuis l'entrée en vigueur du traité de Lisbonne. La jurisprudence relative à l'interprétation de ces dispositions est donc à la fois rare et ancienne de même que la doctrine afférente.

A notre connaissance, il n'y a pas de jurisprudence de la Cour spécifiant d'éventuels critères permettant de déterminer si un accord remplit la condition

[128] En vertu de cette déclaration, c'est «si la ratification de l'AECG échoue de façon définitive suite à une décision prononcée par une Cour constitutionnelle» que l'application provisoire doit être dénoncée.

posée par le paragraphe 6, lettre a), iii). Cette disposition ne pose pas de difficulté particulière. Il est en effet possible d'établir si un accord créé un cadre institutionnel en recherchant en son sein la présence d'organes conjoints et leur capacité à adopter des actes juridiques, contraignants ou non. Dans un grand nombre de cas, de tels organes sont créés pour la gestion d'accords qui, en raison de leur nature (associative ou commerciale par exemple), remplissent d'autres critères permettant de justifier la procédure d'approbation. Par exemple, les hypothèses susceptibles de relever du paragraphe 6, lettre a), iv) concernaient souvent des accords de pêche, lesquels requièrent désormais une approbation sur le fondement du paragraphe 5, lettre a), v) sans qu'il soit nécessaire d'établir l'existence d'«implications budgétaires notables», notion dont l'interprétation a été précisé par la Cour en 1999. L'interprétation de cette disposition n'a pas été soumise de nouveau à la Cour depuis l'arrêt *Parlement européen c/ Conseil* du 8 juillet 1999[129].

9. Suspension des accords externes

A notre connaissance, il n'y a pas d'application faite par le Conseil seul[130] de la possibilité, prévue par le traité, de suspendre un accord. Cette mesure politiquement forte est en outre source d'insécurité juridique pour les situations individuelles établies sous l'empire de l'accord. Ces éléments expliquent sans doute que l'Union préfère «geler» le dialogue politique institué dans le cadre d'un accord, par exemple en suspendant les réunions régulières des éventuelles instances créées par l'accord ou les sommets bilatéraux[131]. Il arrive parfois que des propositions de résolution d'initiative du Parlement européen relatives à la suspension d'un accord externe soient présentées. Plus rarement, il a pu arriver qu'une résolution soit effectivement votée par le Parlement européen[132] sans toutefois que ce vote engendre la moindre proposition de la part de la Commission européenne. On relèvera qu'en France, des propositions de résolution européenne relatives à la suspension de certains accords externes de l'Union ont ponctuellement été déposées sans toutefois être adoptées, ni susciter un écho auprès du gouvernement français[133].

[129] CJCE, 8 juillet 1999, *Parlement européen / Conseil,* aff. C-189/97, ECLI:EU:C:1999:366.

[130] Décision du Conseil et des représentants des gouvernements des États membres, réunis au sein du Conseil, portant suspension de l'application des accords entre la Communauté européenne, ses États membres et la République socialiste fédérative de Yougoslavie, JOCE 1991 L 315, p. 47.

[131] Tel est par exemple le cas actuellement dans les relations UE-Russie. Aucun sommet UE-Russie ne s'est tenu depuis 2014, les instances conjointes de l'accord de partenariat et de coopération qui juridiquement régi toujours les relations UE-Russie ne s'étant pas davantage réunies.

[132] Voir par exemple la résolution du Parlement européen pour la suspension de l'accord SWIFT (P7_TA(2013)0449) et la résolution du Parlement européen pour la suspension de l'accord d'association UE-Israël du 10 avril 2002.

[133] Voir par exemple la proposition de résolution européenne nº1644 du 5 mai 2009 relative à la suspension de l'accord d'association avec Israël.

La doctrine, notamment française[134], relève que la décision de suspension est laissée aux mains du Conseil et qu'il n'y a pas eu d'évolution des traités sur cet aspect touchant la mise en œuvre d'accords en vigueur. Pourtant comparativement, le Parlement européen joue désormais un rôle important dans la procédure de conclusion des accords externes, soit en les approuvant, ce qui est désormais le cas le plus fréquent, soit en donnant un avis consultatif préalable à la conclusion par le Conseil. Ainsi, il n'y a pas de parallélisme des formes, l'amélioration de la position du Parlement européen en matière d'accord externe s'en trouvant relativisée. La rédaction de l'article 218, § 9 TFUE surprend dans la mesure où le Parlement européen se fait généralement le défenseur du respect des droits de l'homme et des principes démocratiques qui constituent le cœur des clauses éléments essentiels insérées de manière désormais quasi-systématique dans les accords externes de l'Union. Il apparaît par conséquent comme une institution tout à fait à même de débattre de la question.

Pour la doctrine française, cette rupture de parallélisme des formes opérée par l'article 218, § 9 TFUE est également problématique s'agissant de l'absence d'intervention du Parlement européen dans la procédure de détermination de la position de l'UE dans les instances créées par les accords internationaux (question 10). Ceci semble d'autant plus vrai que la pratique consistant à doter les accords externes d'un cadre institutionnel incluant des organes conjoints dotés d'un pouvoir de décision favorise le développement de l'accord. Ayant valeur conventionnelle, ces développements produisent parfois un effet direct dans l'ordre juridique de l'Union sans passer par la procédure conventionnelle de droit commun dans laquelle le Parlement européen approuve ou, a minima, est consulté. Cette réalité rend difficile l'exercice par le Parlement européen de son pouvoir d'approbation puisqu'il prend position sur un texte dont il n'est pas en mesure d'anticiper tous les développements, particulièrement lorsqu'il s'agit par exemple d'un accord d'association, d'un accord de libre-échange incluant un mécanisme de convergence règlementaire, ou d'un accord de partenariat et de coopération. A cet égard, le point 40 de l'accord interinstitutionnel «mieux légiférer»[135] ne semble pas d'un grand secours puisqu'il n'envisage pas explicitement la question de la mise en œuvre des accords. En outre, la négociation des «modalités pratiques en matière de coopération et d'échange d'informations» semble être limitée à la question de l'information du Parlement européen dans la conduite des négociations, c'est à dire en amont de la conclusion de l'accord.

[134] I. Bosse-Platière, «Le Parlement européen et la procédure de conclusion des accords internationaux», *in Le Parlement européen après l'entrée en vigueur du traité de Lisbonne*, J. Auvret-Finck (dir.), Larcier, Bruxelles, 2013, 273 p., pp. 79-107, C. Flaesch-Mougin, «Le Parlement européen et les accords externes de l'Union européenne en 2008: réalités et fictions anticipatrices», *ADE*, 2008, pp. 588-598.

[135] Voir *supra*, note 104.

10. Etablissement des positions à prendre au nom de l'UE dans une instance créée par un accord

Les entretiens menés avec des agents de l'administration française n'ont pas permis d'établir pleinement si des décisions contestées au niveau national n'ont pas été contestées devant la Cour de justice. En revanche, on peut relever que la République française est partie intervenante dans plusieurs affaires relatives à l'application de l'article 218, § 9 TFUE s'agissant de la détermination des positions à prendre au nom de l'Union. L'objet de ces interventions concerne chaque fois l'étendue de la compétence de l'Union. L'intervention de la France vise à faire état de l'existence de domaines de compétences réservées pouvant justifier l'adoption d'une position de l'Union au moyen d'un acte hybride[136] voire l'absence même de prise de position de l'Union[137].

En dehors des cas d'intervention de la France devant la Cour, il demeure possible que, pour des raisons de stratégie contentieuse ou dans le souci de ne pas affaiblir politiquement la position exprimée dans l'instance internationale concernée, la France n'ait pas jugé utile d'exprimer publiquement son désaccord avec une position adoptée par l'Union. Une telle hypothèse paraît réaliste au regard des multiples désaccords susceptibles d'apparaître lors de la mise en œuvre de l'article 218, § 9 TFUE. En effet, outre les questions de compétence et leurs incidences sur l'imputabilité de la position adoptée à l'Union seule[138], des désaccords apparaissent parfois s'agissant de la base juridique fondant la position. Quoique n'affectant pas la situation du Parlement européen, exclu de la procédure, ni même en principe[139] les modalités de vote au Conseil, la base juridique est en revanche susceptible d'affecter le champ d'application territorial de la décision prise par l'instance internationale lorsqu'elle concerne l'ELSJ. La forme de l'acte ayant servi à établir la position de l'Union pourrait également constituer un sujet de désaccord, l'article 218, § 9 TFUE n'imposant pas le recours à une décision[140]. Plus largement l'applicabilité même de l'article 218, § 9 TFUE peut faire débat[141].

[136] Dans l'affaire C-687/15 préc., la France estime que l'adoption de la position au moyen de «conclusions» n'est pas contraire aux traités dans la mesure cet acte doit s'analyser comme un acte hybride permettant d'accueillir une position exprimée au nom de l'Union et de ses Etats membres. V. pointt. 70 et s. des conclusions préc.

[137] Dans l'affaire pendante C-600/14 préc.

[138] Pour une illustration récente, voir le recours C-659/16, *Commission/ Conseil*.

[139] C-81/13, *Royaume-Uni / Conseil*, ECLI:EU:C:2014:2449, point 66. On signalera toutefois une tentative récente de contourner cette lecture par l'adjonction d'une base juridique PESC (art. 31 TUE) à l'origine de l'affaire C-244/17.

[140] Voir C-687/15 préc.

[141] Tel est le cas lorsque l'Union n'est pas partie à l'accord dont l'instance est invitée à se prononcer. Tel est également le cas lorsque les actes devant être adoptés par l'instance internationale ne produisent pas

11. Obligation d'information pleine et immédiate du PE (art. 218 §11 TFUE)

11.1. *Comment les Etats membres perçoivent-ils cette obligation?*

La position de la France s'agissant de l'obligation d'information du Parlement européen est d'appliquer strictement l'article 218, § 10, TFUE tel qu'interprété par la Cour de justice. Ceci implique plusieurs choses pour la France. Tout d'abord, l'obligation ne vaut que pour les accords au sens du droit international et ne saurait s'étendre à d'autres instruments (actes concertés non conventionnels, décisions unilatérales relatives à un Etat tiers...). A cet égard, il ressort clairement des entretiens conduits que les discussions actuellement menées par la Commission, le Parlement et le Conseil en application du point 40 de l'accord interinstitutionnel «mieux légiférer», et visant à déterminer les modalités pratiques[142] de leur coopération, sont strictement limitées à la question de l'échange d'informations relatives aux accords. Ensuite, la France comprend de la jurisprudence de la Cour que le respect de l'obligation d'information du Parlement européen au sens de l'article 218 § 10 TFUE implique la transmission d'informations de manière proactive[143]. Ceci révèle à notre sens une différence entre l'obligation d'informer et l'obligation de donner sur demande accès à certains documents.

S'agissant de l'étendue de l'obligation, la France tend à considérer que la Cour exige la transmission au Parlement européen de tout ce qui n'est pas préparatoire. A cet égard la question de la transmission des directives de négociation fait débat. Il semblerait que le Conseil ne soit pas favorable à une telle transmission. La Commission ayant par ailleurs annoncé qu'elle entendait publier de manière plus systématique ses recommandations de directives de négociation, il reste à déterminer si les directives effectivement adoptées par le Conseil seront également transmises au Parlement européen. Dans une telle hypothèse, il conviendrait alors de déterminer l'étendue des bénéficiaires de cette transmission et les conditions de préservation de la confidentialité des informations transmises (possibilité de transmission orale?).

d'effet juridique. V. C-399/12, *République fédérale d'Allemagne / Conseil*, , ECLI:EU:C:2014:2258; I. Bosse-Platière, «Position de l'Union dans une instance créée par un accord: la Cour consacre une interprétation très extensive de l'article 218, §9, TFUE», *RTD Eur.*, nº1/2015.

142 Ces modalités pratiques n'ont pas vocation à présenter un caractère contraignant, le Conseil s'opposant notamment à les formaliser d'une manière qui s'apparenterait à l'accord-cadre Parlement européen / Commission d'octobre 2010 dont il avait d'ailleurs dénoncé l'adoption. V. C. Rapoport, «Aménager les procédures ou s'arranger avec les procédures? A propos du nouvel accord-cadre Parlement européen / Commission», *Revue de l'Union européenne*, nº550, juillet-août 2011, p. 461-468.

143 On relèvera ainsi que l'intervention la République française au soutien du Conseil dans l'affaire C-658/11 ne portait pas sur l'étendue de l'obligation d'information mais uniquement sur le rattachement à la PESC du transfert de personnes suspectées d'actes de piraterie. Par ailleurs, la France n'était pas partie intervenante dans l'affaire C-263/14 à l'occasion de laquelle la Cour a précisé l'interprétation de l'article 218, § 10 TFUE relative à l'obligation d'information du Parlement européen.

La France (et sans doute d'autres membres du Conseil) reste vigilante[144] à ce que le respect du droit à l'information du Parlement européen ne conduise pas *de facto* à lui reconnaître un droit d'être consulté. Pour cette raison, il importe que le Conseil n'ait pas à tenir compte des éventuels avis exprimés par le Parlement européen suite aux informations transmises. Concrètement, cela signifie par exemple que le Conseil n'a pas à respecter un délai minimal entre la transmission d'une information sur un résultat intermédiaire de la négociation et l'adoption par lui d'une position. La seule obligation posée par les traités est relative au caractère immédiat de la transmission de l'information. Pour les personnes interrogées, la signification de l'exigence d'une transmission «immédiate» au sens de l'article 218, § 10 TFUE pourrait d'ailleurs nécessiter une clarification[145].

Par ailleurs, les discussions en cours pour déterminer les modalités pratiques de la collaboration institutionnelle entre le Parlement européen, la Commission et le Conseil ne rejaillissent pas particulièrement sur la relation du gouvernement français avec l'Assemblée nationale ou le Sénat.

11.2. *Quid du rôle des parlements nationaux et/ou régionaux?*

Si l'amélioration de la position institutionnelle du Parlement européen dans le processus de conclusion des accords et l'obligation de l'informer à toutes les étapes de la procédure n'a pas eu d'incidence directe sur l'information de l'Assemblée nationale et du Sénat, les deux chambres du parlement français disposent incontestablement d'une information accrue et d'une capacité d'expression sur les négociations des accords externes de l'Union européenne.

En effet, d'une part, les parlements nationaux sont depuis l'entrée en vigueur du traité de Lisbonne destinataires d'un grand nombre de documents transmis à la fois par la Commission européenne et par le gouvernement français. D'autre part, l'expression parlementaire nationale est multiforme. Elle prend la forme d'une résolution européenne lorsqu'une des deux chambres destine sa prise de position au gouvernement. Elle peut également s'inscrire dans le cadre du dialogue politique entre les chambres et la Commission européenne et prendre la forme d'un avis politique de la commission chargée des affaires européennes d'une chambre adressé directement à la Commission européenne.

Dans le champ particulier de la politique commerciale, le parlement français a directement profité du «phénomène TTIP», cet accord ayant généré une demande inégalée de transparence sur le déroulement des négociations. Dans

[144] La Commission retient une approche différente puisqu'elle s'est engagée, dans l'accord-cadre de 2010 à tenir compte des positions exprimées par le Parlement européen.

[145] La Cour n'exclut pas que «dans certaines circonstances, une information délivrée au Parlement au terme d'un délai de quelques jours puisse être qualifiée d'«immédiate»». Voir C-263/14, *Parlement européen / Conseil*, ECLI:EU:C:2016:435, point. 82.

le cadre de la négociation de cet accord, le Sénat français[146] avait par exemple demandé au gouvernement français «[d']agir auprès des institutions européennes pour mettre fin au manque de transparence caractérisant les négociations des accords [CETA et TTIP], et avait fait état de son souhait que soit permis «aux parlements nationaux d'avoir un accès aux documents de négociation qui soit identique à celui offert au Parlement européen».

Certains membres de l'Assemblée nationale et du Sénat siègent au comité de suivi stratégique de la politique commerciale mis en place par le Gouvernement français à partir de 2014. Cette instance se compose de représentants des organisations non gouvernementales, des syndicats et fédérations professionnelles, des parlementaires européens, des députés et sénateurs français. Sans être une instance destinataire d'informations privilégiées, ce comité constitue un lieu de rencontre et d'échange des points de vue. Permettant notamment aux représentants de la société civile de dialoguer directement avec le ministre compétent[147], les parlementaires présents y prennent connaissance des échanges entre le gouvernement et la société civile sur les questions commerciales. Les travaux de ce comité ont vocation à se poursuivre au-delà du TTIP. Ils devraient porter tant sur les négociations commerciales bilatérales de l'UEque sur les négociations multilatérales, notamment dans le cadre de l'OMC.

La négociation du TTIP a également généré une demande d'accès des parlementaires nationaux aux documents de négociation de nature confidentielle. Sur la base des modalités d'accès prévues par le COREPER en décembre 2015, les Etats membres ont mis en place des salles de lecture accessibles à certains fonctionnaires de l'administration d'Etat ainsi qu'aux parlementaires nationaux. En France la consultation se fait dans une salle sécurisée au Secrétariat général des affaires européennes (SGAE). De même, la Commission européenne a délivré des informations dans des salles sécurisées de ses représentations permanentes dans les Etats membres. Dans la plupart des cas, les documents disponibles dans les salles sécurisées étaient en langue anglaise, ce qui a pu poser des difficultés à certains parlementaires ne maîtrisant pas suffisamment cette langue et devant consulter la documentation sur place. Les personnes interrogées s'accordent pour relever que le dispositif mis en place à l'occasion de la négociation du TTIP n'a pas connu d'équivalent pour les autres négociations commerciales en cours, que ce soit de la part du gouvernement ou de la part de la Commission européenne.

[146] Sénat français, résolution européenne nº 57 du 3 févr. 2015 sur le règlement des différends entre investisseurs et Etats dans les projets d'accords commerciaux entre l'Union européenne, le Canada et les Etats-Unis.

[147] Lors de sa création, l'interlocuteur gouvernemental du comité était le Secrétaire d'Etat au commerce extérieur. Il semblerait désormais que les travaux du comité soient rattachés au ministère des affaires étrangères.

CHAPITRE 3: EFFETS JURIDIQUES DES ACCORDS INTERNATIONAUX[148]

12. Jurisprudence nationale relative à l'application et/ou à l'interprétation d'accords internationaux

12.1. *En l'absence de renvoi préjudiciel*

Cela a été le cas dans l'arrêt *Société air Algérie* prononcé par le Conseil d'Etat français (CE) en 2012[149]. En l'espèce, la société Air Algérie soutenait que la directive 2008/101/CE[150], transposée par une ordonnance du 21 octobre 2010 et le décret attaqué[151], méconnaissait les stipulations de la convention-cadre des Nations unies sur les changements climatiques et du protocole à cette convention signé à Kyoto, qui posent le principe d'une action concertée des parties contractantes et de la prise en compte des spécificités des pays en voie de développement dans le cadre de l'élaboration d'un système de quotas d'émission de gaz à effet de serre dans le secteur du transport aérien. Après avoir indiqué que l'UE était partie à ces deux accords internationaux, le CE a énoncé que la Cour de justice de l'UE(CJUE) est la juridiction compétente pour apprécier l'invocabilité de leurs dispositions. Un renvoi préjudiciel n'a pourtant pas été opéré suite à une application de la théorie de l'acte clair issue de l'arrêt *Cilfit*[152]. Le CE s'est à cette fin référé à l'arrêt *ATAA*[153] à l'occasion duquel la CJUE a décliné l'effet direct du paragraphe 2 de l'article 2 du protocole de Kyoto. La CJUE ne s'était en revanche pas prononcée sur l'effet direct de l'article 2 de la Convention des Nations Unies sur le changement climatique. Mais le CE a estimé que le défaut d'effet direct de cette stipulation ne soulevait pas de doute sérieux, celles-ci n'édictant selon lui aucune obligation claire et précise. S'il est effectivement permis de douter que la CJUE eût reconnu l'effet direct de la stipulation en cause, il reste qu'aucune jurisprudence ne le certifie et qu'elle reste en principe compétente pour décider du fait que la Convention des Nations Unies sur le changement climatique ne crée pas de droits dont les particuliers peuvent se prévaloir en justice devant les juridictions de l'Union. Il convient à ce titre de veiller à ce que le CE ne s'appuie pas abusivement sur la théorie de l'acte clair pour écarter l'invocabilité d'accords internationaux conclus par l'UE dans l'ordre juridique français.

[148] Chapitre rédigé par Jean-Félix Delile.

[149] CE, 6 décembre 2012, *Société Air Algérie et International Air Transport Association*, nº 347870, *Leb.*, p. 398.

[150] Directive 2008/101/CE modifiant la directive 2003/87/CE afin d'intégrer les activités aériennes dans le système communautaire d'échange de quotas d'émission de gaz à effet de serre, *JOUE* 2009 L 8, pp. 3-21.

[151] Décret nº2011-90 du 24 janvier 2011 portant intégration des activités aériennes dans le système communautaire d'échange de quotas d'émission de gaz à effet de serre, JORF 2011 nº 20, p. 1464.

[152] Affaire 283/81,*CILFIT*, ECLI:EU:C:1982:335.

[153] C-366/10, *ATAA*, ECLI:EU:C:2011:864.

Pour revenir à l'examen de la conventionalité de la directive 2008/11 et du décret la transposant, le débat se clôt par une application classique de la jurisprudence *Foto Frost*[154]. Le CE conclut qu'en conséquence du défaut d'effet direct des stipulations invoquées, un renvoi préjudiciel en appréciation de validité est inutile dès lorsque la société Air Algérie ne pourrait utilement soutenir que la directive 2008/101/CE en méconnaîtrait les termes.

12.2. *Jurisprudence relative à la contestation d'accords internationaux sans renvoi préjudiciel*

Il n'y pas, à notre connaissance, une telle jurisprudence

13. Interprétation de la jurisprudence de la CJUE relative à l'effet direct des accords?

Le CE français s'est progressivement rapproché des positions de la CJUE, ce qui semble témoigner d'une adhésion du Palais Royal à la jurisprudence de la CJUE relative à l'effet direct. Ce rapprochement a été entériné lors de l'arrêt *GISTI et FAPIL* de 2012 à l'occasion duquel le CE a jugé qu'une stipulation peut être jugée d'effet direct lorsque «eu égard à l'intention exprimée des parties et à l'économie générale du traité, ainsi qu'à son contenu et à ses termes, elle n'a pas pour objet exclusif de régir les relations entre États et ne requiert l'intervention d'aucun acte complémentaire pour produire des effets à l'égard des particuliers»[155]. La haute juridiction administrative a ainsi abandonné le critère rédactionnel qu'elle employait auparavant pour se prononcer sur l'effet direct des traités afin de s'aligner sur la méthode téléo-systématique employée par la CJUE, alors même que l'UE ne participait pas à l'accord invoqué *in casu*[156]. Le CE français a sur ce point suivi les conclusions de son rapporteur public Gaëlle Dumortier qui exprimaient la nécessité d'aligner la jurisprudence du CE sur celle de la CJUE en matière d'effet direct pour ne pas laisser perdurer un double régime d'invocabilité des accords internationaux en contentieux administratif français, selon que le traité invoqué ait été conclu par l'UE ou non[157]. La Cour de cassation s'est également référée à la jurisprudence de la CJUE pour statuer sur l'invocabilité d'accords mixtes conclus avec la Turquie et l'Algérie, ce qui témoigne d'une prise en considérations de celle-ci[158].

[154] C-314/85, *Foto-Frost*, ECLI:EU:C:1987:452

[155] CE, ass., 11 avril 2012, *GISTI et FAPIL*, nº 322326.

[156] J.F. Delile, *L'invocabilité des accords internationaux devant la CJUE et le CE français*, Bruxelles, Bruylant, 2016, pp. 239-245.

[157] G. Dumortier, «L'effet direct des accords internationaux», *RFDA*, 2012, p. 547.

[158] Cass., ass. plén., 5 avril 2013, *Rachid X*, nº 11-17.520, *Bull. civ.*, nº 2 (accord UE Algérie) ; Cass., ass. plén., 5 avril 2013, *Tékin X*, nº 11-18.947 *Bull. civ.*, nº 3 (décision 3/80 du Conseil d'association CEE-Turquie).

Il convient toutefois de souligner que de manière générale, la subordination de l'invocabilité à l'effet direct telle qu'elle résulte de la jurisprudence de la CJUE et du CE français a été critiquée et reste critiquée dans les doctrines organique[159] et académique[160]. De nombreux auteurs considèrent en effet que la primauté du droit conventionnel dans l'ordre juridique français issue de l'article 55 de la Constitution devrait fonder le droit de se prévaloir de toute norme conventionnelle pour contester la légalité d'un acte juridique législatif ou infra-législatif. Leur raisonnement est, en définitive, en tout point similaire à celui développé par la suite par l'Avocat général Jääskinen à l'occasion de l'affaire *Stichting Natuur* à propos de l'invocabilité des accords internationaux devant la CJUE[161]. La subordination de l'invocabilité à l'effet direct qui résulte de la jurisprudence de la CJUE et du CE français suscite donc un certain malaise au sein des juridictions françaises dès lors que certaines obligations conventionnelles s'en trouvent privées de toutes conséquences juridiques.

Par ailleurs, et pour relativiser la portée de notre premier propos, une partie des magistrats administratifs officiant au sein de tribunaux administratifs ou de Cours administrative d'appel ignore la jurisprudence de la Cour relative à l'effet direct des accords internationaux. Les magistrats sont destinataires de veilles de jurisprudence de la CJUE produites par le Conseil d'Etat et par le centre de diffusion et de recherche juridique. Or aucune information ne leur a par exemple été transmise par ces biais à propos de la jurisprudence *Stichting Natuur*[162] de 2015 qui était pourtant d'un intérêt considérable sur la question de l'effet direct. Les accords conclus par l'UE dont ils ont le plus régulièrement à connaître sont les accords bilatéraux conclus avec la Turquie, l'Algérie, la Tunisie et le Maroc, ainsi que la Convention d'Aarhus. Mais l'admission ou non de l'effet direct des stipulations de ces conventions est, dans les faits, plus tributaire de l'ouverture au droit extranational du magistrat saisi que de la jurisprudence pertinente de la Cour

[159] R. Abraham, «Les effets juridiques, en droit interne, de la Convention de New York relative aux droits de l'enfant», conclusions sur CE, 23 avril 1997, *GISTI*, *R.F.D.A.*, 1997, pp. 585-597; G. Dumortier, «L'effet direct des conventions internationales», conclusions sur CE, ass., 11 avril 2012, *GISTI et FAPIL*, nº 322326, *R.F.D.A.*, 2012, pp. 547-559; Y. Aguila, «L'effet direct des Conventions internationales : une nouvelle grille d'analyse», *A.J.D.A.*, 2012, pp. 729-732.

[160] D. Alland, «L'application du droit international considéré du point de vue de l'office du juge : des habits neufs pour une vieille dame ?», *R.G.D.I.P.*, 1998, pp. 203-244; M. Gautier, «L'effet direct des conventions internationales», *R.F.D.A.*, 2012, pp. 560-572; C. Santulli, «Chronique de droit administratif et droit international», *RFDA* depuis 2008; J. Matringe, «Note sur Conseil d'État, 11 avril 2012, «Note sur CE, 11 avril 2012, *Gisti et Fapil*», *R.G.D.I.P.*, 2012, pp. 936-944; M. Gautier, «L'effet direct des conventions internationales», *R.F.D.A.*, 2012, pp. 560-572H. Tigroudja, «Le juge administratif et l'effet direct des engagements internationaux», *R.F.D.A.*, 2003, pp. 154-168.

[161] C-401/12 P, à C-403/12 P, *Vereniging Milieudefensie* conclusions N. Jääskinen, ECLI:EU:C:2014:310,.

[162] C-404/12 P et C-405/12 P, *Conseil / Stichting Natuur en Milieu et Pesticide Action Network Europe*, ECLI:EU:C:2015:5.

de justice. Certains magistrats sont ouverts au droit de l'UE et vont appliquer la jurisprudence de la Cour ou celle du Conseil d'Etat qui s'en fait le relais, d'autres pourront par simple réticence à l'application du droit extranational décliner l'effet direct dudit accord. En dehors du Conseil d'Etat, il existe donc un réel problème d'aléa dans la mesure où l'application du droit conventionnel dépend en pratique moins du droit positif des opinions du juge saisi.

Hors la question de l'effet direct, la jurisprudence de la CJUE relative à l'invocabilité des accords internationaux n'est de surcroît pas intégralement suivie par le CE lui-même. La haute juridiction administrative ne pratique en effet pas l'interprétation conforme que la CJUE exige lorsque sont invoquées des stipulations conventionnelles dépourvues d'effet direct[163]. Le CE a ainsi pu explicitement refuser d'interpréter le droit français à la lumière de règles conventionnelles en raison de leur défaut d'effet direct[164]. L'exercice de l'interprétation conforme paraît en définitive réservé aux hypothèses où une redéfinition de la substance du droit national – prenant en considération le droit de l'UEet de la Cour européenne des droits de l'homme – est la seule alternative à son invalidation ou à la sanction internationale de l'État[165]. Cette approche de l'interprétation conforme, consistant à l'appréhender comme une alternative à l'invalidation, semble exclure les stipulations conventionnelles sans effet direct de son champ d'application, ce qui les condamne pour l'instant à rester sans effet, même indirects, devant les juridictions administratives françaises. Le juge judiciaire a de son côté exceptionnellement pris en considération des normes internationales dépourvues d'effet direct pour dégager son interprétation du droit interne[166], mais cette pratique reste erratique et n'a en aucun cas été érigée au rang d'obligation par la Cour de cassation[167].

14. Actions en manquement introduites par la Commission européenne contre les Etats membres pour non-respect des engagements internationaux qui lient l'UE?

Oui, un avis motivé a été publié par la Commission dans le cadre d'une procédure de manquement visant la France pour violation de l'accord EEE[168].

[163] C-61/94 *Commission / République Fédérale d'Allemagne*, ECLI:EU:C:1996:313; C-240/09, *Lesoochranárske zoskupenie VLK*, ECLI:EU:C:2011:125.

[164] CE, 8 décembre 2000, *Commune de Breil-sur-Roya*, nº 204756, *Leb.*, p. 581.

[165] CE, sect., 3 juillet 1998, *Bitouzet*, nº 158592, *Leb.*, p. 288; CE, sect., 10 avril 2008, *Conseil national des barreaux-Conseil des barreaux européens*, nº296845 et 296907, *Leb.*, p. 129,

[166] Interprétation à la lumière de la Charte sociale européenne: Cass., Soc., 29 juin 2011, nº 09-71.107 ; Cass., Soc., 19 sept. 2012, nº 11-19.016; Cass., Soc., 29 juin 2011, nº 09-71.107; interprétation à la lumière d'une Résolution du Conseil de sécurité: Cass., Civ. 1re, 25 avr. 2006, *Dumez GTM (SA) c. État irakien*, nº 02-17-344.

[167] S. El Boudouhi, «Le juge interne, juge de droit commun du droit international ? État des lieux de l'invocabilité du droit international conventionnel en droit interne», *RFDA*, p. 571.

[168] Infraction nº20134287, avis motivé disponible à l'adresse qui suit: http://europa.eu/rapid/press-release_MEMO-17-1935_FR.htm

La Commission a demandé à la France de modifier certaines dispositions relatives à la méthode de calcul de l'impôt sur le revenu des personnes physiques. Les contribuables résidant en France qui perçoivent une partie de leurs revenus dans un autre État membre de l'Espace économique européen ne peuvent pas bénéficier des mêmes avantages fiscaux que ceux accordés pour les revenus perçus en France. Le contribuable ne peut pas non plus bénéficier d'un remboursement ou d'un report des crédits d'impôts pour des revenus provenant de sources étrangères lorsque le particulier est déficitaire. En maintenant ces dispositions, la France méconnait les articles de l'accord EEE qui concernent la libre circulation des travailleurs, le droit d'établissement et la libre circulation des capitaux.

15. Mesures de contrôle prises par les Etats

A notre connaissance, il n'y a pas en France de mesure de contrôle spécifique visant à assurer le respect des accords externes qui lient l'UE.

CHAPITRE 4: COMMERCE ET PROTECTION DES INVESTISSEMENTS[169]

16. Portée de la politique commerciale commune

La France a considéré jusqu'à l'avis 2/15 de la Cour de justice, publié en mai 2017, que la politique commerciale commune, si elle relevait bien d'une compétence exclusive de l'Union européenne, ne s'étendait pas pour autant au domaine des investissements étrangers autres que directs, en particulier aux investissements de portefeuille, ainsi qu'aux accords affectant les transports (y compris les services liés à ces transports tels que par exemple les services de maintenance et de réparation dans le secteur du transport aérien). S'agissant des droits de propriété intellectuelle qui touchent au commerce, la France considérait que ces derniers relevaient bien de la politique commerciale commune visée au titre de l'article 207 TFUE à l'exception toutefois des droits ne relevant pas directement du commerce. Dans le cadre de l'avis 2/15, la France faisait ainsi partie des États membres qui soutenaient que le chapitre 11 de l'accord de libre-échange négocié entre l'UEet Singapour couvrait également des aspects non commerciaux de la propriété intellectuelle au motif que son article 11.4 renvoie, au sujet des droits d'auteur et des droits voisins, à des conventions multilatérales qui comportent des dispositions relatives aux droits moraux.

L'avis 2/15[170] a cependant largement répondu à ces interrogations en précisant la portée exacte de la politique commerciale commune. Bien que plusieurs

[169] Chapitre rédigé par Alan Hervé

[170] M. Dony, «L'avis 2/15 de la Cour de justice: un jugement de Salomon?», *RTD. Eur. 2017*, juill.-sept. 2017, pp. 525-554.

interlocuteurs contactés regrettent le raisonnement soutenu par la Cour dans l'avis 2/15 et étaient davantage en phase avec le raisonnement de l'Avocat général, en particulier sur l'application de la doctrine AETR, la France n'entend pas remettre en cause les solutions dégagées par la Cour de justice. Pour autant, l'avis 2/15 rendu à propos de l'ALEUES n'affecte pas selon nos interlocuteurs la nature partagée de la compétence dans le domaine des transports. En outre, si la coopération réglementaire, telle qu'elle est prévue dans le cadre du CETA (chapitre 21) pourrait au regard de l'avis 2/15 être rattachée à la politique commerciale, certains interlocuteurs estiment que la mise en place d'un mécanisme de coopération réglementaire qui permettrait, à terme, de prendre des décisions contraignantes pour les parties aux accords de libre-échange dans le domaine de leurs réglementations techniques, ne relèverait plus alors de la sphère de la politique commerciale.

17. Relation entre les accords bilatéraux d'investissement et les accords conclus par l'UE

La France a accepté d'adopter le Règlement (UE) nº 1219/2012 du Parlement européen et du Conseil du 12 décembre 2012 établissant des dispositions transitoires pour les accords bilatéraux d'investissement conclus entre des États membres et des pays tiers qui précise largement cette articulation[171]. Dès lors que l'Union en vient à négocier avec un pays tiers un accord de protection des investissements, la France s'abstiendra de toute démarche similaire, de même qu'elle acceptera que l'accord négocié par l'Union prévoie lui-même la terminaison de l'accord bilatéral qui la liait éventuellement avec le partenaire (comme c'était le cas dans l'accord de libre-échange négocié avec Singapour).

La France n'a cependant pas pour projet de dénoncer les accords qui la lient actuellement à des pays tiers, de même qu'elle a pu, au titre du règlement 1219/2012, obtenir l'autorisation de négocier de nouveaux accords avec des pays tiers. Le Parlement français a ainsi, le 30 juin 2016, approuvé un accord de protection réciproque des investissements signé en 2014 entre les gouvernements français et colombien[172]. Selon certains interlocuteurs de l'administration française, spécialisés sur les questions d'investissement, il est par ailleurs envisageable qu'un nouveau modèle français d'accord de protection des investissements étrangers soit élaboré dans un avenir proche. Ce nouveau modèle conventionnel pourrait s'inspirer de la nouvelle approche défendue par le gouvernement français et aujourd'hui la Commission en matière de protection des investissements étrangers (juridiction en lieu et place des arbitres, mécanisme d'appel, reconnaissance

[171] JOUE 2012 L 351, p. 40.

[172] https://co.ambafrance.org/Accord-protection-reciproque-des-investissements.

du *policy space* pour les pouvoirs publics de l'Union et de ses États membres, notamment dans la définition de l'expropriation indirecte...).

Du point de vue français, le risque d'un «*treaty shopping*» de la part des investisseurs étrangers sera en tout état de cause écarté dès lors que, du fait de l'application du Règlement (UE) n º 1219/2012, il ne devrait pas exister à terme de concurrence entre les accords conclus par l'Union et les États membres. Cette réponse ne couvre pas toutefois l'hypothèse spécifique des accords de protection des investissements conclus entre États membres de l'Union, dont la compatibilité avec le droit de l'Union est actuellement en cause dans plusieurs affaires en cours d'instance devant la Cour de justice de l'UE (v. notamment CJUE, Affaire C-284/16, *République Slovaque c. Achmea*).

18. Position des États membres sur le mécanisme de règlement des différends en matière de protection des investissements dans les nouveaux ALE?
La France, avec l'Allemagne, est directement à l'origine de la «nouvelle approche» aujourd'hui promue par la Commission dans le domaine de la protection des investissements étrangers. C'est notamment Mathias Fekl, secrétaire d'État au commerce extérieur de septembre 2014 à avril 2017, qui a insisté pour que la Commission renégocie la version initiale du CETA et en particulier la section F de son chapitre 8 consacré au règlement des différends investisseurs/États (ISDS[173]). La France a ainsi conditionné son soutien au CETA à une révision en profondeur de l'ISDS.

En lieu et place des arbitres nommés par les parties aux différends, la France a ainsi soutenu la mise en place d'un Tribunal compétent en la matière, composé de juges nommés de façon permanente par les parties à l'accord. La France appuie aussi la création d'un système d'appel et soutient la création d'une Cour multilatérale sur l'investissement. La nouvelle majorité issue des élections présidentielles et législatives n'a pas fait évoluer à cet égard la position précédemment défendue par le gouvernement français, ce que plusieurs interlocuteurs issus de l'administration centrale et de la représentation de la France auprès de l'UE nous ont confirmé. La France soutient notamment la Commission dans son souhait actuel de renégocier le chapitre investissement du projet d'accord de libre-échange UE/Singapour. Elle est globalement satisfaite du chapitre sur l'investissement contenu dans le projet d'accord UE/Vietnam et a soutenu la proposition présentée le 12 novembre 2015 par la Commission européenne dans le cadre des négociations du TTIP[174].

[173] Investor State Dispute Settlement.
[174] http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

Elle ne souhaite pas, en particulier, que la Commission renonce à mettre en place ces dispositifs de protection des investissements dans les accords commerciaux de l'Union (voir ci-dessous).

19. Position des États membres au sujet de la responsabilité de l'Union et des États membres résultant d'une violation desdits accords?
Les personnes contactées au sein de l'administration française (Trésor, ministère des affaires étrangères) n'ont pas réellement fait état d'une position officielle sur cette question. Elles ont simplement rappelé l'existence de règles prévues tant au titre du règlement (UE) nº 912/2014 du Parlement européen et du Conseil du 23 juillet 2014 établissant un cadre pour la gestion de la responsabilité financière liée aux tribunaux de règlement des différends entre investisseurs et États mis en place par les accords internationaux[175] auxquels l'UE est partie, que des dispositions pertinentes des accords de libre-échange négociés avec le Canada, Singapour et le Vietnam.

Nos interlocuteurs ont certes reconnu qu'en dépit des règles existantes, certains cas pourraient s'avérer problématiques (ainsi par exemple, le cas où la mesure nationale mise en cause par l'investisseur étranger apparaît comme une mesure de transposition d'une règle de l'Union européenne). Mais à ce stade, la réflexion n'a pas été davantage développée, faute de cas concrets qui permettraient de tester le fonctionnement des règles existantes.

20. Relation entre l'article 207 § 1 dernière phrase et l'article 21 TUE (principes et objectifs de l'action extérieure). Vues des États membres sur ce sujet.
Il n'existe pas réellement de position officielle de la France sur cette question qui s'est cependant posée à la Cour de justice lors de l'affaire *Front Polisario*. Dans le cadre du pourvoi contre l'arrêt du Tribunal, la France a alors soutenu la Commission et le Conseil qui estimaient en effet que les principes figurant à l'article 21 du TUE, et notamment la promotion et le soutien des droits fondamentaux devraient être pris en considération par le Conseil lors de la conduite des relations extérieures de l'Union, tout en pouvant être mis en balance avec d'autres principes et objectifs, en vertu du large pouvoir d'appréciation reconnu à cette institution. Ainsi, en pratique, la situation des droits de l'homme dans un pays tiers devrait être regardée comme une question d'ordre politique pouvant conduire le Conseil à faire usage des clauses de surveillance prévues par les accords internationaux conclus par l'Union, une fois ces accords entrés en vigueur. En revanche, le respect des droits de l'homme ne constituerait ni un élément devant faire l'objet d'un examen préalable à la négociation et à la conclusion d'un accord, ni une

[175] JOUE 2014 L 257 pp. 121-134.

exigence de fond conditionnant la conclusion d'un accord international[176]. Il n'est pas évident cependant que cette position soit celle que la France défendrait de façon générale dans d'autres affaires ou d'autres instances.

Pour le reste, des interlocuteurs ont tenu à souligner le fort soutien de la France à l'existence de dispositions et de chapitres relatifs au développement durable qui permettent de faire le lien entre les questions commerciales d'une part, et le respect des droits sociaux et de l'environnement d'autre part. La France serait même prête à renforcer ces dispositifs en les rattachant par exemple à un système de règlement des différends davantage contraignant que celui actuellement prévu dans le cadre des accords de libre-échange (le CETA ou l'ALE UE/Singapour se limitant pour l'heure à un mécanisme spécifique qui émet de simples recommandations pour les parties à l'accord et écarte en cette matière les procédures bilatérales de règlement des différends normalement applicables au titre de ces accords[177]).

21. Procédure de négociation et de conclusion des accords internationaux en matière de politique commerciale commune

Plusieurs fonctionnaires français spécialisés dans les questions commerciales ont exprimé des critiques à l'égard du processus actuel de négociation des accords commerciaux. L'un des principaux points d'achoppement concerne la question des directives de négociation dont la Commission aurait tendance à s'affranchir trop facilement et sans rendre suffisamment compte aux États membres et au Conseil de l'avancée des négociations autrement que par des comptes rendus généraux formulés dans le cadre du comité pour la politique commerciale, et dont le contenu est déjà largement connu et publié. La plus grande transparence affichée par la Commission, qui se manifeste notamment par la publication des directives de négociation et celle des positions de négociation de la Commission – dans le cadre du TTIP – ne s'accompagne ainsi pas nécessairement d'une meilleure information délivrée aux membres du Conseil.

À l'heure où nous écrivons ces lignes, une vaste réflexion est menée par les autorités françaises concernant les suites et les conséquences de l'avis 2/15 sur la politique commerciale commune en général, et le devenir des négociations des accords commerciaux bilatéraux en particulier. L'une des principales interrogations concerne la position à adopter quand à une éventuelle séparation à venir des négociations (couramment appelé le «*split*») selon que celles-ci porteront sur des domaines de compétence exclusive ou partagée. Cette éventualité ressort en particulier des nouveaux projets de directives de négociation d'accords de

[176] Point 248 des conclusions de M. Wathelet dans l'affaire Front Polisario, C-104/16 P, ECLI:EU:C:2016:677.
[177] Voir par exemple l'article 23.10 du CETA.

libre-échange avec la Nouvelle-Zélande et l'Australie déposés par la Commission en septembre 2013, où ne figurent ni la question du règlement des différends investisseurs/États ni celle de la protection des investissements autres que directs[178]. Les autorités françaises s'interrogent ainsi sur l'opportunité de négocier des accords qui se contenteraient d'évoquer la libéralisation des seuls investissements directs sans prévoir de règlement des différends investisseurs/États et pourraient alors être conclus par l'Union seule et, d'autre part, des accords de protection des investissements, incluant les investissements autres que directs et l'ISDS, et seraient alors des accords mixtes.

Certains interlocuteurs craignent encore que la Commission ne parvienne plus à défendre, dans le domaine de la protection des investissements et des mécanismes de règlement des différends investisseurs/États, la nouvelle approche introduite dans l'accord CETA. En effet, dans l'hypothèse d'une négociation séparée d'accords sur la protection des investissements, l'Union pourrait moins facilement imposer à ses partenaires sa nouvelle approche en matière d'investissement, dès lors que l'accès au marché de l'Union permis par les autres dispositions commerciales ne serait plus mis en balance dans la négociation. En somme, le fait de négocier plusieurs accords distincts selon que ces derniers portent sur le commerce ou l'investissement pourrait conduire à affaiblir l'Union en tant que négociatrice. Plus largement, la France paraît souhaiter que les accords commerciaux négociés par l'Union s'enrichissent à l'avenir de nouveaux chapitres qui pourraient justifier le caractère mixte de ces accords. Il en irait ainsi notamment, selon nos interlocuteurs, du fait de l'introduction de règles intéressant la fiscalité ou encore la lutte contre la corruption. La France ne souhaite pas en conséquence que l'avis 2/15 conduise à réduire le contenu des accords commerciaux mais au contraire que ceux-ci dépassent au besoin les questions purement commerciales pour aborder des questions prioritaires pour les États membres et l'Union.

Outre cette crainte d'un appauvrissement du contenu substantiel des accords de libre-échange, la France redoute les conséquences procédurales de l'exclusivité. Ainsi, dans l'hypothèse où les accords négociés à l'avenir en viendraient à ne couvrir que des domaines relevant de la politique commerciale et de compétences exclusives, il apparaît assez probable selon nos interlocuteurs que l'unanimité ne puisse être maintenue lors de la phase de signature et de conclusion des accords. Autrement dit, il existe ainsi une crainte manifeste que la négociation d'accords relevant de la compétence exclusive de l'Union ne conduise à terme à mettre la France en minorité à l'heure de conclure lesdits accords. Curieusement, aucun

[178] Recommandations de décisions du Conseil autorisant l'ouverture de négociations en vue d'un accord de libre-échange avec l'Australie, COM (2017) 472 final et la Nouvelle Zélande, COM (2017) 469 final, 13 sept. 2017.

des juristes contactés dans l'administration centrale et la représentation permanente de la France auprès de l'UE ne défend l'idée selon laquelle l'unanimité pourrait s'imposer dès lors que les accords de libre-échange contiendraient des dispositions «*pour lesquelles l'unanimité est requise pour l'adoption de règles internes*» (conformément à ce que prévoit l'article 207 § 4 al. 2) TFUE).

Nos interlocuteurs sont par ailleurs en partie satisfaits de la mixité des accords commerciaux, qui assure notamment à chacun des États membres une possibilité de s'opposer à la signature et à la conclusion de l'accord au cas où ses intérêts apparaîtraient menacés. Ils sont néanmoins aussi conscients que, dans une Europe à 28, et même à 27, la mixité ralentit considérablement le processus de négociation de ces accords, ce qui est là aussi susceptible à terme d'affecter les intérêts des États membres et ils ne souhaitent pas que se reproduise l'imbroglio provoqué par la signature et la conclusion du CETA en octobre 2016. Mais en tout état de cause, nos interlocuteurs semblent préférer cette situation, perçue comme un moindre mal, à celle d'une possible généralisation de l'exclusivité et surtout de l'application de la règle de la majorité qualifiée dans la conclusion des accords commerciaux.

CHAPITRE 5: ELSJ (CONTRÔLES AUX FRONTIÈRES, ASILE, IMMIGRATION)[179]

22. Articulation du protocole 23 avec l'article 3 § 2 TFUE et pratique française

La confrontation de l'article 3 § 2 TFUE au protocole 23 sur les relations extérieures des Etats membres en ce qui concerne le franchissement des frontières extérieures, peut amener à considérer que l'UE ne dispose pas d'une compétence exclusive externe pour adopter des mesures portant sur les contrôles auxquels sont soumises les personnes franchissant les frontières extérieures. En effet, quand bien même l'UE aurait adopté des mesures sur le fondement de l'article 77 § 2 sous b) TFUE, ce qui pourrait lui permettre de disposer d'une compétence exclusive pour la conclusion d'un accord international, conformément à l'article 3 § 2 TFUE qui prévoit que la conclusion d'un tel accord est possible s'il est susceptible d'affecter les règles communes ou d'en altérer la portée, le protocole l'en empêche**.** Ce dernier indique en effet que les dispositions prévues à l'article 77 § 2 sous b) TFUE ne préjugent pas de la compétence des Etats membres de négocier ou de conclure des accords avec des pays tiers.

[179] Chapitre rédigé par Elise Daniel (questions 22 et 25), Cécile Rapoport (question 23) et Carole Billet (question 24).

L'incidence de ce constat semble néanmoins faible. En effet, l'UE n'a jusqu'alors adopté que très peu d'actes sur le fondement de l'article 77 § 2 sous b) TFUE[180]. De même, de son côté, la France n'a pas conclu d'accords avec des pays tiers depuis l'entrée en vigueur du traité d'Amsterdam, sauf à faire une lecture extensive de ce protocole en considérant que l'accord dit «du Touquet»[181] conclu avec le Royaume-Uni en constitue une mise en œuvre. Cela reviendrait à considérer que le Royaume-Uni, qui ne participe pas à l'espace Schengen, constitue d'une certaine manière un tiers au droit de l'Union en ce domaine[182]. L'accord règle en effet les modalités de contrôle aux frontières dans les ports maritimes de la Manche et de la Mer du Nord des deux pays. Ces différents constats expliquent peut-être pourquoi la doctrine française ne s'est que très peu intéressée au Protocole nº 23[183].

23. Concept de pays tiers sûr

23.1. *La jurisprudence nationale*

La jurisprudence française ne met pas la même signification que le droit de l'UE derrière l'expression «pays tiers sûrs». Un état des lieux de la jurisprudence administrative française montre en effet que l'utilisation de cette expression renvoie à des réalités diverses, toutes éloignées du sens donné au concept par le droit de l'Union.

[180] Les trois actes recensés sont: Règlement (UE) 2017/458 du Parlement européen et du Conseil modifiant le règlement (UE) 2016/399 en ce qui concerne le renforcement des vérifications dans les bases de données pertinentes aux frontières extérieures, JOUE 2017 L 74, p. 1; Règlement (UE) n º 1342/2011 du Parlement européen et du Conseil modifiant le règlement (CE) nº 1931/2006 aux fins d'inclure l'oblast de Kaliningrad et certains districts administratifs polonais dans la zone à considérer comme la zone frontalière, JOUE 2001 L 347, p. 41; Décision 2010/490/UE du Conseil relative à la conclusion, au nom de l'Union, de l'arrangement entre la CE, d'une part, et la Suisse et Liechtenstein, d'autre part, sur les modalités de la participation de ces États aux activités de l'Agence Frontex, JOUE 2010 L 243, p. 2.

[181] Décret de publication nº 2004, JORF 2004, nº 0037, p. 2949.

[182] Telle est la conception que semble retenir le Sénat français qui, dans le rapport relatif à cet accord rappelle que «les modalités de la coopération dans ce domaine avec le Royaume-Uni empruntent la voie d'accords bilatéraux». Rapport fait au nom de la commission des Affaires étrangères, de la défense et des forces armées sur le projet de loi autorisant l'approbation du traité entre le Gouvernement de la République française et le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord relatif à la mise en œuvre de contrôles frontaliers dans les ports maritimes de la Manche et de la mer du Nord des deux pays, par M. André Boyer, session ordinaire de 2003-2004 (https://www.senat.fr/rap/l03-008/l03-0080.html).

[183] A titre d'illustration, un commentaire article par article du traité d'Amsterdam se limite à renvoyer aux commentaires sous le Protocole intégrant l'acquis de Schengen et le Protocole sur la position du Royaume-Uni et de l'Irlande et le Protocole sur la position du Danemark. V. V. Constantinesco, R. Kovar, D. Simon (dir.), *Traité sur l'Union européenne (signé à Maastricht le 7 février 1992), Commentaire article par article*, Economica, 1995, 1000 p.

Ainsi, certains juges administratifs semblent utiliser le concept de «pays tiers sûr» au sens de «pays d'origine sûr»[184]. D'autres[185], utilisent le concept de «pays tiers sûr» ou de «pays tiers européen sûr» pour faire application du règlement Dublin et ainsi renvoyer vers un autre Etat membre (assimilé à un «pays tiers sûr» ou «pays tiers européen sûr») reconnu responsable du traitement de la demande d'asile. Ils invoquent ainsi de façon surabondante le fait que «tout Etat membre conserve le droit d'envoyer un demandeur vers un pays tiers sûr (...)» en vertu de l'article 3, §3, du règlement (UE) nº 604/2013 à l'appui de leur décision de transférer un demandeur à un autre Etat membre reconnu responsable du traitement de la demande d'asile.

Cette importante différence résulte du fait que le droit français n'a pas transposé la directive 2013/32/UE sur ce point. En effet, le Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA), qui codifie l'ensemble de la législation et réglementation française sur la question, ignore le concept de «pays tiers sûr». Il ne connaît que le concept de «pays d'origine sûr», lequel suppose que le demandeur soit ressortissant du pays et exclut donc, en dehors des «Etats Dublin», tout renvoi vers un pays de transit. La liste des pays d'origine sûr est établie et actualisée régulièrement par l'OFPRA (Office français de protection des réfugiés et des apatrides). La liste qui comporte actuellement seize pays[186] ne répertorie que les pays d'origine sûr pour lesquels des ressortissants ont déposé une demande d'asile.

L'article L 723-11 du CESEDA qui liste les hypothèses d'irrecevabilité des demandes d'asile n'envisage pas l'hypothèse des demandeurs provenant de «pays tiers sûrs» mais uniquement celle des bénéficiaires de protection. L'irrecevabilité peut ainsi être prononcée si le demandeur d'asile en France est en réalité déjà bénéficiaire d'une protection, c'est à dire dans l'hypothèse où il a obtenu une protection effective dans un Etat membre de l'Union ou celle où il jouit du statut de réfugié et d'une protection effective dans un Etat tiers.

23.2. *La perception de la doctrine française*

Les concepts de «pays tiers sûr» ou de «pays tiers super sûr» sont compris par la doctrine française comme un des instruments d'externalisation de la politique d'asile puisqu'il s'agit de renvoyer les demandeurs vers des pays de transit[187]. Ces

[184] CAA Nancy, 3 novembre 2011, requête nº10NC01199, relative au renvoi de demandeurs d'asile macédoniens en Macédoine.

[185] V. notamment plusieurs arrêts de la Cour administrative d'appel de Nancy: CAA Nancy, 19 janvier 2017, requête nº 16NC01738; CAA de Nancy, 26 janvier 2017, requête nº 16NC01744.

[186] Décision du 9 octobre 2015 fixant la liste des pays d'origine sûrs, JORF 2015 nº 241, p. 20.

[187] P-F. Laval, «L'instrumentalisation de l'Etat tiers: vers un dévoiement de la coopération européenne en matière d'asile», *Revue de l'Union européenne*, juin 2016, nº599, p. 339-350.

outils permettent ainsi à l'Union «de tenir à l'écart les candidats à l'asile sans être accusé[e] de violation du principe de non-refoulement»[188].

En raison de l'actualité relative à la crise migratoire, la doctrine s'interroge également sur l'application des concepts de «pays tiers sûrs» et pays tiers «super sûrs» à la Turquie, certains[189] pour relever une divergence d'appréciation en la matière entre la Commission et la doctrine ou au sein de la doctrine européenne elle-même[190]. L'un des éléments au cœur des divergences d'appréciation réside dans le fait que la Turquie maintient une réserve à propos de la Convention de Genève la soumettant à une limitation géographique. Certains auteurs y voient une impossibilité d'appliquer le concept de pays tiers «super sûrs»[191] quand par exemple la Commission considère le contraire estimant que si elle ne confère pas le statut de réfugié aux ressortissants non européens, la Turquie n'en confère pas moins une protection équivalente[192].

23.3. *La perception par la doctrine et les juridictions de la jurisprudence Mirza (aff. C-695/15) concernant l'application du concept de pays tiers sûr*

Dans l'arrêt *Mirza*, la Cour de justice considère notamment que l'Etat membre responsable de la demande d'asile vers qui un demandeur a été transféré depuis un autre Etat membre peut faire application des concepts de pays tiers sûr ou du concept de pays tiers européen sûr prévus aux articles 38 et 39 de la directive 2013/32/UE. Il peut ainsi, dans le cadre de ce traitement, renvoyer le demandeur vers un pays tiers sûr sans avoir à en informer l'Etat qui procède au transfert en amont de celui-ci. Ainsi, par le jeu de la détermination de l'Etat responsable de la demande d'asile et compte tenu de la conception nationale variable que chaque Etat membre a du concept de pays tiers sûr ou du pays tiers européen sûr, le demandeur d'asile sera traité très différemment.

Par exemple, même en n'appliquant pas le concept de pays tiers sûr, la France peut, en application du règlement Dublin III, renvoyer un demandeur vers un autre Etat membre (responsable de la demande) qui utilise le concept, voire

[188] M. Benlolo-Carabot, «La politique d'asile de l'Union. Apports et limites de la communautarisation», *LPA*, 2012, nº134, p. 9-14. D. Lochak, ««Un espace de liberté, de sécurité et de justice: pour qui?», *in* M. Benlolo-Carabot, K. Parrot (dir.), *Actualité du droit des étrangers*, Bruylant, Bruxelles, 2011, p.36.

[189] H. Labayle et Ph. De Bruycker, «L'accord UE– Turquie : faux semblant ou marché de dupes ?», 23 mars 2016, (disponible sur le site du groupe de recherche ELSJ: http://www.gdr-elsj.eu/2016/03/23/asile/laccord-union-europeenne-turquie-faux-semblant-ou-marche-de-dupes/).

[190] H. Labayle et Ph de Bruycker font ainsi référence à des divergences de vues exprimées par blogs interposés entre différents auteurs européens.

[191] C. Rapoport,«La coopération UE -Turquie relative à la crise migratoire : les déclarations conjointes «UE –Turquie» révélatrices des lacunes du droit de l'action extérieure de l'Union», *Annuaire de droit de l'UE2016*, Ed. Paris II – Panthéon-Assas, 2017.

[192] H. Labayle et Ph. De Bruycker, préc.

retient une conception plus large et potentiellement discutable, du pays tiers sûr. Il en résulte une dilution des responsabilités, renforcée par le fait que l'Etat qui reprend le traitement de la demande d'asile n'aurait, en l'état du droit de l'Union (ce que confirme la jurisprudence *Mirza*) aucune obligation d'informer l'Etat procédant au transfert du contenu de sa législation et de ses pratiques en matière de pays tiers sûr[193]. Cette jurisprudence a été jugée «révélatrice des failles du système européen d'asile, lequel est essentiellement fondé sur une logique de coopération entre les Etats et non sur la détermination d'une véritable politique commune en la matière, laissant aux pays situés aux frontières extérieures une marge de manœuvre importante»[194].

Pour leur part, plusieurs cours administratives françaises[195] ont récemment fait application de la jurisprudence *Mirz*a en refusant d'annuler un arrêté de remise aux autorités hongroises d'un demandeur d'asile de nationalité kosovare tout en ayant connaissance du fait que la Hongrie pourrait décider de renvoyer le requérant vers un pays tiers sûr. Les cours administratives d'appel concernées estiment en effet qu'il n'est pas établi que le requérant ne disposerait pas d'un droit de recours effectif contre une telle décision de même qu'il n'est pas établi que la Hongrie ferait face à des défaillances systémiques qui justifierait un non transfert.

24. Approche globale de la question des migrations et de la mobilité

24.1. *Impact pratique de l'Approche globale et articulation avec le nouveau cadre de partenariat*

Le nouveau cadre de partenariat avec les pays tiers est présenté par les institutions comme étant établi «dans le cadre» de l'approche globale[196]. Il vise à adapter cette approche globale, qui fut conceptualisée en 2005[197], pour tenir compte du nouveau contexte de «crise migratoire» auquel l'UE fait face. Il s'agit principalement de mieux intégrer la question migratoire dans le cadre général des relations

[193] M. Blondel, «L'interprétation rigoriste d'un instrument dépassé. Commentaire de l'arrêt du 17 mars 2016, *Mirza c/ Bevandorlasi es Allampolgarsagi Hivatal*», *Revue de l'Union européenne*, mars 2017, nº606, p. 171-177.

[194] L. Clément-Wilz, «Chronique Droit administratif et droit de l'Union européenne, 1er janvier 2016- 1er juillet 2016», *RFDA* 2016, spéc. p. 1023.

[195] CAA de Lyon, 16 mai 2017, requête nº15LY02874et requête nº15LY03643 ; CAA de Marseille, 14 septembre 2017, requête nº 16MA04746.

[196] Le titre de la Communication lançant ce nouveau cadre de partenariat est à cet égard explicite. V. Communication de la Commission relative à la mise en place d'un nouveau cadre de partenariat avec les pays tiers dans le cadre de l'Agenda européen en matière de migration, COM(2016) 385 final du 7 juin 2016.

[197] «Priorités d'action en vue de relever les défis liés aux migrations : Première étape du processus de suivi de Hampton Court», COM(2005) 621 final du 30 novembre 2005.

menées par l'UE avec des Etats tiers. La Commission a ainsi pu souligner lors du lancement du nouveau cadre de partenariat en 2016 que «l'approche globale est toujours un processus en constante évolution»[198] et que ce nouveau cadre de partenariat «s'attache essentiellement aux moyens d'améliorer la coordination, la cohérence et les synergies»[199]. Cette nouvelle orientation se manifeste notamment par une évolution des instruments (il n'est plus question de «partenariats pour la mobilité» mais de «pactes» à établir avec les pays tiers), et par l'identification de pays prioritaires déterminés sur la base de critères géographique (en fonction des routes migratoires et des flux, ces pays pouvant être des pays d'origine ou de transit des migrants). La volonté d'une approche globale, reposant sur un équilibre entre les différents volets de la coopération en matière migratoire et s'attaquant aux causes profondes de la migration, perdure, même si l'accent est davantage mis dans le cadre du nouveau cadre de partenariat sur les exigences de réactivité et d'obtention de résultats rapides afin de faire face à la crise migratoire.

La France soutient l'approche globale de la question des migrations et de la mobilité développée par l'UE depuis son lancement. Cette approche est en effet considérée par la France comme «le pendant, au plan européen de la politique qu'elle-même conduit, entre 2006 et 2014, à l'égard des pays tiers»[200]. Elle s'est, à ce titre, engagée aux côtés de l'UE dans le cadre des instruments européens mis en place, et a notamment participé aux différents partenariats pour la mobilité proposés aux Etats tiers, à l'exception de celui mis en place avec la Biélorussie[201]. Elle continue aujourd'hui à s'investir dans le nouveau cadre de partenariat avec les pays tiers.

24.2. *Pratique française en matière de pactes avec des pays africains*

La France a développé plus accords de «gestion concertée des flux migratoires» depuis 2007. Ces accords s'inscrivent dans l'approche globale (il est parfois même fait référence à cette approche globale dans le préambule de l'accord[202]) et sont fondés sur une volonté de mettre en place une coopération équilibrée avec les différents partenaires. Ils comportent tous plusieurs volets communs relatifs à la

[198] COM(2016) 385, précitée, p. 2.

[199] COM(2016) 385, précitée, p. 3.

[200] Rapport d'information du Sénat, fait au nom de la commission des affaires étrangères, de la défense et des forces armées sur les migrants. Par MM Jacques Legendre et Gaëtan Gorce, nº795 du 13 juillet 2016, p.73.

[201] Voir C. Urbano de Sousa «Le partenariat pour la mobilité : un instrument de l'approche globale en matière d'immigration», in M. Maes, M. C. Foblets., P. De Bruycker, *External dimensions of UE migration and asylum law and policy, Dimension externe du droit et de la politique d'immigration et d'asile de l'UE,* , Bruylant, 2011, pp. 363-385; C. Billet, «Les partenariats pour la mobilité, instruments du développement de la coopération entre l'Union et ses partenaires dans le domaine migratoire», in *Annuaire de droit de l'UE*, préc.

[202] C'est le cas dans le préambule de l'accord conclu par la France avec le Cap-Vert.

circulation des personnes, à l'admission et au séjour, à la surveillance des frontières, au retour des personnes en situation irrégulière, à la coopération policière technique et financière dans le domaine migratoire, ainsi qu'à la coopération pour le développement. Huit accords de ce type[203] ont été négociés par la France[204]. La France poursuit actuellement l'application de ces accords même si elle a par contre décidé de ne plus en négocier de nouveaux «à la suite d'un rapport d'audit conjoint du ministère de l'intérieur et du ministère des affaires étrangères et du développement durable concluant que ces accords n'avaient pas donné les résultats escomptés»[205], et considérant qu'il était préférable «de privilégier le cadre européen dès lors que l'UE est en mesure de consacrer davantage de moyens à cette politique»[206]. Il n'apparaît pas que ces accords concertés aient directement servi de modèles ou même influencé les deux pactes mis en place jusqu'ici, avec la Jordanie[207] et le Liban[208]. Au plan institutionnel, une différence majeure réside d'ailleurs dans le fait que les instruments français sont de véritables accords internationaux ratifiés par la France, alors que les Pactes, conçus dès le départ comme une voie alternative à l'adoption d'accords externes de l'Union[209], n'ont effectivement pas été adoptés en suivant la procédure de conclusion des accords externes de l'UE (article 218 TFUE). Ils ont été négociés avec les partenaires, puis annexés à des «priorités de partenariats» et fait l'objet de décisions adoptées dans les conseils d'associations respectifs de ces deux pays.

On relèvera par ailleurs qu'alors même que ces pactes étaient présentés lors du lancement du nouveau cadre de partenariat comme «la clef des relations globales entre l'UE et les pays tiers prioritaires d'origine et de transit des migrants»[210], ces instruments ne sont plus évoqués dans les rapports récents de la Commission relatifs au nouveau cadre de partenariat[211] et semblent dès lors être délaissés.

[203] Dénommés «accords relatifs à la gestion concertée des flux migratoires», «accords relatif à la gestion concertée des flux migratoires et au co-développement» ou encore «relatif à la gestion concertée des flux migratoires et au développement solidaire».

[204] Les Etats concernés sont: le Bénin, le Burkina Faso, le Cameroun, le Cap-Vert, la République du Congo, le Gabon, le Sénégal et la Tunisie. Voir http://basedoc.diplomatie.gouv.fr/Traites/Accords_Traites.php).

[205] Rapport d'information du Sénat par MM J. Legendre et G. Gorce, nº795, 13 juillet 2016, p. 73 http://www.senat.fr/rap/r15-795/r15-7957.html

[206] *Idem*

[207] Voir décision nº 1/2016 du Conseil d'association UE-Jordanie, JOUE 2016 L 355, p. 31.

[208] Voir décision nº 1/2016 du Conseil d'association UE-Liban JOUE 2016 L 350, p. 114.

[209] Premier rapport explicite sur ce point puisqu'il indique que «l'approche des pactes permet d'éviter le risque que l'obtention de résultats concrets soit ralentie par des négociations techniques en vue de la conclusion de véritables accords formels», COM(2016) 700, p.3.

[210] COM(2016) 386, précité, p. 7.

[211] Le deuxième rapport d'avancement relatif au cadre de partenariat ne les évoquait plus que dans le cadre des développements relatifs au Liban et à la Jordanie, avec lesquels de tels pactes étaient finalisés

24.3. *Relations spéciales de la France avec des pays tiers*

La France entretient des relations étroites avec trois des cinq pays visés comme étant prioritaires dans le nouveau cadre de partenariat, à savoir le Niger, le Mali et le Sénégal, qui sont d'anciennes colonies françaises. On relèvera que le Sénégal a d'ailleurs conclu avec la France un accord sur la gestion concertée des flux migratoires actuellement qui est actuellement en vigueur. Des relations fortes, découlant d'une histoire commune, sont également maintenues avec d'autres partenaires envisagés dans le cadre de ce cadre de partenariat (mais qui ne figurent pas au titre des pays prioritaires): l'Algérie fut en effet un département français jusqu'en 1962, et le Maroc et la Tunisie des protectorats français jusqu'en, respectivement, 1956 et 1957.

25. Conclusion d'accords de réadmission par les Etats membres avec des pays tiers

La France a conclu, depuis le début des années 90, près de quarante accords bilatéraux de réadmission, non sans une certaine indifférence de la part de la doctrine à l'égard de tels accords[212]. Depuis l'entrée en vigueur du traité d'Amsterdam, la France a conclu de 12 accords de réadmission[213]. Il convient également de mentionner la signature le 17 août 2011 d'un mémorandum relatif à la coopération en matière de réadmission de leurs nationaux en séjour irrégulier entre le Ministère de l'intérieur de la République française et le Ministère de la sécurité publique de la République socialiste du Vietnam[214].

De surcroît, la France, depuis 2006, signe des accords relatifs à la gestion concertée des flux migratoires et au co-développement. Ces accords intègrent tout un volet sur la réadmission venant préciser les modalités et les obligations réciproques en matière d'identification et de reprises des ressortissants respectifs en situation irrégulière[215]. Cette pratique dont la France est l'initiatrice, est également suivie par d'autres Etats membres de l'UE tels que la Grèce, l'Italie, l'Espagne et le Royaume-Uni est critiquable car elle empêche quelque peu d'avoir une vision précise de l'état de droit dans la matière. Les Etats concernés par ces accords ont été mentionnés à la question précédente.

(COM(2016) 690, p.10). Cet instrument n'est même plus mentionné dans les troisième (COM(2017) 205) et quatrième rapports (COM(2017) 350) d'avancement.

[212] Le quasi-silence de la doctrine sur cette question est évoqué par Paul Klötgen dans son article «Les accords de réadmission. Une approche comparée franco-allemande», *Revue critique de droit international privé*, 2003, p. 239.

[213] Ils concernent l'Allemagne, l'Autriche, l'Albanie, la Bolivie, la Bosnie-Herzégovine, la Dominique, l'Espagne, la Grèce, le Kosovo, la République dominicaine, Sainte-Lucie, le Surinam (mais non ratifié du côté surinamais).

[214] http://www.migreurop.org/IMG/pdf/circulaire_17-08-11_application_memorandum_France_-_Vietnam.pdf

[215] Voir réponse à la question précédente.

On sait que chacun des accords de réadmission européens prévoit la possibilité pour les Etats membres de convenir de protocoles additionnels avec le pays tiers partie à l'accord, permettant ainsi de préciser et renforcer la coopération organisée dans l'accord[216]. Concrètement, la France a conclu de tels protocoles additionnels avec l'Albanie[217], la Serbie[218], la Russie[219] et la Bosnie-Herzégovine[220]. Des protocoles sont en cours de négociation avec l'ARYM et le Sri Lanka[221].

On observe en outre que la France ne négocie pas d'accords avec des Etats tiers vis-à-vis desquels il existe un mandat de négociation de l'Union européenne. Pour les autorités françaises, l'existence d'un accord de réadmission bilatéral entre un Etat membre et un pays tiers est possible tant qu'une décision du Conseil n'a pas conféré de mandat à la Commission européenne en vue de la conclusion d'un accord européen de réadmission. Aussi, il est clair pour les autorités françaises que la conclusion et l'entrée en vigueur de ce dernier type d'accord rend naturellement caducs les accords conclus à titre bilatéral. Il n'en demeure pas moins que les autorités françaises sont vigilantes à ce que le mandat confié à la Commission puisse être assorti dorénavant d'une exigence de résultat. Ce sont les précédents avec la Chine, l'Algérie ou encore le Maroc qui ont incité les autorités françaises à souhaiter de telles exigences. En effet, on sait que le Conseil a autorisé la Commission européenne à négocier des accords de réadmission avec le Maroc (en septembre 2000), l'Algérie et la Chine (en 2002). Or, ces négociations n'ont toujours pas abouti, plus de 15 ans après l'autorisation de négociation! Les autorités françaises déplorent cette situation et voudraient retrouver la possibilité de mener des négociations à titre bilatéral, ce qui n'est pas possible dès lors qu'il existe un mandat de négociation, lequel ne précise pas sa «date d'expiration». Cela est particulièrement valable pour le Maroc dès lors que l'on sait que les négociations entre le Maroc et l'UE ont été sérieusement mises à mal à la suite des arrêts rendus.

Enfin, il convient d'énoncer que la France n'a pas conclu et n'est pas liée par des accords de réadmission contenant des «clauses problématiques», c'est-à-dire une clause des procédures simplifiées du type «éloignement collectif». Il n'en demeure pas moins que la France n'est pas exempt de tout reproche; la Cour européenne des droits de l'homme a notamment eu l'occasion de juger que le régime

[216] La publication de ces protocoles, une fois conclus, est assurée auprès des autres Etats membres par la Commission, permettant ainsi de comparer les pratiques en la matière.

[217] Décret nº 2016-322, JORF 2016 nº 0067.

[218] Décret nº 2015-1368, JORF 2015 nº 252.

[219] Décret nº 2011-213, JORF 2011 nº 0049.

[220] Il n'y a pas de décret portant publication pour ce protocole. Il est possible d'en trouver une trace sur le site du Sénat français, lequel fait mention du projet de loi autorisant l'approbation de ce protocole (https://www.senat.fr/leg/pjl16-527.html).

[221] http://www.senat.fr/rap/l13-624/l13-62413.html.

dérogatoire des arrêtés de reconduite à la frontière de la Guyane n'offre par les garanties procédurales conformes aux exigences de l'article 13 de la Convention européenne des droits de l'homme[222].

Par ailleurs, si, contrairement à la pratique italienne, le France s'astreint à publier les accords de réadmissions conclus avec des Etats tiers, elle prévoit pour autant des procédures différentes selon les Etats tiers concernés, lesquelles, ne correspondent pas aux procédures italiennes considérées comme non respectueuses de la Convention européenne des droits de l'homme[223]. Il y a ainsi, d'une part, des réadmissions immédiates que la France a prévu seulement avec l'Espagne à l'article 7 de l'accord de réadmission signé entre la France et l'Espagne le 26 novembre 2003. Ont, d'autre part, été instituées des «réadmissions accélérées». On retrouve cette procédure à l'article 8 de l'accord conclu avec le Kosovo, à savoir que «[s]i une personne a été appréhendée dans la zone d'un aéroport international de la Partie requérante après avoir franchi illégalement la frontière en provenance directe du territoire de la Partie requise, la Partie requérante peut présenter une demande de réadmission dans un délai de deux jours ouvrables, à compter de l'interpellation de l'intéressé (procédure accélérée)».

ANNEXE
Liste des personnes auditionnées pour la réalisation du rapport

Julien Barbot, Administrateur, Service des affaires européennes, Assemblée nationale
Philippe Bourassé, Conseiller hors classe, Service de la Commission des affaires européennes, Sénat
Florian Blazy, Conseiller juridique, Représentation permanente de la France auprès de l'UE
Cécile Candat, Conseillère juridique adjointe, Représentation permanente de la France auprès de l'UE
Anne-Cécile Castellani-Dembele, Premier Conseiller des Tribunaux administratifs et Cours administratives d'appel
Marc Clément, Juge à la Cour administrative d'appel de Lyon
Benjamin Guichard-Sulger, Secrétariat général des affaires européennes, secteur RELEX – politique commerciale de l'UE
Diego Colas, Directeur adjoint des Affaires Juridiques, Ministère de l'Europe et des Affaires étrangères
Thibault Fleury-Graff, Professeur à l'Université de Rennes 1, Juge assesseur à la Cour national du droit d'asile
François Riegert, Ministre-conseiller, Chef du service économique, Représentation permanente de la France auprès de l'UE

[222] Cour EDH, G.C. 13 décembre 2012, *De Souza Ribeiro c. France*, Req. nº 22689/07.
[223] Cour EDH, 1er septembre 2015, *Khlaifia et autres c. Italie*, Req. nº 16483/12.

Mathieu Tartar, Adjoint au chef de secteur – Dimension extérieure des sujets JAI, Secrétariat général aux affaires européennes

François-Xavier Rubin de Cervens, Représentant permanent adjoint de la France auprès de l'Organisation maritime internationale, Ministère de l'Europe et des Affaires étrangères

GERMANY

Dr. Till Müller-Ibold*

Einleitung

Das dritte Thema des diesjährigen FIDE-Kongresses widmet sich der externen Dimension der EU-Politiken, wobei neben horizontalen Fragen die Themen „Trade and Investment" und Fragen der Migrations- und Asylpolitik im Vordergrund stehen. Der deutsche Bericht zu diesem Themen gibt nachstehend einen Überblick über die aus deutscher Sicht und in Deutschland für diese Themen relevanten Entwicklungen und die deutsche Rechtsprechung und Literatur dazu, und baut dabei auf dem Fragenkatalog der Generalberichterstatter auf. Entwicklungen in anderen Mitgliedstaaten und auf der Ebene der EU werden in anderen Berichten abgedeckt und im Generalbericht zusammengefasst. Die EU-Entwicklungen können aus einem solchen Bericht andererseits nicht völlig ausgeklammert werden; sie bilden ja gerade den Hintergrund und den Anlass für die Entwicklungen und die wissenschaftliche Diskussion in Deutschland.

Besonderer Dank gebührt einer Reihe von deutschen Beamten an verschiedenen Stellen der Verwaltung, insbesondere des deutschen Bundesministeriums für Wirtschaft und Energie sowie des Bundesministeriums des Inneren in Berlin, aber auch der ständigen Vertretung und des Auswärtigen Amtes, die bereit waren zur Vorbereitung des FIDE Kongresses und dieses Berichts Gespräche über die praktischen Erfahrungen deutscher Behörden mit den angesprochenen Themen zu führen. Im Rahmen dieser Gespräche haben meine Gesprächspartner ihre persönliche Meinung und Sichtweise erläutert, eine „amtliche" Haltung der bisherigen deutschen Bundesregierung gab es zu den meisten von

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mir angesprochenen Fragen nicht, und eine neue Bundesregierung war zum Zeitpunkt des Abschlusses der Vorbereitungen zu diesem Bericht noch nicht gebildet. Soweit in diesem Bericht auf solche Gespräche Bezug genommen wird, wird der Eindruck des Verfassers von der persönlichen Sicht einzelner Beamter (und nicht die Auffassung „der Bundesregierung" oder einzelner Ministerien) geschildert.

KAPITEL 1: VERTEILUNG DER ZUSTÄNDIGKEITEN ZWISCHEN DER EUROPÄISCHEN UNION UND DEN MITGLIEDSTAATEN

Die rechtliche Analyse der Relevanz und Kodifizierung der AETR-Rechtsprechung aus deutscher Sicht (erster Teil von Frage 1, Fragen 2, 3 und 4) folgt nachstehend in Abschnitten A. – C., aktuelle Beispiele für die Relevanz des AETR-Effekts werden in Abschnitt D. beschrieben. Abschnitt A. zeichnet dabei kurz die AETR-Rechtsprechung nach, Abschnitt B. erläutert, ebenfalls nur kurz, die Kodifizierung der Rechtsprechung im AEUV (mit Hinweisen auf den Meinungsstand in Deutschland vor dem Gutachten 2/15 des Gerichtshofs[1]), um sich dann im Teil C. mit dem Gutachten 2/15 und seinen Auswirkungen, sowie ersten Reaktionen (in der deutschen Politik, Verwaltung und Fachliteratur) auseinanderzusetzen.

A. Die AETR-Rechtsprechung: Außenkompetenz entspricht Innenkompetenz

Die (im Grundsatz omnipotenten) Mitgliedstaaten haben der Union eine Reihe von Zuständigkeiten übertragen, die diese einheitlich wahrnimmt. Dies wird in Art. 5 EUV als „Prinzip der begrenzten Einzelermächtigung" bezeichnet[2] und gilt sowohl für die Innenkompetenzen als auch die Außenkompetenzen.[3] Damit die Übertragung praktisch wirksam ist, gilt der Grundsatz, dass EU-Recht

[1] EuGH, Gutachten 2/15 v. 16.05.2017, [Freihandelsabkommen Singapur], ECLI:EU:C:2017:376 (Alle Hyperlinks in diesem Beitrag sind am 15.12.2017 zuletzt abgerufen worden).

[2] Art. 5 (1), (2) EUV, der Begriff wurde in der deutschen Literatur schon lange vor seiner ausdrücklichen Erwähnung im EUV verwendet, vgl. Langguth, in: Lenz, Borchardt, EU Verträge, 6. Aufl. 2012, Art. 5 EUV, Rn. 5, vgl. auch Bast, in: Grabitz, Hilf, Nettesheim, Das Recht der Europäischen Union, 61. EL 2017, Art. 5 EUV, Rn. 3 („justiziable Verfassungsnorm"); Kadelbach, in: von der Groeben, Schwarze, Hatje, Europäisches Unionsrecht, 7. Aufl. 2015, Art. 5 EUV, Rn. 4 („Kernbestand des Unionsrechts").

[3] EuGH, Urt. v. 05.12.2017; C-600/14, Deutschland/Rat, ECLI:EU:C:2017:935, Rn. 44 (m.w.N.); vgl. etwa Bernd Grzeszick, Stellungnahme zur Beteiligung des Deutschen Bundestages an gemischten völkerrechtlichen Abkommen – Anhörung des Rechtsausschusses des Deutschen Bundestags am 13.01.2016; https://www.bundestag.de/blob/409794/4e7fb2623ffc719116fa94548a1bc67e/wortprotokoll-data.pdf, S. 41, 46.

Vorrang vor den Regeln des nationalen Rechts hat.[4] Generalanwältin E. Sharpston hat dies jüngst als „*verfassungsrechtliche Kernfrage der Zuständigkeitsverteilung zwischen der Union und den sie konstituierenden Mitgliedstaaten*" umschrieben. „*Aus der Zuständigkeitsverteilung, auf der das gesamte Projekt Europäische Union beruht, muss klar sein, wer auf bestimmten Gebieten die Zuständigkeit zum Handeln hat.*"[5]

Der EWG- und der EG-Vertrag kannten keine detaillierte Aufzählung von Zuständigkeiten,[6] diese ergaben sich vielmehr indirekt durch die Regelungen zu den verschiedenen Politikfeldern, auf denen die Gemeinschaft tätig werden sollte. Dabei wurde vor allem beschrieben, was intern durch Rechtssetzung oder im Rahmen der Verwaltungszuständigkeiten der Kommission geschehen sollte. Dennoch war von Anfang an klar, dass die Union nicht nur nach innen wirken sollte, sondern auch nach außen, durch internationale Übereinkünfte mit anderen Völkerrechtssubjekten. Das dabei einzuhaltende Verfahren wurde ebenso in die Verträge aufgenommen, wie einzelne Politikfelder mit „Außen"-bezug, wie das Zollrecht und die gemeinsame Handelspolitik.

Zugleich verblieben den Mitgliedstaaten völkerrechtlich unbeschränkte Vertragsschlusskompetenzen, an deren Ausübung sie unionsrechtlich allerdings insoweit gehindert sind, als sie diese Kompetenz auf die Union übertragen haben. Hat die Union keine Kompetenzen, bleiben die Mitgliedstaaten ausschließlich zuständig.[7] Dabei setzte sich recht schnell die Erkenntnis durch, dass es zu Verwerfungen innerhalb dieses Zuständigkeitsgeflechts führen würde, wenn Mitgliedstaaten zu Themenbereichen, die intern der EU zugewiesen waren, bilateral mit Drittstaaten nach außen Bindungen erzeugen könnten, die die Union bei der Entwicklung ihrer Politiken einschränken würden. Deshalb erkannte die Rechtsprechung schon früh an, dass die Außenkompetenzen der EU grundsätzlich den Innenkompetenzen entsprechen müssen[8] und das solche Außenkompetenzen auch ausschließlicher Natur sein können. Die zentrale Botschaft des sog. AETR-Urteils war deshalb,[9] dass soweit die EU intern eine materielle Frage regeln konnte, und jedenfalls wenn sie von diesen internen Kompetenzen Gebrauch

[4] St. Rspr. seit dem Urt. des EuGH, Rs 6/64, Costa/ENEL, Slg. 1964, 1270; inzwischen bestätigt in der Erklärung Nr. 17 zur Schlussakte des Vertrages von Lissabon, Abl. 2016 C202/335 (344).

[5] Schlussantrag GAin Sharpston, Gutachten 2/15, Rn. 57.

[6] Schlussantrag GAin Sharpston, Gutachten 2/15, Rn. 56; ebenso Languth, in Lenz, aaO. (Fn. 2), Rn. 5.

[7] Grzeszick, Stellungnahme, aaO. (Fn. 3), S. 48 der Drucksache.

[8] EuGH, 22/70, AETR, Slg. 1971, 263, Rn. 19; ähnlich die Folgerechtsprechung: Rs 3/76 u. a., Kramer, Slg. 1976, 1279, Rn. 20 f.; Gutachten 2/94, EMRK, Slg. 1996, I-1759, Rn. 26; C-266/03, Kommission/Luxemburg, Slg. 2005, I-4805, Rn. 40; Weiß, Kompetenzverteilung bei gemischten Abkommen am Beispiel des TTIP, DÖV 2016, 537, 539 weist aber darauf hin, dass es sich insoweit nur um eine unzureichend präzise Faustformel handele, die so nach Inkrafttreten von Lissabon nicht mehr gültig sei.

[9] EuGH, 22/70, AETR, Slg. 1971, 263.

gemacht hatte, die Mitgliedstaaten nicht berechtigt seien, Verpflichtungen einzugehen, die diese unionsrechtlichen Normen beeinträchtigen.

Diese Rechtsprechung wurde später fortentwickelt, um der Gefahr einer zukünftigen Präjudizierung der EU durch mitgliedstaatliche Übereinkünfte zu begegnen. Auch wenn die EU von ihren internen Befugnissen noch keinen Gebrauch gemacht hatte, wurde eine implizite Außenkompetenz anerkannt, nur setzte diese zusätzlich voraus, dass ein Handeln der EU „notwendig" ist, um eines der Ziele der EU zu erreichen.[10] Dies hat der Gerichtshof im Gutachten 1/76 präzisiert und später hervorgehoben, dass die im Gutachten 1/76 postulierte ausschließliche Zuständigkeit den Fall betreffe, dass die interne Zuständigkeit wirksam nur zugleich mit der Außenkompetenz ausgeübt werden könne,[11] um Vertragsziele zu verwirklichen, die sich durch die Aufstellung autonomer Regeln nicht erreichen ließen.[12] Die Verwirklichung des Zieles der Gemeinschaft müsse mit dem Abschluss des völkerrechtlichen Übereinkommens „untrennbar verbunden" sein.[13] Im Kern geht es dem Gerichtshof darum, dass die Mitgliedstaaten nicht befugt sein sollen, durch völkerrechtlich bindende Übereinkünfte die Wirksamkeit des Unionsrechts zu beeinträchtigen.[14]

Die Zuweisung von (Verbands-) Kompetenzen beantwortete aber nicht die Frage, welche Folgen sich für die Vertragsschlusskompetenzen ergeben, wenn ein Abkommen mehrere Regelungsbereiche abdeckt, für die unterschiedliche Kompetenzzuweisungen bestehen. Wenn weder die Union, noch die Mitgliedstaaten unionsrechtlich über die nötige Verbandskompetenzen in allen Bereichen verfügen, muss das Abkommen als gemischtes Abkommen von der Union und den Mitgliedstaaten gemeinsam geschlossen werden („obligatorisch gemischtes Abkommen").[15]

Neben der Kompetenzzuweisung stellt sich die Frage der Kompetenzabgrenzung. Wie sehr muss ein Abkommen einen Kompetenzbereich berühren, damit eine Verpflichtung entsteht, diesen Kompetenzbereich beim Vertragsschluss auch zu berücksichtigen?[16] Dazu wird von einer Reihe von Autoren und

[10] EuGH, Gutachten 1/76, Slg. 1977, 741, für die Verwirklichung des freien Dienstleistungsverkehrs; z. B. verneint in EuGH, C-476/98, KOM/Deutschland – „Open Skies", Slg. 2002, I-9855, Rn. 82 ff.; s.a. EuGH, Gutachten 1/03 [Abschluss des neuen Übereinkommens von Lugano], Slg. 2006, I-1145, Rn. 114); C. Callies, in: C. Callies/M. Ruffert, EUV/AEUV, Das Verfassungsrecht der Europäischen Union, 5. Aufl. 2016, Art. 3 AEUV, Rn. 17.

[11] EuGH, Gutachten 1/94, Rn. 89.

[12] So die Formulierung in den „Open Skies"-Urteilen, u. a. EuGH, Urt. C-467/98, Kommission/Dänemark, Slg. 2002, I-9519, Rn. 57.

[13] Gutachten 1/94, Rn. 86, vgl. auch Gutachten 1/03, Rn. 115 m.w.N.

[14] Callies, in: Callies/Ruffert, EUV/AEUV, aaO. (Fn. 10), Art. 3 AEUV, Rn. 17.

[15] Mögele, in: Streinz, EUV/AEUV, 2. Aufl. 2012, Art. 216 AEUV, Rn. 40.

[16] Grzeszick, Stellungnahme, aaO. (Fn. 3), S. 48 der Drucksache; Mögele, in: Streinz, EUV/AEUV, aaO. (Fn. 15), Art. 216 AEUV, Rn. 40 mit Verweis auf Rosas, in: Koskenniemi, International Law Aspects

verschiedenen Generalanwälten die Meinung vertreten, dass jede Überschneidung der Inhalte eines Abkommens mit dem Bereich der ausschließlichen Verbandskompetenzen von Union bzw. Mitgliedstaaten ausreicht, damit der betreffende Rechtsträger für den Abschluss mit zuständig ist.[17] Diese Auffassung hat Generalanwältin Kokott besonders einprägsam so formuliert: „*So, wie ein kleiner Tropfen Pastis ein Glas Wasser trüben kann, können auch einzelne, noch so untergeordnete Bestimmungen in einem auf Artikel 133 (5) UAbs. 1 EG gestützten internationalen Vertragswerk den Zwang zum Abschluss eines gemischten Abkommens auslösen.*"[18]

Demgegenüber wird auch vertreten, dass für die Zuständigkeitsabgrenzung vor allem auf den inhaltlichen Schwerpunkt des Vertrags abzustellen sei.[19] Wieder andere weisen mit guten Gründen darauf hin, dass jedenfalls bloße Neben- und Hilfsbestimmungen für die Kompetenzzuweisung irrelevant seien, ebenso wie ganz vereinzelte Vorschriften, die in die Kompetenz der Mitgliedstaaten fielen.[20] Dieser Meinung scheint auch der Gerichtshof zuzuneigen.[21]

B. Die Kodifizierung dieser Grundstruktur im Lissabonner Vertrag

Diese Grundstruktur allgemein, und die AETR Rechtsprechung im Besonderen, sind im Lissaboner Vertrag durch Art. 3 (2) und Art. 216 (1) AEUV kodifiziert worden,[22] wobei sich diese Bestimmungen in sehr viel detailreichere Vorschriften

of the European Union, S. 125, 130; vgl. auch EuGH C-268/94, Slg. 1996, I-6177, Rn. 75 ff. (Portugal/Rat und Kommission).

[17] Lorenzmeier, in: Grabitz/Hilf/Nettesheim, Das Recht der EU, aaO. (Fn. 2), Art. 218 AEUV, Rn. 16; B. Grzeszick/J. Hettche, Zur Beteiligung des Bundestages an gemischten völkerrechtlichen Abkommen, AöR 141 (2016), 225, 233; Engel, Tagungsbericht, Internationale Handlungsfähigkeit der EU durch gemischte Abkommen, Integration 1/2015, 81.

[18] Schlussantrag GAin Kokott, C-13/07, Kommission/Rat, EU:C:2009:190, Rn. 121), vgl. EuGH, C-268/94, Portugal/Rat, EU:C:1996:461, Rn. 39 m.w.N.

[19] So wohl F. Mayer, Stellt das geplante Freihandelsabkommen der EU mit Kanada (CETA) ein gemischtes Abkommen dar?, Rechtsgutachten (https://www.bmwi.de/Redaktion/DE/Downloads/C-D/ceta-gutachten-einstufung-als-gemischtes-abkommen.html) (letzter Zugriff, 20.11.2017), S. 7 unter Verweis auf EuGH, C-137/12, Kommission/Rat, Rn. 53; ähnlich wohl Frank Hoffmeister, Wider die German Angst – Ein Plädoyer für die transatlantische Handels- und Investitionspartnerschaft (TTIP), ArchVR 53 (2015), 60, Heber: Die Kompetenzverteilung im Rahmen der Austrittsverhandlungen nach Art. 50 EUV unter besonderer Berücksichtigung bestehenden Sekundärrechts, EuR 2017, 581, 590 f. unter Hinweis auf A. Kerkemeyer, Europarechtliche Bedenken gegen das CETA-Abkommen, KJ 48 (2015), 264, 266.

[20] Mögele, in: Streinz, EUV/AEUV, 2. Aufl. 2012, Art. 216 AEUV, Rn. 40; unter Hinweis auf Beispiele aus der Rspr.: Vorschriften über die Verhängung strafrechtlicher Sanktionen, EuGH, C-25/94, Slg. 1996, I-1469, Rn. 47 (FAO) oder auch die Tragung von Verwaltungskosten durch die Mitgliedsstaaten bei einer internationalen Organisation, siehe EuGH, Gutachten 1/94, Slg. 1994, I-5267, Rn. 21 (WTO).

[21] EuGH, Gutachten 1/08 [Abkommen zur Änderung von GATS Verpflichtungen], EU:C:2009:739, Rn. 166 und die dort zitierte Rechtsprechung.

[22] Schlussantrag GAin Sharpston, Gutachten 2/15, Rn. 70; M. Cremona, Extending the reach of the AETR principle, ELRev 2009, 754; Pelka, in: Schwarze, EU Kommentar, 3. Aufl. 2012, Art. 3 AEUV,

zur Zuständigkeitsabgrenzung einbetten, die es so im Rahmen der EWG und EG noch nicht gab. Beide Vorschriften ähneln sich in ihrem Wortlaut, enthalten aber unterschiedliche Aussagen und haben unterschiedliche, komplementäre Funktionen im Gesamtgefüge der Verträge allgemein und der Zuständigkeitsverteilung im Besonderen.

1. Die Analyse von Wortlaut und Struktur

Die Analyse beider Vorschriften muss auf der Grundlage ihrer Gleichrangigkeit im Rahmen einer Gesamtschau vor dem Hintergrund der Rechtsprechung erfolgen, die durch diese Vorschriften kodifiziert wurde.[23] Angesichts der komplexen Struktur der Regelungen über die Außenbeziehungen, und angesichts der Tatsache, dass Art. 3 (2) AEUV „ausschließliche" Zuständigkeiten regelt, während Art. 216 (1) AEUV auch nicht ausschließliche Zuständigkeiten erfasst, kann Art. 216 (1) nicht *lex specialis* (i. S. v. Art. 2 (6) AEUV) zu Art. 3 (2) AEUV sein.[24]

Schon die Gegenüberstellung beider Vorschriften hilft bei ihrem Verständnis. Beide bestehen im Original nur aus einem Absatz, der nachfolgend (zur Verdeutlichung) jeweils in Teilabsätze aufgeteilt wurde (der Text ist unverändert, nur Absätze und Kennzeichnungsziffern ((i), (ii), ... für die verschiedenen Alternativen) sowie Hervorhebungen wurden hinzugefügt):

Art. 3 (2) AEUV	Art. 216 (1) AEUV
Die Union hat ferner die *ausschließliche* Zuständigkeit für den Abschluss internationaler Übereinkünfte, ***(i)*** wenn der Abschluss einer solchen Übereinkunft in einem Gesetzgebungsakt der Union vorgesehen ist, ***(ii)*** wenn er notwendig ist, damit sie ihre interne Zuständigkeit ausüben kann, oder ***(iii)*** soweit er gemeinsame Regeln beeinträchtigen oder deren Tragweite verändern könnte.	Die Union kann *mit einem oder mehreren Drittländern oder einer oder mehreren internationalen Organisationen* eine Übereinkunft schließen, ***(i)*** wenn *dies in den Verträgen vorgesehen ist* oder wenn der Abschluss einer Übereinkunft im Rahmen der Politik der Union entweder ***(ii)*** zur Verwirklichung eines der in den Verträgen festgesetzten Ziele erforderlich oder ***(iii)*** in einem verbindlichen Rechtsakt der Union vorgesehen ist oder aber ***(iv)*** gemeinsame Vorschriften beeinträchtigen oder deren Anwendungsbereich ändern könnte.

Rn. 17; Callies, in: Callies/Ruffert, EUV/AEUV, aaO. (Fn. 10), Art. 3 AEUV, Rn. 17 spricht von „enger inhaltlicher Annäherung."

[23] Ähnlich Obwexer, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 3 AEUV, Rn. 34; Lachmeyer/von Förster, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 216 AEUV, Rn. 13.

[24] So aber wohl Callies, in: Callies/Ruffert, EUV/AEUV, aaO. (Fn. 10), Art. 3 AEUV, Rn. 18, der in Art. 216 (1) AEUV eine Konkretisierung von Art. 3 (2) AEUV sieht, ihm folgend Pelka, in: Schwarze, aaO. (Fn. 22), Art. 3 AEUV, Rn. 18.

Aus der Gegenüberstellung wird deutlich, dass sowohl Art. 3 (2) als auch Art. 216 (1) der Union die Zuständigkeit zum Abschluss internationaler Abkommen übertragen, soweit

- der Abschluss einer solchen Übereinkunft „*in einem Gesetzgebungsakt* (verbindlichen Rechtsakt) *der Union vorgesehen ist*" (Art. 3 (2) 1. Alternative, sowie Art. 216 (1) 3. Alternative), oder
- soweit er „*gemeinsame Regeln* (Vorschriften) *beeinträchtigen oder deren Tragweite* (Anwendungsbereich) *verändern könnte*" (Art. 3 (2) 3. Alternative, sowie Art. 216 (1) 4. Alternative).

Vor allem die im zweiten Punkt angesprochene Alternative (in der Literatur auch als AETR-Variante bezeichnet)[25] kodifiziert den Rechtsgedanken des AETR-Urteils, die im ersten Punkt angesprochene Alternative (auch als Rechtsaktvariante bezeichnet)[26] entspricht seiner Logik. Beide Alternativen sind in Art. 3 (2) und 216 (1) weitgehend deckungsgleich und beziehen sich auf die erfolgte Wahrnehmung von Innenkompetenzen aufgrund des Erlasses sekundärrechtlicher Regelungen.[27] Dabei ist die sprachliche Fassung der AETR-Variante insofern missglückt, als die Zuständigkeit der Union begründet wird, wenn der Abschluss der Übereinkunft durch die Mitgliedstaaten die beeinträchtigende Wirkung hätte, und nicht (wie der Wortlaut suggeriert), der Abschluss durch die Union.[28]

Ähnlich, aber mit inhaltlichen Unterschieden, ist die Beschreibung der weiteren Alternative, dass die Gemeinschaft zuständig ist, wenn

- der Vertrag „*notwendig ist, damit sie ihre interne Zuständigkeit ausüben kann*" (Art. 3 (2) 2. Alternative) bzw. wenn er „*zur Verwirklichung eines der in den Verträgen festgesetzten Ziele erforderlich*" ist (Art. 216 (1) 2. Alternative).

Diese Alternative (z. T. als Zielvariante bezeichnet)[29] kodifiziert, mit erheblichen Abweichungen im Detail (dazu sogleich unten), den Rechtsgedanken der Folgerechtsprechung nach dem AETR-Urteil, wonach eine implizite Außenkompetenz auch anerkannt wird, wenn die EU von ihren internen Befugnissen

[25] Vöneky/Beylage Haarmann, in: Grabitz, aaO. (Fn. 2), Art. 216 AEUV, Rn. 17.; Obwexer, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 3 AEUV Rn. 40; Mögele, in: Streinz, EUV/AEUV, 2. Aufl. 2012, Art. 216 AEUV, Rn. 34.

[26] Vöneky/Beylage Haarmann, in: Grabitz, aaO. (Fn. 2), Art. 216 AEUV, Rn. 8 f.; Mögele, in: Streinz, EUV/AEUV, 2. Aufl. 2012, Art. 216 AEUV, Rn. 35.

[27] Mögele, in: Streinz, EUV/AEUV, 2. Aufl. 2012, Art. 216 AEUV, Rn. 34, 35.

[28] Obwexer, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 3 AEUV Rn. 41; Mögele, in: Streinz, EUV/AEUV, 2. Aufl. 2012, Art. 216 AEUV, Rn. 36 m.w.N.; im Ergebnis ebenso, Nettesheim, in: Grabitz, aaO. (Fn. 2), Art. 3 AEUV, Rn. 24.

[29] Mögele, in: Streinz, EUV/AEUV, 2. Aufl. 2012, Art. 216 AEUV, Rn. 30

noch keinen Gebrauch gemacht hatte, aber ein Handeln der EU „notwendig" ist, um eines der Ziele der EU zu erreichen.[30]

Demgegenüber enthält Art. 3 (2) eine Feststellung, die in Art. 216 (1) so nicht vorkommt, nämlich dass die Zuweisung der Kompetenz an die Union durch Art. 3 (2) eine ausschließliche Zuständigkeit (im Sinne von Art. 2 (1) AEUV) begründet, ein Tätigwerden der Mitgliedstaaten daher grundsätzlich unzulässig ist, selbst wenn die Union untätig bleibt.[31] Es liegt deshalb an sich nahe, den soeben identifizierten Wortlautunterschied zwischen Art. 3 (2) 2. Alternative und Art. 216 (1) 2. Alternative AEUV so zu verstehen, dass der Wortlaut in Art. 3 (2) speziell die Rechtsprechung wiederspiegelt, die eine implizite, ausschließliche Zuständigkeit festgestellt hat, und zugleich zu prüfen, ob der Wortlaut von Art. 216 (1) 2. Alternative weiter ist und auch nicht-ausschließliche implizite Zuständigkeiten erfasst. Dafür spricht, dass der Wortlaut von Art. 3 (2) eine Zuständigkeit für eine Übereinkunft begründet, die „*notwendig ist, damit* [die Union] *ihre* [bereits bestehende] *interne Zuständigkeit ausüben kann*",[32] während es für Art. 216 (1) 2. Alternative ausreicht, dass die Übereinkunft zur „*Verwirklichung eines* [d. h.: jedes] *der in den Verträgen festgesetzten Ziele erforderlich*" ist.[33] Andererseits scheint der Wortlaut von Art. 216 (1) eher den in der früheren Rechtsprechung erwähnten Kriterien für eine ausschließliche implizite Zuständigkeit[34] zu entsprechen als Art. 3 (2) AEUV.

Außerdem enthält Art. 216 (1) 1. Alternative (nicht aber Art. 3 (2)) die Aussage, dass die Gemeinschaft für den Abschluss von Übereinkünften zuständig ist, „*wenn dies in den Verträgen vorgesehen ist*." Diese Aussage in Art. 216 (1) mag selbstverständlich erscheinen, ihr Fehlen in Art. 3 (2) ist hingegen nicht selbstverständlich, sondern folgerichtig. Denn nicht alle im Vertrag selbst vorgesehenen Vertragsschlusskompetenzen sind „ausschließliche" Zuständigkeiten. Ausdrückliche Vertragsschlusskompetenzen sind daher immer zuständigkeitsbegründend (Art. 216 (1) AEUV), führen aber nicht notwendigerweise zu einer

[30] EuGH, Gutachten 1/76, Slg. 1977, 741, für die Verwirklichung des freien Dienstleistungsverkehrs; z. B. verneint in EuGH, C-476/98, Kommission/Deutschland – „Open Skies", Slg. 2002, I-9855, Rn. 82 ff.; s.a. EuGH, Gutachten 1/03 [Abschluss des neuen Übereinkommens von Lugano], Slg. 2006, I-1145, Rn. 114 ff.)

[31] Weiß, Kompetenzverteilung bei gemischten Abkommen, DÖV 2016, 537, 538.

[32] Nettesheim, in: Grabitz, aaO. (Fn. 2), Art. 3 AEUV, Rn. 23 will den Wortlaut so verstehen, dass damit nur eine ausgeübte interne Zuständigkeit gemeint ist, unter Hinweis auf das Gutachten 1/94 (WTO), Rn. 77; vgl. aber jetzt EuGH, Urt. v. 05.12.2017, C-600/14, Deutschland/Rat (OTIF), ECLI:EU:C:2017:935.

[33] Mögele, in: Streinz, EUV/AEUV, 2. Aufl. 2012, Art. 216 AEUV, Rn. 31 meint, dass der Wortlaut zu weit sei, und einer gewissen teleologischen Reduktion bedürfe.

[34] EuGH, Gutachten 1/03 [Lugano II], Slg. 2006, I-1145, Rn. 115: „*ausschließliche Zuständigkeit wenn der Abschluss der völkerrechtlichen Vereinbarung somit erforderlich ist, um Ziele des EG-Vertrags zu verwirklichen, die sich durch die Aufstellung autonomer Regeln nicht erreichen ließen*", so auch Urt. C-467/98 (Kommission/Dänemark, Slg. 2002, I-9519, (Open Sky) Rn. 57.

ausschließlichen Zuständigkeit i. S. v. Art. 3 (2).[35] Dieses Verständnis der Vorschrift ist systemgerecht, weil durch die Erwähnung vertraglicher Vertragsschlusskompetenzen in Art. 3 (2) sonst jede nichtausschließliche Zuständigkeit in eine ausschließliche Zuständigkeit verwandelt würde.

Schließlich stellt Art. 216 (1) klar, dass die Vertragsschlusskompetenz sich auf Verträge mit „*einem oder mehreren Drittländern oder einer oder mehreren internationalen Organisationen*" erstreckt, ohne dass dies in Art. 3 (2) angesprochen wäre. Dies scheint eine rein technische Klarstellung zu sein, die im Kontext von Art. 216 (Titel V, Internationale Übereinkünfte) naheliegend erscheint, ohne einen wirklichen Unterschied zu Art. 3 (2) erkennen zu lassen.

Vor diesem Hintergrund lassen sich schon aus der Analyse des Wortlauts, des Kontexts und der Struktur der Vorschriften die folgenden Hauptunterschiede zwischen Art. 3 (2) und Art. 216 (1) AEUV ableiten:

- Art. 3 (2) AEUV regelt die ausschließliche Vertragsschlusskompetenz der Union, während Art. 216 (1) auch Fälle von nicht-ausschließlichen (geteilter) Vertragsschlusskompetenzen erfasst.
- Art. 3 (2) (ii) erfordert für den Fall, dass eine interne Zuständigkeit eine entsprechende externe Zuständigkeit begründen soll, dass die Übereinkunft „*notwendig ist, damit* [die Union] *ihre* [bereits bestehende] *interne Zuständigkeit ausüben kann*", während es für Art. 216 (1) ausreicht, dass die Übereinkunft zur („*Verwirklichung eines* [d. h.: jedes] *der in den Verträgen festgesetzten Ziele erforderlich*" ist. Für den Fall, dass Art. 216 (1) einschlägig, Art. 3 (2) aber unanwendbar ist (und auch sonst keine ausschließliche Zuständigkeit der Union ersichtlich ist), wird der Abschluss der Übereinkunft dann von einer geteilten Zuständigkeit erfasst.[36]
- Art. 216 (1) 1. Alternative AEUV begründet immer eine Vertragsschlusskompetenz. Ob es sich um eine ausschließliche oder eine geteilte Kompetenz handelt, beurteilt sich nach der Vertragsnorm, die die Kompetenzzuweisung enthält.
- Demgegenüber sind die Zuständigkeitsanforderungen von Art. 3 (2) 1. Alternative und Art. 216 (1) 3. Alternative einerseits und von Art. 3 (2) 3. Alternative und Art. 216 (1) 4. Alternative AEUV andererseits im Wesentlichen deckungsgleich. Zuständigkeiten, die auf dieser Basis begründet werden, sind daher grundsätzlich ausschließliche Zuständigkeiten der Union.

[35] Ähnlich Schlussantrag GAin Sharpston, Gutachten 2/15, Rn. 64; eine Aufzählung der ausdrücklichen Vertragsschlusskompetenzen im Vertrag findet sich bei Vöneky/Beylage Haarmann, in: Grabitz, aaO. (Fn. 2), Art. 216 AEUV, Rn. 7.

[36] Das gilt vorbehaltlich eventueller *lex-specialis* Vorschriften in EUV oder AEUV.

2. Das Gutachten 2/15

Die eben beschriebene Differenzierung ist in der Folgerechtsprechung zum AETR-Urteil bereits angelegt. Im Gutachten 1/03 (Lugano II) hat der Gerichtshof sich mit dieser Frage und der Differenzierung zwischen ausschließlicher und nicht-ausschließlicher Zuständigkeit näher befasst:[37] *„Der Gerichtshof hat außerdem festgestellt, dass die Gemeinschaft immer dann, wenn das Gemeinschaftsrecht ihren Organen im Hinblick auf ein bestimmtes Ziel im Inneren eine Zuständigkeit verleiht, befugt ist, die zur Erreichung dieses Zieles erforderlichen völkerrechtlichen Verpflichtungen einzugehen, auch wenn insoweit eine ausdrückliche Bestimmung fehlt. Diese Zuständigkeit der Gemeinschaft kann ausschließlich sein, oder sie kann zwischen dieser und den Mitgliedstaaten geteilt sein.*"

Diesem Ansatz folgt der Gerichtshof auch im Gutachten 2/15,[38] das nicht nur die neueste, sondern wohl auch die seit dem Inkrafttreten des Vertrages von Lissabon tiefgreifendste Analyse der Außenzuständigkeiten der Union enthält.

a. Die Zuständigkeitsverteilung

Der Gerichtshof und Generalanwältin Sharpston prüfen sehr ausführlich, inwieweit die Union für den Abschluss des Freihandelsabkommens mit Singapur (EU-Singapore Free Trade Agreement, „EUSFTA") zuständig ist. Hier ist nicht der Ort (und zu wenig Raum), um das Gutachten in allen Details darzustellen. Dennoch ist eine kurze Analyse der Reihenfolge der Prüfungsschritte, die der Gerichtshof bzw. die Generalanwältin für erforderlich halten, aufschlussreich, besonders hinsichtlich der Bereiche, in denen eine ausschließliche Zuständigkeit der Union nicht anerkannt wird.

i. Zum Investitionsschutz für Portfolioinvestitionen

Im Gutachten 2/15 analysiert der Gerichtshof die Zuständigkeit der Union zum Abschluss des EUSFTA hinsichtlich der verschiedenen Regelungen des Abkommens. Zum Investitionsschutz für Portfolioinvestitionen stellt der Gerichtshof zunächst fest, dass Portfolioinvestitionen nicht Regelungsgegenstand der gemeinsamen Handelspolitik i. S. v. Art. 207 AEUV sind (im Wesentlichen, weil sich aus Wortlaut und Entstehungsgeschichte von Art. 207 die Beschränkung auf „Direktinvestitionen" ergibt), sodass er eine ausschließliche Zuständigkeit für Regelungen zu Portfolioinvestitionen nach Art. 3 (1) e) AEUV nicht anerkennt.[39]

In einem zweiten Analyseschritt stellt der Gerichtshof sodann fest, dass mangels sekundärrechtlicher Regelungen zu Portfolioinvestitionen auch keine

[37] EuGH, Gutachten 1/03 [Lugano II], Slg. 2006, I-1145, Rn. 114 f.
[38] EuGH, Gutachten 2/15 v. 16.05.2017, [Freihandelsabkommen Singapur], ECLI:EU:C:2017:376.
[39] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 80-109.

ausschließliche Zuständigkeit nach Art. 3 (2) 3. Alternative AEUV besteht. Dabei betont der Gerichtshof, dass es sich bei den in Art. 3 (2) 3. Alternative genannten *„gemeinsamen Regeln"*, die vom Übereinkommen „*beeinträchtig*[t] *oder* [in ihrer] *Tragweite verändert*[t]" werden müssten, um Regeln des Sekundärrechts handeln muss, weil internationale Abkommen eine solche Wirkung auf Primärrecht gar nicht entfalten könnten. Deshalb sei die Berufung der Kommission auf Art. 63 (Kapitalverkehrsfreiheit) insoweit irrelevant.[40] Da die „*Kommission in ihren vor dem Gerichtshof abgegebenen Erklärungen ausdrücklich dargelegt*" hatte, dass der Abschluss eines solchen Abkommens nicht im Sinne von Art. 3 (2) 2. Alternative AEUV „*notwendig* ... [sei], *damit* [die Union] *ihre interne Zuständigkeit ausüben kann*", hat der Gerichtshof andererseits keine Basis für eine ausschließliche Zuständigkeit im Sinne von Art. 3 (2) 2. Alternative AEUV gesehen.[41] Auf der Basis des „AETR-Effekts" ergibt sich daher keine ausschließliche Unionszuständigkeit.

Der Gerichtshof kommt damit zum dritten Schritt, der Zuständigkeitsanalyse auf der Grundlage von Art. 216:[42] „*Der Abschluss einer internationalen Übereinkunft durch die Union, die solche Investitionen erfasst, kann sich jedoch als im Sinne von Art. 216* (1) *AEUV ‚zur Verwirklichung eines der in den Verträgen festgesetzten Ziele erforderlich' erweisen*", u. a. weil „*der Abschluss internationaler Übereinkünfte, die zur Errichtung dieses freien Kapital- und Zahlungsverkehrs auf gegenseitiger Basis beitragen, als zur vollständigen Verwirklichung dieses freien Verkehrs erforderlich angesehen werden*" könne, also zur Verwirklichung eines Ziels des AEUV erforderlich sei. Die Kapitalverkehrsfreiheit sei aber gemäß Art. 4 (2) a) AEUV eine zwischen der Union und ihren Mitgliedstaaten geteilte Zuständigkeit für den Binnenmarkt. Daraus folge, dass die der Union durch Art. 216 (1) AEUV übertragene Zuständigkeit für den Abschluss einer Übereinkunft ebenfalls als eine geteilte Zuständigkeit anzusehen sei, da Art. 4 (1) AEUV vorsehe, dass die Union „*ihre Zuständigkeit mit den Mitgliedstaaten* [teilt], *wenn ihr die Verträge außerhalb der in den Artikeln 3 und 6 genannten Bereiche eine Zuständigkeit übertragen.*"[43]

ii. Zur Bedeutung des AETR-Effekts in der Verkehrspolitik

Generalanwältin Sharpston vertritt im Gutachtenverfahren 2/15 die grundsätzliche Auffassung, es sei nicht erforderlich, dass die Union für jede einzelne Bestimmung eines Abkommens zuständig sei. Vielmehr habe der Gerichtshof schon

[40] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 225-238.

[41] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 237, vgl. auch die Schlussanträge von GAin Sharpston, Rn. 348 „*Es wird nicht vorgetragen, dass für die Union eine ausschließliche Zuständigkeit für den Abschluss des EUSFTA notwendig sei, um ihre interne Zuständigkeit auszuüben. Art. 3 (2) Zweite Alternative AEUV findet daher keine Anwendung.*"

[42] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 239 ff.

[43] EuGH, Gutachten 2/15 , ECLI:EU:C:2017:376, Rn. 242.

im Gutachten 2/00 klargestellt, „*dass* [...] *der genaue Umfang der jeweiligen ausschließlichen Zuständigkeiten der Union und der jeweiligen geteilten (oder ausschließlichen) Zuständigkeiten der Mitgliedstaaten in Bezug auf eine konkrete Übereinkunft als solcher keine Auswirkungen auf die Zuständigkeit der Union* [...] *haben könne*."[44] Das EUSFTA sei eine sehr heterogene Übereinkunft. Daraus folge „*zwangsläufig, dass sich die Würdigung der Frage, ob eine Zuständigkeit gegeben ist und welcher Art (ausschließlich oder geteilt) sie ist, (je nach Kontext) auf ein einzelnes Kapitel oder Gruppen von Kapiteln des EUSFTA, auf einen oder mehrere Teile dieser Übereinkunft oder bisweilen auf eine einzelne Bestimmung konzentrieren muss*."[45] Trotz ihrer Bereitschaft zur bereichsweisen Analyse kommt die Generalanwältin zu dem Ergebnis, dass im Bereich der Verkehrspolitik keine auf der kodifizierten AETR-Rechtsprechung beruhende ausschließliche Zuständigkeit gemäß Art. 3 (2) AEUV anzunehmen sei, wohl aber eine geteilte Zuständigkeit nach Art. 216 (1) AEUV.

Dabei stützt sich die Generalanwältin auf eine detaillierte Analyse der Vorschriften des Abkommens, die sie zu den Regelungen des zum maßgebenden Zeitpunkt geltenden Sekundärrechts in einer dreistufigen Analyse in Beziehung setzt.[46] Der erste Schritt dieser Prüfung besteht in der Abgrenzung des Bereichs, den die internationale Übereinkunft betrifft. Der zweite Schritt ist die Ermittlung der in dem Bereich bestehenden gemeinsamen Regeln. Der dritte Schritt besteht in der Prüfung der Auswirkungen des Abschlusses der internationalen Übereinkunft auf die relevanten gemeinsamen Regeln, wobei die Gefahr, dass gemeinsame Regeln beeinträchtigt oder deren Tragweite verändert werden könnten, ausreicht. Soweit der durch die internationale Übereinkunft geregelte Bereich vollständig durch gemeinsame Regeln harmonisiert ist, sei die ausschließliche Zuständigkeit in der Regel die Folge. Soweit aber der durch die internationale Übereinkunft geregelte Bereich nur teilweise durch gemeinsame Regeln harmonisiert wird, sei die ausschließliche Zuständigkeit der Union nicht zwangsläufig die Folge, es bedürfe der näheren Prüfung.

Bei ihrer Analyse des EUSFTA stellt die Generalanwältin zur Verkehrspolitik die verschiedenen Regelungsbereiche des Abkommens fest, vergleicht sie mit den Regelungsbereichen des Sekundärrechts und stellt fest, dass hinsichtlich der Übernahme von Verpflichtungen zum Luft-, See- und Binnenschiffsverkehr keine ausschließliche Zuständigkeit anerkannt werden solle, weil die Überschneidungen zu gering sind; immerhin sei von einer geteilten externen Zuständigkeit gemäß Art. 216 (1) AEUV auszugehen. Demgegenüber sei eine ausschließliche

[44] Schlussanträge von GAin Sharpston, Gutachten 2/15, Rn. 80 f. unter Hinweis auf EuGH, Gutachten 2/00 (Protokoll von Cartagena über die biologische Sicherheit) v. 06.12.2001 (EU:C:2001:664, Rn. 15).
[45] Schlussanträge von GAin Sharpston, Gutachten 2/15, Rn. 82.
[46] Schlussanträge von GAin Sharpston, Gutachten 2/15, Rn. 121-132.

externe Zuständigkeit nach Art. 3 (2) 3. Alternative AEUV für die Übernahme von Verpflichtungen zum Eisenbahn-und Straßenverkehr anzunehmen.[47]

Der Gerichtshof geht einen etwas anderen Weg und knüpft unmittelbar an das AETR-Urteil an. Er verweist auf Rn. 17 des AETR-Urteils, wonach *„in den Bereichen, in denen die Union Vorschriften erlassen hat, die* in irgendeiner Form *gemeinsame Rechtsnormen vorsehen, die Mitgliedstaaten weder einzeln noch selbst gemeinsam handelnd mehr berechtigt sind, mit dritten Staaten Verpflichtungen einzugehen, die diese Normen beeinträchtigen.*"[48] (Hervorhebung durch den Verfasser). Für die Beurteilung, ob diese Verpflichtungen *„gemeinsame Regeln beeinträchtigen oder deren Tragweite verändern* [könnten]", sei die *„ständige Rechtsprechung des Gerichtshofs*[49] *zugrunde zu legen, wonach diese Gefahr besteht, wenn die Verpflichtungen in den Anwendungsbereich der gemeinsamen Regeln fallen.*"[50] Mit anderen Worten, der Gerichtshof prüft zunächst, ob Sekundärrecht besteht, um dann zu sehen, ob Verpflichtungen aus dem Abkommen in dessen Anwendungsbereich fallen.

Dabei betont der Gerichtshof, dass die *„Tragweite der gemeinsamen Regeln der Union auch dann durch solche Verpflichtungen beeinträchtigt oder verändert werden* [kann]*, wenn diese Verpflichtungen einen Bereich betreffen, der bereits weitgehend von gemeinsamen Regeln erfasst ist.*"[51] Erneut betrachtet der Gerichtshof zunächst den Sekundärrechtsbestand. Ist der durch Verpflichtungen aus den Abkommen tangiert, so folgt daraus die ausschließliche Zuständigkeit gemäß Art. 3 (2) 3. Alternative AEUV.

Bei der Prüfung der Zuständigkeit zum Abschluss des EUSFTA für Verpflichtungen im Bereich Verkehr stellt der Gerichtshof vor diesem Hintergrund zunächst fest, dass sie (i) nicht als Teil der gemeinsamen Handelspolitik anzusehen seien (aufgrund von Art. 207 (5) AEUV). Er prüfte sodann (ii) den Regelungsbestand der Union hinsichtlich von Seeverkehr, Straßen- und

[47] Schlussanträge von GAin Sharpston, Gutachten 2/15, Rn. 220-268.

[48] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 170, unter Hinweis auf die Rechtssache 22/70, Kommission/Rat (AETR), EU:C:1971:32), Rn. 17; sowie unter Hinweis auf sein Urt. in der Sache C-467/98, Kommission/Dänemark, EU:C:2002:625, Rn. 77-80.

[49] Der Gerichtshof verweist auf seine Rechtsprechung in der Sache C-114/12, Kommission/Rat, EU:C:2014:2151, Rn. 68; Gutachten 1/13 [Beitritt von Drittstaaten zum Haager Übereinkommen], EU:C:2014:2303, Rn. 71; C-66/13, Green Network, EU:C:2014:2399, Rn. 29, und Gutachten 3/15 [Vertrag von Marrakesch über den Zugang zu veröffentlichten Werken] v. 14.02.2017, EU:C:2017:114, Rn. 105.

[50] EuGH, Gutachten 2/15, Rn. 180.

[51] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 181, unter Hinweis auf sein Gutachten 1/03 [Neues Übereinkommen von Lugano], EU:C:2006:81, Rn. 126; C-114/12, Kommission/Rat, EU:C:2014:2151, Rn. 69, 70; Gutachten 1/13 [Beitritt von Drittstaaten zum Haager Übereinkommen], EU:C:2014:2303, Rn. 72, 73, und Gutachten 3/15 [Vertrag von Marrakesch über den Zugang zu veröffentlichten Werken], EU:C:2017:114, Rn. 106, 107).

Eisenbahnverkehr[52] und stellt fest, dass die Regelungsdichte in diesen Bereichen so hoch ist, dass die Regelungen des Abkommens geeignet wären, Sinn, Tragweite und Wirksamkeit des vorhandenen Sekundärrechts zu beeinflussen, selbst wenn das Abkommen zu diesen Regeln nicht im Widerspruch stehe. Deshalb war hinsichtlich dieser Verkehrsbereiche die Union für den Abschluss der EUSFTA gemäß Art. 3 (2) AEUV ausschließlich zuständig.[53]

Insgesamt steht für den Gerichtshof die Frage im Vordergrund, ob ein Bereich im Wesentlichen durch Sekundärrecht abgedeckt wird. Ist das der Fall und berühren Verpflichtungen aus dem abzuschließenden Abkommen diese Regelungen, dann sind die Voraussetzungen von Art. 3 (2) 3. Alternative AEUV erfüllt und die Union wird ausschließlich zuständig. Durch eine Analyse, die sich im Vergleich zu der von Generalanwältin Sharpston (i) durch einen anderen Prüfungsschwerpunkt und (ii) eine großzügigere Sicht auf die Frage, wann ein Bereich im Wesentlichen durch Sekundärrecht abgedeckt ist, auszeichnet, kommt der Gerichtshof so zu dem Ergebnis, dass alle verkehrspolitischen Regelungen des EUSFTA von der ausschließlichen „AETR"-Zuständigkeit der Union umfasst werden.

iii. Zur Bedeutung von Regelungen äußerst begrenzter Tragweite

Interessant ist auch der Ansatz des Gerichtshofs zu unwesentlichen Nebenbereichen, hinsichtlich derer keine EU-Zuständigkeit besteht. Diese Frage stellte sich hinsichtlich der Zuständigkeit für den Binnenschiffsverkehr.

Im Bereich des Binnenschiffsverkehrs stellt der Gerichtshof keine mit den anderen Bereichen der Verkehrspolitik vergleichbare Regelungsdichte des Sekundärrechts fest. In dieser Hinsicht beschränkt er sich auf die Analyse der Verpflichtungen im EUSFTA und kommt zu dem Ergebnis, dass es „allenfalls" um „*Verpflichtungen von äußerst begrenzter Tragweite*" geht.[54] Der Gerichtshof betont, dass „*nach ständiger Rechtsprechung bei der Prüfung der Art der Zuständigkeit für den Abschluss einer internationalen Übereinkunft keine Bestimmungen dieser Übereinkunft zu berücksichtigen* [sind], *die von äußerst begrenzter Tragweite sind*.[55] *Daher ist im vorliegen-*

[52] Der Gerichtshof prüft tatsächlich zuerst kurz, ob das EUSFTA überhaupt relevante Verpflichtungen enthält. Das führt dazu, dass er auf eine Analyse des Luftverkehrs verzichtet, weil sich aus Art. 8.3 Buchst. c und Art. 8.9 Buchst. e EUSFTA ergäbe, dass „*der inländische und der internationale Luftverkehr dagegen nicht von diesem Abkommen erfasst*" wird (Rn. 62). Die vom EUSFTA erfassten „Luftfahrzeugreparatur- und -wartungsdienstleistungen, bei denen ein Luftfahrzeug vom Betrieb ausgesetzt wird", der „Verkauf und [die] Vermarktung von Luftverkehrsdienstleistungen" und die „Dienstleistungen computergesteuerter Buchungssysteme" seien keine „echten" Verkehrsdienstleistungen, sondern als „gewerbliche Dienstleistungen" einzustufen, die unter Art. 207 (1) fielen (Rn. 65, 68).

[53] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 201, 210.

[54] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 216.

[55] Unter Hinweis auf das Gutachten 1/08 [Abkommen zur Änderung der Listen spezifischer Verpflichtungen nach dem GATS], EU:C:2009:739, Rn. 166 und die dort angeführte Rechtsprechung.

den Fall die Art der Zuständigkeit der Union für die in Kapitel 8 des geplanten Abkommens enthaltenen Verpflichtungen im Verkehrsbereich unter Berücksichtigung der Verpflichtungen in Bezug auf den See-, Eisenbahn- und Straßenverkehr zu bestimmen." Daher sei die Union für das gesamte Kapitel 8 [Verkehr] ausschließlich zuständig.[56]

b. Die Folgen geteilter Zuständigkeiten für den Abschluss internationaler Übereinkünfte

Eine der größeren Überraschungen des Gutachtens 2/15 sind die Aussagen (oder besser: deren Fehlen) zu den Folgen einer geteilten Zuständigkeit für die praktische Umsetzung des Vertragsschlussverfahrens. Der Gerichtshof ordnet die Regelungen zu Portfolio- („Nicht-direkt") Investitionen (sowie zum ISDS[57]) im EUSFTA als eine zwischen EU und Mitgliedstaaten geteilte Zuständigkeit ein.[58] Trotz dieser Feststellung hält er kurz und apodiktisch fest, die Union könne die diesbezüglichen Regelungen (u. a. Kapitel 9 Abschnitt A EUSFTA) nicht selbst abschließen, vielmehr sei ein gemischtes Abkommen unter Beteiligung der Mitgliedstaaten erforderlich.[59]

Allgemein sind in Abhängigkeit der Zuständigkeiten von Union und Mitgliedstaaten für in einer internationalen Übereinkunft enthaltene Regelungen fünf wesentliche Fallgestaltungen denkbar, hinsichtlich derer sich vor der Entscheidung des Gerichtshofs zum Gutachten 2/15 die Rechtsfolgen wie folgt darstellten:

a) Hat die Union die ausschließliche Zuständigkeit für alle Bereiche eines Übereinkommens, dann ist die Union allein für den Abschluss des Übereinkommens ausschließlich zuständig;
b) Haben die Mitgliedstaaten die ausschließliche Zuständigkeit für alle Bereiche eines Übereinkommens, dann sind sie allein für den Abschluss

[56] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 217.

[57] **Der Gerichtshof nennt keine klare Rechtsgrundlage für eine (geteilte) Kompetenz der EU für Ver**tragsregelungen über Portfolio-Investitionen und das ISDS. Zum ISDS betont der Gerichtshof (Rn. 292), dass nach Wahl des Investors von der obligatorischen staatlichen Gerichtsbarkeit abgewichen werden kann. Wegen dieses tiefgreifenden Eingriffs in die mitgliedstaatliche Justizhoheit spricht der Gerichtshof den ISDS-Regelungen bloßen Hilfscharakter ab. Aus der Sicht der Mitgliedstaaten wäre es deshalb konsequent, das Bestehen einer ausschließlichen mitgliedstaatlichen Kompetenz (statt einer geteilten Kompetenz) anzunehmen. Damit passt die Aussage, die Union könne ein Abkommen mit solchen Regelungen nicht allein abschließen, aber auch nicht, denn dann hätte die Union insoweit gar keine Kompetenz. Deshalb halte ich es, insbesondere angesichts des späteren Urteil in der Sache C-600/14 (s. u., Rn. 44 und Fn. 70) für wenig wahrscheinlich, dass der Gerichtshof nur untechnisch von einer „geteilten Kompetenz" sprach und eine ausschließliche Kompetenz der Mitgliedstaaten begründen wollte.

[58] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 243.

[59] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 244.

des Übereinkommens ausschließlich zuständig, die Union wird nicht Vertragspartei;

c) Hat die Union die ausschließliche Zuständigkeit für bestimmte Bereiche eines Übereinkommens und sind die Mitgliedstaaten für weitere Bereiche ausschließlich zuständig, dann ist zwingend der Abschluss des Übereinkommens als „gemischtes Abkommen" durch Union und Mitgliedstaaten erforderlich (sog. *„obligatorisch gemischtes Abkommen");*

d) Hat die Union die (i) ausschließliche Zuständigkeit für bestimmte Bereiche eines Übereinkommens, sind (ii) die Mitgliedstaaten für weitere Bereiche ausschließlich zuständig und gibt es (iii) Bereiche der geteilten Zuständigkeit, dann ist zwingend der Abschluss des Übereinkommens als „gemischtes Abkommen" durch Union und Mitgliedstaaten erforderlich (weil die verbleibenden ausschließlichen Kompetenzen der Mitgliedstaaten deren Beteiligung nötig machen);[60]

e) Hat die Union die (i) ausschließliche Zuständigkeit für bestimmte Bereiche eines Übereinkommens und gibt es (ii) Bereiche der geteilten Zuständigkeit, ohne dass (iii) die Mitgliedstaaten selbst für einen Bereich noch ausschließlich zuständig sind, dann ist der Abschluss des Übereinkommens als „fakultativ gemischtes Abkommen" durch Union und Mitgliedstaaten möglich, aber nicht zwingend erforderlich (sog. *„fakultativ gemischtes Abkommen").*

Hinsichtlich der fünften Alternative lautet die Grundregel zur Ausübung geteilter Zuständigkeiten in Art. 2 (2) AEUV wie folgt:

> *„Übertragen die Verträge der Union für einen bestimmten Bereich eine mit den Mitgliedstaaten geteilte Zuständigkeit, so können die Union und die Mitgliedstaaten in diesem Bereich gesetzgeberisch tätig werden und verbindliche Rechtsakte erlassen. Die Mitgliedstaaten nehmen ihre Zuständigkeit wahr, sofern und soweit die Union ihre Zuständigkeit nicht ausgeübt hat. Die Mitgliedstaaten nehmen ihre Zuständigkeit erneut wahr, sofern und soweit die Union entschieden hat, ihre Zuständigkeit nicht mehr auszuüben."*

Wenn also für eine Materie die Zuständigkeit zwischen Union und Mitgliedstaaten geteilt ist, führt das dazu, dass zunächst die Union entscheiden muss, ob sie handeln will,[61] während Mitgliedstaaten im Bereich geteilter Zuständigkeiten

[60] Schlussantrag GAin Sharpston, Gutachten 2/15, Rn. 78; unter Verweis auf Schlussantrag GAin Kokott, Kommission/Rat, C-13/07, EU:C:2009:190, Rn. 121; und EuGH, Portugal/Rat, C-268/94, EU:C:1996:461, Rn. 39.

[61] Die Union hätte das Recht zunächst selbst über diese Zuständigkeit zu entscheiden, vgl. GAin Sharpston, Schlussanträge zu Gutachten 2/15, Rn. 73, („Vorgriffsrecht der Union"); im Ergebnis ähnlich etwa

autonom nur handeln können, wenn die Union untätig geblieben ist (oder in der Zukunft nicht mehr tätig werden will). Der Gerichtshof hatte hinsichtlich der Regeln zu Portfolioinvestitionen im EUSFTA im vorliegenden Fall ausdrücklich festgestellt, bei der Außenzuständigkeit handele es sich gemäß Art. 4 AEUV um eine geteilte Zuständigkeit. Deshalb müsste grundsätzlich die Grundregel des Art. 2 AEUV anwendbar sein.[62]

Das hätte zur Konsequenz, dass die EU (im Rahmen ihrer Institutionen) darüber entscheiden müsste, ob sie die geteilte (Außen-) Zuständigkeit selbst wahrnimmt und das Abkommen allein schließt oder hierauf verzichtet und das Abkommen mit den Mitgliedstaaten als fakultativ gemischtes Abkommen abschließt.[63] Diese Entscheidung wäre im Wesentlichen von den Mitgliedstaaten kollektiv im Rat zu treffen, allerdings (soweit nicht aus besonderen Gründen Einstimmigkeit im Rat erforderlich wäre) unter Geltung des Mehrheitsprinzips,[64] sodass Blockaden einzelner Mitgliedstaaten ausgeschlossen oder erheblich erschwert wären. Dieser Ansatz fand im deutschen Schrifttum Unterstützung.[65]

Allerdings gibt es auch eine Reihe von Gegenstimmen, die meinen, dass die Grundregel für die Ausübung geteilter Zuständigkeiten aus Art. 2 (2) für die internen Zuständigkeiten, nicht aber im Außenverhältnis gelten.[66] Insofern sei beim Vorliegen interner geteilter Kompetenzen nicht ohne Weiteres anzunehmen, dass auch im Außenverhältnis eine geteilte Zuständigkeit bestehe.

Der Ansatz, der von der Existenz fakultativ gemischter Abkommen (jedenfalls beim festgestellten Vorliegen geteilter externer Zuständigkeiten) ausgeht,

Mögele, in: Streinz, EUV/AEUV, 2. Aufl. 2012, Art. 216 AEUV, Rn. 40; Calliess, in: Calliess/Ruffert, EUV/AEUV, 5. Aufl. 2016, Art. 2 AEUV, Rn. 13 ff.; Nettesheim, in: Grabitz, aaO. (Fn. 2), Art. 2 AEUV, Rn. 27.

62 Schlussantrag GAin J. Kokott, C-13/07, Kommission/Rat, EU:C:2009:190, Rn. 88; G. Van Der Loo, R. Wessel, The Non-Ratification of Mixed Agreements, CMLRev [2017] 54.

63 Schlussantrag GAin Sharpston, Gutachten 2/15, Rn. 73-74, die die Frage aufwirft, ob die Wahrnehmung der *internen* gemischten Zuständigkeit von der Wahrnehmung der gemischten Außenzuständigkeit getrennt werden kann. Die GAin scheint das zu bejahen.

64 Schlussantrag GAin Sharpston, Gutachten 2/15, Rn. 74.

65 Mögele, in Streinz, EUV/AEUV, Art. 216, Rn. 40 ff.; Calliess, in: Calliess/Ruffert, EUV/AEUV, aaO. (Fn. 61), Art. 2 AEUV, Rn. 13 ff.

66 Weiß, Kompetenzverteilung bei gemischten Abkommen am Beispiel des TTIP, DÖV 2016, 537, 539 f. m.w.N. (offenbar beschränkt auf Fälle in denen die gemischte externe Kompetenz sich nicht ohne Weiteres feststellen lässt); weiter offenbar Bernd Grzeszick, der erwähnt (ohne Bezug auf das Gutachten 2/15), dass in der deutschen Literatur „auf breiter Linie" angenommen werde, dass bei geteilten Zuständigkeiten immer ein gemischtes Abkommen erforderlich sei, Grzeszick, Stellungnahme zur Beteiligung des Deutschen Bundestages an gemischten völkerrechtlichen Abkommen – Anhörung des Rechtsausschusses des Deutschen Bundestags am 13.01.2016; https://www.bundestag.de/blob/409794/4e7fb2623ffc719116fa94548a1bc67e/wortprotokoll-data.pdf, S. 51, unter Verweis auf Mayr, EuR 2015, 575, 582; ebenso offenbar Bäumler, Vom Vertragstext zum Inkrafttreten, (CETA), EuR 2016, 607, 617 f.

wurde auch von Generalanwältin Sharpston in ihren Schlussanträgen[67] (und offenbar auch vom Rat) grundsätzlich befürwortet, selbst wenn Generalanwältin Sharpston auf der Grundlage ihrer Analyse zu dem Ergebnis kommen musste, das EUSFTA bedürfe der obligatorischen Mitwirkung der Mitgliedstaaten (weil nach ihrer Auffassung die Union keine Zuständigkeit für die Ablösung der bestehenden bilateralen Investitionsschutzabkommen hatte, sondern dies in die ausschließliche Zuständigkeit der Mitgliedstaaten fiel).[68]

Der Gerichtshof hat sich zu diesen Überlegungen im Gutachten 2/15 nicht geäußert. Ohne nähere Begründung kommt er zu dem Ergebnis, dass die Inhalte des Abkommens, die in die geteilte externe Zuständigkeit fallen, nicht von der EU „*allein genehmigt werden* [können],"[69] sodass das Freihandelsabkommen mit Singapur von der EU und den Mitgliedstaaten gemeinsam abgeschlossen werden muss.

Der Gerichtshof hat dieses überraschend wirkende Ergebnis des Gutachtens 2/15 in seinem Urteil vom 5. Dezember 2017[70] präzisiert. In dem zugrunde liegenden Verfahren (C-600/14) ging es unter anderem um die Zuständigkeitsverteilung für die Regelung bestimmter zivilrechtlicher Haftungsfragen im Eisenbahnverkehr, hinsichtlich derer es keine EU-internen Regelungen gibt.[71] Generalanwalt Szpunar lehnte deshalb in seinem Schlussantrag vom 24. April 2017 eine ausschließliche Zuständigkeit der Union nach Art. 3 (2) AEUV ab,[72] ging aber von einer geteilten Zuständigkeit nach Art. 216 (1) AEUV aus. Da der Rat diese Zuständigkeit ausgeübt habe, sei Deutschland gehindert, insoweit seine eigene Zuständigkeit auszuüben.[73] Dies stand in einem gewissen Widerspruch zur apodiktischen Feststellung des Gerichtshofs im Gutachten 2/15, dass im Falle einer geteilten Zuständigkeit die Mitwirkung der Mitgliedstaaten notwendig sei.

Der Gerichtshof bestätigt den Generalanwalt durch Urteil vom 5. Dezember 2017 und erläutert, dass er in Rn. 244 des Gutachtens 2/15 zwar festgestellt habe, „*dass die maßgeblichen Bestimmungen des* [EUSFTA [...]], *die in die zwischen der Union und ihren Mitgliedstaaten geteilte Zuständigkeit fallen, nicht von der Union allein genehmigt werden konnten. Damit stellte er jedoch nur auf die vom Rat im damaligen Gutachtenverfahren vorgetragene Unmöglichkeit ab, die erforderliche Ratsmehrheit dafür zu erreichen, dass die Union die in diesem Bereich mit den Mitgliedstaaten geteilte Außenkompetenz allein ausüben konnte.*"[74]

[67] Schlussantrag GAin Sharpston, Gutachten 2/15, Rn. 72-74.
[68] GAin Sharpston, Schlussanträge zu Gutachten 2/15, Rn. 563.
[69] EuGH, Gutachten 2/15, Rn. 243, 244, siehe auch Rn. 282, 304.
[70] EuGH, Urt. v. 05.12.2017, C-600/14, Deutschland/Rat (OTIF), ECLI:EU:C:2017:935.
[71] Schlussanträge GA Szpunar, C-600/14, Deutschland/Rat, ECLI:EU:C:2017:296, Rn. 136, 140-144, 151, 153-155.
[72] Ibid., Rn. 144, 155.
[73] Ibid., Rn. 119 f.
[74] EuGH, Urt. v. 05.12.2017, C-600/14, Deutschland/Rat (OTIF), ECLI:EU:C:2017:935, insb. Rn. 68.

3. Erste Reaktionen in der wissenschaftlichen Literatur

In der deutschen Literatur finden sich bisher erst wenige Analysen des Gutachtens 2/15. Hinsichtlich der Analyse der Zuständigkeitsverteilung wird beschreibend und zustimmend betont, dass der Gerichtshof den neuen Wortlaut von Art. 3 (2) und Art. 216 (1) AEUV ernst genommen und diese Vorschriften vor dem Hintergrund der AETR überzeugend ausgelegt habe.[75]

Die Frage, welche Konsequenzen aus einer geteilten Zuständigkeit folgen, steht bei vielen Kommentaren im Vordergrund. Eine Reihe von Autoren sind von dem Ergebnis überrascht und konstatieren zunächst einmal die Existenz eines gewissen Widerspruchs.[76] Einige Autoren neigen dazu, die Haltung des Gerichtshofs zu verallgemeinern,[77] also in allen Fällen der o. g. 5. Alternative (Rn. 37) den Vertragsabschluss in der Form eines *obligatorisch gemischten Abkommens* zu fordern. Sie berufen sich darauf, dass der Gerichtshof eindeutig eine geteilte Kompetenz annahm und zugleich die obligatorische Mitwirkung der Mitgliedstaaten ohne erkennbare Ausnahme für erforderlich hielt.[78]

Andererseits lässt sich die Kürze und fehlende Begründung möglicherweise auch durch Meinungsunterschiede hinsichtlich der „richtigen" Begründung innerhalb des Gerichtshofs erklären. Dabei ist zu berücksichtigen, dass der Gerichtshof es meist vermeidet, unter den Richtern umstrittene Fragen im Urteil explizit näher zu analysieren und die Wahrscheinlichkeit von Meinungsunterschieden innerhalb des Gerichtshofs besonders groß ist, wenn der Gerichtshof (wie hier) ausnahmsweise im Plenum (also unter Beteiligung aller 28 Richter) entscheidet.

Andere Autoren versuchen deshalb, die Entscheidung im Gutachten 2/15 vor dem Hintergrund der Besonderheiten des Einzelfalls zu erklären. Dazu werden

[75] Thym, Mixity after Opinion 2/15. Judicial Confusion over Shared Competences, Verfassungsblog v. 31.5.2017, abrufbar unter http://verfassungsblog.de/mixity-after-opinion-215-judicial-confusion-over-shared-competences/.

[76] Vgl. N. Behrends, P. Kubicki, H. Rathke, Das Gutachten des EuGH zum Freihandelsabkommen mit Singapur, Deutscher Bundestag, Fachbereich Europa, Infobrief – (zitiert als: Behrends u. a., BT-Gutachten) S. 11; Kleimann/Kübek, The Singapore Opinion or the End of Mixity as We Know It, verfassungsblog.de v. 23.05.2017, online abrufbar unter http://verfassungsblog.de/the-singapore-opinion-or-the-end-of-mixity-as-we-know-it/; Giorgia Sangiuolo, A comment on opinion 2/15 and investor state dispute resolution. The price of preserving the division of powers, https://blogs.kcl.ac.uk/kslrcommerciallawblog/2017/08/25/a-comment-on-opinion-215-and-investor-state-dispute-resolution-the-price-of-preserving-the-division-of-powers/, die die Entscheidung mehr als „politische Entscheidung" zulasten eines kohärenten Vertragswerks deutet.

[77] So Ankersmit, Opinion 2/15 and the Future of Mixity and ISDS, European Law Blog vom 18.5.2017, online abrufbar unter https://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/.

[78] Vgl. Behrends, u. a., BT-Gutachten, aaO. (Fn. 76), S. 10.

verschiedene Überlegungen angestellt, die den Widerspruch zwischen dem Gutachten und Art. 2 (2) AEUV auflösen sollen.

Die erste, und nach dem jüngsten Urteil des Gerichtshofs in der Sache C-600/14 wohl zutreffende, Erklärung lautet wie folgt: Die Union muss ihre Kompetenz bei geteilten Zuständigkeiten gemäß Art. 2 (2) auch ausüben. Im Fall des EUSFTA hatte der Rat der Kommission ausdrücklich ein Verhandlungsmandat zum Abschluss eines gemischten Abkommens erteilt,[79] worin konkludent die Aussage liegt, die gemischte Zuständigkeit durch die Union nicht ausüben zu wollen. Auf die mangelnde Bereitschaft des Rates, die geteilte Zuständigkeit für die Union wahrzunehmen, hatte der Rat vor dem EuGH auch hingewiesen. Das erklärt, warum die vom Gerichtshof betonten gemischten Zuständigkeiten im konkreten Fall bei den Mitgliedstaaten verblieben waren. Das Ergebnis des Gerichtshofs im Gutachten 2/15 rechtfertigt sich dann daraus, dass die Union (im Rat) die geteilte Zuständigkeit nicht ausüben wollte.[80]

Problematisch bleibt in diesem Zusammenhang allerdings, dass der Rat sich nicht konkret mit den vom Gerichtshof erst nachträglich festgestellten gemischten Zuständigkeiten befassen konnte (der Rat ging damals ja von noch weitergehenden, gemischten Zuständigkeiten aus), der Rat also sein Handlungsermessen (Abschluss durch EU oder die Mitgliedstaaten) gar nicht vernünftig ausüben konnte.

Ein zweiter Erklärungsversuch setzt bei der Grundregel von Art. 2 (2) AEUV an. Diese wird teilweise als Regel vor allem für die Wahrnehmung von Innenkompetenzen wahrgenommen, sodass man die Frage aufwerfen kann, ob Art. 2 (2) überhaupt das Vorgehen bei gemischten Außenkompetenzen regelt.[81] Insofern wird in der Literatur diskutiert, ob eine Sperrwirkung von Art. 2 (2) AEUV zugunsten der Union voraussetzt, dass die Union ihre entsprechende Innenkompetenz schon wahrgenommen hat oder wenigstens beabsichtigt, sie nach innen oder außen wahrzunehmen.[82] In eine ähnliche Richtung geht eine (wohl auch von GAin Sharpston angedeutete) Frage, ob eine geteilte Außenkompetenz nur gleichzeitig mit der entsprechenden Innenkompetenz ausgeübt

[79] Schlussantrag GAin Sharpston, Gutachten 2/15, Rn. 83 (auch Rn. 7).

[80] Behrends, u. a., BT-Gutachten, aaO. (Fn. 76), S. 13; vgl. etwa Thym, Mixity after Opinion 2/15. Judicial Confusion over Shared Competences, Verfassungsblog v. 31.05.2017, abrufbar unter http://verfassungsblog.de/mixity-after-opinion-215-judicial-confusion-over-shared-competences/.

[81] Siehe oben, Rn. 41; sowie Behrends, u. a., BT-Gutachten, aaO. (Fn. 76), S. 10, Grzeszick, Stellungnahme, aaO. (Fn. 65), S. 46, unter Hinweis auf F. Kaiser, Gemischte Abkommen im Lichte bundesstaatlicher Erfahrungen, Mohr, 2009, S. 14.

[82] Kaiser, Gemischte Abkommen, aaO., S. 14, 25; Mayer, Stellt das geplante Freihandelsabkommen der EU mit Kanada (CETA) ein gemischtes Abkommen dar?, Rechtsgutachten, aaO. Fn. 19, S. 6; S.D. Engbrink, Die Kohärenz des auswärtigen Handelns der Europäischen Union, Mohr, 2014, S. 124.

werden kann[83] oder ob die geteilte Zuständigkeit nach außen in der Form begrenzt ist, dass sie nur so weit reicht, wie auch das Recht zum Erlass von Rechtsakten nach innen reichen würde.[84]

Der Widerspruch im Gutachten 2/15 entfiele nämlich auch dann, wenn mangels einer ausgeübten Innenkompetenz (oder angesichts der Beschränkungen dieser Kompetenz) der Rat gar keine Möglichkeit gehabt hätte, sich für die Ausübung der Außenkompetenz durch die Union zu entscheiden. Denkbar sei, dass der Gerichtshof gemeint habe, dass die Regelungen, die die Union nach innen auf der Grundlage von Art. 64 AEUV zum freien Kapitalverkehr erlassen könne, weniger weit reichen als die Regelungen, die das EUSFTA (nach außen) enthielten, gerade hinsichtlich der Portfolioinvestitionen.[85] Dieser zweite Erklärungsansatz ließe aber die Frage unbeantwortet, welche Unterschiede zwischen einer geteilten Außenkompetenz und einer ausschließlichen Kompetenz der Mitgliedstaaten dann noch verblieben.

Einem solchen Ansatz hat allerdings der Gerichtshof hinsichtlich Art. 216 (1) 2. Alternative jüngst ausdrücklich eine Absage erteilt. Schon Generalanwalt Szpunar hatte sich in der Sache C-600/14 hinsichtlich Art. 216 (1) 2. Alternative ausdrücklich gegen eine Begrenzung einer geteilten Außenkompetenz auf ausgeübte Binnenkompetenzen ausgesprochen.[86] Dem ist der Gerichtshof gefolgt (unter Betonung des Unterschieds der 2. zur 4. Alternative; hinsichtlich letzterer sei die Ausübung von Kompetenzen durch Sekundärrecht erforderlich).[87] Gegen eine Begrenzung einer geteilten Außenkompetenz auf ausgeübte Binnenkompetenzen im Falle von Art. 216 (1) 1. Alternative AEUV spricht auch, dass wenn ausdrückliche primärrechtliche Vertragsschlusskompetenzen bestehen, diese Kompetenzen weitgehend inhaltsleer wären, wenn sie nur zusammen mit oder in den Grenzen von gemischten Binnenkompetenzen ausgeübt werden könnten.

Bisher hat sich zu dieser Frage noch keine „herrschende" oder überwiegende Meinung in der deutschen „Doktrin" herausgebildet.

[83] Schlussantrag GAin Sharpston, Gutachten 2/15, Rn. 73: "*However, the text of Article 2 (2) TFEU can be read as permitting the European Union to exercise its right of pre-emption in relation to both external and internal competence.*" Die Generalanwältin weist in anderem Kontext (Handelspolitik und Art. 3 (1) e) AEUV) darauf hin, dass hinsichtlich ausschließlicher Kompetenzen die parallele Ausübung von Innenkompetenzen nicht erforderlich ist (Rn. 109, Fn. 60, in Abgrenzung zu GAin Kokott)), andererseits deutete der Gerichtshof im Gutachten 1/94 noch auf die Notwendigkeit der Ausübung von Innenkompetenzen hin (Slg. 1994, I-5267, Rn. 77). Gegen eine Begrenzung der Außenkompetenzen auf ausgeübte Binnenkompetenzen auch GA Szpunar, C-600/14, Deutschland/Rat, ECLI:EU:C:2017:296, Rn. 104-115 m.w.N.

[84] Thym, Mixity after Opinion 2/15 – Judicial Confusion over Shared Competences, Verfassungsblog v. 31.05.2017, abrufbar unter http://verfassungsblog.de/mixity-after-opinion-215-judicial-confusion--over-shared-competences/.

[85] Thym, ibid., s.a. Behrends u. a., BT-Gutachten, aaO., Fn. 76, S. 10.

[86] Schlussanträge GA Szpunar, C-600/14, Deutschland/Rat, ECLI:EU:C:2017:296, Rn. 104-115 m.w.N.

[87] EuGH, Urt. v. 05.12.2017, C-600/14, Deutschland/Rat (OTIF), ECLI:EU:C:2017:935, Rn. 61 ff., 67.

4. Erste Reaktionen aus Politik und Verwaltung

Interessant sind die politischen Reaktionen, die sich allerdings nicht spezifisch mit dem Gutachten 2/15 auseinandersetzen. Die EU-Handelspolitik war Thema der gescheiterten Sondierungsgespräche („Jamaika Koalition") für die Regierungsbildung nach der deutschen Bundestagswahl im Herbst 2017. Mit erstaunlicher Einmütigkeit heißt es in den Papieren zum Sachstand der Sondierungsgespräche: „*Wir wollen die Architektur künftiger Handelsabkommen nach dem Prinzip „EU-only" gestalten und Transparenz sowie Parlamentsbeteiligung im Verfahren von Anbeginn an stärken*."[88]

Einigkeit bestand auch darüber, dass „*freier und fairer Handel Wohlstand schafft und dass Globalisierung gerecht gestaltet werden muss*" und dass „*in der Handelspolitik die Sustainable Development Goals (SDGs) beachtet werden sollen*." Ein „*regelbasiertes multilaterales Handelssystem*" und „*die zentrale Rolle der WTO*" sollen gestärkt werden. Bis das erreicht sei, seien weitere bilaterale Handelsabkommen notwendig, mit denen der Marktzugang für deutsche und europäische Unternehmen verbessert werden soll.[89] Aus Sicht des Verfassers spricht manches dafür, dass eine ähnliche Haltung auch im Falle einer Regierungsbildung durch CDU und SPD vorherrschen würde.

Hinsichtlich von Reaktionen der Verwaltung ist mein Eindruck, dass dort die jetzt deutlich gewordenen Unterschiede zwischen Art. 3 (2) 2. Alternative (Außenzuständigkeit, die zur internen Kompetenzwahrnehmung notwendig ist) und Art. 216 (1) 2. Alternative (Kompetenz zur Zielverwirklichung) aufmerksam verfolgt werden. Art. 216 (1) 2. Alternative sei wesentlich weiter gefasst, begründe aber eben keine ausschließliche Zuständigkeit. Die konturenlose Weite der Vorschrift sei allerdings aus der Sicht des deutschen Verfassungsrechts nicht ganz unproblematisch (siehe dazu unten, Rn. 67).

Weiterer Klärungsbedarf wird anscheinend hinsichtlich der Zuständigkeitsanalyse des Gerichtshofs gesehen, weil die Grenzen der Zuständigkeitsübertragung unklar blieben. Bei der Übertragung von Verbandskompetenzen sei jeweils streng zu prüfen, ob alle von einem EU-only-Abkommen zu erfassenden Regelungsbereiche auf die EU übertragen wurden. Demgegenüber dürfe auf den Schwerpunkt der Zuständigkeiten nur abgestellt werden, wenn es bei unstreitig

[88] Arbeitspapier: Ergebnis der Sondierungsgespräche zwischen CDU/CSU, FDP und Bündnis 90/Die Grünen (15.11.2017), S. 56, Zeile 1999-2001; ebenso bereits die ersten Sondierungspapiere, z. B. Anlage 11, Sondierungsstand Internationale Politik (03.11.2017) S. 3 (Stichwort „Handel").

[89] Ibid., Zeile 1989-1997. Das bedeutet aber nicht, dass alle Parteien die zur Ratifikation anstehenden Abkommen (insb. CETA) gutheißen, die Gründen möchten (im Gegensatz zu FDP, CDU und CSU) CETA nicht ratifizieren.

bestehender Verbandskompetenz nur darum gehe, die richtige Rechtsgrundlage für das Vorgehen der Union zu bestimmen.[90]

Hinsichtlich der Konsequenzen von geteilten Zuständigkeiten nach dem Gutachten 2/15 ist das Urteil in der Rechtssache C-600/14 (Deutschland/Rat) (OTIF) natürlich gerade von deutscher Seite (als Verfahrenspartei) zur Kenntnis genommen worden, das manche Zweifel über die Konsequenzen von geteilten Zuständigkeiten ausgeräumt hat.[91]

C. Zu den Aktuellen Entwicklungen

Die Generalberichterstatter bitten (neben der oben stehenden rechtlichen Analyse der AETR-Rechtsprechung und ihrer Kodifizierung im AEUV) um praktische Beispiele für die Relevanz des „AETR-Effekts" in jüngster Zeit und zwar sowohl was die politische Diskussion als auch was rechtliche Auseinandersetzungen betrifft. Ohne Anspruch auf Vollständigkeit lassen sich aus deutscher Perspektive folgende Beispiele erwähnen.

1. Freihandelsabkommen – CETA, TTIP etc.

Die Bedeutung des AETR-Effekts ist in der öffentlichen Diskussion und der juristischen Fachwelt in den vergangenen Jahren im Zusammenhang mit der öffentlichen Debatte über die Sinnhaftigkeit und die Zuständigkeit des Abschlusses der umfassenden Freihandelsabkommen (comprehensive Free-Trade-Agreements) wie TTIP und CETA angesprochen worden. Die vorherrschende Sorge in diesem Zusammenhang war die Entkopplung der sich erweiternden EU-Zuständigkeiten (durch ausdrückliche Kompetenzübertragungen, aber auch den AETR-Effekt) von parlamentarischer Kontrolle, wobei gerade die Investitionsschutzregeln (mit Investor-State Dispute Settlement) als Beschränkung zukünftiger Souveränitätsausübung als problematisch und als Gefahr für die parlamentarische Willensbildung verstanden werden, speziell wenn die obligatorische Streitschlichtung außerhalb von staatlichen Gerichten erfolgt und deshalb außerhalb des Systems der Gewaltenteilung und von gegenseitigen „*checks and balances*" steht.[92]

[90] Wie etwa EuGH, C-377/12, Kommission/Rat, ECLI:EU:C:2014:1903.

[91] EuGH, Urt. v. 05.12.2017, C-600/14, Deutschland/Rat (OTIF), ECLI:EU:C:2017:935; siehe dazu oben, Rn. 44 f., 50.

[92] Vgl. Müller-Ibold, Recht ohne Rechtsschutz? Die (ausgeschlossene) unmittelbare Wirkung jüngerer Freihandelsabkommen der EU und Rechtsschutz durch Investor-State Dispute Settlement Verfahren, in: Marc Bungenberg, Christoph Herrmann (Hrsg.), Die gemeinsame Handelspolitik der Europäischen Union – Fünf Jahre nach Lissabon, 2016, S. 137 ff., siehe auch Christoph Ohler, Demokratische Legitimation und rechtsstaatliche Bindung von Investor-Staat Schiedsverfahren, in: Bungenberg/Herrmann, ibid. 2016, S. 119 ff.

Der Deutsche Bundestag hat dazu eine Expertenanhörung durchgeführt,[93] in deren Rahmen Abgeordnete und die angehörten Experten nachdrücklich die Auffassung vertraten, der Deutsche Bundestag müsse, gerade auch zur Wahrung der verbliebenen deutschen Zuständigkeiten, von der Bundesregierung befasst werden und dem Abschluss solcher Verträge ausdrücklich zustimmen.[94]

2. BVerfG – Skepsis gegenüber schleichender Kompetenzerweiterung

Das kritische Verhältnis des deutschen Bundesverfassungsgerichts zu Kompetenzübertragungen an die EU ist inzwischen auch über die deutschen Grenzen hinaus bekannt. In jüngerer Zeit fokussiert sich das Interesse des BVerfG auf die Frage, ob die Union sich im Rahmen der Rechtssetzung und Rechtsanwendung in den kompetenzrechtlichen Grenzen hält, die aus dem Prinzip der „beschränkten Einzelermächtigung" erwachsen. Dabei prüft das BVerfG zum einen, ob die Union sich an die Grenzen der auf sie übertragenen Zuständigkeiten hält, und zum anderen die Frage, welche Zuständigkeiten der Union nach deutschem Verfassungsrecht überhaupt übertragen werden können.

Hinsichtlich der ersten Frage nimmt das Gericht das Recht für sich in Anspruch, festzustellen, ob Rechtsakte der Union über die Zuständigkeiten hinausgehen, die das Kompetenzgefüge des Unionsrechts vorsehen. Solche „ausbrechenden" Rechtsakte seien *ultra vires*, wenn sie gegen den Grundsatz der begrenzten Einzelermächtigung (jetzt Art. 5 (1) und (2) EUV) oder das Subsidiaritätsprinzip (jetzt Art. 5 (3) EUV) verstießen.[95] Hinsichtlich der zweiten Frage unterzieht das Gericht Kompetenzübertragungen einer „Identitätskontrolle" (so in der Entscheidung über die Frage, ob der Vertrag von Lissabon mit dem Grundgesetz vereinbar war)[96] und prüft, ob die Übertragung von Kompetenzen an die Union nicht die sog. Ewigkeitsgarantien verletzen (dazu gehört gemäß Art. 1, 20 und 79 (3) GG der Kerngehalt von Vorschriften des Grundgesetzes, die sich auch durch Verfassungsänderung durch Bundestag und Bundesrat nicht ändern lassen (insbesondere das Demokratieprinzip)).

Vor diesem Hintergrund hat sich das BVerfG kritisch mit Art. 352 AEUV auseinandergesetzt (die im Folgenden wichtigen Passagen der Vorschrift sind nachstehend hervorgehoben): „*Erscheint ein Tätigwerden der Union im Rahmen der*

[93] Vgl. Wortprotokoll der 82. Sitzung des Ausschusses für Recht und Verbraucherschutz Berlin, den 13.01.2016, https://www.bundestag.de/blob/409794/4e7fb2623ffc7191116fa94548a1bc67e/wortprotokoll-data.pdf; https://www.bundestag.de/dokumente/textarchiv/2016/kw02-pa-recht/400432.

[94] Vgl. Presseerklärung des Bundestages, https://www.bundestag.de/dokumente/textarchiv/2016/kw02-pa-recht/400432.

[95] BVerfG v. 12.10.1993 – 2 BvR 2134, 2159/92, BVerfGE 89, 155; (BVerfG v. 30.6.2009 – 2 BvE 2, 5/08 u. a., BVerfGE 123, 267).

[96] BVerfG v. 30.06.2009 – 2 BvE 2, 5/08 u. a., BVerfGE 123, 267.

in den Verträgen festgelegten Politikbereiche erforderlich, um eines der Ziele der Verträge zu verwirklichen, und sind in den Verträgen die hierfür erforderlichen Befugnisse nicht vorgesehen, so erlässt der Rat einstimmig [...] *die geeigneten Vorschriften*." (Hervorhebung durch den Verfasser.) Nach Auffassung des BVerfG stößt diese Vorschrift „*im Hinblick auf das Verbot zur Übertragung von Blankettermächtigungen oder zur Übertragung der Kompetenz-Kompetenz auf verfassungsrechtliche Bedenken, weil es die neu gefasste Regelung ermöglicht, Vertragsgrundlagen der Europäischen Union substantiell zu ändern*."[97] Das von ihm konstatierte verfassungsrechtliche Problem hat das BVerfG für Art. 352 AEUV durch verfahrensrechtliche Sicherungen (Einstimmigkeit im Rat und Bindung des deutschen Vertreters im Rat an einen vorherigen Parlamentsbeschluss) „gelöst".

Art. 216 (1) AEUV oder die AETR Rechtsprechung wurden im Urteil des BVerfG nicht direkt angesprochen. Doch sind die Voraussetzungen für die Außenkompetenz nach dem Wortlaut von Art. 216 (1) 2. Alternative AEUV dem Wortlaut von Art. 352 AEUV (s.o.) recht ähnlich: „*Die Union kann* [...] *eine Übereinkunft schließen,* [...] *wenn der Abschluss einer Übereinkunft im Rahmen der Politik der Union* [...] *zur Verwirklichung eines der in den Verträgen festgesetzten Ziele erforderlich*" ist (Hervorhebung durch den Verfasser). Da die Beschlussfassung nach Art. 216 (1) in vielen Bereichen keine Einstimmigkeit voraussetzt, ließe sich die verfahrensrechtliche „Lösung" des BVerfG auch nicht auf den Bereich von Art. 216 (1) übertragen. Es gibt deshalb Stimmen in der Literatur, die zur Vermeidung von verfassungsrechtlichen Problemen die Frage aufwerfen, ob eine Außenkompetenz nach Art. 216 (1) 2. Alternative AEUV nur angenommen werden kann, wenn eine interne Kompetenz zur Regelung des Gegenstands der Übereinkunft besteht oder sogar ausgeübt wurde.[98]

Aber das BVerfG äußert solche Bedenken nicht zum ersten Mal. Im Lissabon-Urteil hat es für materielle Zuständigkeitserweiterungen zugunsten der Union (ob durch Vertragsänderung oder schleichend) ein innerstaatliches Zustimmungsgesetz i. S. v. Art. 23 Grundgesetz gefordert.[99] Daraufhin sind mögliche Anwendungsfälle im sog. „Integrationsverantwortungsgesetz"[100] geregelt worden.

[97] BVerfG v. 30.06.2009 – 2 BvE 2, 5/08 u. a., BVerfGE 123, 267, Rn. 328.

[98] Thym, Mixity after Opinion 2/15. Judicial Confusion over Shared Competences, Verfassungsblog v. 31.05.2017, abrufbar unter http://verfassungsblog.de/mixity-after-opinion-215-judicial-confusion--over-shared-competences/; Mögele, in: Streinz, EUV/AEUV, 2. Aufl. 2012, Art. 216 AEUV, Rn. 31; differenziert zur Notwendigkeit einer einschränkenden Auslegung Vöneky/Beylage Haarmann, in: Grabitz, aaO. (Fn. 2), Art. 216 AEUV, Rn. 11.

[99] BVerfG, Urt. v. 30.06.2009 – 2 BvE 2/08 u. a., BVerfGE 123, 267 (433 ff.) – Lissabon (http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

[100] Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (Integrationsverantwortungsgesetz – IntVG), v. 22.09.2009, BGBl. 2009 I S. 3022 (mit nachfolgenden Änderungen).

Kritik richtet sich vor diesem Hintergrund auch gegen Art. 216 (1) 3. Alternative AEUV, soweit dieser für die Entstehung einer Außenkompetenz der Union eine entsprechende Feststellung in einem Sekundärrechtsakt genügen lasse, weil dies mit dem Grundsatz der begrenzten Einzelermächtigung aus Art. 5 (2) EUV unvereinbar sei.[101] Soweit die entsprechende Innenkompetenz aber der Union wirksam übertragen wurde, halte ich diese These allerdings für wenig überzeugend.

3. Die EU-Türkei-Erklärung zur Steuerung von Migrationsströmen

Am 15. Oktober 2015 vereinbarten die Republik Türkei und die Europäische Union einen gemeinsamen Aktionsplan, mit dessen Hilfe die Zusammenarbeit bei der Migrationssteuerung verbessert werden sollte, insbesondere auch um die massenhafte Migration von syrischen Flüchtlingen über die Türkei nach Griechenland einzuschränken. Im Rahmen eines Treffens des Europäischen Rates unter Beteiligung der Türkei am 29. November 2015 wurde beschlossen, den gemeinsamen Aktionsplan in Kraft zu setzen. Am 18. März 2016 traf sich der Europäische Rat erneut mit dem türkischen Ministerpräsidenten und veröffentlichte danach eine Presseerklärung.[102] Darin heißt es (unter Bezugnahme auf den Aktionsplan): „*Um das Geschäftsmodell der Schleuser zu zerschlagen,* [...] *haben die EU und die* [Republik] *Türkei heute beschlossen, die irreguläre Migration aus der Türkei in die* [Union] *zu beenden. Um dieses Ziel zu erreichen, haben sie die folgenden zusätzlichen Maßnahmen vereinbart:* [...] *1) Alle neuen irregulären Migranten, die ab dem 20. März 2016 von der Türkei auf die griechischen Inseln gelangen, werden in die Türkei rückgeführt.*"

Zwei pakistanische und ein afghanischer Asylbewerber fürchteten, wegen dieser „Vereinbarung" aus Griechenland (wo sie Asylanträge gestellt hatten) in die Türkei zurückgeschoben zu werden, und klagten gemäß Art. 263 AEUV auf Nichtigerklärung der Vereinbarung, für deren Abschluss der Europäische Rat nicht zuständig gewesen sei. Das Gericht der EU hat die Klage abgewiesen[103] mit dem Argument, es handele sich bei der Türkei-Erklärung nicht um eine Vereinbarung, an der die EU beteiligt gewesen sei, vielmehr hätten die Mitglieder des europäischen Rates als Vertreter der Mitgliedstaaten gehandelt.

Dieses Urteil ist in Deutschland kritisch kommentiert worden.[104] Dabei werden zwar die Schwierigkeiten bei der Zuständigkeitsbegründung zugunsten des

[101] Grzeszick, Stellungnahme, aaO. (Fn. 65), S. 47; unter Hinweis auf Dörr, in: Grabitz, aaO. (Fn. 2), Art. 47 EUV, Rn. 45.

[102] http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

[103] EuGH, Urt. v. 28.02.2017, T-192/16, NF/Europäischer Rat, ECLI:EU:T:2017:128, (sowie die Urteile in den Parallelsachen T-193/16, und T-257/16.

[104] Vgl. etwa: http://www.zeit.de/politik/ausland/2017-02/fluechtlingsabkommen-eu-gericht-unzustaendig; http://www.euractiv.de/section/eu-aussenpolitik/news/griechenland-hoechstes-gericht-prueft-rechtmaessigkeit-von-fluechtlingspakt/.

EuG anerkannt.[105] Doch liegt der Schwerpunkt der Begründung des EuG auf dem Fehlen eines anfechtbaren Rechtsaktes, und hier setzt die Kritik (und der Vergleich mit dem AETR-Urteil) an.[106] Auch damals hatten sich die Mitgliedstaaten im Rahmen des Rates auf ein gemeinsames Vorgehen in den Verhandlungen zum AETR-Abkommen geeinigt, ohne die Zuständigkeit der Union anzuerkennen. Die Union habe das Flüchtlingsrecht (insbesondere das Asylverfahrensrecht) und das Einwanderungsrecht (insbesondere die Rückführung von Migranten ohne Aufenthaltsrecht) so weitgehend durch interne Gesetzgebung geregelt, dass ein völkerrechtliches Handeln der Mitgliedstaaten außerhalb des institutionellen Rahmens der Union „*diese gemeinsame Regeln beeinträchtigen oder deren Tragweite verändern*" würde. Hinzu käme, dass zentrale politische Zugeständnisse der Unionsseite (finanzielle Hilfen zu Lasten des Unionshaushalts, Visafreiheit für türkische Staatsangehörige) nur durch ein Handeln der Unionsorgane eingelost werden können. Für relevante Teile des Türkei-Deals sei deshalb allein die Union als Völkerrechtssubjekt zuständig, nicht die Mitgliedstaaten. Der Ansatz des EuG (Zulassung des Ausweichens auf nationale Maßnahmen) konterkariere die Grundlage der AETR-Entscheidung, nämlich der justiziellen Durchsetzung der Kompetenzordnung.

KAPITEL 2: VERHANDLUNGEN UND ABSCHLÜSSE INTERNATIONALER ÜBEREINKÜNFTE (ART. 218 AEUV)

Die Fragen der Generalberichterstatter zu Kapitel 2 werden nachfolgend in der Reihenfolge beantwortet, in der sie gestellt wurden.

Frage 5: Kooperation Verhandlungsführer – Rat

Nach Art. 218 (4) AEUV kann der Rat dem Verhandlungsführer (also meist der Kommission) „*Richtlinien erteilen und einen Sonderausschuss bestellen; die Verhandlungen sind im Benehmen mit diesem Ausschuss zu führen*." Die Vorschrift erlaubt es dem Rat, sowohl inhaltlich (durch Richtlinien) also auch verfahrensrechtlich (durch die Verpflichtung des Verhandlungsführers, sich mit einem Sonderausschuss ins Benehmen zu setzen) auf die Verhandlungsführung Einfluss zu nehmen.[107]

[105] Die Alternative, Klage vor nationalen Gerichten und Vorlage an den EuGH, hat insoweit offenbar keinen Erfolg gehabt, http://www.euractiv.de/section/eu-aussenpolitik/news/griechenland-hoechstes-gericht-prueft-rechtmaessigkeit-von-fluechtlingspakt/ und https://www.proasyl.de/news/nach-dem-urteil-des-hoechsten-griechischen-gerichts-zum-tuerkei-deal-last-exit-strassburg/.

[106] Bast, Jürgen: Scharade im kontrollfreien Raum: Hat die EU gar keinen Türkei-Deal geschlossen?, VerfBlog, 03.03.2017, http://verfassungsblog.de/scharade-im-kontrollfreien-raum-hat-die-eu-gar-keinen-tuerkei-deal-geschlossen/, DOI: http://dx.doi.org/10.17176/20170303-144337.

[107] Bungenberg, in; von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218, Rn. 41; Lorenzmeier, in Grabitz, aaO. (Fn. 2), Art. 218, Rn. 29.

Die Richtlinien können das zu erzielende Verhandlungsergebnis nicht im Detail vorwegnehmen, müssen also der Kommission einen gewissen Verhandlungsspielraum lassen.[108] Der Sonderausschuss und Richtlinien sollen die laufende Rückkopplung von Verhandlungsergebnissen an die politischen Entscheidungsträger sicherstellen, die im Rat letztlich über das Verhandlungsergebnis entscheiden.[109]

Dies hat der Gerichtshof jüngst betont.[110] Der Rat hatte im Rahmen eines Verhandlungsmandats für ein Abkommen zur Verknüpfung des Emissionshandelssystems der Europäischen Union mit dem Australiens Verhandlungsrichtlinien erlassen und einen Sonderausschuss bestellt. Dabei wurde die Kommission zu regelmäßiger und rechtzeitiger Berichterstattung an den Ausschuss verpflichtet und gleichzeitig geregelt, dass die Verhandlungspositionen der Union im Sonderausschuss im Einzelnen festgelegt würden. Der Gerichtshof sah in den detaillierten Berichtspflichten kein Problem; insoweit könne der Rat die Kommission ohne Verstoß gegen die Pflicht zur loyalen Zusammenarbeit binden.[111] Auch könne der Rat Verhandlungsrichtlinien vorgeben, doch obliege die Festlegung der Details der Verhandlungspositionen dem Verhandlungsführer, mithin der Kommission. Dieses institutionelle Gleichgewicht könne der Rat nicht durch die Verhandlungsrichtlinien und die Bindung an den Sonderausschuss überspielen.[112]

Mein Eindruck von der Beurteilung der Zusammenarbeit durch deutsche Behörden ist, dass diese Frage nicht einheitlich bewertet wird. In der Tendenz habe ich manche individuelle Reaktionen als Spuren von Frustration hinsichtlich der praktischen Anwendung gedeutet. Das Verhalten der Kommission entspreche nicht immer den Erwartungen oder den Anforderungen des Gerichtshofes. Hinsichtlich von Verhandlungsmandaten und Richtlinien habe die Kommission gelegentlich die Tendenz, diese nicht als verbindliche Vorgaben anzusehen. Als praktisches Beispiel wird auf die Verhandlung der neuen Generation von Freihandelsabkommen verwiesen, hinsichtlich derer das Verhandlungsmandat den Abschluss von gemischten Abkommen vorgesehen habe, während die Kommission ein EU-only Abkommen verhandelt habe.

Hinsichtlich der Abstimmung der Kommission mit dem Rat ist mein Eindruck, dass auch die Ratsarbeitsgruppen sich von der Kommission teilweise sehr spät (und zu wenig detailreich) über den Stand der Verhandlungen informiert fühlten, die auch auf ausdrückliche Nachfrage nicht oder ausweichend antworte. Dies erkläre die Tendenz, Berichtspflichten im Detail vorzuschreiben. Teilweise

[108] Schmalenbach, in: Callies/Ruffert, aaO. (Fn. 10), Art 218 AEUV, Rn. 13.
[109] Bungenberg, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218, Rn. 39.
[110] EuGH, C-425/13, Kommission/Rat, ECLI:EU:C:2015:483.
[111] Ibid., Rn. 78.
[112] Ibid., Rn. 89 f.

wird im Vorgehen der Kommission ein gewisser Widerspruch zu den Überlegungen gesehen, die dem Entwurf des Verfassungsvertrages und später des Vertrages von Lissabon zugrunde gelegen hätten, dass nämlich die Mitgliedstaaten Außenkompetenzen an die Union abtreten, dafür aber in den Verhandlungsprozess verstärkt einbezogen werden.

Frage 6: Vorläufige Anwendung

Da völkerrechtliche Abkommen der Union erst mit ihrer völkerrechtlichen Wirksamkeit „integraler Bestandteil" der EU-Rechtsordnung werden[113] und sich das Inkrafttreten durch die Notwendigkeit der Ratifikation oft erheblich verzögert (gerade bei gemischten Abkommen), besteht ein praktisches Bedürfnis für die vorläufige Anwendung eines Abkommens. Völkerrechtlich eröffnet Art. 25 WVRK[114] die Möglichkeit dazu.

Die Zuständigkeit der Union, ein Abkommen vorläufig anzuwenden, beschränkt sich auf den Bereich der eigenen Außenkompetenzen. Hinsichtlich von gemischten Abkommen kann die EU daher nur zu den Vorschriften eine vorläufige Anwendung vereinbaren und beschließen, für die sie selbst zuständig ist.[115]

Mein Eindruck von der deutschen Haltung ist, dass im Grundsatz sowohl das Recht der Union, über eine solche vorläufige Anwendung zu entscheiden, als auch ein praktisches Bedürfnis für eine vorläufige Anwendung anerkannt werden. Allerdings wird betont, dass gerade bei gemischten Abkommen eine besondere Zurückhaltung erforderlich sei, um legitime politische Prozesse auch in den Mitgliedstaaten nicht zu präjudizieren. Eine Mitwirkung des Europäischen Parlaments (EP) an Beschlüssen für die vorläufige Anwendung wurde nicht gefordert.

Art. 218 (5) AEUV enthält auch keine ausdrücklichen Regelungen zur Mitwirkung des EP an Beschlüssen über die vorläufige Anwendung. Das entspricht dem Gedanken, dass keine irreversiblen völkerrechtlichen Bindungen entstehen und somit die Mitwirkung des Parlaments erst zu dem Zeitpunkt erforderlich ist, in dem über die endgültige Inkraftsetzung der Übereinkunft entschieden wird.[116]

[113] EuGH, Rs 181/73, Haegeman, Slg. 1974, 449, Rn. 5; Rs 12/86, Demirel, Slg. 1987, 3719, Rn. 7, und C-301/08, Bogiatzi, Slg. 2009, I-10185, Rn. 23.

[114] Wiener Übereinkommen über das Recht der Verträge v. 23.05.1969 (Wiener Vertragsrechtskonvention, WVRK), BGBl. 1985 II, S. 926. Der gleiche Gedanke kommt in Art. 25 des Wiener Übereinkommens über das Recht der Verträge zwischen Staaten und internationalen Organisationen oder zwischen internationalen Organisationen v. 21.03.1986 (BGBl. 1990 II, S. 1415) zum Ausdruck, letzteres ist aber noch nicht in Kraft getreten. Die Regelungen in Art. 25 beider Übereinkommen kodifizieren aber ohnehin nur geltendes Völkergewohnheitsrecht.

[115] So auch Bäumler, Vom Vertragstext zum Inkrafttreten, EuR 2016, 607, 625.

[116] Müller-Ibold, in: Lenz, EU Verträge, Art. 218 AEUV, Rn. 16; Bungenberg, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218 AEUV, Rn. 58; Schmalenbach, in: Callies/Ruffert, Art. 218 AEUV, Rn. 7.

Andererseits hat die vorläufige Anwendung Wirkungen im Unionsrecht. Drittstaatsangehörige können die Vorteile und Rechte aus dem Abkommen bereits in Anspruch nehmen, und deren rückwirkende Beseitigung für den Fall, dass das endgültige Abkommen nicht in Kraft tritt, unterliegt den Grenzen des Vertrauensschutzes. Vor diesem Hintergrund liegt es durchaus nahe, die in Art. 218 (6), (2) AEUV geregelten Mitwirkungsrechte für den endgültigen Abschluss bereits für den Fall zu berücksichtigen, dass eine vorläufige Anwendung geplant ist.[117] Die Mitwirkungsrechte des Parlaments dienen dazu, eine Umgehung der Legislativbefugnisse des EP bei der Ausübung der Innenkompetenzen zu verhindern. Der dem AETR-Urteil zugrunde liegende Rechtsgedanke, dass eine Präjudizierung der Union durch die Mitgliedstaaten verhindert werden soll, lässt sich durchaus auf die Situation des EP übertragen, dessen Mitwirkungsrechte gerade im Falle einer längerfristigen „vorläufigen" Anwendung präjudiziert werden könnten.

In der deutschen Literatur ist die Frage umstritten, ob dem EP in entsprechender Anwendung von Art. 218 (6), (2) AEUV Mitwirkungsrechte auch hinsichtlich des Beschlusses über die vorläufige Anwendung eingeräumt werden sollten.[118] Gerade im Zusammenhang mit den neuen umfassenden Freihandelsabkommen sind Forderungen nach aktiver Beteiligung des Parlaments erhoben worden,[119] die in Deutschland auch auf politischer Ebene Gehör fanden (siehe oben, bei Rn. 56).

Jedenfalls hat das EP ein Recht auf unverzügliche und umfassende Unterrichtung (Art. 218 (10) AEUV) während der Verhandlung und des Abschlusses von internationalen Übereinkünften,[120] und gerade auch anlässlich von Entscheidungen über die vorläufige Anwendung.[121] Die daraus folgenden Rechte hat das EP durch eine interinstitutionelle Vereinbarung mit der Kommission abgesichert. Danach soll das Parlament ebenso umfassend informiert werden,

[117] Bungenberg, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218, Rn. 58, Müller-Ibold, in: Lenz, EU Verträge, Art. 218, Rn. 16.

[118] Dafür: Weisgerber, CETA und TTIP: Abschluss als gemischte Abkommen und Entscheidung über die vorläufige Anwendung, Saar Blueprints, 02/2017 DE, online verfügbar unter: http://jean-monnet-saar.eu/?page_id=67; für die grundsätzliche Möglichkeit auch Müller-Ibold, in: Lenz, EU Verträge, aaO. (Fn. 2), Art. 218, Rn. 16; Bungenberg, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218, Rn. 58; a.A. Schmalenbach in: Calliess/Ruffert, aaO. (Fn. 61) Art. 218 AEUV, Rn. 7; Mögele in: Streinz, Art. 218 AEUV, Rn. 11.

[119] Europäischer Gewerkschaftsverband für den öffentlichen Dienst, Aktueller Lagebericht über die EGÖD-Roadmap für den Widerstand gegen die CETA-Ratifizierung [...], http://www.epsu.org/sites/default/files/article/files/2016.12.15%20Update%20CETA% 20December%202016%20%26%20request%20for%20action%20DE.pdf.

[120] EuGH, C-263/14, EP/Rat, ECLI:EU:C:2016:435, Rn. 75 m.w.N.

[121] Müller-Ibold, Lenz, EU Verträge, aaO. (Fn. 2), Art. 218, Rn. 9; Bungenberg, von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218, Rn. 48.

wie der Rat bzw. ein von ihm bestellter Sonderausschuss.[122] Das Europäische Parlament selbst hat in Art. 108 und 109 seiner Verfahrensordnung[123] Regeln darüber beschlossen, wie das Parlament vorgehen wird, wenn es denn beteiligt oder zumindest angehört wird. Aus der Existenz der Regelungen lässt sich im Übrigen die Erwartung des EP ableiten, auch tatsächlich von Kommission und Rat beteiligt zu werden.

Nach den Erfahrungen im Ratifikationsverfahren für das „ACTA-Abkommen"[124] (das Parlament hatte dem Abkommen die Zustimmung verweigert, u. a. weil es von Kommission und Rat unzureichend beteiligt worden sei) haben Rat und Kommission begonnen, das Parlament tatsächlich in den Verhandlungs- und Vertragsschlussprozess mit einzubinden,[125] auch weil vermieden werden soll, dass eine vorläufige Anwendung vereinbart wird, das Parlament aber später seine Zustimmung zum Abkommen selbst verweigert.[126]

Frage 7: Vorläufige Anwendung trotz Nichtratifikation

Die vorläufige Anwendung einer völkerrechtlichen Übereinkunft dient dazu, bestimmte Wirkungen vorzuverlagern, also bereits vor dem eigentlichen Inkrafttreten anzuwenden. Das kommt in Art. 25 (1) WVRK[127] zum Ausdruck: „*Ein Vertrag oder ein Teil eines Vertrags wird bis zu seinem Inkrafttreten vorläufig angewendet*, [wenn ...]."

Dementsprechend entfällt nach Meinung des Verfassers die *raison d'être* einer vorläufigen Anwendung, wenn nicht mehr damit zu rechnen ist, dass ein Abkommen noch in Kraft treten wird. Auch das kommt in Art. 25 (2) WVRK zum Ausdruck, in dem es heißt: „*Sofern der Vertrag nichts anderes vorsieht oder die Verhandlungsstaaten nichts anderes vereinbart haben, endet die vorläufige Anwendung eines Vertrags oder eines Teiles eines Vertrags hinsichtlich eines Staates, wenn dieser den anderen Staaten, zwischen denen der Vertrag vorläufig angewendet wird, seine Absicht notifiziert,*

[122] Rahmenvereinbarung über die Beziehungen zwischen dem Europäischen Parlament und der Europäischen Kommission, ABl. 2010, L 304/47–62.

[123] Veröffentlicht auf der Website des EP, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20150909+TOC+DOC+XML+V0//DE.

[124] Müller-Ibold, Lenz, EU Verträge, Art. 218, Rn. 9; das EP hatte im Juli 2012 das sog. ACTA Abkommen abgelehnt, u. a. weil es sich nicht ausreichend in den Verhandlungsprozess eingebunden fühlte, vgl. Entschließung v. 10.03.2010 zur Transparenz und zum Stand der Verhandlungen über das ACTA, ABl. 2010 C 349E/47) sowie Matthews/Žikowská, The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union, IIC 2013, 626.

[125] Weisgerber, CETA und TTIP: Abschluss als gemischte Abkommen und Entscheidung über die vorläufige Anwendung, Saar Blueprints, 02/2017 DE, online verfügbar unter: http://jean-monnet-saar.eu/?page_id=67; Bäumler, EuR 2016, S. 607, 625.

[126] Vgl. die Beschreibung von Bäumler, Vom Vertragstext zum Inkrafttreten, EuR 2017, 607, 625; über die praktische Vorgehensweise im Rahmen der Freihandelsabkommen mit Peru und Kolumbien.

[127] Wiener Übereinkommen über das Recht der Verträge, s.o., Fn. 114.

nicht Vertragspartei zu werden." Die WVRK bestimmt daher, dass wenn eine Vertragspartei erklärt, nicht mehr Vertragspartei werden zu können (z. B. weil das innerstaatliche Ratifikationsverfahren endgültig gescheitert ist), die vorläufige Anwendbarkeit in der Regel endet, soweit nichts anderes vereinbart ist.

Damit betont die Vorschrift auch, dass die Vertragsparteien zu der Frage abweichende Regelungen treffen können. Eine unabänderliche völkerrechtliche Pflicht zur Beendigung der vorläufigen Anwendung in solchen Situationen besteht deshalb nicht. Völkerrechtlich ist es deshalb möglich, die Regelungen im Übereinkommen über die vorläufige Anwendung so zu fassen, dass die vorläufige Anwendung weiterläuft, z. B. bis ein Nachfolgeabkommen vereinbart und vorläufig angewendet werden kann. Ob eine solche Regelung getroffen wird, liegt dabei im Ermessen der Vertragsparteien. Entsprechende Regelungen unter den Parteien sind auch nach Unterzeichnung des Übereinkommens noch möglich, z. B. wenn sich die Ratifikationsschwierigkeiten einer Partei abzeichnen (obwohl es dann oft politisch dafür „zu spät" ist).

Gemeinschaftsrechtlich spielen in diesem Zusammenhang die gegenseitigen Loyalitätspflichten der Mitgliedstaaten und der Union eine zentrale Rolle, die gerade für gemischte Abkommen betont wurden.[128] Beschränkt sich die vorläufige Anwendung des Abkommens auf Bereiche der ausschließlichen Zuständigkeit der Union, ist es zweifelhaft, ob die Verweigerung der Ratifikation durch einen Mitgliedstaat die weitere vorläufige Geltung von Vorschriften aufhalten kann, hinsichtlich derer der betreffende Mitgliedstaat keine Kompetenz (mehr) hat.

Allerdings sind solche Situationen zumeist von erheblicher politischer Brisanz. Rechtlich (sowohl aus Sicht des Völkerrechts, als auch aus Sicht des Unionsrechts) sind flexible Lösungen möglich, so dass in der Praxis ein weites Ermessen der Vertragsparteien anzunehmen ist, für die entstehenden Schwierigkeiten eine politisch adäquate Lösung zu finden. Diese Lösungen ermöglichen es zugleich, politischen Erpressungsversuchen von Regierungen (oder Gerichten!) der Mitgliedstaaten zu wiederstehen.

Die Entscheidung des Gerichtshofs im Gutachten 2/15 wird dabei die Tendenz verstärken, Freihandelsabkommen und Investitionsschutzabkommen wieder zu trennen, um die politischen Schwierigkeiten hinsichtlich des Investitionsschutzes von den Fragen der Handelserleichterungen zu trennen. Die Kommission hat dies im Rahmen ihrer neuen Handelsstrategie bereits angekündigt.[129] Freihandelsabkommen sollen mit Vorschriften über Direktinvestitionen, aber ohne

[128] Vgl. etwa EuGH, C-459/03, Kommission/Großbritannien, Slg. 2006, I-4635, Rn. 175 f.; Bungenberg, von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218 AEUV, Rn. 77.
[129] Mitteilung der Kommission: „Durch eine ausgewogene und fortschrittliche Handelspolitik die Globalisierung meistern" COM [2017] 492.

Regelungen zum Schutz von Portfolioinvestitionen und ISDS-Verfahren abgeschlossen werden (siehe auch unten, Rn. 192).

Aus Sicht der deutschen Rechtswissenschaft kommen hinsichtlich der vorläufigen Anwendung noch die Besonderheiten hinzu, die sich, jedenfalls nach Auffassung des Bundesverfassungsgerichts in seinen Beschlüssen zu CETA, aus dem deutschen Verfassungsrecht ergeben.[130] Die Bundestagsfraktion der LINKEN und 68.015 Beschwerdeführer hatten vor dem Bundesverfassungsgericht beantragt,[131] der Bundesregierung zu untersagen, im Rat dem von der Kommission vorgeschlagenen Beschluss über die Unterzeichnung und vorläufige Anwendung von CETA als gemischtem Abkommen zuzustimmen. Zugleich waren Anträge auf den Erlass einer einstweiligen Anordnung gestellt worden, die das Bundesverfassungsgericht (allerdings nur unter Auflagen) abwies.

Das Gericht prüft anhand seiner jüngeren Rechtsprechung zu den Grenzen deutscher Souveränitätsübertragung an die EU,[132] ob es „ausgeschlossen" ist, dass mit der Entscheidung der EU zur vorläufigen Anwendung von CETA ultra vires gehandelt wird. Zum Zwecke dieser Prüfung stellt das Gericht dann zu verschiedenen Themen (Investitionsschutz, aber auch Anerkennung von Berufsqualifikationen, Teilen des Seeverkehrs, etc.) fest, „*der Europäischen Union dürfte es* [an der eignen Kompetenz] *... fehlen*." Außerdem, so das Gericht, bestünde die Gefahr, dass der durch CETA geschaffene gemischte Ausschuss weitere Regeln träfe, die in verbleibende Zuständigkeiten Deutschlands eingriffen, obwohl nicht sichergestellt sei, dass Deutschland in dem gemischten Ausschuss vertreten sei und weil Deutschland im Rat durch qualifizierte Mehrheit überstimmt werden könne. Deshalb sei es insoweit „*nicht ausgeschlossen, dass hierdurch das Gesetzgebungsrecht und die Integrationsverantwortung des Bundestages verletzt würden*."[133]

Hinsichtlich der vorläufigen Anwendung sei ein Verstoß gegen diese Grenzen zwar nicht naheliegend, aber auch nicht unmöglich. Deshalb müsse Deutschland zum einen sicherstellen, dass nur die Teile des Abkommens, die „unstreitig" in die Zuständigkeit der Union fallen, für vorläufig anwendbar erklärt werden, und zum anderen (unabhängig von den anderen Mitgliedstaaten und der Union) die Möglichkeiten haben (z. B. im Rahmen von Art. 30.7.IIIc CETA), selbst einseitig die vorläufige Anwendung zu beenden.

[130] BVerfG, Urt. v. 13.10.2016 – 2 BvR 1368/16 u. a., NJW 2016, 3583 ff., https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/10/rs20161013_2bvr136816.html; vgl. dazu näher Holterhus: Eilanträge in Sachen CETA – Europäische Außenhandelspolitik im Mehrebenengeflecht von Verfassungs-, Unions- und Völkerrecht, EuZW 2016, 896.

[131] Die Bundestagsfraktion der LINKEN im Wege des sog. Organstreits, die Beschwerdeführer durch Verfassungsbeschwerden.

[132] Siehe dazu oben, Rn. 64 ff.

[133] BVerfG, 2 BvR 1368/16 u. a., aaO. NJW 2016, 3583 ff., Rn. 65.

Soweit das Urteil auf den Überlegungen zur Abgrenzung der Zuständigkeiten (in diesem Urteil ebenso wie in der früheren Entscheidung zum Lissabonner Vertrag) beruht, ist das Urteil durch die Plenarentscheidung des Gerichtshofs im Gutachten 2/15 teilweise überholt (selbst wenn natürlich nicht ganz auszuschließen ist, dass das BVerfG ohne Vorlage an den EuGH auf den Gedanken kommen könnte, die Entscheidung, was „unstreitig" in die Zuständigkeit der Union falle, liege vor allem bei ihm).

Die Entscheidung des BVerfG ist in der Literatur überwiegend kritisch kommentiert worden;[134] z. T. wird das Herangehen des BVerfG als der Versuch beschrieben, den „Luxemburger Kompromiss" kraft justizieller Einflussnahme erneut einzuführen. Die Entscheidung zeigt zugleich eine neue Tendenz des BVerfG, seine hinsichtlich der Übertragung von Zuständigkeiten an die EU entwickelte Rechtsprechung auch auf andere internationale Übereinkünfte zu übertragen, selbst wenn diese von der EU mit Drittstaaten angeschlossen werden. Diese Tendenz mag der Logik der Rechtsprechung entsprechen,[135] ist aber an sich mit dem Ansatz des Grundgesetzes, dass Zuständigkeiten auf die EU und internationale Organisationen übertragen werden können und dann nicht mehr der laufenden Einzelfallkontrolle deutscher Hoheitsträger unterliegen, nur schwer vereinbar.[136]

Frage 8: Zustimmungsrechte des Europäischen Parlaments

Die Mitwirkungsbefugnisse des EP bei der Aushandlung und dem Abschluss völkerrechtlicher Verträge sind durch den Lissabon-Vertrag erheblich erweitert worden.

Das Zustimmungserfordernis aus Art. 218 (6) a) iii) betrifft Abkommen, die durch Einführung von Verfahren der Zusammenarbeit mit den jeweiligen Vertragspartnern einen besonderen institutionellen Rahmen schaffen. Das sind insbesondere Assoziierungs- und Freihandelsabkommen, die durch „gemischte Ausschüsse", Assoziationsräte o. ä., Institutionen schaffen, die (in aller Regel) durch Konsens, also einstimmig, begrenzte Änderungen an den vereinbarten Vertragstexten ermöglichen. Dabei ist nicht jede Gründung eines Gremiums ausreichend; es kommt vielmehr darauf an, ob die geschaffenen Gremien eigenständige Entscheidungsbefugnisse haben, durch die die vorherige Rechtslage

[134] Nowrot/Tietje, CETA an der Leine des BVerfG, EuR 2017, 137; Krajewski, Spielstand nach dem CETA-Beschluss: 2:2 u. Karlsruhe behält das letzte Wort, Verfassungsblog v. 13.10.2016. Vgl. aber Holterhus: Eilanträge in Sachen CETA – Europäische Außenhandelspolitik im Mehrebenengeflecht von Verfassungs-, Unions- und Völkerrecht, EuZW 2016, 896.

[135] Nowrot/Tietje, CETA an der Leine des BVerfG, EuR 2017, 137.

[136] So auch Nowrot/Tietje, CETA an der Leine des BVerfG, EuR 2017, 137.

verändert werden kann.[137] Das CETA-Abkommen schafft z. B. einen solchen „institutionellen Rahmen" durch den gemischten Ausschuss, dessen Rolle und Einbindung in einen demokratischen Prozess offenbar das BVerfG umtreibt, wie aus den Entscheidungen über die Ablehnung einer einstweiligen Anordnung zu CETA folgt.[138]

Die Zustimmung des EP ist gemäß Art. 218 (6) a) iv) AEUV hinsichtlich von Übereinkünften erforderlich, die „erhebliche finanzielle Folgen" für die EU haben. Die Vorschrift schützt das Budgetrecht des EP.[139] Der EuGH hat dazu in einer Plenarentscheidung[140] hervorgehoben, dass die Frage, ob die finanziellen Folgen „erheblich" sind, nach objektiven Kriterien zu ermitteln sei. Der Rat hat insoweit also kein Beurteilungsermessen. Der EuGH lehnte es auch ab, die finanzielle Bedeutung am Gesamtvolumen des Haushalts zu messen; ein solcher Ansatzpunkt würde die Vorschrift „ihrer praktischen Wirksamkeit berauben."[141] Richtigerweise sei die Bedeutung eines Einzelabkommens aus den Kosten während der Gesamtlaufzeit im Vergleich entweder zu den Gesamtkosten der außenpolitischen Maßnahmen der EU oder – bei sektorbezogenen Abkommen – im Vergleich zu den Gesamtausgaben im entsprechenden Sektor vorzunehmen. Ausgaben von 1 % der außenpolitischen Gesamtausgaben und von 5 % der sektorbezogenen Gesamtausgaben seien noch nicht „erheblich".[142]

Das Urteil führt dazu, dass nur wenige (zu wenige?) Abkommen als Abkommen mit „erheblichen finanziellen Auswirkungen" dem Zustimmungsvorbehalt für das EP unterfallen, weil es unwahrscheinlich ist, dass mit einem oder mehreren einzelnen Ländern Übereinkünfte mit finanziellen Konsequenzen dieser Größenordnung abgeschlossen werden.[143]

Frage 9: Aussetzung von Übereinkünften

Der Verfasser ist der Auffassung, dass Art. 218 (9) AEUV das Verfahren der (vorläufigen) Aussetzung der Anwendung von völkerrechtlichen Übereinkünften regelt. Die Aussetzung ist im Vergleich zur Kündigung ein „Minus" (weil die Übereinkunft grundsätzlich in Kraft bleibt), kann allerdings, wenn die

[137] Müller-Ibold, in Lenz: EU-Verträge, Art. 218, Rn. 12; s.a. Schmalenbach, in: Callies/Ruffert, aaO. (Fn. 10), Art. 218, Rn. 23 m.w.N, weiter wohl Bungenberg, in: von der Groeben, aaO. (Fn. 2), Art. 218 AEUV Rn. 69.

[138] So auch Bäumler, Vom Vertragstext zum Inkrafttreten, EuR 2016, 607, 621.

[139] Müller-Ibold, in: Lenz: EU-Verträge, Art. 218, Rn. 13; vergl. auch Bungenberg, Bungenberg, in: von der Groeben, aaO. (Fn. 2), Art. 218 AEUV Rn. 70.

[140] EuGH, C-189/97, EP/Rat, Slg. 1999, I-4741.

[141] EuGH, ibid., Rn. 25-29.

[142] EuGH, ibid., Rn. 31-33.

[143] Müller-Ibold, in: Lenz, EU-Verträge, Art. 218, Rn. 13; Lorenzmeier, in: Grabitz, aaO. (Fn. 2), Art. 218 AEUV, Rn. 47 mit Fn. 7, „überaus restriktiver Standard."

Aussetzung auf Dauer angelegt ist, in ihren Wirkungen einer Kündigung weitgehend entsprechen.

Die EU kann von ihr geschlossene Übereinkünfte kündigen (analog Art. 54 ff. WVRK). EUV und AEUV enthalten dafür keine besonderen Verfahrensregelungen. Der EuGH lässt die Suspendierung oder Kündigung eines Abkommens durch die EU zu, weil keine unionsrechtlichen Vorschriften entgegenstehen.[144] Die Kündigung wird überwiegend als *actus contrarius* zum Vertragsschluss gesehen, deshalb ist das Vertragsschlussverfahren entsprechend anzuwenden. Da die Kündigung oft ohne „Verhandlungen" ausgesprochen werden wird, kann das Verfahren entsprechend abgekürzt werden. Daher ist der Rat für die Kündigungserklärung zuständig; er handelt auf Vorschlag der Kommission (und/oder des Hohen Vertreters). Bedurfte der Vertragsschluss der Zustimmung des EP, so gilt dies nach der in Deutschland wohl vorherrschenden Meinung auch für die Kündigung.[145]

Hinsichtlich der vorläufigen Aussetzung (Suspendierung) enthält Art. 218 (9) AEUV verfahrensrechtliche Sonderregeln. Diese sehen die Beteiligung des EP nicht vor, weder durch Zustimmungs- noch durch Anhörungsrechte; vielmehr ist das EP nur zu unterrichten. Das mag für den Fall angemessen sein, in dem das Verhalten des Vertragspartners eine schnelle Reaktion erfordert.[146] Wenn aber keine besondere Eile geboten ist und gerade wenn die Suspendierung auf Dauer angelegt ist, stellt sich die Frage, ob in einem solchen Fall nicht ein Eingriff in die Rechte des Parlaments vorliegt, weil ein von diesem ja gebilligtes Vertragswerk unangewendet bleiben soll.

Nicht besonders geregelt ist auch die Frage der Kündigung und Aussetzung von gemischten Abkommen.[147] Immerhin ist dem Gutachten 2/15 zu entnehmen, dass wenn die Union hinsichtlich eines Abkommens durch Zeitablauf oder weitere Zuständigkeitsübertragungen eine weitergehende ausschließliche Zuständigkeit erwirbt, auch die Kündigungs- (und damit die Aussetzungs-) rechte

[144] EuGH, C-162/96, Racke, Slg. 1998, I-3655.

[145] So auch Lorenzmeier, in: Grabitz, aaO. (Fn. 2), Art. 218 AEUV, Rn. 59-61; Bäumler, Vom Vertragstext zum Inkrafttreten, EuR 2016, 607, 628; Schmalenbach, in: Calliess/Ruffert, aaO. (Fn. 61), Art. 218 AEUV, Rn. 16; nuancierter Bungenberg von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218, Rn. 83 unter Hinweis auf die frühere Praxis das EP nicht einzubeziehen.

[146] Bungenberg, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218, Rn. 83, weist darauf hin, dass diese Situation schon früher als Rechtfertigung dafür gedient hatte, auch hinsichtlich der Kündigung keine Mitwirkung des EP zu fordern.

[147] Bäumler, Vom Vertragstext zum Inkrafttreten, EuR 2016, 607, 628 geht (unter Hinweis auf Lorenzmeier, in: Grabitz, aaO. (Fn. 2), Art. 218 AEUV, Rn. 59-61) davon aus, dass die Union „ihren" Teil des Abkommens allein kündigen kann (ggf. nach Konsultation mit den Mitgliedsstaaten) und dass wenn (wie bei den Freihandelsabkommen) der ganz überwiegende Teil des Abkommens davon betroffen ist, völkerrechtlich der gesamte Vertrag hinfällig wird.

auf die Union übergehen.[148] Grundsätzlich müssten im Fall eines gemischten Abkommens, in dem ausschließliche Zuständigkeiten bei den Mitgliedstaaten verblieben sind, sowohl die Union als auch die Mitgliedstaaten die Aussetzung aussprechen, es sei denn, das auszusetzende Abkommen sehe etwas anderes vor.

Die Gründe, die die EU zu einer Kündigung bzw. Aussetzung berechtigen, sind nicht in Art. 218 geregelt, sondern sind entweder dem zu kündigenden Übereinkommen oder dem allgemeinen Völkerrecht zu entnehmen. Kündigungsgründe können z. B. als Folge einer Verletzung oder Nichterfüllung eines Abkommens durch die Vertragsgegenseite in Betracht kommen.[149]

Frage 10: Unionsstandpunkt in gemischten Ausschüssen o. ä.

In Deutschland sind Beschlüsse von gemischten Ausschüssen (oder Assoziationsräten) regelmäßig Gegenstand von Rechtsstreitigkeiten und von Diskussionen im politischen Raum. Beschlüsse dieser Art sind verbindliche Beschlüsse hinsichtlich derer die Union oder die Mitgliedstaaten ein Stimmrecht haben; die Formulierung einer Position z. B. vor Streitschlichtungsgremien oder dem internationalen Seegerichtshof (bei dem dann unabhängige Richter oder Schiedsrichter eine Entscheidung treffen) sind nicht Gegenstand der nachstehenden Überlegungen des Verfassers.[150]

Deutschland und eine Reihe von anderen Mitgliedstaaten waren der Auffassung, dass sich die Regelung in Art. 218 (9) AEUV nur auf Beschlüsse im Rahmen von internationalen Übereinkünften bezieht, hinsichtlich derer die Union Vertragspartei ist. Der Gerichtshof hat dies hinsichtlich eines Standpunktes, der im Rahmen der Internationalen Organisation für Rebe und Wein (OIV) einzunehmen war, anders gesehen und entschieden, dass ein Ratsbeschluss auch dann ergehen kann, wenn mehrere Mitgliedstaaten Vertragsparteien eines Übereinkommens sind, „*dessen Wirkungen den Inhalt der vom Unionsgesetzgeber im Bereich der gemeinsamen Marktorganisation für Wein erlassenen Regelung maßgeblich*“ beeinflussen kann.[151]

[148] Der Gerichtshof hat der Union jedenfalls das Recht zugestanden, Aufhebungsvereinbarung zu schließen, EuGH, Gutachten 2/15, aaO. Rn. 245-251, a.A. die GAin Sharpston, ibid., Rn. 376 ff.; ähnlich wohl die Argumentation Deutschlands im Gutachtenverfahren 2/15. Im Gutachten 2/15 ging es um Aufhebungsvereinbarungen (die im Einvernehmen mit dem Drittstaat erfolgen), nicht um die einseitige Kündigung. Es liegt nahe die Zuständigkeit zur Kündigung ebenso zu behandeln wie die Zuständigkeit einen Aufhebungsvertrag zu schließen, selbst wenn sich im Falle der Kündigung noch andere völkerrechtliche Fragen stellen mögen.

[149] Vgl. dazu EuGH, C-162/96, Racke, Slg. 1998, I-3655, Rn. 41 ff.; Bungenberg, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218, Rn. 83.

[150] EuGH, C-73/14, Rat/Kommission, ECLI:EU:C:2015:663.

[151] EuGH, C-399/12, Deutschland/Rat, ECLI:EU:C:2014:2258, Rn. 63.

Beschlüsse zur internen Festlegung der Position nach Art. 218 (9) AEUV müssen als förmliche Beschlüsse im Sinne von Art. 288 (4) AEUV gefasst werden.[152] Das bedeutet, dass die Kommission (oder der hohe Vertreter) einen Vorschlag machen muss, über den zumeist mit qualifizierter Mehrheit abzustimmen ist. Will der Rat den Vorschlag ändern, kann er das nur einstimmig tun (Art. 293 (1) AEUV).

Hinsichtlich des Verfahrens zur Bestimmung eines EU-internen Standpunktes in einer solchen Institution sind aus Sicht der deutschen Rechtswissenschaft die Entscheidungen des BVerfG zu CETA interessant. Das BVerfG führt zu den in CETA vorgesehenen gemischten Ausschüssen Folgendes aus:[153]

> *„(1) Es erscheint ferner auch nicht völlig ausgeschlossen, dass die Ausgestaltung des in CETA vorgesehenen Ausschusssystems die Grundsätze des Demokratieprinzips als Teil der Verfassungsidentität des Grundgesetzes berührt. Art. 26.1 CETA-E sieht einen Gemischten Ausschuss vor, der für alle Fragen zuständig ist, die die Handels- und Investitionstätigkeit zwischen den Vertragsparteien und die Umsetzung und Anwendung von CETA betreffen (vgl. Art. 26.1 III CETA-E). Seine Beschlüsse sind für die Vertragsparteien – „vorbehaltlich der Erfüllung etwaiger interner Anforderungen und des Abschlusses etwaiger interner Verfahren" – bindend und von ihnen umzusetzen (Art. 26.3 II CETA-E). Zu den wichtigen Befugnissen des Gemischten CETA-Ausschusses gehört, soweit in CETA vorgesehen, die Befugnis, Änderungen des Abkommens zu beschließen (Art. 26.1 V Buchst. c CETA-E) und Protokolle und Anhänge zu ändern (Art. 30.2 II 1 CETAE). (...)* [Das BVerfG schildert Beispiele für Regelungsmöglichkeiten.]
>
> *(2) Nach dem Wortlaut des Abkommens und den bisher vorgesehenen Regelungen hat die Bundesrepublik Deutschland im Hinblick auf die Tätigkeit des Ausschusssystems keine gesicherten Einflussmöglichkeiten. Die Zusammensetzung der Ausschüsse und ihre Entscheidungsverfahren sind in dem Abkommen selbst nur rudimentär geregelt. Es sieht insbesondere nicht vor, dass die Mitgliedstaaten dort durch eigene Vertreter mit Sitz und Stimme mitwirken, und zwar unabhängig davon, ob die Ausschüsse Gegenstände behandeln, die in die unionale oder nationale Zuständigkeit fallen. Für den Gemischten CETA-Ausschuss ist lediglich bestimmt, dass er sich aus „Vertretern der Europäischen Union und Vertretern Kanadas" zusammensetzen soll (Art. 26.1 I 1 CETA-E). Es erscheint daher denkbar, dass deutsche Stellen von Einflussmöglichkeiten insoweit gänzlich ausgeschlossen werden, so dass eine personelle und sachliche Legitimation der Ausschusstätigkeit ebenso unmöglich wäre wie ihre Verantwortung gegenüber den Bürgern. (...)* [Das BVerfG zählt die von CETA erfassten Regelungsbereiche auf.]
>
> *Mit Blick auf die Entscheidungsverfahren sieht das Abkommen vor, dass der Gemischte CETA-Ausschuss seine Beschlüsse einvernehmlich trifft (Art. 26.3 III CETA-E). Auch wenn*

[152] EuGH, C-687/15, Kommission/Rat, ECLI:EU:C:2017:308.

[153] BVerfG, Urt. v. 13.10.2016 – 2 BvR 1368/16 u. a., Rn. 62-64; http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/10/rs20161013_2bvr136816.html.

er Beschlüsse daher nicht gegen die Stimme der Europäischen Union fassen kann, gibt es insoweit keine gesicherte Einwirkungsmöglichkeit der Bundesrepublik Deutschland. Vergleichbares gilt für die Sonderausschüsse (vgl. etwa Art. 26.2 IV 3, 13.18, 21.7 V und VII CETA-E). Soweit die Mitgliedstaaten in den Ausschüssen nicht vertreten sind, können sie lediglich mittelbar auf deren Verfahren und Entscheidungen einwirken, indem sie nach Art. 218 IX AEUV in einem Beschluss des Rates den Gemeinsamen Standpunkt festlegen, den der Vertreter der Europäischen Union in den CETA-Ausschüssen zu vertreten hat. Dieser Einfluss ist indes dadurch begrenzt, dass der Rat – soweit nichts anderes festgelegt ist – mit qualifizierter Mehrheit beschließt (Art. 16 III EUV, 218 VIII UAbs. 1 AEUV). (...) (3) Die demokratische Legitimation und Kontrolle derartiger Beschlüsse erscheint mit Blick auf Art. 20 I und II GG prekär und dürfte wohl nur gewährleistet sein, wenn Mitgliedstaatliche Zuständigkeiten oder die Reichweite des Integrationsprogramms berührende Beschlüsse nur mit der Zustimmung Deutschlands gefasst werden. Es erscheint nicht von vornherein ausgeschlossen, dass hierdurch das Gesetzgebungsrecht und die Integrationsverantwortung des Bundestags verletzt würden."

Diese Äußerungen des BVerfG stammen aus einer Entscheidung zum vorläufigen Rechtsschutz. Ob das Gericht auch für die Entscheidung in der Hauptsache an dieser Haltung festhält, muss abgewartet werden. Das Risiko besteht, denn die Wortwahl setzt die bisherige Logik der Rechtsprechung fort. Das BVerfG scheint Gremien, die vor allem geschaffen wurden, um technische Anpassung komplexer Regelungen in effizienten Verfahren zu ermöglichen, einem deutschen Zustimmungsvorbehalt unterwerfen zu wollen, obwohl die meisten der vom BVerfG selbst aufgezählten Zuständigkeitsbereiche der ausschließlichen Zuständigkeit der Union unterliegen.[154]

Andererseits sind die Erklärungen, die anlässlich der Unterzeichnung und der Einigung über die vorläufige Anwendbarkeit von CETA tatsächlich abgegeben worden sind, weniger weitreichend. Das hatte einige der Antragsteller, deren Anträge auf einstweiligen Rechtsschutz am 13. Oktober 2016 abgewiesen worden waren, veranlasst, erneut einen Eilantrag beim BVerfG zu stellen. Auch diese weiteren Eilanträge hat das BVerfG am 7. Dezember 2016 abgewiesen. Im Beschluss des Gerichts heißt es dazu:[155] *„Zwar folgt aus dem Wortlaut der Erklärungen zu Beschlüssen des Gemischten CETA-Ausschusses (Erklärung Nr. 18 der Kommission sowie Erklärung Nr. 19 des Rates und der Kommission, Ratsdokument 13463/1/16 REV 1) nicht, dass eine zur Gewährleistung demokratischer Legitimation und Kontrolle von*

[154] Das BVerfG erwähnt (Rn. 62) alle Kapitel von Kapitel 3 bis 20, Urt. v. 13.10.2016, aaO. http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2016/10/rs20161013_2bvr136816.html; vgl. auch Holterhus: Eilanträge in Sachen CETA – Europäische Außenhandelspolitik im Mehrebenengeflecht von Verfassungs-, Unions- und Völkerrecht, EuZW 2016, 896, 899 f.

[155] BVerfG, Beschl. v. 07.12.2016, 2 BvR 1444/16 u. a., Rn. 30; http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2016/12/rs20161207_2bvr144416.html.

Beschlüssen des Gemischten CETA-Ausschusses wohl erforderliche Zustimmung Deutschlands in jedem Fall eingeholt werden wird. Allerdings ist die Erklärung Nr. 19 des Rates und der Mitgliedstaaten dahingehend auszulegen, dass bei einer etwaigen Beschlussfassung des Gemischten CETA-Ausschusses im Rahmen der vorläufigen Anwendung von CETA alle Mitgliedstaatlichen Belange berücksichtigt werden."

Das BVerfG zeigt also eine gewisse Flexibilität. Der Versuch allerdings, Aussagen des Rates gesichtswahrend quasi „authentisch" zu interpretieren, ist dabei wenig überzeugend. Dennoch darf man auf die Entscheidung in der Hauptsache gespannt sein, in der das BVerfG das Gutachten 2/15 wird „verarbeiten" müssen (in juristischer und psychologischer Hinsicht), das allerdings zum Thema Portfolioinvestitionen und ISDS auch Elemente enthält, die das Gericht als wohltuend empfinden wird.

Die rechtliche Diskussion um existierende Beschlüsse solcher institutioneller Ausschüsse in vorhandenen Abkommen in Deutschland betrifft insbesondere die Beschlüsse, denen der Europäische Gerichtshof unmittelbare Wirkung zuerkannt hat.[156] Dies ist zum Beispiel im Aufenthaltsrecht oder im Zollrecht anerkannt und hat in Deutschland gerade auch hinsichtlich der Integration und des Aufenthaltsrechts türkischer Staatsangehöriger große praktische Bedeutung. Exemplarisch sei auf die Beschlüsse Nr. 1/80[157] und 1/95[158] des Assoziationsrats EG/Türkei verwiesen. Zu diesen Beschlüssen gibt es eine Vielzahl nationaler Entscheidungen, die z. T. zu Vorlagen an den Gerichtshof geführt haben, zum Teil (angesichts der bestehenden Rechtsprechung) aber auch ohne neue Vorlagen ausgekommen sind. Außerdem gibt es zum Beschluss 1/80 eine Verwaltungsanweisung von 101 Seiten Länge, die die Konsequenzen des Beschlusses aus Sicht der Verwaltung sehr detailliert darstellt.[159] Diese Beispiele zeigen, dass solche Beschlüsse die deutsche Lebenswirklichkeit (und die praktische Rechtsanwendung) zum Teil stark prägen.

[156] EuGH, C-230/03, Sedef/Hamburg, ECLI:EU:C:2006:5, Slg. 2006 I-157, Rn. 33.

[157] Beschlüsse auf der Grundlage des „Assoziierungsabkommens zwischen der Europäischen Wirtschaftsgemeinschaft und der Türkei" v. 12.09.1963, ABl. 1964, Nr. 217, S. 3685 (BGBl. 1964 II S. 509, 510) und des „Zusatzprotokolls (...) für die Übergangsphase der Assoziation" v. 23.11.1970 ABl. 1972 L 293/1 (BGBl. 1972 II S. 385), der Beschluss 1/80 ist nicht im EU Abl. veröffentlicht, vgl. aber z. B. http://www.migrationsrecht.net/arb-1/80-nur-deutsche-fassung.html?catid=120.

[158] Beschlusses Nr. 1/95 des Assoziationsrates EG–Türkei v. 22.12.1995 über die Durchführung der Endphase der Zollunion, ABl. 1996, L 35/1; zu seiner unmittelbaren Anwendbarkeit vgl. EuGH, C-65/16, Istanbul Lojistik Ltd, ECLI:EU:C:2017:770, Rn. 38 ff.

[159] Allgemeine Anwendungshinweise des Bundesministeriums des Innern zum Beschluss Nr. 1/80 des Assoziationsrats EWG/Türkei und zu Art. 41 (1) des Zusatzprotokolls zum Assoziierungsabkommen (AAH – ARB 1/80) – Fassung 2013 – v. 26.11.2013 https://www.bmi.bund.de/SharedDocs/downloads/DE/themen/migration/anwendungshinweise-assoziationsrecht-ewg-tuerkei.pdf?__blob=publicationFile&v=2.

Das zeigt, gerade was die Beschlüsse des Assoziationsrats aufgrund des Abkommens mit der Türkei betrifft, auch die Tatsache, dass angesichts politischer Spannungen mit der Türkei aktiv darüber nachgedacht wird, wie solche Beschlüsse rückgängig gemacht, suspendiert oder gekündigt werden können. Überlegungen dazu hat zum Beispiel der wissenschaftliche Dienst des deutschen Bundestages angestellt, der sich in einem mehrseitigen Gutachten unter dem neutralen Titel „Rechtsfragen zur Zollunion zwischen der EU und der Türkei" mit den Beendigungsmöglichkeiten befasste.[160]

Frage 11: Unterrichtung des EP und der nationalen Parlamente

Die Beteiligungsrechte des Europäischen Parlaments sind nach allgemeiner Meinung der deutschen Literatur durch die letzten Vertragsänderungen weiter gestärkt worden.[161] „*Das EP wird in allen Phasen des Verfahrens unverzüglich und umfassend unterrichtet*", heißt es in Art. 218 (10) AEUV. Nach Auffassung des Verfassers, beschränkt sich die Unterrichtung nicht auf das Verfahren zum Abschluss der Übereinkunft; auch während des laufenden Verhandlungsprozesses muss unterrichtet werden, und zwar auch über Zwischenergebnisse der Verhandlungen.[162] Die Veröffentlichung eines Beschlusses über die Unterzeichnung und den Abschluss einer Übereinkunft im Amtsblatt der Europäischen Union ist keine geeignete Form der Unterrichtung, weil „*das Erfordernis der Unterrichtung gemäß Art. 218 (10) AEUV vorgesehen ist, um sicherzustellen, dass das Parlament gerade infolge der Wahl der Rechtsgrundlage für einen Beschluss über den Abschluss einer Übereinkunft in die Lage versetzt wird, eine demokratische Kontrolle über das Außenhandeln der Union auszuüben und – spezifischer – zu überprüfen, dass seine Befugnisse gewahrt worden sind.*"[163]

Art. 218 (10) AEUV ist durch eine interinstitutionelle Rahmenvereinbarung zwischen Kommission und EP konkretisiert worden, aus der sich ergibt, dass die Kommission dem EP zusichert, es in ähnlicher Weise wie und gleichzeitig mit dem Rat zu informieren,[164] wobei die Intensität der Unterrichtung besonders

[160] Deutscher Bundestag, wissenschaftliche Dienste, Rechtsfragen zur Zollunion zwischen der EU und der Türkei, WD 2 – 3000 – 147/16, v. 01.12.2016, https://www.bundestag.de/blob /490498/6e13d-1ca7340d0c961593904ddfdb33f/wd-2-147-16-pdf-data.pdf.

[161] Bungenberg, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218 AEUV, Rn. 47f.; M. Krajewski, Die neue handelspolitische Bedeutung des Europäischen Parlaments, in: Bungenberg/Herrmann, Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon, 2011, S. 55 ff.

[162] EuGH, C-263/14, EP/Rat, ECLI:EU:C:2016:435, Rn. 75, 77 unter Hinweis auf C-658/11, Parlament/Rat, EU:C:2014:2025, Rn. 86.

[163] EuGH, C-263/14, EP/Rat, ECLI:EU:C:2016:435, Rn. 80, unter Hinweis auf C-658/11, Parlament/Rat, EU:C:2014:2025, Rn. 79.

[164] Vgl. Rahmenvereinbarung, ABl. 2010, L304/47.

ausgeprägt sein soll, wenn es sich um Abkommen handelt, denen das Parlament letztlich zustimmen muss.[165]

Hinsichtlich der Beteiligung nationaler Parlamente enthält der AEUV keine besonderen Vorschriften. Das entspricht der Struktur des Vertrages, der den Mitgliedstaaten bestimmte Rechte zuweist und die Wahrnehmung solcher Rechte dem nationalen (Verfassungs-) Recht überlässt.[166]

Hinsichtlich der Beteiligungsrechte des deutschen Bundestages hat sich das BVerfG in seiner Rechtsprechung mehrfach dazu geäußert, dass die Bundesregierung den Bundestag auch hinsichtlich der Ausübung von Außenkompetenzen unterrichten muss und ihm Gelegenheit geben muss, seiner „Integrationsverantwortung" gerecht zu werden.[167] Unter anderem in den Entscheidungen zu Griechenland-Hilfen[168] oder im OMT-Urteil[169] betont das BVerfG, dass das Demokratieprinzip (und das Budgetrecht des Bundestages) auch durch verfahrensrechtliche Sicherungen verwirklicht werden muss, indem eine hinreichende Beteiligung des deutschen Bundestages sichergestellt wird.

Zu der Frage, wie seine eigene Beteiligung gerade bei gemischten Abkommen sichergestellt werden kann, und zu den praktischen Modalitäten hat der Bundestag eine öffentliche Expertenanhörung durchgeführt, in der (auch unter Bezugnahme auf die Entscheidungspraxis des BVerfG) die aktive Unterrichtung und Beteiligung des Bundestages für notwendig erachtet wurde.[170]

KAPITEL 3: RECHTSWIRKUNGEN DER INTERNATIONALEN ÜBEREINKÜNFTE

Die Fragen der Generalberichterstatter zu Kapitel 3 werden nachfolgend in der Reihenfolge beantwortet, in der sie gestellt wurden.

[165] Rahmenvereinbarung, Anhang II Ziffer 5 (im Vergleich zu Ziffer 6).

[166] Vgl. dazu für das deutsche Recht: Holterhus: Die Rolle des Deutschen Bundestags in der auswärtigen Handelspolitik der Europäischen Union – Insb. zu den parlamentarischen Einflussmöglichkeiten im völkerrechtlichen Vertragsschlussverfahren, EuR 2017, 234.

[167] BVerfG, Lissabon Urt., BVerfG, Urt. v. 30.06.2009 – 2 BvE 2/08, ECLI:DE:BVerfG:2009:es20090630.2bve000208, Rn. 236 ff.

[168] BVerfG, (Griechenland Hilfen), Urt. v. 07.09.2011 – 2 BvR 987/10, BVerfGE 129, 124 – 186, ECLI:DE:BVerfG:2011:rs20110907.2bvr098710, Rn. 124 ff.

[169] BVerfG, (OMT), Urt. v. 21.06.2016 – 2 BvR 2728/13, BVerfGE 142, 123 – 234, Rn. 212 ff., (m.w.N. auch zu den früheren Entscheidungen des BVerfG in dieser Sache und den Vorlagebeschluss an den EuGH, der zum Urt. des EuGH, v. 16.06.2015, C-62/14, Gauweiler, EU:C:2015:400, führte). Vgl. dazu auch Holterhus: Die Rolle des Deutschen Bundestags in der auswärtigen Handelspolitik, aaO. EuR 2017, 234, 254 ff. (m.w.N.).

[170] Öffentliche Anhörung, Wortprotokoll (und schriftlich vorbereitete Statements der Experten), https://www.bundestag.de/dokumente/textarchiv/2016/kw02-pa-recht/400432.

Frage 12: Nationale Entscheidungen zu EU-Abkommen

Aus Sicht der deutschen Rechtswissenschaft sind jedenfalls zwei Verfahren bemerkenswert, die sich mit der Zulässigkeit von handelspolitischen Abkommen der EU beschäftigen. Beide Verfahren betreffen das Freihandelsabkommen mit Kanada (CETA). Zum einen sind die Entscheidungen des Bundesverfassungsgerichts zu nennen, die bereits oben, in Rn. 92, 107 und 118 näher beschrieben wurden.

Zum anderen ist ein Urteil des Bayerischen Verfassungsgerichtshofs interessant, mit dem die Zulassung eines Volksbegehrens gegen CETA abgelehnt wird.[171] Am 14. Oktober 2016 hatten 30.002 Antragsteller in Bayern (einem deutschen Bundesland) den Antrag gestellt, ein Volksbegehren unter dem Titel „Nein zu CETA!" zuzulassen. Gegenstand des Volksbegehrens war ein Gesetz, mit dem die Vertreter Bayerns im Bundesrat (der zweiten Kammer des deutschen Parlaments auf Bundesebene) verpflichtet werden sollten, in allen Abstimmungen gegen CETA zu stimmen. Die Zulassung hatte die Bayerische Staatsregierung abgelehnt. Dagegen wandten sich die Kläger vor dem Bayerischen Verfassungsgerichtshof.

Die Bayerische Verfassung sieht in Art. 70 (4) BV im Grundsatz die Möglichkeit vor, die Bayerische Staatsregierung im Zusammenhang mit der Übertragung von Hoheitsakten an die Europäische Union hinsichtlich der Wahrnehmung ihrer verfassungsrechtlichen Aufgaben durch Gesetz Weisungen zu erteilen (also grundsätzlich auch hinsichtlich des Abstimmungsverhaltens ihrer Vertreter im Bundesrat (Art. 51 (1) Grundgesetz)). Dieser Art. war erst 2013 in die bayerische Landesverfassung eingefügt worden und soll die Mitwirkungsrechte des Landesgesetzgebers in Angelegenheiten der Europäischen Union stärken. Hintergrund der Verfassungsänderung war die Sorge vor einem „Demokratiedefizit" und der Aushöhlung der Befugnisse der Gesetzgeber in den Bundesländern. Die Präsidenten der deutschen Landesparlamente hatten dies in einer Erklärung anlässlich ihrer Jahrestagung am 21./22. Juni 2010 problematisiert.[172]

Der Bayerische Verfassungsgerichtshof erläutert, dass die „Übertragung von Hoheitsrechten auf die Europäische Union" nach Art. 70 (4) S. 2 BV bewusst an die Regelung des Art. 23 GG anknüpfe, der die spezielle Ermächtigung zur Mitwirkung an der europäischen Integration enthält. Dem Landesgesetzgeber soll dann – und nur dann – eine unmittelbare Beteiligung durch gesetzliche Weisung gegenüber der Staatsregierung für die Abstimmung im Bundesrat ermöglicht werden, wenn die Übertragung von Hoheitsrechten auf die Europäische Union

[171] Bayerischer VerfGH München, Entscheidung v. 15.02.2017 – Vf 60-IX-16, DÖV 2017, 641; http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2017-N-102360?hl=true.

[172] Sog. Stuttgarter Erklärung, Landtag von Baden-Württemberg, Landtags-Drs. 14/6554.

durch ein Bundesgesetz im Sinne des Art. 23 (1) S. 2 GG das Gesetzgebungsrecht des Landtags betrifft. Solche Eingriffe in die Gesetzgebungskompetenz des Landesgesetzgebers sollten – nach dem Willen des Gesetzgebers – auf eine breite demokratische Legitimation gestützt werden.[173]

Ob eine solche Weisung überhaupt zulässig sei, hält der Bayerische VerfGH angesichts einer schon älteren Rechtsprechung des Bundesverfassungsgerichts[174] für zweifelhaft, weil nach dem Grundgesetz der Bundesrat aus Vertretern der Landesregierungen gebildet wird und deshalb Weisungen des Landtages bundesverfassungsrechtlich zumindest zweifelhaft seien. Die Frage könne aber dahinstehen,[175] weil jedenfalls die konkreten Voraussetzungen nach Art. 70 (4) BV nicht vorlägen, solange dem Bundesrat kein Zuständigkeitsübertragungsgesetz im Sinne von Art. 23 GG zur Abstimmung vorliege. Zum Zeitpunkt der Entscheidung des Bayerischen Verfassungsgerichtshof lag eine entsprechende Gesetzesvorlage dem Bundesrat nicht vor (und mit einer solchen Vorlage war, nach Auffassung des Gerichts, auch nicht zu rechnen, weil etwa das deutsche Zustimmungsgesetz für das Freihandelsabkommen mit Korea nicht auf Art. 23 GG gestützt worden war).[176]

Aus der Sicht des Verfassers ist das Interessante an der Entscheidung weniger, dass ein Volksbegehren im konkreten Fall nicht zugelassen wurde, sondern die sichtbare Tendenz, Fragen der EU-Kompetenzen nicht nur auf der Ebene der Union und nicht nur auf der der Zentralstaaten, sondern auch auf der Ebene der Länder und Regionen auf den Prüfstand zu stellen, was die Einheitlichkeit der Willensbildung in der Union durch die Vervielfältigung von Akteuren (im Namen der Verringerung des Demokratiedefizits) verkompliziert. Das Beispiel der Maßnahmen der Wallonie (wallonische Region Belgiens) zeigt die Risiken, die eine solche Verlagerung birgt.[177]

[173] Bayerischer VerfGH München, Entscheidung v. 15.02.2017 – Vf 60-IX-16, DÖV 2017, 641, Rn. 52.
[174] BVerfG, Urt. v. 30.07.1958, BVerfGE 8, 104/120 f.
[175] Bayerischer VerfGH München, Entscheidung v. 15.02.2017 – Vf 60-IX-16, DÖV 2017, 641, Rn. 53 ff.
[176] Bayerischer VerfGH München, Entscheidung v. 15.02.2017 – Vf 60-IX-16, DÖV 2017, 641, Rn. 62 ff.
[177] Zur Ablehnung von CETA durch die Wallonie siehe, Cécile Ducourtieux in: Le Monde, Le rejet wallon du traité commercial CETA avec le Canada plonge l'UE dans le désarroi, 20.10.2016, http://www.lemonde.fr/europe/article/2016/10/20/la-wallonie-maintient-son-opposition-au-traite-commercial-ceta-avec-le-canada_5017686_3214.html; letztlich wurde die belgische Bundesregierung verpflichtet, beim Gerichtshof ein Gutachtenverfahren zur inhaltlichen Vereinbarkeit von CETA mit EU Recht in Gang zu setzen, Eric Deffet, in: Le Soir, La Belgique va saisir la Cour européenne de Justice sur le Ceta, 05.09.2017, http://plus.lesoir.be/112577/article/2017-09-05/la-belgique-va-saisir-la-cour-europeenne-de-justice-sur-le-ceta; und die Wallonie könnte, gerade in der Folge des Gutachtens 2/15, den Ratifikationsprozess erneut blockieren, La Libre (Belgique), La Wallonie pourra (encore) bloquer (un peu) le Ceta, http://www.lalibre.be/actu/international/la-wallonie-pourra-encore-bloquer-un-peu-le-ceta-591b4bf5cd70022542ddb74e.

Frage 13: Unmittelbare Anwendung

Im Grundsatz genießen völkerrechtliche Übereinkommen unionsintern Vorrang vor abgeleitetem Unionsrecht. Da gemäß Art. 216 (2) AEUV völkerrechtliche Übereinkommen für die Institutionen verbindlich sind, muss sich die Rechtmäßigkeit des Sekundärrechts an den Anforderungen solcher Übereinkünfte messen lassen.[178]

Damit sich allerdings Parteien in Verfahren vor den EU-Gerichten (oder nationalen Gerichten) auf den Inhalt der Übereinkünfte unmittelbar berufen können, müssen diese „unmittelbar anwendbar" oder „*self-executing*" sein. Die konkreten Voraussetzungen dafür hat der EuGH in seinem Urteil „International Fruit Company" beschrieben: „*Die Gültigkeit der Handlungen der Organe im Sinne von Artikel 177 EWG-Vertrag kann an einer Bestimmung des Völkerrechts gemessen werden, wenn diese Bestimmung die Gemeinschaft bindet und ein Recht der Gemeinschaftsangehörigen begründet, sich vor Gericht auf sie zu berufen.*"[179]

Nach Auffassung des Verfassers kommt es deshalb darauf an, ob die völkervertraglichen Regelungen subsumtionsfähig sind und deshalb von den Institutionen oder nationalen Behörden und Gerichten ohne Weiteres angewendet werden können oder ob sie den Institutionen oder den Behörden und Gerichten einen Umsetzungsspielraum belassen.[180] Das ergibt sich aus der Interpretation der jeweiligen Norm, die hinreichend bestimmt und geeignet sein muss, um dem Einzelnen Rechte zu verleihen.[181] Diese Überlegungen hatte die Rechtsprechung insbesondere zu den Freihandelsabkommen mit den EFTA-Staaten entwickelt.[182] So führte der EuGH in der Rechtssache Kupferberg aus: „*Deshalb begründet Artikel 21 (1) des Abkommens für die Vertragsparteien eine unbedingte Verpflichtung zur Nichtdiskriminierung im steuerlichen Bereich, die allein von der Feststellung abhängt, daß die einem bestimmten Steuersystem unterliegenden Erzeugnisse einander gleichartig sind, und deren Grenzen sich unmittelbar aus dem Zweck des Abkommens ergeben. Diese Bestimmung kann als solche von einem Gericht angewandt werden und kann daher unmittelbare Wirkungen in der gesamten Gemeinschaft erzeugen.*"[183]

[178] Siehe auch Lachmayer/von Förster, in von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 216 AEUV, Rn. 24; Mögele, in Streinz, EUV/AEUV, aaO. (Fn. 15), Art. 216, Rn. 52 ff.

[179] Rs 21/72 u. a., International Fruit Company, ECLI:EU:C:1972:115, Slg. 1972, 1219 (GATT), Tenor des Urteils, Ziffer 1; fortgeführt in EuGH C-149/96, Portugal/Rat, Rn. 47 ff.

[180] Schroeder, in Streinz, aaO. (Fn. 15), Art. 288 AEUV, Rn. 48.

[181] EuGH, Rs 21/72 u. a., International Fruit Company, ECLI:EU:C:1972:115, Slg. 1972, 1219, Rn. 19, 20.

[182] EuGH, C-235/99, Barkoci, Slg. 2001, I-6557, Rn. 51 f.; 270/80, Polydor/Harlequin, Slg. 1982, 329, Rn. 14ff.; 104/81, HZA Mainz/Kupferberg (I), Slg. 1982, 3641, Rn. 28 ff.; siehe andererseits EuGH, C-207/91, Eurim Pharm/BGA, Slg. 1993, I-3723, Rn. 21 ff. und C-63/99, Gloszczuk, Slg. 2001, I-6369, Rn. 52). Von den ursprünglichen Abkommen ist (nach Inkrafttreten des EWR) nur noch das Abkommen mit der Schweiz in Kraft ist (ABl. 1972 L 300/189), die zitierte Rechtsprechung ist aber nach wie vor für die Auslegung von völkerrechtlicher Übereinkünften mit Drittstaaten von Bedeutung.

[183] EuGH, Rs 104/81, Hauptzollamt Mainz/Kupferberg & Cie., EU:C:1982:362, Rn. 26; siehe auch EuGH, Rs 17/81, Pabst&Richarz KG/Hauptzollamt Oldenburg, EU:C:1982:129, Rn. 27.

Hinsichtlich des WTO-Abkommens (und seiner diversen Teile) war der EuGH von Anfang an kritischer. Der EuGH hat die unmittelbare Wirkung schon für das GATT 1947 grundsätzlich abgelehnt[184] und seine Ablehnung auf das WTO-Abkommen und das GATT 1994 erstreckt, wobei er darauf hinwies, dass die Besonderheiten dieses Abkommens, das durch große Flexibilität seiner Bestimmungen gekennzeichnet sei, der Begründung derartiger Rechte entgegenstünden.[185] Das schließt es nach Auffassung des EuGH auch aus, dass Mitgliedstaaten sich gegenüber den EU-Institutionen auf das WTO-Abkommen berufen[186] (obwohl sie wie die Union Vertragsparteien sind), während die Institutionen berechtigt sind, die Mitgliedstaaten durch den EuGH zur Einhaltung ihrer Verpflichtungen aus dem Abkommen zu zwingen.[187]

In jüngerer Zeit hat der EuGH begonnen, die Logik seiner ablehnenden Haltung zu den WTO-Abkommen auf „klassische" völkerrechtliche Übereinkünfte zu übertragen, möglicherweise aber auch nur einheitliche Kriterien anzuwenden, um die Kohärenz seiner Rechtsprechung zu erhöhen:[188] „[Es] *können die Bestimmungen eines internationalen Vertrags, dessen Vertragspartei die Union ist, zur Begründung einer Klage auf Nichtigerklärung einer Handlung des Sekundärrechts der Union oder einer Einrede der Rechtswidrigkeit einer solchen Handlung nur unter der Voraussetzung geltend gemacht werden, dass zum einen Art und Struktur des betreffenden Vertrags dem nicht entgegenstehen und zum anderen diese Bestimmungen inhaltlich unbedingt und hinreichend genau erscheinen*."[189]

Durch den Verweis auf die „Art und Struktur" von internationalen Übereinkünften werden für die unmittelbare Anwendung durch den EuGH tendenziell weitere Hürden errichtet. Es kommt hinzu, dass die vertieften Freihandelsabkommen, die gegenwärtig verhandelt werden (TTIP, CETA etc.), Klauseln enthalten, die eine unmittelbare Anwendung ausdrücklich ausschließen sollen.[190]

[184] EuGH, 267/81 u. a., Amministrazione delle finanze/SPI u. a., Slg. 1983, 801, Rn. 15; 21/72 u. a., International Fruit Company/Produktschap, Slg. 1972, 1219, Rn. 10 f.

[185] EuG, T-2/99, T.Port/Rat, Slg. 2001, II-2093, Rn. 51; EuGH, C 27/00, Omega Air, Slg. 2002, I 2569, Rn. 89 ff.

[186] EuGH, C-149/96, Portugal/Rat, Slg. 1999, I-8395, Rn. 40, 43–47; C-377/02, Léon Van Parys/BIRB, Slg. 2005, I-1465, Rn. 39, 48; dazu Steinbach, Zur Rechtswirkung von WTO-Streitbeilegungsentscheidungen, EuZW 2005, 331.

[187] EuGH, C-61/94, KOM/Deutschland, Slg. 1996, I-3989.

[188] In diese Richtung wohl Bungenberg, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 218, Rn. 129 ff.

[189] Siehe aus jüngerer Zeit EuGH, Urt. v. 13.01.2015, C-401/12 P, Vereniging Milieudefensie, ECLI:EU:C:2015:4, Rn. 54 m.w.N. (hinsichtlich des umweltrechtlichen Übereinkommen von Århus); in Abgrenzung zu EuGH, Rs 188/85, Fediol, Rn. 19-22 und EuGH, C-69/89. Nakajiama All Precision/Rat, EU:C:1991:186, Rn. 36 ff.

[190] So statuiert etwa Art. 14.6 CETA (ähnlich Art. 17.15 EU-Singapur FTA): "*Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties*

Es besteht kein Zweifel, dass der Gerichtshof die Art und Struktur von Übereinkünften an solchen Regelungen messen und hinsichtlich solcher Übereinkünfte keine unmittelbare Anwendung zulassen wird.

In Deutschland ist auch aus einem anderen Grund mit einer Einschränkung der deutschen Rechtsprechung zu rechnen, die bisher der unmittelbaren Wirkung von Freihandelsabkommen, aber auch der WTO-Abkommen, aufgeschlossen gegenüber stand.[191] Eine solche unmittelbare Wirkung war in den Bereichen möglich, die inhaltlich der deutschen Zuständigkeit unterfielen (z. B. hinsichtlich von Teilen von TRIPS).[192] Durch die Erweiterung der Zuständigkeiten der Union und die Einbeziehung solcher Bereiche in die gemeinsame Handelspolitik, ist diese Möglichkeit seit Inkrafttreten des Vertrages von Lissabon weitgehend entfallen, weil jetzt insoweit die restriktivere Sicht des Gerichtshofs zum Tragen kommt.[193]

Frage 14: Vertragsverletzungsverfahren gegen Mitgliedstaaten
Solche Fälle sind dem Verfasser nicht bekannt.

Frage 15: Nationale Kontrollmßnahmen
In Deutschland unterliegt das Handeln von Behörden, den Parlamenten und Gerichten dem Rechtsstaatsprinzip. Deshalb sind alle Träger staatlicher Gewalt grundsätzlich verpflichtet, zunächst selbst sicherzustellen, dass sie bei ihrem Handeln Recht und Gesetz beachten; dazu gehört auch das Recht der Europäischen Union, einschließlich der von der Union abgeschlossenen internationalen Übereinkünfte, die integraler Bestandteil des Unionsrechts sind.[194] Dabei ist auch der Grundsatz anerkannt, dass dem EU-Recht gegenüber deutschem Recht der Vorrang zukommt.

under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties. No Party may provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement."

[191] Vgl. BGH, NJW 1999, 1953, 1958 – Kopienversanddienst; GRUR 2002, 1046, 1048 – Faxkarte.

[192] Der EuGH hatte das Recht der Mitgliedsstaaten anerkannt – soweit sie selbst für die Umsetzung der WTO-Abkommen zuständig sind und keine Maßnahmen der EU zur Umsetzung existieren – zu entscheiden, ob dem Abkommen vor ihren Gerichten unmittelbare Wirkung zukommen soll, EuGH, C-300/98, Parfums Christian Dior, Slg. 2000, I 11307, Rn. 48 f. zu Art. 50 TRIPS; C-89/99, Schieving-Nijsted/Groeneveld, Slg. 2001, I 5851, Rn. 53 ff.

[193] Siehe aber die von Bungenberg angedeutete Möglichkeit einer „abgeschwächten, mittelbaren Direktwirkung" von TRIPS, Bungenberg, in: von de Groeben, aaO. (Fn. 2), Art. 218 AEUV, Rn. 133, m. w. N., u. a. unter Hinweis auf EuGH, C-300/98, Parfums Christian Dior, Slg. 2000, I 11307, Rn. 44, 47 zu Art. 50 TRIPS.

[194] EuGH, Rs 181/73, Haegeman, Slg. 1974, 449, Rn. 5; Rs 12/86, Demirel, Slg. 1987, 3719, Rn. 7, und C-301/08, Bogiatzi, Slg. 2009, I-10185, Rn. 23.

Darüber hinaus unterliegen nachgeordnete Behörden der Rechtsaufsicht der Bundesregierung bzw. der Landesregierungen. Die Landesbehörden (einschließlich der Landesregierungen) sind auch nach dem Grundsatz des bundesfreundlichen Verhaltens verpflichtet, Verstöße gegen EU-Recht zu unterlassen. Dies kann der Bund notfalls auch gerichtlich gegenüber den Ländern durchsetzen. Auch insofern sind die von der Union abgeschlossenen internationalen Übereinkünfte integraler Bestandteil des Unionsrechts.

Schließlich gibt es auf der Ebene der Bundesregierung ein gut strukturiertes Instrumentarium zur europarechtlichen Koordinierung, dessen Hauptziel zwar die politische Koordinierung ist, in dessen Rahmen aber auch die Europarechtskonformität des Regierungshandelns sichergestellt wird.[195] Das wichtigste Koordinierungsgremium ist der Staatssekretärsausschuss für Europafragen, dem traditionell ein Staatsminister oder Staatssekretär des Auswärtigen Amtes vorsitzt.[196] Dort werden europapolitische Grundsatzfragen und wichtige EU-Angelegenheiten von ressortübergreifendem Interesse geklärt. Unterhalb der Staatssekretärsebene hat die Runde der mit Europafragen befassten Abteilungsleiter der verschiedenen Ministerien die Aufgabe, politisch relevante und/oder konfliktträchtige Dossiers zu identifizieren. Gesetzgebungsvorhaben und das Verwaltungshandeln auf Bundesebene werden dabei einer Rechtskontrolle hinsichtlich ihrer Vereinbarkeit mit dem Europarecht unterzogen, das auch Verstöße gegen internationale Abkommen feststellen und vermeiden soll.

KAPITEL 4: HANDEL UND INVESTITIONSSCHUTZ

Die Fragen der Generalberichterstatter zum Kapitel 4 werden in der Form beantwortet, dass das Oberthema von Frage 16 (Begriff der gemeinsamen Handelspolitik) aus Sicht der deutschen Rechtswissenschaft nach der Entscheidung des Gerichtshofs im Gutachten 2/15 nachfolgend im Abschnitt A. dargestellt wird. Danach wird in Abschnitt B auf die konkreten Einzelfragen der Generalberichterstatter einegangen.

A. Zum Begriff der gemeinsamen Handelspolitik

Die gemeinsame Handelspolitik (GHP) ist Teil von Titel II des Fünften Teils des AEUV („Das auswärtige Handeln der Union"). Ihr Ziel ist es, die EU in die Lage zu versetzen, sowohl im internationalen Bereich als handlungsfähiger Partner die GHP nach außen zu vertreten als auch diese Politik intern umzusetzen.

[195] Vgl. Bundesministerium für Wirtschaft und Energie, http://www.bmwi.de/Redaktion/DE/Artikel/Europa/gestaltung-der-deutschen-europapolitik.html.

[196] Vgl. Auswärtiges Amt: Koordinierungsfunktion, https://www.auswaertiges-amt.de/de/aussenpolitik/europa/deutsche-europapolitik/entscheidungsfindung-node.

1. Die Entwicklung der gemeinsamen Handelspolitik vor Lissabon

Mit der Gründung der EWG haben die Mitgliedstaaten eine Zollunion geschaffen und später nach Schaffung der EG einen Binnenmarkt etabliert, in dem Waren und Dienstleistungen frei zirkulieren, ohne dass es auf ihren Ursprung ankommt. Der freie Warenverkehr mit eingeführten Waren und die Dienstleistungsfreiheit im Binnenmarkt können nur störungsfrei funktionieren, wenn für deren Einfuhr die gleichen Regeln gelten. Dabei ergänzt die GHP die Bestimmungen des Dritten Teils des AEUV, insbesondere dessen Vorschriften über den Binnenmarkt (Titel I), den freien Warenverkehr (Titel II; speziell zur Zollunion und den GZT dort Kapitel I) sowie über den freien Dienstleistungs- und Kapitalverkehr (Titel IV).

Der Begriff „gemeinsame Handelspolitik" ist vor dem Hintergrund dieser Funktion der GHP und der sich wandelnden Struktur des Welthandels zu sehen. Ausgangspunkt für die Definition ist die (nicht abschließende) Aufzählung („insbesondere") in Art. 207 (1) (Änderung von Zollsätzen, Abschluss von Zoll- und Handelsabkommen etc.). Nach der ursprünglichen Meinung des Rates waren deshalb solche Rechtsakte „handelspolitischer" Natur, die die Beeinflussung der Handelsströme zum Ziel hatten.[197] Demgegenüber neigte die KOM zu der Auffassung, dass der Einsatz handelspolitischer Instrumente die Natur eines Rechtsaktes determiniert.[198] Der Wandel der Schwerpunkte im Welthandel und die Diskussion der unterschiedlichen Positionen gerade im Rahmen des Naturkautschukverfahrens hatten den Gerichthof zunächst bewogen, den Begriff der GHP „in einer offenen Perspektive" zu sehen,[199] also eine gewisse Kohärenz zwischen dem Inhalt handelspolitischer Regelungen, die international beobachtbar waren, und dem innergemeinschaftlichen Verständnis von der Bedeutung des Begriffs zugelassen. Doch mit der Gründung der WTO ergaben sich auf einen Schlag erhebliche Änderungen der Regelungsinhalte und -dichte handelspolitischer Regelungen durch die WTO-Abkommen von 1994. Die Mitgliedstaaten waren nicht länger bereit, die von ihnen empfundene Erosion ihrer Zuständigkeiten zugunsten der EU hinzunehmen; es kam zum Streit über die Grenzen des Begriffs der GHP und zum Gutachten 1/94 des EuGH.[200]

[197] Stellungnahme zum Gutachten 1/78, Naturkautschuk-Übereinkommen, Slg. 1979, 2871, 2887; 08.09.2009, C-411/06, KOM/EP u. a., Rn. 38. Die Bezugnahme auf die früheren Auffassungen von Rat und Kommission wird in der deutschen Literatur z. T. kritisiert, doch ist die Nähe der heutigen Definition des Gerichtshofs (vgl. unten, Rn. 150) zur ursprünglichen Position des Rates durchaus interessant.

[198] Stellungnahme zum Gutachten 1/78, Naturkautschuk-Übereinkommen, Slg. 1979, 2871, 2884; 08.09.2009, C-411/06, KOM/EP u. a., Rn. 31.

[199] EuGH, Gutachten 1/78, „Naturkautschuk", Slg. 1979, 2871, 2913, siehe unten Rn. 9; zur Position der deutschen „Doktrin" siehe etwa Ehlermann, FS Teitgen 1984, 145; Koutrakos, Eur. L. Rev. 1998, 235, 250; siehe auch Weiß, in Grabitz, aaO. (Fn. 2), Art. 207 AEUV, Rn. 68.

[200] Gutachten 1/94, WTO, Slg. 1994, I-5276, Rn. 35 ff.; die geänderte Rechtsprechung stieß auf vielfältige Kritik, vgl. statt vieler Krenzler/da Fonseca-Wollheim, EuR 1998, 223, 229.

Angesichts des Ausmaßes der neuen Regelungsmaterien der WTO (im Vergleich zum früheren GATT) änderte der Gerichtshof seine Rechtsprechung. Im Gutachten 1/94 legte der EuGH den Schwerpunkt eher auf eine statische Interpretation und entschied (wenn auch unter Bezugnahme auf den „offenen" Charakters des Begriffs),[201] dass Regelungen über Dienstleistungen (das „GATS"-Abkommen) und den Schutz geistigen Eigentums (das TRIPS-Übereinkommen) nur zum Teil unter den Begriff der Handelspolitik i. S. v. ex-Art. 133 EG fielen, weil sie nicht den freien Warenverkehr beträfen, sondern andere Grundfreiheiten. Dies vertiefte der Gerichtshof im später erstatteten Gutachten 2/92,[202] in dem er, auch soweit der Warenverkehr betroffen war, ex-Art. 133 EG mit dem Argument für unanwendbar erklärte, es gehe im konkreten Fall mehr um Harmonisierung im Binnenmarkt und weniger um die Regelung von Außenhandel. Diese Überlegung setzt sich in der Rechtsprechung bis heute fort.

Die Änderungen von ex-Art. 133 EG durch die Verträge von Amsterdam und Nizza erweiterten die handelspolitischen Kompetenzen punktuell, beseitigten aber die Schwierigkeiten nicht, die sich ergaben, weil EU-Kompetenzen und der typische Regelungsbereich angestrebter handelspolitischer Übereinkommen auseinanderfallen und weil solche Übereinkommen deshalb als „gemischte Abkommen" zu schließen sind.

2. Die Änderungen der Gemeinsamen Handelspolitik durch Lissabon

Der Lissabon-Vertrag hat die GHP demgegenüber auf eine neue Grundlage gestellt und zugleich konsolidiert. Die GHP ist nun Teil und Instrument des auswärtigen Handelns der EU insgesamt: Gem. Art. 207 (1) S. 2 AEUV wird die GHP „im Rahmen der Grundsätze und Ziele des auswärtigen Handelns der Union gestaltet." Damit hat der Vertrag von Lissabon die ursprüngliche – auf Liberalisierung und handelspolitische Schutzmaßnahmen fokussierte – Zielsetzung der GHP erheblich modifiziert. Dieser bindet die GHP an sehr viel komplexere, an den Gesamtinteressen der EU ausgerichtete Zielvorgaben (s. Art. 21 (mit Art. 7, 9, 11) EUV und Art. 205, 206 AEUV).[203]

Außerdem wurden die gewandelten Realitäten des internationalen Wirtschaftssystems berücksichtigt und die Bereiche, die schon die Gründungsverträge zur WTO der internationalen Handelspolitik zuordneten, wieder in den einheitlichen Zuständigkeitsbereich der EU integriert (einschl. der Einbeziehung von nichttarifären („anderen") Beschränkungen des internationalen

[201] Ibid., Rn. 41.

[202] Gutachten 2/92 (OECD-Beschluss zur Inländerbehandlung, Slg. 1995, I-525, Rn. 24 ff.; ähnlich für das Verhältnis Außenhandel und Umweltschutz, EuGH, 08.09.2009, C-411/06, KOM/EP u. a., Rn. 46 f.)

[203] Vedder, Die außenpolitische Zielbindung der gemeinsamen Handelspolitik, in: Bungenberg/Herrmann, aaO. (Fn. 161), 2011, S. 121 ff.; Müller-Ibold, in: Lenz, aaO. (Fn. 2), Art. 205, Rn. 2 ff.

Handelsverkehrs, der Dienstleistungen, der handelsbezogenen Aspekte des geistigen Eigentums und der ausländischen Direktinvestitionen in den Begriff der GHP durch Art. 206, 207 AEUV).

Allerdings wird der Zustand, der vor dem Gutachten 1/94 bestand, nicht vollständig wiederhergestellt. Denn der Begriff der GHP bleibt eher statisch, weil durch den Wortlaut determiniert. Es ist nicht erkennbar, dass der Vertrag von Lissabon zugleich den Auftrag enthält, den Begriff der Handelspolitik wieder in „einer offenen Perspektive" zu sehen, so dass die Begriffsbildung etwa auf der Ebene der WTO den europarechtlichen Begriff erneut prägen könnte,[204] selbst wenn nach der Änderung durch den Vertrag von Lissabon nur noch wenige Bereiche verbleiben, die von den Handelspartnern als Teil von handelspolitischen Abkommen gesehen werden, ohne Teil der GHP i. S. v. Art. 207 AEUV zu sein (das betrifft z. B. Portfolioinvestitionen, bestimmte Verkehrsfragen und jetzt den Bereich "*Investor State Dispute Settlement*").

Eine gewisse Dynamik hinsichtlich der Zuständigkeiten der EU ist aber aufgrund anderer Mechanismen des AEUV dennoch möglich. Insbesondere der in Art. 3 (2) und Art. 216 (1) kodifizierte „AETR-Effekt" erlaubt es,[205] durch Wahrnehmung von Innenkompetenzen den Kompetenzrahmen der Union auch nach außen abzurunden, und zwar auch insoweit, als der Wortlaut von Art. 207 (oder andere Vorschriften des AEUV) eine einschränkende Auslegung des Begriffs „Handelspolitik" erfordern (wie z. B. im Bereich Verkehr oder der Portfolioinvestitionen).

3. Die Rechtsprechung nach Lissabon, einschließlich des Gutachtens 2/15 (Freihandelsabkommen mit Singapur)

Der Gerichthof hat nach Inkrafttreten des Vertrages von Lissabon auf die Vertragsänderungen reagiert, die er als „*bedeutsame Entwicklung des Primärrechts der Union*" bezeichnet.[206] Dabei nimmt der Gerichtshof zum einen auf die expliziten Änderungen in Art. 207 (1) AEUV Bezug, wodurch die Handelspolitik um „neue Aspekte des heutigen internationalen Handels" erweitert worden sei (also insbesondere unter Einbeziehung aller Dienstleistungen (außer Verkehrsdienstleistungen), der nichttarifären („anderen") Beschränkungen des internationalen

[204] In den Worten des EuGH, Gutachten 1/78, „Naturkautschuk", Slg. 1979, 2871, 2913. Eine erneute dynamische Interpretation befürworten Cottier/Trinberg, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 207, Rn. 10. Eine (offenbar begrenzte) interpretatorische Dynamik hält auch GAin Sharpston für möglich, vgl. SA. Gutachen 2/15, Rn. 98 ff.

[205] Siehe dazu oben, Kapitel 1.

[206] EuGH, Daiichi Sankyo, C-414/11, EU:C:2013:520, Rn. 46 und 48; EuGH (Plenum), Gutachten 2/15 v. 16.05.2017, ECLI:EU:C:2017:376 , (siehe Fn. 1), Rn. 141.

Handelsverkehrs, der handelsbezogenen Aspekte des geistigen Eigentums und der ausländischen Direktinvestitionen).[207]

Der Gerichtshof knüpft hinsichtlich von Inhalt und Grenzen der gemeinsamen Handelspolitik an den Wortlaut an:[208] *„Gemäß Art. 207 (1) AEUV wird diese Politik, nach einheitlichen Grundsätzen gestaltet; dies gilt insbesondere für die Änderung von Zollsätzen, für den Abschluss von Zoll- und Handelsabkommen, die den Handel mit Waren und Dienstleistungen betreffen, und für die Handelsaspekte des geistigen Eigentums, die ausländischen Direktinvestitionen, die Vereinheitlichung der Liberalisierungsmaßnahmen, die Ausfuhrpolitik sowie die handelspolitischen Schutzmaßnahmen* [...]. *Die gemeinsame Handelspolitik wird im Rahmen der Grundsätze und Ziele des auswärtigen Handelns der Union gestaltet. Aus dieser Bestimmung, insbesondere aus ihrem Satz 2, wonach die gemeinsame Handelspolitik zum „auswärtigen Handeln der Union" gehört, geht hervor, dass diese Politik den Handelsverkehr mit Drittländern betrifft."*[209]

Innerhalb der Wortlautgrenzen ist für den Gerichtshof das Ziel des zu beurteilenden Abkommens entscheidend. Wie schon im Gutachten 2/92 angedeutet, betont der Gerichtshof jetzt, dass *„nach ständiger Rechtsprechung ein Rechtsakt der Union, wie ein von dieser geschlossenes Abkommen, nicht schon deshalb zu der Kategorie von Rechtsakten, die unter die gemeinsame Handelspolitik fallen, zählt, weil er bestimmte Auswirkungen auf den Handelsverkehr mit einem oder mehreren Drittstaaten haben kann. Dagegen ist ein Rechtsakt der Union Teil der gemeinsamen Handelspolitik, wenn er speziell diesen Handelsverkehr betrifft, weil er ihn im Wesentlichen fördern, erleichtern oder regeln soll und sich direkt und sofort auf ihn auswirkt."*[210]

Diese Rechtsprechung nähert sich hinsichtlich der Begriffsbestimmung von Maßnahmen, die zur gemeinsamen Handelspolitik gehören, damit der historischen Rechtsauffassung des Rates an, nach der handelspolitische Maßnahmen solche seien, die der *„Beeinflussung von Handelsströmen dienen"*.[211]

Allerdings ist für den Gerichtshof der Strukturwandel durch die Einbeziehung der GHP in das Gesamtkonzept des auswärtigen Handels der EU durch Art. 21 EUV und Art. 205 AEUV (der Gerichtshof erwähnt Art. 206 nicht ausdrücklich) ebenso bedeutsam.[212] Dadurch muss sich auch die GHP an den dort

[207] Behrends, u. a., BT-Gutachten, aaO. (Fn. 76), S. 8.

[208] EuGH, Gutachten 2/15, Rn. 34 ff.

[209] EuGH, Gutachten 2/15, Rn. 35 unter Hinweis auf seine Urteile Daiichi Sankyo, C-414/11, EU:C:2013:520, Rn. 50, sowie Kommission/Rat, C-137/12, EU:C:2013:675, Rn. 56.

[210] EuGH, Gutachten 2/15, Rn. 36, unter Hinweis auf seine „ständige Rechtsprechung", u. a. Urt. Daiichi Sankyo, C-414/11, EU:C:2013:520, Rn. 51, sowie Kommission/Rat, C-137/12, EU:C:2013:675, Rn. 57, und Gutachten 3/15 [Vertrag von Marrakesch über den Zugang zu veröffentlichten Werken], EU:C:2017:114, Rn. 61.

[211] Vgl. Stellungnahme des Rates im Gutachtenverfahren 1/78 [Naturkautschuk], Slg. 1979, 2871, 2887, sowie seine Position in des Sache C-411/06, Kommission/EP und Rat, Slg. 2009, I-7585, Rn. 38).

[212] EuGH, Gutachten 2/15, Rn. 142.

genannten Grundsätzen (u. a. Demokratie, Rechtsstaatlichkeit, Menschen- und Grundrechte) und Zielen der EU orientieren.[213] Der Gerichtshof verweist darüber hinaus auf die sog. Querschnittsklauseln in Art. 9 und 11 AEUV (allerdings ohne Art. 7 AEUV (Kohärenzgebot) oder die Querschnittklauseln in Art. 12 und 13 AEUV ausdrücklich zu erwähnen).[214] Der Gerichtshof folgert aus der Bindung der GHP an diese Grundvorgaben, dass deren Berücksichtigung, und damit auch die Regelung von solchen Querschnittsthemen, in handelspolitischen Übereinkünften möglich sein muss. Hinsichtlich des Freihandelsabkommens mit Singapur hat der Gerichtshof so insbesondere die Regelungen in dessen Kapitel 13 (zu Handel und nachhaltiger Entwicklung) als Teil der ausschließlichen, handelspolitischen Zuständigkeiten der EU eingeordnet,[215] soweit diese inhaltlich einen spezifischen Bezug zum Handelsverkehr haben. (Eine nähere Diskussion der Bedeutung von Art. 21 EUV und der komplexen Zielvorgaben folgt unten im Zusammenhang mit Frage 20 (Rn. 201 ff.).

Hinsichtlich der von der GHP erfassten Bereiche, hat der EuGH inzwischen Folgendes entschieden:

- Das TRIPS-Übereinkommen der WTO fällt in den Bereich der GHP und damit in die ausschließliche Zuständigkeit der Union;[216]
- Das Europäische Übereinkommen über den rechtlichen Schutz von zugangskontrollierten Diensten[217], in dem es darum ging, einheitliche Standards zum Schutz solcher Dienste, die unionsintern bestanden (und allenfalls im Detail geändert wurden),[218] auch im Verhältnis zu Drittstaaten zu vereinbaren, fällt in den Bereich der gemeinsamen Handelspolitik, u. a. weil das Hauptziel die Förderung rechtmäßigen Handels und das Unterbinden illegalen Handels mit Drittstaaten war;[219]
- Demgegenüber fällt der Vertrag von Marrakesch über den Zugang zu veröffentlichten Werken (insbesondere durch behinderte Personen) nicht unter die gemeinsame Handelspolitik, weil darin nichtkommerzielle Erleichterungen für Behinderte geregelt wurden, vor allem aber, weil

[213] Vgl. EuGH, Gutachten 2/15, Rn. 143-145; Behrends u. a., BT-Gutachten, aaO., Fn. 76, S. 8; vgl. Herrmann/Müller-Ibold in: Die Entwicklung des europäischen Außenwirtschaftsrechts, EuZW 2016, 646, (647).

[214] Vgl. EuGH, Gutachten 2/15, Rn. 143-145; Behrends u. a., BT-Gutachten, aaO., Fn. 76, S. 8.

[215] Vgl. EuGH, Gutachten 2/15, Rn. 147 ff.; Behrends u. a., BT-Gutachten, aaO., Fn. 76, S. 9, 13 f.

[216] EuGH, Daiichi Sankyo, C-414/11, EU:C:2013:520, Rn. 49-61, vgl. Herrmann/Müller-Ibold in: Die Entwicklung des europäischen Außenwirtschaftsrechts, EuZW 2016, 646.

[217] ABl. 2011, L 336/2.

[218] Richtlinie 98/84/EG über den rechtlichen Schutz von zugangskontrollierten Diensten und von Zugangskontrolldiensten, ABl. 1998 L 320, S. 54).

[219] EuGH, C-137/12, Kommission/Rat, ECLI:EU:C:2013:675, Rn. 74, vgl. Herrmann/Müller-Ibold in: Die Entwicklung des europäischen Außenwirtschaftsrechts, EuZW 2016, 646.

die Regelungen zu einer Änderung der bestehenden Binnenmarktregelung geführt hätten, also eine inhaltliche Harmonisierung und weniger der (kommerzielle) Handel mit Drittstaaten im Vordergrund steht.[220] Dennoch fällt das Abkommen gemäß Art. 3 (2) AEUV in die ausschließliche Zuständigkeit der Union.[221]

- Die folgenden Regelungsbereiche des Freihandelsabkommens mit Singapur:
  - Die Regelungen, die den Marktzugang betreffen, ordnet der EuGH der GHP zu, und sieht insbesondere den Handelsbezug als ohne Weiteres gegeben an.[222] Dazu gehören Inländerbehandlung, Marktzugang für Waren, handelspolitische Schutzmaßnahmen, technische Handelshemmnisse, gesundheitspolizeiliche und pflanzenschutzrechtliche Maßnahmen, Zoll- und Handelserleichterungen, Abbau nichttarifärer Handelshemmnisse, Investitionen im Bereich der Erzeugung erneuerbarer Energien, Regelungen zu Dienstleistungen aller Art (unabhängig von der Art ihrer Erbringung (außer Verkehr)), Niederlassungsfreiheit und elektronischem Geschäftsverkehr sowie im Bereich des öffentlichen Beschaffungswesens (außer Verkehr)).
  - Hinsichtlich der Regelungen, die nicht unmittelbar dem Marktzugang dienen (sondern Bereiche betreffen wie Investitionsschutz für Direktinvestitionen (durch Inländerbehandlung, Willkürverbot, Schutz vor entschädigungsloser Enteignung, Schutz vor Diskriminierung und Rechtsunsicherheit),[223] Schutz des geistigen Eigentums[224] und des Wettbewerbs[225]), prüft der EuGH die Handelsauswirkungen genauer und betont, dass die Regelungen im konkreten Fall nicht den Binnenmarkt regeln oder harmonisieren, sondern auf die Erleichterung des Handelsverkehrs mit Singapur abstellen und deshalb der GHP zugeordnet werden können.[226] Dies entspricht dem Ansatz im Gutachten 3/2015 und der Rechtssache C-137/12.
  - Nicht zur GHP gehören demgegenüber Regelungen zu Verkehrsdienstleistungen (wegen der ausdrücklichen Ausnahme in Art. 207 (5) AEUV),[227] des öffentlichen Beschaffungswesens im Bereich Verkehr

[220] Gutachten 3/15 [Vertrag von Marrakesch über den Zugang zu veröffentlichten Werken], EU:C:2017:114, Rn. 101.

[221] Gutachten 3/15, ibid., Rn. 102-130.

[222] EuGH, Gutachten 2/15, Rn. 40 ff.

[223] EuGH, Gutachten 2/15, Rn. 78-110.

[224] EuGH, Gutachten 2/15, Rn. 111-130.

[225] EuGH, Gutachten 2/15, Rn. 131-138.

[226] Behrends u. a., BT-Gutachten, aaO., Fn. 76, S. 13 f.

[227] EuGH, Gutachten 2/15, Rn. 57 ff.; die Ausnahme für den Verkehr erfasst auch „andere Dienstleistungen, wenn sie naturgemäß mit einer körperlichen Handlung der Beförderung von Personen

(aus dem gleichen Grund)[228] und der Portfolioinvestitionen (wegen des auf Direktinvestitionen beschränkten Wortlauts von Art. 207 (1)).[229]

- Der Gerichtshof betont, dass im Grundsatz alle institutionellen Vorschriften, die Vorschriften über Transparenz, das Verfahren sowie die Streitbeilegung in internationalen Übereinkünften akzessorischen Charakter haben und damit in den Regelungsbereich der GHP fallen, soweit die materiellen Regeln der Übereinkunft in den Bereich der GHP fallen oder sonst der ausschließlichen Zuständigkeit der Union unterliegen.[230] Nur hinsichtlich des "*Investor-State Dispute Settlement*" macht er eine Ausnahme, weil diese Vorschriften tief in das Prozessrecht der Mitgliedstaaten eingreifen (was hinsichtlich der zwischenstaatlichen Streitbeilegung nicht der Fall sei).[231]

4. Ergebnis: Der Begriff der Handelspolitik nach Lissabon und Singapur

Vor diesem Hintergrund lässt sich als Zwischenergebnis festhalten, dass nach der Rechtsprechung des Gerichtshofs, so wie sie sich im Gutachten 2/15 manifestiert hat (jüngst bestätigt im Urteil vom 25.Oktober 2017 in der Rechtsache C-389/15),[232] eine Maßnahme der gemeinsamen Handelspolitik i. S. v. Art. 207 AEUV unterliegt, wenn sie:

- „*speziell den Handelsverkehr* [für Waren und Dienstleistungen aller Art] *mit einem oder mehreren Drittstaaten betrifft, weil er ihn im Wesentlichen fördern, erleichtern oder regeln soll und sich direkt und sofort auf ihn auswirkt*";
- nicht vorrangig der Harmonisierung von Regeln im Binnenmarkt dient und
- nicht einem Bereich zuzuordnen ist, für den der AEUV ausdrücklich Sonderregeln vorsieht (d.h. Verkehr und im Umkehrschluss des Wortlauts von Art. 207 Portfolioinvestitionen).

Dabei kommt es darauf an, dass die Regelung „im Wesentlichen" dem Ziel der Regelung des Handelsverkehrs dient; untergeordnete Nebenziele ändern

oder Waren von einem Ort zum anderen mittels eines Verkehrsmittels verbunden sind", aaO. Rn. 61 unter Hinweis auf EuGH, C-168/14, Grupo Itevelesa u. a., EU:C:2015:685, Rn. 45, 46).

[228] EuGH, Gutachten 2/15, Rn. 77.

[229] EuGH, Gutachten 2/15, Rn. 83.

[230] EuGH, Gutachten 2/15, Rn. 276 ff. unter Hinweis auf seine ständige Rspr.: Gutachten 1/76 [Stilllegungsfonds für die Binnenschifffahrt], EU:C:1977:63, Rn. 5, Gutachten 1/78 [Internationales Naturkautschukübereinkommen], EU:C:1979:224, Rn. 56, 48; und Kommission/Rat, C-137/12, EU:C:2013:675, Rn. 70, 71).

[231] EuGH, Gutachten 2/15, Rn. 285-293 (ISDS), Rn. 294-304 (SSDS).

[232] EuGH, C-389/15, Kommission/Rat [Lissabonner Abkommen über Ursprungsbezeichnungen], Rn. 49 ff.

daran nichts. Zulässig sind auch Vorschriften, mit denen weitergehende Querschnittsmaterien geregelt werden, damit den weiteren außenpolitischen Zielen der Union, in die die GHP eingebettet ist, Rechnung getragen werden kann.

B. Die konkreten Fragen der Generalberichterstatter

Frage 16

Hinsichtlich der Frage nach dem Begriff der gemeinsamen Handelspolitik aus deutscher Sicht nach der Entscheidung des Gerichtshofs im Gutachten 2/15 hat der Verfasser soeben unter A. seine Analyse dargestellt. Nachfolgend wird auf die konkreten Einzelfragen der Generalberichterstatter eingegangen.

a. GHP und Investitionen

Was ist der Standpunkt der Mitgliedstaaten, hinsichtlich der ausländischen Direktinvesti-tionen? Beinhaltet dieser Begriff [gemeinsame Handelspolitik] auch Portfolioinvestitionen?

Mein Eindruck ist, dass der Auffassung des Gerichtshofs, die Union sei für internationale Übereinkünfte im Bereich der ausländischen Direktinvestitionen ausschließlich zuständig, während die Zuständigkeiten für den Bereich der Portfolioinvestitionen bei den Mitgliedstaaten verblieben seien, zunehmend zugestimmt wird. Deren Richtigkeit ergäbe sich aus dem Wortlaut und dem Willen der Mitgliedstaaten bei der Abfassung des Vertrages von Lissabon. Diese Auffassung hat auch das Bundesverfassungsgericht wiederholt vertreten.[233]

Die Anknüpfung der Definition von „Direktinvestitionen" an Kontrollerwerb und Teilhabe an der Verwaltung des Zielunternehmens durch den Gerichtshof sei im Grundsatz richtig.[234] Die Feststellung des Gerichtshofs, dass sich „*Art. 207 (1) AEUV allgemein auf Handlungen der Union im Bereich der „ausländischen Direktinvestitionen*" [bezieht], *ohne danach zu unterscheiden, ob die Handlungen die Zulassung oder den Schutz dieser Investitionen zum Gegenstand haben*"[235], wurde aufmerksam registriert. Die Zuständigkeiten für die Außenvertretung im Bereich

[233] Vgl. etwa BVerfG, Urt. v. 30.06.2009 (Lissabon) – 2 BvE 2/08, BVerfGE 123, 267, ECLI:DE:BVerfG:2009:es20090630.2bve000208, Rn. 371.

[234] Gutachten 2/15, aaO. Rn. 80: „*Direktinvestitionen bestehen nach ständiger Rechtsprechung in Investitionen jeder Art durch natürliche oder juristische Personen zur Schaffung oder Aufrechterhaltung dauerhafter und direkter Beziehungen zwischen denjenigen, die die Mittel bereitstellen, und den Unternehmen, für die die Mittel zum Zweck einer wirtschaftlichen Tätigkeit bestimmt sind. Eine Beteiligung an einem als Aktiengesellschaft gegründeten Unternehmen ist eine Direktinvestition, wenn die Aktien ihrem Inhaber die Möglichkeit geben, sich tatsächlich an der Verwaltung dieser Gesellschaft oder an deren Kontrolle zu beteiligen*" unter Hinweis auf EuGH , C-446/04, Test Claimants in the FII Group Litigation, EU:C:2006:774, Rn. 181, 182, C-326/07, Kommission/Italien, EU:C:2009:193, Rn. 35, und C-464/14, SECIL, EU:C:2016:896, Rn. 75, 76).

[235] Gutachten 2/15, aaO. Rn. 87.

der Portfolioinvestition können sich durch interne Rechtssetzung der Union weiter verschieben, womit aber nicht unmittelbar zu rechnen sei.

In Deutschland wird auch aufmerksam beobachtet, dass die Kommission offenbar eine Trennung von Freihandelsabkommen (EU-only) und Investitionsschutzabkommen (gemischte Abkommen) anstrebt (siehe dazu unten, Rn. 192). Dies wird als technisch machbare Lösung angesehen, die aber in der Praxis komplexe Frage aufwerfe, weil es zunehmend schwerer sei, Marktzugang inhaltlich vom Investitionsschutz zu trennen.

Demgegenüber habe ich den Eindruck, dass die Haltung des Gerichtshofs, der Union stehe das Recht zu bestehende Investitionsschutzabkommen der Mitgliedstaten im Einvernehmen mit dem Drittstaat aufzuheben, mit einer gewissen Skepsis begegnet wird. Denkbar sei, dass die Mitgliedstaaten unionsrechtlich zur Kündigung bestimmter Abkommen verpflichtet seien und dass die Kommission dies im Wege von Vertragsverletzungsverfahren durchsetzen könne. Aber eine „Ersatzvornahme" durch die Kommission unmittelbar sei völkerrechtlich problematisch, und es sei zweifelhaft, ob betroffenen Drittstaaten einseitige Kündigungen solcher Abkommen akzeptieren würden.

In der deutschen Literatur sind bis zum Urteil im Gutachten 2/15 ganz gegensätzliche Auffassungen vertreten worden, die von einer weitgehenden Kompetenzerhaltung der Mitgliedstaaten über eine (naheliegende) Mittelmeinung[236] bis zur ausschließlichen Zuständigkeit der Union (analog der Argumentation der Kommission im Gutachtenverfahren 2/15) reichen.[237] Für eine weite Unionskompetenz wird vorgetragen, (i) schon die Ausübung der externen Zuständigkeiten begründe die Kompetenz, (ii) die Zuständigkeit sei i. S. v. Art. 3 (2) notwendig zur Zielerreichung, (iii) die Union habe bereits ausreichend viel Sekundärrecht erlassen oder (iv) der eigentumsrechtliche Schutz beider Investitionsformen sei sachlich verwandt und es bestünde ein Bedürfnis, beide Investitionsformen einheitlich zu behandeln, sodass jedenfalls eine ausschließliche Zuständigkeit der Union gemäß Art. 3 (2) AEUV anzunehmen sei.[238]

[236] Direktinvestitionen fallen in den Zuständigkeitsbereich der EU, Portfolioinvestitionen verbleiben im Zuständigkeitsbereich der Mitgliedstaaten, so etwa Weiß, in: Grabitz, aaO. (Fn. 2), Art. 207 AEUV, Rn. 44 ff.; Cottier/Trinberg, in: von der Groeben, Art. 207 AEUV, Rn. 59; Mayr: „Mixed" oder „EU-only" – Sind die Investitionsschutzbestimmungen im CETA von der Außenhandelskompetenz der EU „gedeckt"? EuR 2015, 575.

[237] Vgl. die Übersicht bei Weiß, in: Grabitz, aaO. (Fn. 2), Art. 207 AEUV, Rn. 46, unter Hinweis etwa auf Herrmann, EuZW 2010, 207, 209 f.; zum Meinungsstand s.a. Herrmann/Müller-Ibold: Die Entwicklung des europäischen Außenwirtschaftsrechts, EuZW 2016, 646, 647 f.

[238] Franz, Anmerkung zur CETA Beschluss des BVerfG, GewArch 2017, 26, unter Hinweis auf Frenz, Handbuch Europarecht, Bd. 6, 2011, Rn. 5040, 5063; vgl auch Müller-Ibold, Handelsaspekte geistigen Eigentums sowie Investitionen, in Herrmann, Krenzler, Streinz, 2009, S. 117, 124.

Nach Verkündung des Gutachtens 2/15 ist noch nicht absehbar, ob die Autoren, die von einer weiteren Zuständigkeit ausgegangen sind, an dieser Auffassung festhalten (oder auf weitere interne Regelungen warten, um über Art. 3 (2) AEUV später eine erstarkte ausschließliche Zuständigkeit der Union für Portfolioinvestitionen begründen zu können).

b. GHP und Verkehr

Nach einer im deutschen Schrifttum verbreiteten Auffassung fallen Übereinkünfte im Bereich Verkehr nicht unter den Begriff der gemeinsamen Handelspolitik. Art. 207 (5) AEUV sei insoweit deutlich und eindeutig.[239] Nur in engen Ausnahmebereichen (Reservierungssysteme) sei eine Zuständigkeit (entsprechend den Überlegungen des Gerichtshofs) als Teil der gemeinsamen Handelspolitik denkbar.

Dies schließe jedoch nicht aus, dass eine ausschließliche Zuständigkeit der Union auf anderer Grundlage bestehe, namentlich Art. 3 (2) AEUV, gerade im Hinblick auf die vielfältigen verkehrspolitischen Reglungen, die in der Union bestehen. Diese weitere Frage ist in der deutschen Literatur durchaus umstritten.[240] Die Überlegungen von GAin Sharpston und des Gerichtshofs zu den Vertragsschlusskompetenzen im Bereich des Verkehrs sowie erste Reaktion darauf sind oben im Rahmen von Kapitel I (Rn. 27 ff.) näher dargestellt worden.

Dass die Union in diesem Bereich über weitreichende Zuständigkeiten auch für das Handeln nach außen verfügt, ist durch Urteil und Schlussanträge im Verfahren C-600/14 (Deutschland/Rat) (OTIF) jüngst noch einmal betont worden. Auch soweit es unionsintern zu zivilrechtlichen Haftungsfragen im Eisenbahnverkehr keine internen Regelungen gibt,[241] folgt aus der weiten Formulierung von Art. 216 (1) einerseits und dem weiten Regelungsbereich der Verkehrspolitik andererseits, dass die gemeinsame Festlegung eines im Rahmen der OTIF einzunehmenden Standpunkts „*im Sinne des Art. 216 Abs. 1 AEUV im Rahmen der Politik der Union zur Verwirklichung eines der in den Verträgen festgesetzten Ziele erforderlich*“ ist, und deshalb in die Zuständigkeit der Union fällt.[242]

c. GHP und TRIPS

Die Rechtsprechung des EuGH lässt kaum Zweifel, dass das TRIPS-Übereinkommen („*Agreement on Trade related Aspects of Intellectual Property Rights*“) seit dem

[239] Cottier/Trinberg, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 207 Rn. 39; Weiß, in: Grabitz, aaO. (Fn. 2), Art. 207 Rn. 54, m.w.N.)

[240] Behrends u. a., BT-Gutachten, aaO., Fn. 76, S. 17 m. w. N.

[241] EuGH, Urt. v. 05.12.2017; C-600/14, Deutschland/Rat, ECLI:EU:C:2017:935; ebenso Schlussanträge GA Szpunar, C-600/14, ECLI:EU:C:2017:296, Rn. 136, 140-144, 151, 153-155.

[242] EuGH, ibid., Rn. 43-72.

Inkrafttreten des Lissabonner Vertrages in seiner Gesamtheit in den Bereich der GHP und damit in die ausschließliche Zuständigkeit der Union fällt.[243] Dies hatte der Gerichtshof bereits im Urteil Daiichi Sankyo in relativ klarer Form zum Ausdruck gebracht, unter ausdrücklicher Aufgabe der Rechtsprechung zu früheren (vor Lissabon) Vertragsfassungen.[244]

In seinem Urteil Daiichi Sankyo stützte sich der Gerichtshof sowohl auf den Wortlaut von Art. 207 (1) AEUV (der nach Änderung von Art. 207 (1) die GHP auf „*the commercial aspects of intellectual property*" erstreckt) als auch auf den Sinn und Zweck von TRIPS. Der Gerichtshof betonte,[245] dass „*der Hauptzweck des TRIPS-Übereinkommens darin besteht, den Schutz des geistigen Eigentums weltweit zu verstärken und zu harmonisieren* [m.w.N]. *Wie aus seiner Präambel hervorgeht, soll das TRIPS-Übereinkommen Verzerrungen des internationalen Handels dadurch verringern, dass es im Hoheitsgebiet aller WTO-Mitglieder einen wirksamen und angemessenen Schutz der Rechte des geistigen Eigentums gewährleistet*." Die Regeln über die Verfügbarkeit, den Umfang und die Ausübung der Rechte des geistigen Eigentums dienten dazu, die einschlägigen Regeln weltweit zu vereinheitlichen und damit den internationalen Handelsverkehr zu erleichtern. Diese Regeln stünden daher „*im Zusammenhang mit der Liberalisierung des internationalen Handelsverkehrs und nicht mit der Harmonisierung der Rechtsvorschriften der Mitgliedstaaten der Union*."

Gegen dieses Ergebnis hatten verschiedene Mitgliedstaaten und auch Deutschland Einwände erhoben. Im Rahmen des Gutachtenverfahrens 2/15 zum EUSFTA trugen sie u. a. vor, das Urteil Daiichi Sankyo habe sich nur auf Art. 27 TRIPS bezogen. Selbst wenn es weiter gemeint gewesen sei, könne man jedenfalls die Vorschriften zu „Zivil-und Verwaltungsverfahren und Rechtsbehelfe" nicht unter den Begriff der GHP einordnen.

Schließlich seien Regelungen zu den Urheberpersönlichkeitsrechten ("*moral rights*", die den Bestand, jedoch nicht die Ausübung der Rechte betreffen) nicht handelsbezogen und nicht Teil der GHP. Dazu konnten sich die Mitgliedstaaten zum einen darauf berufen, dass selbst das TRIPS-Übereinkommen diese "*moral rights*" weitgehend ausklammert (gemäß Art. 9 (1), (2) TRIPS). Außerdem konnten sie auf eine bestehende Rechtsprechung im Bereich des Binnenmarkts verweisen, die zwischen Bestand der Rechte und der binnenmarktrelevanten

[243] EuGH, Daiichi Sankyo, C-414/11, EU:C:2013:520, Rn. 49-61; Gutachten 2/15, FTA Singapore, Rn. 130.
[244] EuGH, Daiichi Sankyo, C-414/11, EU:C:2013:520, Rn. 48: „*Unter Berücksichtigung dieser bedeutsamen Entwicklung des Pimärrechts ist* [für] *die Frage der (...) ausschließliche*[n] *Zuständigkeit der Union für die gemeinsame Handelspolitik (...) daher weder das Gutachten 1/94 (...), noch das Urteil Merck Genéricos – Produtos Farmaceuticos* [C-431/05, Slg. 2007, I-7001] *erheblich, mit dem zu einem Zeitpunkt, zu dem Art. 133 EG galt, die von der Union übernommenen Verpflichtungen aus dem TRIPS-Übereinkommen von den bei den Mitgliedsstaaten verbliebenen abgegrenzt wurden.*"
[245] EuGH, Daiichi Sankyo, C-414/11, EU:C:2013:520, Rn. 58-60.

Ausübung dieser Rechte unterscheidet.[246] Auf der anderen Seite ist inzwischen die Regelungsdichte im Sekundärrecht hinsichtlich der Harmonisierung der Regeln zum geistigen Eigentum so groß geworden, dass sich mit guten Argumenten vertreten lässt, die ausschließliche Zuständigkeit der Union bestünde jedenfalls auf der Grundlage von Art. 3 (2) AEUV.[247]

Schon die Schlussanträge von GAin Sharpston wiesen die meisten dieser Einwände zurück, mit Ausnahme der Fragen, die sich auf die Regelung von "*moral rights*" beziehen. Nach Auffassung der GAin habe sich das Urteil Daiichi Sankyo auf das TRIPS-Übereinkommen insgesamt bezogen, und Vorschriften, die das „Zivil- und Verwaltungsverfahren und Rechtsbehelfe" nach nationalem Recht beträfen, dienten der Transparenz und dem wirksamen Schutz der garantierten (handelsbezogenen) Rechte und zur Durchsetzung von Verpflichtungen und bildeten deshalb einen integralen Bestandteil der gemeinsamen Handelspolitik der Union.[248] Die GAin betont, sie stimme mit Generalanwalt Wahl darin überein, *„dass Rechte des geistigen Eigentums von ihrer Natur her überwiegend handelsbezogen sind, da sie im Wesentlichen ausschließliche Rechte sind, die Monopole begründen, die den freien Waren- oder Dienstleistungsverkehr einschränken können. In einer Marktwirtschaft besteht die hauptsächliche Bedeutung dieser Rechte in ihrem wirtschaftlichen Wert. Sofern ihre Ausübung für die kommerzielle Nutzung des geschützten geistigen Eigentums auf einem grenzüberschreitenden Markt von wesentlicher Bedeutung ist, fallen diese Rechte unter die, Handelsaspekte des geistigen Eigentums'."*[249]

Vor diesem Hintergrund sieht die GAin einen Unterschied zwischen TRIPS und dem EUSFTA: *„Anders als das TRIPS-Übereinkommen inkorporiert Art. 11.4 des EUSFTA (über den für das Urheberrecht und verwandte Schutzrechte gewährten Schutz) alle Rechte und Pflichten aus der Berner Übereinkunft. Er umfasst somit Art. 6bis dieser Übereinkunft, der Urheberpersönlichkeitsrechte schützt. Art. 6bis selbst unterscheidet Urheberpersönlichkeitsrechte von vermögensrechtlichen Befugnissen des Urhebers."*[250] Sie habe *„die gesonderte – und wichtige – Rolle der Urheberpersönlichkeitsrechte bereits*

[246] Ständige Rechtsprechung etwa im Wettbewerbsrecht, vgl. EuGH, Consten Grundig, Rs 56/64 u. a., Slg. 1966, S. 394 (deutsche Fassung): *„Die in Artikel 3 des Entscheidungstenors enthaltene Anordnung, von den innerstaatlichen gewerblichen Schutzrechten nicht zur Verhinderung von Paralleleinfuhren Gebrauch zu machen, läßt den Bestand dieser Rechte unberührt und beschränkt nur ihre Ausübung, soweit dies zur Durchsetzung des Verbots des Artikels 85 (1) erforderlich ist."* Darauf weisen u. a. Cottier/Trinberg, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 207 AEUV, Rn. 40 hin.

[247] Cottier/Trinberg, von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Rn. 40, 45, dazu auch näher, Müller-Ibold, Handelsaspekte geistigen Eigentums sowie Investitionen, in Herrmann, Krenzler, Streinz, Die Außenwirtschaftspolitik nach dem Verfassungsvertrag, 2006, S. 117.

[248] GAin Sharpston, SA, Gutachten 2/15, FTA Singapore, Rn. 430, 449 f.

[249] GAin Sharpston, SA, Gutachten 2/15, FTA Singapore, Rn. 436, unter Hinweis auf die SA des GA Wahl zu Gutachten 3/15 (Vertrag von Marrakesch, EU:C:2016:657, Rn. 56.

[250] GAin Sharpston, SA, Gutachten 2/15, FTA Singapore, Rn. 452.

betont. Diese Rolle wird im EUSFTA eindeutig anerkannt. Diese Rechte sind jedoch ebenso eindeutig nicht handelsbezogen. Ich komme daher zu dem Ergebnis, dass, soweit Kapitel Elf für nicht handelsbezogene Aspekte des geistigen Eigentums gilt, die Zuständigkeit der Union für den Abschluss dieser Teile dieses Kapitels nicht auf Art. 207 (1) AEUV gestützt werden kann."[251]

Der Gerichtshof kommt demgegenüber zu dem Ergebnis, dass alle Regelungen zu geistigem Eigentum im EUSFTA unter den Begriff der GHP und damit in die ausschließliche Zuständigkeit der Union fallen. Er bestätigt zunächst, dass es auch insoweit darauf ankommt, ob die betroffenen Regelungen „*einen spezifischen Bezug zum internationalen Handelsverkehr haben, weil sie ihn im Wesentlichen fördern, erleichtern oder regeln sollen und sich direkt und sofort auf ihn auswirken.*"[252]

Der Gerichtshof beschreibt sodann die verschiedenen Bestimmungen in Kapitel 11 und fasst sein Ergebnis wie folgt zusammen: „*Aus dem Vorstehenden folgt erstens, dass die Bestimmungen von Kapitel 11 des geplanten Abkommens, wie in seinem Art. 11.1 (6) ausgeführt, tatsächlich darauf gerichtet sind, ‚die Produktion und Vermarktung innovativer und kreativer Erzeugnisse sowie die Erbringung von Dienstleistungen zwischen den Vertragsparteien zu erleichtern' und ‚die Vorteile aus Handel und Investitionen* [...] *zu steigern'. Daraus folgt zweitens, dass dieses Kapitel keineswegs die Harmonisierung von Rechtsvorschriften der Mitgliedstaaten der Union betrifft, sondern dass es die Liberalisierung des Handelsverkehrs zwischen der Union und der Republik Singapur regelt. Drittens zeigt sich in Anbetracht der wesentlichen Bedeutung, die dem Schutz von Rechten des geistigen Eigentums im Waren- und Dienstleistungshandel allgemein* [...] *zukommt* [...], *dass sich die Bestimmungen von Kapitel 11 des geplanten Abkommens direkt und sofort auf den Handelsverkehr zwischen der Union und der Republik Singapur auswirken können.*"[253]

Ausdrücklich (wenn auch sehr knapp) widmet sich der Gerichtshof den von Mitgliedstaaten und GAin Sharpston vorgetragenen Bedenken, dass Kapitel 11 auch Regelungen zum Urheberpersönlichkeitsrecht enthalte, die sich nicht unter den Begriff der „Handelsaspekte des geistigen Eigentums" (und damit unter den Begriff der GHP) einordnen ließen. Ohne die ausführliche Analyse der GAin auch nur zu erwähnen, betont der Gerichtshof: „*Nach Ansicht einiger Mitgliedstaaten, die vor dem Gerichtshof Erklärungen abgegeben haben, umfasst Kapitel 11 des geplanten Abkommens auch nicht handelsbezogene Aspekte des geistigen Eigentums, da Art. 11.4 für*

[251] GAin Sharpston, SA, Gutachten 2/15, FTA Singapore, Rn. 454. Dieses Ergebnis beruht auf der Überlegung der GAin, dass „*soweit eine Übereinkunft wie das EUSFTA die Entstehung und den Schutz von Persönlichkeitsrechten umfasst, die Rechtsgrundlage für den Abschluss dieser Übereinkunft nicht allein Art. 207 (1) AEUV sein kann*", ibid., Rn. 437.

[252] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 112; unter Hinweis auf Daiichi Sankyo, C-414/11, EU:C:2013:520, Rn. 58, u. a.

[253] Ibid., Rn. 127, ebenso EuGH, Urt. v. 25.10.2017, C-389/15, Kommission/Rat, Rn. 72 zum Lissabonner Abkommen über Ursprungsbezeichnungen und geografische Angaben.

das Urheberrecht und verwandte Schutzrechte auf multilaterale Übereinkünfte verweise, die auch die Urheberpersönlichkeitsrechte regelten. Der Verweis im geplanten Abkommen auf diese Übereinkünfte reicht jedoch im Rahmen der Bestimmung der Art der Zuständigkeit der Union zum Abschluss des geplanten Abkommens nicht für die Annahme aus, dass dieser Bereich fester Bestandteil des Abkommens ist, in dem die Urheberpersönlichkeitsrechte nicht erwähnt werden."[254]

Der Gerichtshof unterscheidet hier (in der französischen Fassung wird dies nach meinem Eindruck noch deutlicher) zwischen Regelungen im EUSFTA selbst (in dem "*moral rights*" nicht erwähnt werden) und einem Verweis (« *renvoi* » oder "*reference*") auf bestehende andere Abkommen.[255] Der Gerichtshof hält offenbar einen reinen Verweis nicht für problematisch, selbst wenn dadurch Vorschriften aus anderen internationalen Übereinkünften in das EUSFTA „inkorporiert" und inhaltlich verbindlich werden (eine Tatsache, die die GAin betont hatte). Hinsichtlich des EUSFTA spricht dafür immerhin, dass die Geltungskraft der in Bezug genommen Übereinkünfte (und der von der GAin für problematisch erachteten „*moral rights*") zwischen den Vertragsparteien des EUSFTA nicht in erster Linie aus dem EUSFTA folgt, sondern unmittelbar aus den Übereinkünften, an die alle Mitgliedstaaten schon seit langem gebunden waren (als Parteien dieser Abkommen).

Andererseits zeigt die Entscheidung des Gerichtshofs (und der Vergleich zu den Schlussanträgen der GAin), dass die eigenständige Regelung von Urheberpersönlichkeitsrechten durch internationale Übereinkünfte der Union nicht ohne Weiteres in den Rahmen der GHP fallen würde.[256] Wo genau die Grenze verläuft, ist noch nicht absehbar.[257] Einige Mitgliedstaaten (möglicherweise auch Deutschland) sind offenbar geneigt, diesen Punkt im Rahmen zukünftiger Rechtsstreitigkeiten (oder in der politischen Auseinandersetzung) erneut zum Gegenstand der Debatte zu machen. Nach meinem Eindruck ist die Haltung der deutschen Verwaltung hierzu uneinheitlich.

[254] Ibid., Rn. 129.

[255] Ibid., Rn. 129, die französische Fassung lautet: *« Toutefois, le renvoi par l'accord envisagé à ces conventions ne suffit pas, aux fins de déterminer la nature de la compétence de l'Union pour conclure l'accord envisagé, pour considérer que cette matière constitue une composante à part entière de ce dernier, qui ne mentionne pas les droits moraux. »*. Die englische Fassung lautet: "*However, the reference by the envisaged agreement to those conventions is not sufficient, with a view to determining the nature of the competence of the European Union to conclude the envisaged agreement, for that subject to be regarded, in its own right, as a component of that agreement, which does not mention moral rights.*"

[256] Anderer Auffassung (vor dem Gutachten 2/15): Cottier/Trinberg, von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 207, Rn. 45.

[257] Vgl. auch M. Nettesheim, Umfassende Freihandelsabkommen und Grundgesetz – Verfassungsrechtliche Grundlagen der Zustimmung zu CETA (Gutachten v. 25.06.17 für foodwatch), S. 71, (https://www.foodwatch.org/uploads/media/Nettesheim_Studie_CETA-Grundgesetz_25Juni2017.pdf).

Frage 17: Verhältnis der Investitionsschutzabkommen von Mitgliedstaaten und EU

Eine amtliche Haltung der deutschen Behörden zu dieser Frage ist dem Verfasser nicht bekannt. Nach seiner Auffassung sind für die Antwort auf diese Fragen völkerrechtliche und unionsrechtliche Überlegungen relevant.[258] Völkerrechtlich gilt zunächst der Grundsatz „*pacta sunt servanda*" aber auch das Verbot des „*venire contra factum proprium*".[259] Außerdem ist das Verhältnis von zeitlich aufeinanderfolgenden internationalen Übereinkünften in Art. 30 WVRK geregelt:

> *(3) Sind alle Vertragsparteien eines früheren Vertrags zugleich Vertragsparteien eines späteren, ohne daß der frühere Vertrag beendet oder nach Artikel 59 suspendiert wird, so findet der frühere Vertrag nur insoweit Anwendung, als er mit dem späteren Vertrag vereinbar ist.*
>
> *(4) Gehören nicht alle Vertragsparteien des früheren Vertrags zu den Vertragsparteien des späteren,*
>
> *a) so findet zwischen Staaten, die Vertragsparteien beider Verträge sind, Absatz 3 Anwendung;*
>
> *b) so regelt zwischen einem Staat, der Vertragspartei beider Verträge ist, und einem Staat, der Vertragspartei nur eines der beiden Verträge ist, der Vertrag, dem beide Staaten als Vertragsparteien angehören, ihre gegenseitigen Rechte und Pflichten.*[260]

Diese Überlegungen liegen auch Art. 351 AEUV zugrunde. Hinsichtlich von Investitionsschutzabkommen der Mitgliedstaaten (fast alle in der Form von "*bilateral investment treaties*", „BITs") hatte der Gerichtshof noch unter Geltung des EGV entschieden, dass Art. 351 AEUV (damals Art. 307 EGV) Investoren ihre Rechte unter einem BIT erhält, das der Mitgliedstaat vor Inkrafttreten des EGV für den betreffenden Mitgliedstaat abgeschlossen hatte.[261] Dabei betonte er,[262] dass ex-Art. 307 (1) EG „*nach ständiger Rechtsprechung* [bezweckt], *gemäß den Grundsätzen des Völkerrechts, wie sie sich insbesondere aus Art. 30 (4) Buchst. b des Wiener Übereinkommens über das Recht der Verträge vom 23. Mai 1969 ergeben, klarzustellen, dass die Anwendung des EG-Vertrags nicht die Pflicht des betreffenden Mitgliedstaats berührt, die Rechte von Drittländern aus einer älteren Übereinkunft zu wahren und seine entsprechenden Verpflichtungen zu erfüllen.*"

[258] Vergl. auch N. Weith, Die zukünftige Rolle der EU-Mitgliedstaaten in der EU Investitionsschutzpolitik, in: Bungenberg/Herrmann, Die gemeinsame Handelspolitik, aaO. (Fn. 161), 2011, S. 185 ff., S. Hindelang, Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik, in: Bungenberg/Herrmann, Die gemeinsame Handelspolitik, aaO. S. 157 ff

[259] Vgl. etwa. Art. 24 WVRK (aaO. Fn. 114).

[260] Art. 30 (3), (4) WVRK (aaO. Fn. 114), wobei sich für Art. 30 (4) die Frage stellt, ob die Union auch völkerrechtlich Rechtnachfolger des Mitgliedstaates anzusehen ist, der das ursprüngliche Übereinkommen geschlossen hatte.

[261] EuGH, C-264/09, Kommission/Slowakische Republik, Slg. 2011, I-8065, ECLI:EU:C:2011:580, Rn. 51 f.

[262] EuGH, ibid., Rn. 41, unter Hinweis auf die Rechtssache 812/79, Burgoa, Slg. 1980, 2787, Rn. 8.

Allerdings ist Art. 351 nach seinem Wortlaut nur auf mitgliedstaatliche Verträge anzuwenden, die vor dem 1. Januar 1958 bzw. dem Beitritt der betreffenden Mitgliedstaaten mit Drittländern abgeschlossen wurden. Das trifft auf eine Reihe von Investitionsschutzabkommen der Mitgliedstaaten zu, nicht aber auf solche, die gerade die Gründungsmitglieder der EWG ihre BITs z. T. seit den 60iger Jahren neu abgeschlossen oder erheblich modifiziert haben.

In der deutschen Literatur wird überwiegend die Auffassung vertreten, das Art. 351 AEUV nicht nur auf mitgliedstaatliche Verträge anzuwenden ist, die vor Gründung bzw. dem Beitritt der betreffenden Mitgliedstaaten mit Drittländern abgeschlossen wurden, sondern analog auch auf spätere Verträge, wenn die Zuständigkeit zum Abschluss solcher Verträge erst nach dem Beitritt auf die Union übergegangen ist und das mitgliedstaatliche Abkommen zu einer Zeit in Kraft trat, als der Mitgliedstaat noch selbst für dessen Abschluss zuständig war.[263] Dafür spricht, dass Art. 351 ohnehin nur völkerrechtliche Verpflichtungen kodifiziert, die von Sinn und Zweck auch in den Situation anwendbar werden, wo die Zuständigkeit erst nach Abschluss eines völkerrechtlichen Vertrages auf ein neues Völkerrechtssubjekt übergeht.

Die meisten bilateralen BITs sind aber vor dem Inkrafttreten des Lissaboner Vertrages (mit dem Zuständigkeit zur Regelung von „Direktinvestitionen" auf die Union überging) in Kraft getreten oder danach mit Zustimmung der Kommission abgeschlossen worden. Daraus folgt, dass Drittstaaten und „deren" Investoren jetzt und in Zukunft Rechte aus solchen BITs herleiten können, solange sie nicht außer Kraft getreten sind.

Hinsichtlich der „Altverträge" (vor dem 1. Dezember 2009) besteht aber auch die Pflicht der Mitgliedstaaten, diese möglichst unionsrechtskonform durchzuführen. Schon 1962 hatte der Gerichtshof daraus gefolgert, dass die Begriffe „Rechte und Pflichten" im heutigen Art. 351 AEUV sich auf die Rechte der Drittstaaten (die zu wahren seien) und die Pflichten der Mitgliedstaaten aus solchen Verträgen bezögen.[264] Die Rechte der Mitgliedstaaten aus solchen Verträgen seien nicht geschützt, diese seien daher unionsrechtskonform auszuüben.[265]

[263] Lavranos, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 351 Rn. 6, unter Hinweis auf Wohlfarth, in Wohlfahrt u. a., Europäische Wirtschaftsgemeinschaft, Art. 234 Rn. 5; so auch Weiß, in: Grabitz, aaO. (Fn. 2), Art. 207 AEUV, Rn. 48; Meessen, The Application of Rules of Public International Law within Community Law, CMLRev 1976,485; Terhechte, in Schwarze, EU-Kommentar, Art. 307 EGV, Rn. 15, a.A. wohl nur Manzini, EJIL 2001, 785.

[264] Lavranos, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 351 Rn. 4 unter Hinweis auf EuGH, Rs 10/61, Kommission/Italien, Slg. 1962, S. 7, 23; sowie C-324/93, Evans Medical, ECLI:EU:C:1995:84, Slg. 1995, I-596, I-607, Rn. 32.

[265] Weiß, in: Grabitz, aaO. (Fn. 2), Art. 207 AEUV, Rn. 48; Lavranos, in: von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 351, Rn. 4.

Diese Rechtslage wird durch die Verordnung 1219/2012 abgerundet.[266] Darin wird bestätigt, dass die vor dem Inkrafttreten des Vertrages von Lissabon unterzeichneten BITs zwar der Kommission notifiziert werden müssen, aber bis zum Inkrafttreten eines BIT zwischen der Union und dem betreffenden Drittstaat „*nach Maßgabe des AEUV und dieser Verordnung*" in Kraft bleiben (Art. 3 der VO). Hinsichtlich von seit dem 1. Dezember 2009 abgeschlossenen Verträgen behält sich die Kommission ein Prüfungsrecht vor. Nach Zustimmung der Kommission kann der betroffene Mitgliedstaat das Abkommen abschließen, in Kraft setzten und ändern (Art. 7, Art. 12 der VO).

BITs zwischen Mitgliedstaaten werden von der Verordnung nicht erfasst (so ausdrücklich der 15. Erwägungsgrund der VO). Dies folgt vor allem aus der Tatsache, dass die Zuständigkeit aus Art. 207 („ausländische" Direktinvestitionen) nur Investitionen in oder aus Drittstaaten umfasst.[267] Die Kommission steht solchen Abkommen zwischen Mitgliedstaaten seit einigen Jahren kritisch gegenüber. Hinsichtlich solcher BITs und insbesondere deren ISDS-Regeln, ist gegenwärtig vor dem Gerichtshof ein Vorabentscheidungsersuchen des deutschen Bundesgerichtshofs anhängig, in dem die Frage aufgeworfen wird, ob ISDS-Regeln und die daraus folgenden Schiedssprüche mit Grundprinzipien des AEUV unvereinbar sind, und deshalb (als mit dem *ordre public* unvereinbar) nicht vollstreckungsfähig sind. Generalanwalt Wathelet hat diese Kritik für unberechtigt gehalten.[268] Seine Haltung entspricht der Tendenz des Bundesgerichtshofs, der sich angesichts der wissenschaftlichen Diskussion zu dieser Frage aber zur Vorlage verpflichtet fühlte. Ein Urteil des Gerichtshofs steht noch aus.

Die vorstehend geschilderten Grundsätze sind in der deutschen Literatur weitgehend unbestritten. Allerdings sind zwei Fragestellungen noch unbeantwortet. Zum einen stellt sich die Frage, ob die Union mit ihrer Verordnung 1219/2012 wirksam in Rechte von Drittstaaten und deren Investoren eingreifen kann. Man stelle sich etwa vor, ein Mitgliedstaat unterlässt die Notifizierung eines „Alt-BIT". Dies könnte die völkerrechtliche Wirksamkeit des Alt-BIT nicht berühren. Nach dem Wortlaut der VO könnte man aber zweifeln, ob ein solches Abkommen fortgelten kann. Dafür spricht, dass die Union durch Sekundärrecht nicht in die Wirksamkeit eines Altabkommens eingreifen kann, dessen

[266] Verordnung (EU) 1219/2012 zur Einführung einer Übergangsregelung für bilaterale Investitionsschutzabkommen zwischen den Mitgliedsstaaten und Drittländern, ABl. 2012 L 351/40; vgl. dazu Hoffmeister, Uenuevar, From BITS and pieces towards European Investment Agreements, in: Bungenberg, Reinisch, Tietje, EU and Investment Agreements, 2013, S. 57-87; vgl. Herrmann/Müller-Ibold: Die Entwicklung des europäischen Außenwirtschaftsrechts, EuZW 2016, 646, 647.

[267] Weiß, in: Grabitz, aaO. (Fn. 2), Art. 207 AEUV, Rn. 39.

[268] Generalanwalt Wathelet, Schlussantrag, C-284/16, Slowakische Republik/Achmea, ECLI:EU:C:2017:699.

Geltungsanspruch primärrechtlich abgesichert ist.[269] Denkbar ist hingegen, dass die Kommission den betreffenden Mitgliedstaat zur Kündigung des Abkommens verpflichten kann.

Zweitens stellt sich die Frage, welche Folgen das Gutachten 2/15 auf den Grundansatz der VO 1219/2012 hat. Diese beruht nämlich auf dem Konzept, das Investitionsschutzabkommen insgesamt in die Zuständigkeit der Union fallen. Das zeigt zum Beispiel die etwas verklausulierte Bezugnahme der 2. Begründungserwägung der VO auf Art. 3 (2) AEUV auch für die Investitionen, die nicht Teil der gemeinsamen Handelspolitik sind (im „*Dritten Teil Titel IV Kapitel 4 AEUV* [sind] *gemeinsame Regeln zum Kapitalverkehr zwischen den Mitgliedstaaten und Drittländern festgelegt, die auch für den Kapitalverkehr im Zusammenhang mit Investitionen gelten. Von den Mitgliedstaaten abgeschlossene internationale Abkommen über ausländische Investitionen können sich auf diese Regeln auswirken*"). Für Zwecke von Art. 3 (2) AEUV hatte der Gerichtshof diese Argumentation zurückgewiesen, nahm aber eine geteilte Zuständigkeit auf Grundlage von Art. 216 (1) an:[270] „*Der Abschluss einer internationalen Übereinkunft durch die Union, die solche Investitionen erfasst, kann sich jedoch als im Sinne von Art. 216 (1) AEUV ‚zur Verwirklichung eines der in den Verträgen festgesetzten Ziele erforderlich' erweisen.*" Könnte die Union diese Kompetenz zum Erlass der Verordnung (die inhaltlich Außenkompetenzen regelt) genutzt haben?[271] Insofern stellen sich ggf. noch Fragen zur Rechtmäßigkeit der Verordnung.

Frage 18: ISDS in den neuen Freihandelsabkommen

Die heute bestehenden deutschen bilateralen Investitionsschutzabkommen enthalten in aller Regel neben einem „State-to-State-Dispute-Settlement-Verfahren" (SSDS) auch Regelungen über „Investor-State-Dispute-Settlement-Verfahren" (ISDS) vor ICSID- oder UNCITRAL-Schiedsgerichten. Solche Regelungen haben deshalb in Deutschland eine lange Tradition.[272]

Nach meinem Eindruck wird hinsichtlich von SSDS-Verfahren in Deutschland deren Notwendigkeit auch weiterhin anerkannt, mangels anderer Foren, in denen ein solcher Streit sinnvoll ausgetragen werden kann. Allerdings wurde hervorgehoben, dass solche Verfahren im Wesentlichen nur noch zwischen Mitgliedstaaten und Drittstaaten (Nicht-EU-Mitgliedstaaten) möglich sind, wie sich aus dem Urteil des Gerichtshofs zur Unzulässigkeit von Schiedsverfahren nach der Seerechtskonvention zwischen Mitgliedstaaten ableiten lasse.[273]

[269] Ebenso wohl Lavranos, aaO. Rn. 4 a.E.
[270] EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 239 ff.
[271] Zweifelnd Weiß, in: Grabitz, aaO. (Fn. 2), Art. 207 AEUV, Rn. 46.
[272] Vgl. Müller-Ibold, Recht ohne Rechtsschutz? in: Bungenberg, Herrmann aaO. (Fn. 92), S. 137 ff.
[273] EuGH, C-459/03, Kommission/Irland, ECLI:EU:C:2006:345, Slg. 2006, I-4657.

Hinsichtlich von ISDS ist das Spektrum der Meinungen nach meinem Eindruck sowohl innerhalb der Verwaltung als auch allgemein breit gefächert. Es handelt sich insoweit um hoch politische Fragen, hinsichtlich derer sich die Haltung einer künftigen Bundesregierung noch nicht prognostizieren lässt, und die von den meisten meiner Gesprächspartner aus der Verwaltung nicht kommentiert wurden.

Grundsätzlich wird in Deutschland die Frage gestellt, ob solche Verfahren immer notwendig und noch zeitgemäß sind. Auf der einen Seite wird anerkannt, dass deutsche Unternehmen, die in Drittstaaten investieren, in denen rechtsstaatliche Defizite bestehen oder in denen Korruption und Vetternwirtschaft verbreitet sind, ein legitimes Interesse an neutralen Foren haben, um willkürliche Eingriffe in solche Investitionen neutral nachprüfen lassen zu können. Andererseits wird für den Rechtsverkehr mit hoch entwickelten Industriestaaten (USA, Kanada, Australien etc.) ein deutlich geringeres Bedürfnis für Streitschlichtungsverfahren außerhalb der ordentlichen Gerichtsbarkeit gesehen. Schließlich wird darauf hingewiesen, dass durch die Änderung der Investitionsströme (deutlich mehr "*inward investment*" in die Bundesrepublik) auch das deutsche Interesse daran gestiegen ist, die eigenen politischen Entscheidungsspielräume gegen unvorhersehbare Einschränkungen zu verteidigen.[274] Insofern deutet sich für Deutschland (abgesehen von politischen Vorgaben und deren Umsetzung durch die Verwaltung) insgesamt eine gewisse *case-by-case*-Analyse an, die, was ISDS-Verfahren im Rahmen von Freihandelsabkommen wie CETA oder TTIP betrifft, durchaus kritische Töne enthält.

Der von der Kommission vorgeschlagene Schiedsgerichtshof (wie er sich in dem geänderten Abkommen mit Kanada, Vietnam, Singapur etc. widerspiegelt) wird von manchen Beobachtern als Verbesserung empfunden, weil er das Risiko von interessengeleiteten Schiedsrichtern vermindere. Der Vorschlag der Kommission über ein Verhandlungsmandat für eine "*Convention establishing a multilateral court for the settling of investment disputes*"[275] den Kommissionspräsident Juncker in seiner "*State of the Union address*" hervorgehoben hatte, wurde zum Zeitpunkt meiner Gespräche noch geprüft.

Im Zusammenhang mit der Rede von Kommissionspräsident Juncker hat die Kommission auch ihre neue Handelsstrategie vorgestellt.[276] Freihandelsabkommen sollen künftig vor dem Hintergrund des Gutachtens 2/15 des Gerichtshofs mit Vorschriften über Direktinvestitionen, aber ohne die Regelungen zum

[274] Diese Überlegungen spielen auch im deutschen Schrifttum eine Rolle, vgl. etwa Bungenberg, von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 207, Rn. 61, m.w.N. in Fn. 61.

[275] KOM (2017) 493.

[276] „Durch eine ausgewogene und fortschrittliche Handelspolitik die Globalisierung meistern" COM [2017] 492.

Schutz von Portfolioinvestitionen und zur Investor-Staat-Streitbeilegung abgeschlossen werden. Dadurch werden aus Sicht der Kommission die Abkommen zu „*EU-only*"-Abkommen, was den Abschluss und die Ratifikation vereinfacht und beschleunigt. Investitionsschutzabkommen würden – soweit ein Bedarf besteht – gesondert verhandelt und abgeschlossen; sie fallen in die zwischen Union und Mitgliedstaaten geteilte Zuständigkeit.[277]

Die Thematik spielte auch auf der deutschen politischen Bühne im Rahmen der gescheiterten Sondierungsgespräche für die Bildung einer neuen Bundesregierung eine Rolle. Während die FDP die laufenden Verhandlungen über bilaterale Handelsabkommen zügig und ohne Überfrachtung mit sachfremden Themen abschließen will, betonen die Grünen, sie wollten faire Handels- und Investitionsabkommen ohne Investorenschiedsgerichte.[278]

In der deutschen wissenschaftlichen Literatur lässt sich insoweit ebenfalls ein breites Meinungsspektrum konstatieren, das von der Verteidigung der traditionellen ISDS-Verfahren[279] bis zu einer vollständigen Ablehnung[280] reicht. Zugleich wird auf praktische Probleme verwiesen, etwa die Tatsache, dass die EU (im Gegensatz zu den Mitgliedstaaten) gegenwärtig nicht Mitglied der ICSID-Konvention ist und ein Beitritt für eine internationale Organisation nicht vorgesehen ist,[281] sodass die Mitgliedstaaten bis auf Weiteres (ggf. unter der Kontrolle der Kommission) die „Beklagtenfunktion" in ICSID Verfahren weiter ausfüllen müssten und zugleich mit der Kommission konstruktiv zusammenarbeiten müssen.

Frage 19: Verantwortlichkeit für Vertragsverletzung durch Mitgliedstaaten und Union

Die handelspolitischen Abkommen der Union werden mit ihrem Abschluss integraler Bestandteil der Rechtsordnung der Union. Soweit Verpflichtungen für

[277] Stöbener de Mora: Investitionsschutzrecht: Kommissionsvorschläge zu künftigem Vorgehen und Verhandlungsmandat für multilateralen Gerichtshof, EuZW 2017, 787.

[278] Ergebnis der Sondierungsgespräche, Stand 15.11.17, Zeile 2003-2007.

[279] Müller-Ibold, Recht ohne Rechtsschutz? aaO. (Fn. 92) (m.w.N.); im Ergebnis für die Beibehaltung von ISDS in den neuen Freihandelsabkommen, Christian Tietje, Freya Baetens: The impact of Investor-State-Dispute Settlement (ISDS), [2014], Study prepared for the Dutch Government, https://www.rijksoverheid.nl/documenten/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip (zuletzt aufgerufen am 18.11.2017), S. 91, Tz. 186.

[280] Karl A. Schachtschneider, Die Freihandelsabkommen TTIP und CETA – Vertraglicher Investitionsschutz versus Souveränität der Bürger und Völker http://www.wissensmanufaktur.net/media/pdf/ttip-ceta.pdf, S. 1 (3), (zuletzt aufgerufen am 18.11.2017); Deutscher Richterbund, Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP http://www.drb.de/fileadmin/docs/Stellungnahmen/2016/DRB_160201_ Stn_Nr_04_Europaeisches_Investitionsgericht.pdf – Nr. 4/2016, (zuletzt aufgerufen am 18.11.2017).

[281] Cottier/Trinberg, von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 207, Rn. 62 f.; Weiß, in: Grabitz, aaO. (Fn. 2), Art. 207 AEUV, Rn. 41.

die Union gegenüber dem Vertragspartner entstehen, handelt es sich um Pflichten, die die Union selbst, aber auch die Mitgliedstaaten zu erfüllen haben, denn gemäß Art. 216 (2) AEUV sind die Abkommen der Union auch für die Mitgliedstaaten verbindlich.

Nach Auffassung des Verfassers haftet völkerrechtlich (also im Außenverhältnis zur anderen Partei des Abkommens) vor allem die Union für die Einhaltung der von ihr (allein) abgeschlossenen Abkommen. Bei gemischten Abkommen ist die Frage komplexer, hier ist völkerrechtlich eine „gesamtschuldnerische" Haftung denkbar. Nur wenn die Zuständigkeitsabgrenzung völlig eindeutig ist und die Union bzw. ein Mitgliedstaat zugleich Kompetenzinhaber und Verursacher der Verletzung ist, mag sich die Haftung im Einzelfall auf den „zuständigen Verursacher" beschränken.

Sowohl in Fällen einer „gesamtschuldnerischen" Haftung als auch im Fall einer Haftung der Union für eine Verletzung eines EU-only-Abkommens durch einen Mitgliedstaat stellt sich die Frage, wer im Innenverhältnis (also im unionsrechtlich geprägten Verhältnis von Union und Mitgliedstaaten) die Folgen der Rechtsverletzung zu tragen hat. Für den Bereich der Haftung wegen Verstößen gegen die WTO-Abkommen hatte der Gerichtshof dazu bereits eine Verpflichtung der Mitgliedstaaten zur Zusammenarbeit mit der Kommission statuiert, z. B. für den Fall, dass einzelne Mitgliedstaaten ihren Verpflichtungen nicht nachkamen und die Handelspartner ihre nach WTO-Recht zulässigen Gegenmaßnahmen gegen die EU insgesamt richteten.[282]

Grundsätzlich wird für die Haftungszuordnung im Innenverhältnis das „Verursacherprinzip" für einschlägig gehalten, wonach derjenige die Konsequenzen zu tragen hat, der für die Abkommensverletzung verantwortlich war. Hinsichtlich der Haftung als Folge von Investor-State-Dispute-Settlement-Verfahren hat sich dieser Gedanke auch in der Verordnung 912/2014 niedergeschlagen.[283] Dort heißt es in Art. 3 (1) zur grundsätzlichen Aufteilung der Verantwortlichkeit:[284]

> *„Die finanzielle Verantwortung, die sich aus einer unter eine Übereinkunft fallenden Streitigkeit ergibt, wird nach den folgenden Kriterien aufgeteilt:*
>
> *a) bei der Union liegt die finanzielle Verantwortung, die sich aus einer von einem Organ, einer Einrichtung oder einer sonstigen Stelle der Union vorgenommenen Behandlung ergibt;*

[282] EuGH, Gutachten 1/94, WTO, Slg. 1994, I-5276, Rn. 104 ff.

[283] Verordnung (EU) Nr. 912/2014 v. 23.07.2014 zur Schaffung der Rahmenbedingungen für die Regelung der finanziellen Verantwortung bei Investor-Staat-Streitigkeiten vor Schiedsgerichten, welche durch internationale Übereinkünfte eingesetzt wurden, bei denen die Europäische Union Vertragspartei ist, ABl. 2014 L 257/121.

[284] Verschiedene weitere Detailregelungen bestimmen die Haftung in Sonderfällen, z. B. wenn entweder die Union oder der Mitgliedstaat die Rolle des Schiedsbeklagten freiwillig übernommen hat, etc.

b) bei dem betroffenen Mitgliedstaat liegt die finanzielle Verantwortung, die sich aus einer von ihm vorgenommenen Behandlung ergibt;

c) als Ausnahme von Buchstabe b liegt die finanzielle Verantwortung, die sich aus einer von einem Mitgliedstaat vorgenommenen Behandlung ergibt, bei der Union, wenn die Behandlung nach Unionsrecht vorgeschrieben war.“

Daraus ergibt sich über das Verursacherprinzip hinaus eine Tendenz zur Zuordnung der Verantwortung auf die Mitgliedstaaten, die auch für ihre nach EU-Recht rechtmäßige Ermessensausübung bei der Umsetzung von EU-Recht haften; die EU selbst haftet für die Umsetzung von EU-Recht durch die Mitgliedstaaten nur, wenn diese zu der haftungsauslösenden „Behandlung“ des Geschädigten verpflichtet waren, weil ihnen das EU-Recht diese Behandlung vorschrieb.[285] Tatsächlich obliegt der Vollzug des EU-Rechts in den meisten Fällen den Mitgliedstaaten. In vielen Fällen ist das Verwaltungsverfahren, dessen Dauer und auch dessen Ergebnis (angemessene Berücksichtigung von Vertrauensschutz, angemessene Entschädigung bei enteignenden Eingriffen etc.) nicht abschließend EU-rechtlich determiniert, sodass eine Haftung der Mitgliedstaaten für insoweit entstehende Fehler nicht unangemessen ist.

Ungeregelt ist bisher die Frage, welche Konsequenzen sich in Fällen ergeben, in denen die Vertragspartner der Union auf Vertragsverletzungen der EU oder einzelnen Mitgliedstaaten nicht mit Schadensersatzforderungen, sondern mit Strafmaßnahmen (Retorsion oder Repressalie) begegnen, die nicht die gesamte Union gleichmäßig, sondern bestimmte Mitgliedstaaten oder einzelne Hersteller überproportional treffen. Folgendes hypothetische Beispiel: Eine staatliche Beihilfe sei EU-rechtlich von der Kommission genehmigt und von einem Mitgliedstaat ausgezahlt worden. Diese wird später auf Antrag eines WTO-Mitglieds von der WTO (*Dispute Settlement Body*, „DSB“) als WTO-rechtlich unzulässige Beihilfe eingestuft, kann aber vom Empfänger nicht effektiv zurückgefordert werden. Dem betroffenen Drittstaat genehmigt der DSB daraufhin, Zollpräferenzen zugunsten der EU auszusetzen. Wurde die Beihilfe z. B. in Italien gewährt, während die ausgesetzten Zollpräferenzen (Erhebung von oft prohibitiven Sonderzöllen) vor allem in Frankreich hergestellte Luxusprodukte treffen, stellt sich die Frage, ob der Frankreich bzw. den französischen Herstellern entstandene Schaden von der Kommission (die die Beihilfen gemäß Art. 108 AEUV genehmigt hat) und/oder den italienischen Behörden (die die Beihilfen gewährt haben) ersetzt werden muss, und wenn ja, in welchem Verhältnis.[286]

[285] Vgl. Weiß, Grabitz, aaO. (Fn. 2), Art. 207 AEUV, Rn. 41, unter Hinweis auf Tietje, EuZW, 2010, 647, 649.
[286] Die bisherige Rechtsprechung im Zusammenhang mit den sog. Hormonfällen, lässt einen Schadensausgleich durch die Union als eher unwahrscheinlich erscheinen, vgl. EuG, T-174/00, Biret/Rat, Slg. 2002, II-21; EuG, T-317/02, FICF/Kommission, ECLI:EU:T:2004:360, Slg. 2004, II-4325.

Frage 20: Verhältnis der GHP zu Art. 21 EUV

Der Lissaboner Vertrag hat im Vergleich zum früheren EGV die außenpolitischen Aufgaben der EU erheblich erweitert und neue Strukturen geschaffen. Zum einen durch die Aufgabe der „Drei-Säulen-Struktur" und der damit verbundenen Einbeziehung der GASP in den EUV. Zweitens sind die Regeln zum sonstigen auswärtigen Handeln der EU im Fünften Teil des AEUV („Das auswärtige Handeln der Union") konsolidiert. Zum auswärtigen Handeln gehören deshalb, neben der GASP, die im Fünften Teil des AEUV erwähnten Bereiche, nämlich die gemeinsame Handelspolitik („GHP") (Titel II, Art. 206 – Art. 207), die „Zusammenarbeit mit Drittländern und humanitäre Hilfe" (Titel III, Art. 208 Art. 214), der Erlass von restriktiven Maßnahmen (Sanktionen) (Titel IV, Art. 215), der Abschluss internationaler Übereinkünfte (Titel V, Art. 216 – Art. 219), die Beziehungen der EU zu internationalen Organisationen und Drittländern nebst Delegationen der EU (Titel VI, Art. 220 u. Art. 221) sowie die Anwendung der Solidaritätsklausel (Titel VII, Art. 222). Drittens ist zu berücksichtigen, dass der AEUV vereinzelt auch an anderer Stelle Außenkompetenzen vorsieht. Viertens schließlich folgt aus der AETR-Rechtsprechung und ihrer Kodifizierung in Art. 3 (2) und Art. 216 AEUV, dass Außenkompetenzen auch darüber hinaus zur Komplementierung von Innenkompetenzen bestehen.[287]

Nach Auffassung des Verfassers wurden im EUV den Bestimmungen zu Maßnahmen auf internationaler Ebene insbesondere durch Art. 21 EUV „allgemeine Bestimmungen" vorangestellt, um diesen inhaltlich z. T. sehr unterschiedlichen, außen(handels)-politischen Zuständigkeiten eine Struktur und einen inhaltlichen Rahmen zu geben, deren Geltung auch im Bereich des Fünften Teils des AEUV durch die wechselseitige Bezugnahme in Art. 21 (3) EUV und Art. 205 AEUV besonders betont wird. Gerade deshalb ist Art. 21 EUV aber auch mit den weiteren Zielbestimmungen in Art. 205 und Art. 206 AEUV zusammen zu sehen, die inhaltlich zusammengehören. Dabei ist für das Verständnis dieses Vorschriftengeflechts wichtig, dass zwischen dem EUV und AEUV kein Über-/Unterordnungsverhältnis besteht, sondern dass beide Verträge gleichrangig nebeneinander stehen (Art. 1 (3) S. 2 EUV).

Danach soll das auswärtige Handeln an Grundsätzen und Zielen ausgerichtet werden, wie Demokratie, Rechtsstaatlichkeit, die universelle Geltung der Menschenrechte, die Achtung der Menschenwürde, die Grundsätze der Gleichheit und der Solidarität, Nachhaltigkeit sowie die Achtung der Grundsätze der Charta der Vereinten Nationen und des Völkerrechts.[288] Art. 21 (2) e) EUV

[287] Siehe dazu ausführlich oben, Kapitel I., Rn. 14 ff.; sowie EuGH, Gutachten 1/03, Übereinkommen von Lugano, Slg. 2006, I-1145), Gutachten 2/15 (EUSFTA).

[288] Ausführlich Vedder, Die außenpolitische Zielbindung in der gemeinsamen Handelspolitik, in Bungenberg/Herrmann, Die gemeinsame Handelspolitik, aaO. (Fn. 161), 2011, S. 121 ff.; Müller-Ibold,

bestimmt insbesondere, dass die Union im Rahmen ihrer Politik „*die Integration aller Länder in die Weltwirtschaft fördern* [soll]*, unter anderem auch durch den schrittweisen Abbau internationaler Handelshemmnisse*". Diese Vorschrift wird durch Art. 216 AEUV näher konkretisiert.[289]

Darüber hinaus achtet die EU gemäß Art. 21 (3) UAbs. 2 EUV auf die Kohärenz zwischen den einzelnen Bereichen ihres auswärtigen Handelns sowie zwischen diesen und ihren übrigen Politikbereichen. Die Vorschrift betont und konkretisiert das allgemeine Kohärenzgebot des Art. 7 AEUV (sowie die sog. Querschnittsklauseln in Art. 9 (Soziales) und Art. 11 (Umwelt) AEUV). Die außenpolitischen Handlungsinstrumente sind aufeinander und mit der Binnenpolitik abzustimmen, was insbesondere in Hinblick auf das Nebeneinander intergouvernementaler Außenpolitik und supranationaler Außenbeziehungen von Relevanz ist.[290] Das Kohärenzgebot gilt sowohl horizontal zwischen den verschiedenen Politikbereichen der EU als auch vertikal zwischen EU und Mitgliedstaaten.[291] Deshalb muss die GHP (auch soweit dazu die Wahrnehmung von Binnenkompetenzen gehört) sich in die Gesamtstruktur der Außenbeziehungen einfügen.

Materiell enthalten Art. 21 EUV (sowie Art. 7, 9 und Art. 11 AEUV) mit Art. 205 und Art. 206 AEUV ein Netz von Programmsätzen, die von den Institutionen der EU ebenso wie von den Mitgliedstaaten bei der Gestaltung der GHP zu berücksichtigen sind, die aber zugleich auch den möglichen Regelungsbereich der GHP erweitern (wenn z. B. Umwelt und Nachhaltigkeitsfragen als Teil der auswärtigen Politik Beachtung geschenkt werden soll, dann muss die Union dies auch im Rahmen der von ihr zu schließenden Abkommen explizit regeln können). Darauf hat der Gerichtshof im Gutachten 2/15 ausdrücklich hingewiesen.[292]

Dieses Netz von Programmsätzen (Art. 21 EUV i. V. m. den diversen Regelungen im AEUV) begründet rechtliche Verpflichtungen der EU, ihrer Institutionen und der Mitgliedstaaten untereinander[293] (und nicht nur unverbindliche politische Programmsätze). Insbesondere in Verbindung mit dem Grundsatz der

in: Lenz, Art. 205, Rn. 3.

289 Art. 216 ist nach wie vor auf die Liberalisierung des Welthandels ausgerichtet, Weiß in: Grabitz, aaO. (Fn. 2), Art. 206 AEUV, Rn. 12.

290 Thym, in Pernice, 2008, 179; Krajewski: Normative Grundlagen der EU-Außenwirtschaftsbeziehungen: Verbindlich, umsetzbar und angewandt? EuR 2016, 235, 239: Mit Art. 21 (1) EUV „*soll nicht nur die Konsistenz und Kohärenz der EU-Außenpolitik mit Blick auf die Binnenpolitiken normativ abgesichert werden. Es wird auch klargestellt, dass die inhaltliche Ausrichtung der Politik nach innen und nach außen den gleichen Werten verpflichtet ist und an ihnen zu messen ist.*"

291 Denkschrift Auswärtiges Amt, 2007, 56.

292 EuGH, Gutachten 2/15, ECLI:EU:C:2017:376, Rn. 141-147.

293 Vgl. EuGH, 19.11.1998, C-150/94, Vereinigtes Königreich u. a./Rat, Rn. 67, EuG, 10.12.2015, T-512/12, Frente Polisario, ECLI:EU:T:2015:953; so auch Müller-Ibold, in Lenz: EU Verträge, Art. 206 Rn. 3, Weiß,

loyalen Zusammenarbeit (Art. 4 (3) EUV) können sich daraus für die Organe der EU und die Mitgliedstaaten auch konkrete Handlungspflichten ergeben. Demgegenüber lassen sich aus den genannten Vorschriften keine Rechte von Drittstaaten gegenüber der Union und ihren Mitgliedstaaten herleiten. Hinsichtlich von Art. 206 AEUV war anerkannt, dass er dem einzelnen Unionsbürger kein Recht auf Handel mit Drittländern gibt,[294] auch ein Grundrecht auf Außenwirtschaftsfreiheit wurde bisher nicht anerkannt.[295] Daran hat sich durch die größere Komplexität des jetzt bestehenden Netzes an Zielvorgaben nichts geändert.

Allerdings befinden sich die rechtlichen Vorgaben durch Art. 21 EUV (und der diversen Regelungen im AEUV) auf einem recht hohen Abstraktionsniveau. Für den konkreten Einzelfall lassen sich aus den abstrakten Programmsätzen zwar grundsätzlich Anforderungen (z. T. auch gegensätzlicher Art) herleiten.[296] Und hinsichtlich der Zielverwirklichung bestehen für jeden der Programmsätze verschiedene Umsetzungs- oder Durchführungsalternativen. Die verschiedenen Ziele sind deshalb zwar soweit wie möglich miteinander in Einklang zu bringen, doch hinsichtlich der Zielerreichung und der Auflösung von Zielkonflikten verfügen die Institutionen über ein weites Ermessen. Deswegen und angesichts der sehr weiten Formulierung von Art. 21 EUV (und der diversen Regelungen im AEUV) ist die Unvereinbarkeit von Einzelmaßnahmen mit diesen Vorschriften nur in Ausnahmefällen denkbar.[297] Das führt dazu, dass die für die Umsetzung der GHP zuständigen Unionsinstitutionen ein besonders weites Ermessen bei der Auswahl und Gestaltung der Maßnahmen haben.

in: Grabitz, aaO. (Fn. 2), Art. 206, Rn. 13; Krajewski: Normative Grundlagen der EU-Außenwirtschaftsbeziehungen: Verbindlich, umsetzbar und angewandt? EuR 2016, 235, 242 f., m.w.N.

294 GA Slynn, 245/81, EDEKA/Deutschland, Slg. 1982, 2745, 2766).

295 Vgl. GA Jacobs, 24.09.1996, C-124/95, Centro-Com, Rn. 65; Ein solches ließe sich aus dem allgemeinen Grundrecht auf wirtschaftliche Betätigungsfreiheit nach Art. 16 GRC herleiten; in seiner Anwendung wäre es indes durch vielfältige andere Rechtsgüter beschränkt; vgl. Weiß, in: Grabitz, aaO. (Fn. 2), Art. 206, Rn. 16.

296 So wird es in vielen Fällen hinsichtlich der Gestaltung der Handelspolitik gegenüber bestimmten, wenig demokratischen Drittstaaten Zielkonflikte zwischen dem Wunsch Menschenrechte und Demokratie zu sichern, und der Anforderung Solidarität mit Entwicklungsnachteilen und dem Abbau von Handelsschranken geben. Auch zwischen dem Ziel eine Außenhandelspolitik zu betreiben, um den Welthandel zu erleichtern und dem Ziel einen „gerechten" Handels iSv. Art. 3 (5) S. 2 EUV zu gewährleisten (und dafür handelspolitische Schutzmaßnahmen zu ergreifen) kann es Zielkonflikte geben. Deren Auflösung im Einzelfall steht im Ermessen der zuständigen Institutionen.

297 Müller-Ibold, in: Lenz, aaO. (Fn. 2), Art. 206 AEUV, Rn. 3 und 4; vgl. Terhechte, in Grabitz, aaO. (Fn. 2), Art. 205 AEUV, Rn. 23 („Justiziabilitätsschwäche", erforderlich sei eine „evidente und schwere Zielverfehlung"); Weiß, in: Grabitz, aaO. (Fn. 2), Art. 206, Rn. 16. Sehr ausführlich untersuchen diese Frage auch Cottier/Trinberg, von der Groeben, u.a., Europäisches Unionsrecht, aaO. (Fn. 2), Art. 206, Rn. 29-32; Krajewski: Normative Grundlagen der EU-Außenwirtschaftsbeziehungen: Verbindlich, umsetzbar und angewandt? EuR 2016, 235, 243.

Frage 21. Vertragsschlussverfahren zu handelspolitischen Abkommen
Das Vertragsschlussverfahren für handelspolitische Abkommen nach Art. 207 AEUV unterscheidet sich nur in wenigen Bereichen von dem Verfahren zum Abschluss völkerrechtlicher Abkommen (nach Art. 218 AEUV) allgemein, denn Art. 207 (3) verweist für das Verfahren weitgehend auf Art. 218. Insofern kann auf die Bemerkungen zum Vertragsschlussverfahren allgemein verwiesen werden (siehe oben zu Frage 5, Rn. 74-77).

Eine Besonderheit des Verfahrens zum Abschluss handelspolitischer Abkommen liegt in der obligatorischen Bestellung eines Sonderausschusses durch den Rat, der die Verhandlungen begleitet. Nach meinem Eindruck gibt es aus der Sicht der Mitgliedstaaten ein gewisses Maß an Kritik am Informationsverhalten der Kommission, die zu selten und zu wenig detailreich informiere.

Eine weitere Besonderheit des Verfahrens nach Art. 207 besteht darin, dass die Kommission praktisch immer Verhandlungsführerin ist und auch den Vorschlag für ein Verhandlungsmandat unterbreitet, während der Hohe Vertreter im Vertragstext nicht erwähnt wird. Dies wird nach Einschätzung des Verfassers als eher natürliche Folge der Regelungsmaterien der GHP angesehen, hinsichtlich derer die GASP Themen (für die der Hohe Vertreter zuständig ist) keine wesentliche Rolle spielen.

Hinsichtlich von Abkommen, die nach Art. 207 (4) AEUV Einstimmigkeit im Rat erfordern, ist sich die Kommission offenbar der politischen Sensibilitäten der Mitgliedstaaten bewusst ist und bemüht sich mehr um Abstimmung mit den Mitgliedstaaten.

KAPITEL 5: RAUM DER FREIHEIT, DER SICHERHEIT UND DES RECHTS (POLITIK BZGL. DER GRENZKONTROLLEN, DES ASYLRECHTS UND DER EINWANDERUNG)

Frage 22
Die Frage 22 der Generalberichterstatter betrifft das Verhältnis der Ausnahmevorschrift im Protokoll 23 zu der allgemeinen Vorschrift in Art. 3 (2) hinsichtlich der Außenkompetenzen der Union zum Abschluss von internationalen Übereinkünften zu Maßnahmen in Bezug auf das Überschreiten der Außengrenzen.

Zur Analyse der Frage empfiehlt es sich, in zwei Schritten vorzugehen, nämlich zunächst (i) das grundsätzliche Verhältnis von Art. 3 (2) AEUV zu Art. 77 (2) und Protokoll 23 zum AEUV zu klären, um sodann (ii) anhand des Anwendungsbereichs des betreffenden Sekundärrechts zu prüfen, ob eine Inkongruenz mit Abkommen Deutschlands besteht.

1. Die Kompetenzstruktur für den Abschluss von Übereinkünfte

Frage 22 weist zurecht darauf hin, dass es sich bei den Zuständigkeiten der Union im Bereich des „Raums der Freiheit, der Sicherheit und des Rechts" gemäß Art. 4 (2) j) AEUV im Grundsatz um eine zwischen Mitgliedstaaten und Union geteilte Zuständigkeit handelt. Diese kann, wenn die Union in einem Bereich sekundärrechtliche Maßnahmen erlässt und einen Bereich im Wesentlichen regelt, gemäß Art. 3 (2) AEUV zu einer „*ausschließlichen Zuständigkeit für den Abschluss internationaler Übereinkünfte*" erstarken, (...) „*soweit* [der Abschluss von Abkommen durch die Mitgliedstaaten][298] *gemeinsame Regeln beeinträchtigen oder deren Tragweite verändern könnte*" (3. Alternative). Daraus folgt, dass das Erstarken zu einer ausschließlichen Zuständigkeit im Vergleich zur Regelsituation zwar eine gewisse Ausnahme darstellt, die aber, angesichts der Bedeutung des kodifizierten AETR-Prinzips, eher Regelcharakter hat.

Art. 77 (2) AEUV enthält konkrete (geteilte) Rechtssetzungsbefugnisse der Union zur Gestaltung des Raums der Freiheit, der Sicherheit und des Rechts im Sinne von Art. 4 (2) j AEUV und Art. 67 (1) und (2) AEUV. Art. 77 AEUV bestimmt in Abs. 1 b), dass die Union eine Politik entwickelt, mit der „*die Personenkontrolle und die wirksame Überwachung des Grenzübertritts an den Außengrenzen sichergestellt werden soll*." Art. 77 (2) AEUV regelt die dazu erforderlichen Kompetenzen:

> *„(2) Für die Zwecke des Absatzes 1 erlassen das Europäische Parlament und der Rat gemäß dem ordentlichen Gesetzgebungsverfahren Maßnahmen, die folgende Bereiche betreffen:*
>
> *a) die gemeinsame Politik in Bezug auf Visa und andere kurzfristige Aufenthaltstitel;*
>
> *b) die Kontrollen, denen Personen beim Überschreiten der Außengrenzen unterzogen werden;*
>
> *c) die Voraussetzungen, unter denen sich Drittstaatsangehörige innerhalb der Union während eines kurzen Zeitraums frei bewegen können;*
>
> *d) alle Maßnahmen, die für die schrittweise Einführung eines integrierten Grenzschutzsystems an den Außengrenzen erforderlich sind* [...]."

Gleichzeitig bestimmt das Protokoll 23 zum EUV und AEUV, für die Zuständigkeit der Mitgliedstaaten, internationale Übereinkünfte abzuschließen, Folgendes:

> „*Die in Artikel 77 Absatz 2 Buchstabe b* [AEUV] *aufgenommenen Bestimmungen über Maßnahmen in Bezug auf das Überschreiten der Außengrenzen berühren nicht die Zuständigkeit der Mitgliedstaaten für die Aushandlung und den Abschluss von Übereinkünften mit Drittländern, sofern sie mit den Rechtsvorschriften der Union und anderen in Betracht kommenden internationalen Übereinkünften in Einklang stehen.*"

[298] Zu der missverständlichen Formulierung von Art. 3 (2) 3. Alternative AEUV siehe oben Kapitel 1, Rn. 15 a.E. m.w.N. in Fn. 28.

Gemäß Artikel 51 EUV sind die „*Protokolle und Anhänge der Verträge Bestandteil der Verträge*". Wenn Protokoll 23 eine eigenständige Bedeutung zukommen soll, so folgt daraus erstens, dass es hinsichtlich des AETR-Effekts als „Lex specialis" eine Ausnahme von Art. 3 (2) AEUV vorsieht. Selbst wenn also Sekundärrecht auf der Grundlage von Art. 77 (2) b) AEUV erlassen wird, bleiben die Mitgliedstaaten weiter berechtigt, internationale Verträge abzuschließen, fortzusetzen und zu ändern, selbst wenn die Regelungsdichte der Maßnahmen nach Art. 77 (2) b) so dicht ist, dass die Voraussetzungen für eine ausschließliche Zuständigkeit der Union gemäß Art. 3 (2) AEUV erfüllt sind. Zweitens kann die Union gemäß Art. 2 (1) 2. Halbsatz AEUV jedenfalls auch hinsichtlich ausschließlicher Zuständigkeiten deren Ausübung auf die Mitgliedstaaten zurückübertragen,[299] sodass ein eingeschränkter Kompetenzvorbehalt zugunsten der Mitgliedstaaten wie in Protokoll 23 auch nicht der in EUV und AEUV angelegten Verfassungs- und Kompetenzstruktur widerspricht.

Internationalen Übereinkünfte der Mitgliedstaaten im Sinne des Protokolls 23 müssen (i) mit den Rechtsvorschriften der Union und (ii) anderen in Betracht kommenden internationalen Übereinkünften im Einklang stehen. Das gilt jedenfalls im Zeitpunkt des Abschlusses solcher Verträge. Hinsichtlich von Änderungen von Zuständigkeiten im EU-Recht nach dem Abschluss der Verträge gilt Art. 351 AEUV analog,[300] d. h. die Mitgliedstaaten sind berechtigt ihren Verpflichtungen aus solchen Übereinkünften nachzukommen, ihre Rechte daraus dürfen sie aber nur insofern ausüben, als dies mit dem EU-Recht in Einklang steht; ggf. müssen sie Abkommen kündigen oder sich um Änderungen bemühen.[301]

2. Keine Inkongruenz zwischen (i) dem Sekundärrecht zum Überschreiten der Außengrenzen mit (ii) Übereinkünften Deutschlands

Das von der Union auf der Grundlage von Art. 77 (2) b) AEUV angenommene Sekundärrecht erfasst eine Reihe von Regelungsbereichen.

In der Frage der Generalberichterstatter wird auf Regelungen Bezug genommen, die auf der Grundlage von Art. 77 (2) a) AEUV erlassen wurden, nämlich Regelungen über die Erteilung, Gestaltung etc. von kurzfristigen Aufenthaltstiteln, vor allem Visa. Diesen Regelungsbereich hat die Union vor allem durch die

[299] Art. 2 (1) 2. Hs AEUV: „*[...] die Mitgliedstaaten dürfen in einem solchen Fall nur tätig werden, wenn sie von der Union hierzu ermächtigt werden [...]*".

[300] Zur analogen Anwendung siehe oben, Rn. 180. Dem Wortlaut von Protokoll 23 („*sofern sie mit den Rechtsvorschriften der Union* [...] *in Einklang stehen*" ist auch keine besondere Bindung an zukünftige Änderungen des Unionsrechts zu entnehmen. Dies gilt auch unter Berücksichtigung der anderen Sprachversionen: (engl.) "*as long as they respect Union law* [...]" oder (franz.) « *pour autant que lesdits accords respectent le droit de l'Union* [...] ». Ein Versuch, solche Abkommen, über die Regeln nach Art. 351 AEUV hinaus, an spätere Änderungen des Unionsrechts zu binden, stieße sofort an völkerrechtliche Grenzen.

[301] Siehe oben, Rn. 180.

Verordnung 539/2001[302] und die Verordnung 1683/95[303] geregelt; sie kann darüber hinaus auch Regeln zu anderen kurzfristigen Aufenthaltstiteln schaffen.[304] Hinsichtlich der Bestimmungen für kurzfristige Aufenthalte hat die Union, angesichts der sehr weit gefassten Regelungen, wohl die ausschließliche Zuständigkeit für internationale Übereinkünfte gemäß Art. 3 (2) AEUV erlangt. Protokoll 23 enthält in dieser Beziehung aber keine Sonderregelungen, denn Protokoll 23 betrifft nur die Außenkompetenzen, die im Zusammenhang mit Regelungen nach Art. 77 (2) ***b)*** AEUV entstehen (nicht aber im Zusammenhang mit Regelungen nach Art. 77 (2) ***a)*** AEUV).

Zum anderen hat die Union auf der Grundlage von Art. 77 (2) b) AEUV verschiedene Bestimmungen für das Überschreiten der Binnen- und Außengrenzen durch Personen erlassen, insbesondere den sog. Schengener Grenzkodex (jetzt VO 2016/399).[305] Darin sind detaillierte Regeln für das Überschreiten der Binnen- und Außengrenzen enthalten. Hinsichtlich der Außengrenzen (Titel II) sind das in Kapitel I Regelungen über das „Überschreiten der Außengrenzen und Einreisevoraussetzungen" und in Kapitel II Regelungen über „Grenzkontrollen an den Außengrenzen und Einreiseverweigerung". Weitere Regelungen betreffen das Verwaltungsverfahren. Diese Regelungen betreffen vor allem Fragen der Einreise; Regelungen zu Kontrollen bei der Ausreise beschränken sich im Wesentlichen auf das Abstempeln von Reisedokumenten, damit im Falle der Wiedereinreise die Dauer früherer Aufenthalte bestimmt werden kann.[306]

Deutschland, das lediglich bei Ein-/Ausreisen auf dem Luft- und ggf. auf dem Seeweg Außengrenzkontrollen vornimmt, unterhält keine besonderen völkervertraglichen Übereinkünfte mit Drittstaaten hinsichtlich des Grenzabfertigungsverfahrens und anderer im Schengener Grenzkodex geregelter Fragen im Zusammenhang mit der Ein- und Ausreise von Staatsangehörigen von Drittstaaten.[307]

[302] Verordnung (EG) Nr. 539/2001 des Rates v. 15.03.2001 zur Aufstellung der Liste der Drittländer, deren Staatsangehörige beim Überschreiten der Außengrenzen im Besitz eines Visums sein müssen, sowie der Liste der Drittländer, deren Staatsangehörige von dieser Visumpflicht befreit sind, ABl. 2001 L 81/1, mit nachfolgenden Änderungen.

[303] Verordnung (EG) Nr. 1683/95 des Rates über eine einheitliche Visagestaltung, ABl. 1995 L 164/1, mit nachfolgenden Änderungen.

[304] Progin-Theuerkauf, in: von der Groeben, Europäisches Unionsrecht, aaO. (Fn. 2), Art. 77 AEUV, Rn. 18; Thym, in: Grabitz, aaO. (Fn. 2), Art. 77 AEUV, Rn. 20.

[305] Verordnung (EU) 2016/399 des Europäischen Parlaments und des Rates v. 09.03.2016 über einen Gemeinschaftskodex für das Überschreiten der Grenzen durch Personen (Schengener Grenzkodex), ABl. 2016 L 77/1, mit nachfolgenden Änderungen.

[306] Art. 11 und Art. 12 (4) VO 2016/399, zu den Ausreisefragen siehe unten zu Frage 25, Rn. 264 ff.

[307] Verschiedene technische Übereinkünfte z.B. mit der Schweiz sind in jüngerer Zeit aufgehoben worden, vergl. BGBl. 2013 Teil II Nr. 27 S. 1301. Es gibt allerdings noch Polizeikooperationsverträge mit den Schengener Nachbarstaaten, auch der Schweiz, die vor allem Nacheile, grenzüberschreitende

Allerdings gibt es multilaterale Abkommen, z. B. die Wiener Übereinkommen über diplomatische oder konsularische Beziehungen, die eine Vorzugsbehandlung im Zusammenhang mit Bevorzugungen oder Befreiungen von Staatsoberhäuptern, Regierungsmitgliedern, Diplomaten und Konsularbeamten vorsehen, die (i) ihrem Inhalt nach im Schengener Grenzkodex berücksichtigt sind, (ii) als Altabkommen gemäß Art. 351 AEUV ohnehin fortbestehen können und (iii) als Kodifizierung von Völkergewohnheitsrecht letztlich auch die Union binden, sodass es in dieser Hinsicht kaum eines Rückgriffs auf Protokoll 23 bedarf, um die Zulässigkeit des Fortbestandes solcher Regelungen zu begründen.

Weiterhin gibt es Rückführungsübereinkommen mit Drittstaaten, um die Rückführung von Personen zu erleichtern, die nicht (oder nicht mehr) berechtigt sind, sich in Deutschland bzw. der EU aufzuhalten, weil sie illegal eingereist oder nach Ende eines zunächst zulässigen Aufenthaltes nicht rechtzeitig ausgereist sind. Die Zuständigkeit der EU zum Abschluss solcher Abkommen beruht vor allem auf Art. 79 (3) AEUV; auch insoweit spielt Protokoll 23 keine besondere Rolle. Die Fragen im Zusammenhang mit diesen Abkommen werden unten im Zusammenhang mit der Frage 25 erörtert (Rn. 264 ff.).

Daher ist aus deutscher Sicht nicht erkennbar, dass wesentliche völkervertragliche Regelungen Deutschlands bestehen, die einer Rechtfertigung auf der Grundlage des Protokolls 23 zum EUV/AEUV bedürften.

Frage 23

1. Der rechtliche Hintergrund in Deutschland

a. Entwicklung des Grundrechts auf Asyl

Die deutsche Verfassung (das Grundgesetz („GG")) sah bis 1993 in Art. 16 (2) 2) GG kurz und bündig vor: „*Politisch Verfolgte genießen Asylrecht.*" Das bedeutete, dass ein schutzbedürftiger Mensch, der Deutschland erreichte, ein einklagbares Recht auf Schutz vor Zurückweisung an der Grenze und auf Schutz vor Ausweisung, Abschiebung oder Auslieferung an den Verfolgerstaat hatte[308] und dass der Staat ihm auch ein menschenwürdiges Leben in Deutschland ermöglichen musste.[309] Dieses Grundrecht unterlag keinem Gesetzesvorbehalt, es konnte deshalb ohne Änderung der Verfassung nicht per Gesetz eingeschränkt werden.

Observation etc. regeln, aber auch dann relevant sind, wenn vorübergehend an den Binnengrenzen kontrolliert wird. Zollkontrollstellen mit der Schweiz bleiben teilweise bestehen, spielen aber im hier relevanten Kontext von Kontrollen des Personenverkehrs keine Rolle, vergl. dazu Deutscher Bundestag, Wissenschaftliche Dienste, Kurzinformation, Nebeneinanderliegende Grenzabfertigungsstellen an der deutsch-schweizerischen Grenze, https://www.bundestag.de/blob/416626/ff0044add812192cfe5d-0d690310eea4/wd-2-029-16-pdf-data.pdf.

308 BVerfG, E 9, 174, 184; BVerfG E 60, 348, 359; BVerwG NVwZ 1983, 38, 40.

309 BVerwG E 49, 202, 206, kritisch zur damaligen Zeit z. B. Huber, Ausländer und Asylrecht, München 1983, S. 153, Rn. 439.

Zum Ende der 1980er Jahre begann, im Zusammenhang mit der wachsenden Zahl von Asylbewerbern, eine öffentlichen Diskussion über eine Beschränkung des Asylrechts und die Änderung von Art. 16 GG. Es kam 1992 politisch zum sogenannten „Asylkompromiss" und in der Folge 1993 zu einer Änderung des Grundgesetzes. Ziel war es auch, das Asylrecht zu „europäisieren" und die Möglichkeit zu schaffen, multilateral mit anderen Mitgliedstaaten der EU gemeinsame Regelungen und Verfahren, insbesondere im Rahmen der Schengener Abkommen, zu entwickeln[310] (die Möglichkeit, entsprechende Hoheitsrechte auf die EU zu übertragen, ergab sich schon seit 1992 aus Art. 23 GG, die Schengen-Regeln standen aber damals noch außerhalb des EU-Rechts).[311] In diesem Zusammenhang wurden auch Regelungen zu „sicheren Drittstaaten" und „sicheren Herkunftsstaaten" ins deutsche Recht aufgenommen und teilweise mit Verfassungsrang ausgestattet.

Das Grundrecht auf Asyl wurde in einem neuen Art. 16a GG neu geregelt und wesentlich eingeschränkt.[312] Art. 16a lautet wie folgt:

> *„1. Politisch Verfolgte genießen Asylrecht.*
>
> *2. Auf Absatz 1 kann sich nicht berufen, wer aus einem Mitgliedstaat der Europäischen Gemeinschaften oder aus einem anderen Drittstaat einreist, in dem die Anwendung des Abkommens über die Rechtsstellung der Flüchtlinge[313] und der Konvention zum Schutze der Menschenrechte und Grundfreiheiten[314] sichergestellt ist. Die Staaten außerhalb der Europäischen Gemeinschaften, auf die die Voraussetzungen des Satzes 1 zutreffen, werden durch Gesetz, das der Zustimmung des Bundesrates bedarf, bestimmt.* […]"

b. Die Relevanz sicherer Drittstaaten nach heutigem deutschen Recht

Nach heutigem deutschen Recht ist die Existenz von Drittstaaten, in denen ein Ausländer vor politischer Verfolgung sicher ist, in dreierlei Hinsicht relevant:

[310] Bergmann, in: Bergmann/Dienelt, Ausländerrecht, 11. Auf. 2016, AsylG, Vorbemerkung, Rn. 11-15.
[311] Günther, in: Beck Online Kommentar Ausländerrecht, § 29 AsylG, Rn. 2 (m.w.N.); Maaßen, Grundgesetz – Beck Online Kommentar, Art. 16a GG, Rn. 109.
[312] Art. 16a wurde in das Grundgesetz eingefügt durch Art. 1 Nr. 2 des Gesetzes v. 28.06.1993 BGBl. 1993 Teil I S. 1002 mit Wirkung ab dem 30.06.1993. Zur Rechtmäßigkeit dieser Grundgesetzänderung und ihrer inhaltlichen Deutung vgl. BVerfG, Urt. V. 14.05.1996 – 2 BvR 1938/93, 2 BvR 2315/93 –, BVerfGE 94, 49; 2 BvR 1507/93, 2 BvR 1508/93 –, BVerfGE 94, 115; – 2 BvR 1516/93 –, BVerfGE 94, 166.
[313] Gemeint ist die Genfer Flüchtlingskonvention („GFK"), deren amtlicher Titel „Abkommen über die Rechtsstellung der Flüchtlinge" v. 28.07.1951 lautet, BGBl. 1953 II S. 559, Originalfundstelle: United Nations, Treaty Series, vol. 189, 1954, I Treaties and international agreements, p. 137–220, No. 2545, in der Fassung des „Protokolls über die Rechtsstellung der Flüchtlinge" v. 31.01.1967, BGBl. 1969 II S. 1293, zu dessen Inkrafttreten vgl. BGBl. 1970 II S. 194.
[314] Gemeint ist die „Convention for the Protection of Human Rights and Fundamental Freedoms" (deutscher Titel: „Konvention zum Schutz der Menschenrechte und Grundfreiheiten" kurz „EMRK") (Konvention Nr. 5 des Europarats), zuletzt bekannt gemacht in BGBl. 2002 II S. 1054, 1055.

- Hat der Ausländer die Staatsangehörigkeit[315] eines Landes, in dem er keiner politischen Verfolgung ausgesetzt ist, dann ist er nicht „schutzlos" und kein Flüchtling. Vielmehr sind in diesem Fall Asylrecht und internationaler Schutz in Deutschland gegenüber der Pflicht des Heimatlandes (des „sicheren Herkunftsstaats"),[316] seinen Staatsangehörigen Schutz zu bieten, subsidiär.[317]
- Hat der Ausländer die Staatsangehörigkeit[318] eines Landes, in dem er verfolgt wird, reist aber über ein sicheres (europäisches) Drittland ein, so kann er sich auf ein Asylrecht nicht berufen und internationalen Schutz nicht geltend machen (es sei denn, die Dublin-III-Regeln wiesen Deutschland die Zuständigkeit für die Prüfung und Entscheidung über die Gewährung internationalen Schutzes zu).[319]
- Hat der Ausländer die Staatsangehörigkeit eines Landes, in dem er verfolgt wird, und reist er zwar nicht über ein sicheres (europäisches) Drittland ein, sondern fand zunächst in einem sonstigen (sicheren) Drittland Zuflucht, so wird vermutet, dass er bereits Schutz gefunden hat und deshalb (weiteren) internationalen Schutz nicht geltend machen kann (es sei denn, die Dublin-III-Regeln wiesen Deutschland die Zuständigkeit für die Prüfung und Entscheidung über die Gewährung internationalen Schutzes zu).[320]

Dies waren zunächst sehr praxisrelevante Regelungen. Allerdings ist die praktische Relevanz dieser Vorschriften für Deutschland jedenfalls seit Inkrafttreten der Dublin-II- und -III-Regeln wesentlich geringer geworden, weil die darin enthaltenen Zuständigkeitsregelungen des Unionrechts den o. g. materiellen Regeln des deutschen Rechts (und zwar auch des deutschen Verfassungsrechts) zu sicheren Drittstaaten vorgehen. Nach Art. 3 (1) 2) der Verordnung 604/2013 („Dublin-III-VO")[321] ist für die Prüfung von Anträgen auf internationalen Schutz

[315] Hat er mehrere Staatsangehörigkeiten, so genügt es wenn er Schutz im Land einer seiner Staatsangehörigkeiten finden kann, ist er Staatenlos kommt es auf das Land an, in dem der Staatenlose ein dauerndes Aufenthaltsrecht hat.

[316] Zu den deutschen Erfahrungen mit der Festlegung sicherer Herkunftsstaaten siehe: Bundesministerium des Innern, Erster Bericht der Bundesregierung gemäß §29a Absatz 2a Asylgesetz zu der Überprüfung der Voraussetzungen zur Einstufung der in Anlage II zum Asylgesetz bezeichneten sicheren Herkunftsstaaten vom 23. Oktober 2017.

[317] Art. 16a (2) GG, § 29a AsylG i. V. m. Anhang II AsylG; Günther, in BeckOK AuslR, 15. Aufl. 01.08.2017, AsylG § 27, Rn. 8, BVerwG, Urt. 06.08.1996 – 9 C 192/95, BVerwG E 101, 328, NVwZ 1997, 194. Unter den Mitgliedstaaten der Union gilt dies in verstärktem Maße, wie sich aus Protokoll 24 zum AEUV ergibt.

[318] Bei Staatenlosen käme es auf das Land an, in dem der Staatenlose ein dauerndes Aufenthaltsrecht hat.

[319] Art. 16a (3) GG, § 26a AsylG mit Anhang I AsylG.

[320] § 29 (1) 4 AsylG i. V. m. § 27 (1) AsylG.

[321] Verordnung (EU) Nr. 604/2013 v. 26.06.2013 zur Festlegung der Kriterien und Verfahren zur Bestimmung des Mitgliedstaats, der für die Prüfung eines von einem Drittstaatsangehörigen oder

grundsätzlich nur ein Mitgliedstaat zuständig und zwar in der Regel der der ersten Einreise in den Schengen-Raum. Die Bedeutung der Einreise aus einem sicheren Drittstaat im Sinne von Art. 38 und 39 der Richtlinie 2013/32[322] ist deshalb in Deutschland gering, weil die Einreise zumeist über einen Schengen-Staat erfolgt. Daran knüpft § 29 AsylG an, indem er solche Anträge für unzulässig erklärt, für die ein anderer Mitgliedstaat nach der Dublin-III-VO zuständig ist. Soweit die Konzepte zu sicheren Drittstaaten trotz (oder im Rahmen) der Dublin-III-Regeln relevant sind, wären die bestehenden nationalen Konzepte entsprechend der europäischen Regeln auszulegen und anzuwenden.[323]

Grundsätzlich regelt das EU-Recht nur Mindeststandards zu der Frage, was ein sicherer Drittstaat (oder sicherer europäischer Drittstaat) ist, und überlässt die Ausgestaltung des Konzepts dem nationalen Recht.[324] Das hat jüngst das Bundesverwaltungsgericht („BVerwG") in einem Vorlagebeschluss vom März 2017[325] an den EuGH betont und hervorgehoben, dass der deutsche Begriff des sicheren Drittstaats angesichts europarechtlicher Vorgaben in seinem Anwendungsbereich reduziert werden müsse (und dies insoweit als *„acte claire"* bezeichnet). Der deutsche Begriff umfasse nämlich auch Mitgliedstaaten der Union, während sich aus Art. 33 i. V. m. mit Art. 38 (und ggf. Art. 39) der Richtlinie 2013/32 ergäbe, dass dieser Begriff auf „Nicht-Mitgliedstaaten" beschränkt sei.[326] In der Tat heißt es in Art. 33 deutlich: *„Mitgliedstaaten können einen Antrag auf internationalen Schutz nur dann als unzulässig betrachten, wenn (a) ein anderer Mitgliedstaat internationalen Schutz gewährt hat;* [...] *oder (c) ein Staat, der kein Mitgliedstaat ist, als für den Antragsteller sicherer Drittstaat gemäß Artikel 38 betrachtet wird* [...]" (Hervorhebung hinzugefügt).[327]

Staatenlosen in einem Mitgliedstaat gestellten Antrags auf internationalen Schutz zuständig ist, ABl. 2013 L 180/31, in der Form der Berichtigung v. 25.02.2017, ABl. 2017 L 49/50 (Dublin III VO).

[322] Richtlinie 2013/32/EU des Europäischen Parlaments und des Rates v. 26.06.2013 zu gemeinsamen Verfahren für die Zuerkennung und Aberkennung des internationalen Schutzes, ABl. 2013 L 180/60.

[323] Bergmann, in: Bergmann/Dienelt, Ausländerrecht, 11. Aufl. 2016, § 26a AsylG, Rn. 1.

[324] Art. 38 (2) Richtlinie 2013/32, aaO. (Fn. 322), sowie Art. 39 (1), (4) Richtlinie 2013/32.

[325] BVerwG, Beschluss v. 23.03.2017 1 C 20.16, BeckRS 2017, 111628 beckonline (ECLI:DE:BVERWG:2017:230317B1C20.16.0; Rn. 12-14), die Sache ist beim Gerichtshof (mit zwei weiteren Vorlagebeschlüssen v. gleichen Tage u. a. unter dem Aktenzeichen C-297/17) anhängig. Der EuGH hat am 14.07.2017 beschlossen, hierüber nicht im beschleunigten Verfahren zu entscheiden (ECLI:EU:C:2017:561).

[326] Ob dies nicht weitergehend für alle Staaten gelten müsste, für die die Dublin-III-Regeln verbindlich sind, und ob der Begriff Mitgliedstaaten teleologisch auf die EU-Mitgliedstaaten reduziert werden müsste, für die die Dublin-III-Regeln voll verbindlich sind (also ggf. unter Ausschluss des Vereinigten Königreichs und Irlands), bedarf hier keiner Erörterung, vgl. dazu Bergmann, in: Bergmann/Dienelt, Ausländerrecht, 11. Aufl. 2016, § 26a AsylG, Rn. 2.

[327] Die Argumentation des BVerwG lässt sich allerdings nicht auf sichere Herkunftsländer übertragen, weil insoweit primärrechtlich, nämlich im Protokoll 24 zum AEUV, geregelt ist, dass Mitgliedstaaten

Der in Frage 23 angesprochene Begriff „sicherer Drittstaat" i. S. v. Art. 38 der Richtlinie 2013/32[328] entspricht dabei allerdings auch sonst in verschiedener Hinsicht nicht dem in Deutschland verwendeten, unmittelbar auf der verfassungsrechtlichen Vorgabe von Art. 16 a (2) GG beruhenden Begriff. In Art. 16a (2) GG werden Fälle beschrieben, in denen das materielle Grundrecht auf Asyl einem Betroffenen nicht zukommt. Ausländer die aus Mitgliedstaaten der Union[329] sowie solchen Drittstaaten einreisen, in denen „*die Anwendung des Abkommens über die Rechtsstellung der Flüchtlinge und der Konvention zum Schutze der Menschenrechte und Grundfreiheiten gewährleistet ist*", können sich nicht auf das Asylgrundrecht berufen.

Diese Definition wird in Art. 26a Asylgesetz („AsylG")[330] wiederholt. Art. 26a AsylG enthält auch die deutsche Legaldefinition des Begriffs „sicherer Drittstaat" entsprechend der Regelung in Art. 16 a (2) GG, aber ergänzt um einige Ausnahmen.[331] Aus Anlage I zum AsylG folgt, dass sichere Drittstaaten in diesem Sinne (zusätzlich zu den EU-Mitgliedstaaten)[332] aus deutscher Sicht heute nur die Schweiz und Norwegen sind. Diese Definition von einem „sicheren Drittstaat" ähnelt der Definition des „sicheren europäischen Drittstaats" im Sinne von Art. 39 der Richtlinie 2013/32, [333] weil nicht nur auf die Genfer Konvention, sondern auch auf die Europäische Menschenrechtskonvention Bezug genommen

der Europäischen Union „*füreinander für alle rechtlichen und praktischen Zwecke im Zusammenhang mit Asylangelegenheiten als sichere Herkunftsländer* [gelten]."

328 Richtlinie 2013/32/EU, aaO. (Fn. 322).

329 Hinsichtlich der Mitgliedstaaten der Union siehe aber den genannten Beschluss des BVerwG (Rn. 231 und Fn. 325), der den Begriff geltungserhaltend auf Nicht-Mitgliedstaaten reduziert.

330 Asylgesetz (in der Fassung der Bekanntmachung v. 02.09.2008 (BGBl. 2008 I S. 1798), zuletzt geändert durch Gesetz v. 20.07.2017 (BGBl. 2017 I S. 2780). Das Asylgesetz wurde bis 10/2015 als „Asylverfahrensgesetz" bezeichnet. Diese Bezeichnung findet sich deshalb in vielen der in diesem Zusammenhang zitierten Literaturstellen und Gerichtsentscheidungen. Durch Art. 1 Nr. 1 des Asylverfahrensbeschleunigungsgesetzes erhielt das Gesetz mit Wirkung v. 24.10.2015 seine heutige Bezeichnung.

331 Art. 26a (1) AsylG lautet: „*Ein Ausländer, der aus einem Drittstaat im Sinne des Artikels 16a Abs. 2 Satz 1 des Grundgesetzes (sicherer Drittstaat) eingereist ist, kann sich nicht auf Artikel 16a Abs. 1 des Grundgesetzes berufen. Er wird nicht als Asylberechtigter anerkannt. Satz 1 gilt nicht, wenn 1. der Ausländer im Zeitpunkt seiner Einreise in den sicheren Drittstaat im Besitz eines Aufenthaltstitels für die Bundesrepublik Deutschland war, 2. die Bundesrepublik Deutschland auf Grund von Rechtsvorschriften der Europäischen Gemeinschaft oder eines völkerrechtlichen Vertrages mit dem sicheren Drittstaat für die Durchführung des Asylverfahrens zuständig ist oder 3. der Ausländer auf Grund einer Anordnung nach § 18 Abs. 4 Nr. 2 AsylG nicht zurückgewiesen oder zurückgeschoben worden ist.*"

332 Hierzu erneut der Hinweis, dass nach der deutschen gesetzlichen Definition auch EU-Mitgliedstaaten sichere Drittstaaten seien können, dass aber das BVerwG jüngst dazu festgestellt hat, der Begriff müsse wegen vorrangigen EU-Rechts auf Nicht-EU-Mitgliedstaaten beschränkt werden, s.o. Rn. 231.

333 Richtlinie 2013/32/EU, aaO. (Fn. 322); Art. 39 (2) lautet: „*Ein Drittstaat kann nur dann als sicherer Drittstaat für die Zwecke des Absatzes 1 betrachtet werden, wenn er*
a) die Genfer Flüchtlingskonvention ohne geografischen Vorbehalt ratifiziert hat und deren Bestimmungen einhält,

wird (und weil sowohl die Schweiz als auch Norwegen über das in Art. 39 der Richtlinie 2013/32 geforderte gesetzliche Asylverfahrensrecht verfügen). Vor diesem Hintergrund regelt § 29 (1) Nr. 3 AsylG,[334] dass ein Antrag auf Asylgewährung (verfahrensrechtlich) unzulässig ist, wenn ein potentieller Antragsteller aus einem sicheren (europäischen) Drittstaat i. S. v. § 26a AsylG einreist und der betreffende Staat zur Wiederaufnahme bereit ist.

§ 29 AsylG erfasst neben den eigentlichen Asylanträgen auch Anträge auf Gewährung internationalen Schutzes, nämlich Anträge auf Anerkennung als Flüchtling nach der Genfer Konvention (§ 3 AsylG) oder auf Gewährung subsidiären Schutzes (§ 4 AsylG).[335] § 29 AsylG regelt auch weitere Unzulässigkeitsgründe für einen Antrag. Danach sind Asylanträge auch unzulässig, wenn

- (gemäß § 29 (1) Nr. 1 AsylG) ein anderer Staat aufgrund von EU-Recht oder eines völkerrechtlichen Vertrages für die Durchführung des Asylverfahrens zuständig ist;
- (gemäß § 29 (1) Nr. 2 AsylG) ein anderer Mitgliedstaat der Europäischen Union dem Ausländer bereits internationalen Schutz gewährt hat oder
- (gemäß § 29 (1) Nr. 4 AsylG) ein Staat, der kein Mitgliedstaat der Europäischen Union und bereit ist, den Ausländer wieder aufzunehmen, als „sonstiger (sicherer) Drittstaat" gemäß § 27 betrachtet wird.

Die ersten zwei Alternativen betreffen die Zuständigkeitsverteilung nach der Dublin-III-Verordnung und dienen der Inkorporierung und Anpassung des deutschen Rechts an die Vorgaben der Union. Sie führen in der Praxis dazu, dass die meisten heute gestellten Anträge unzulässig wären, wenn Deutschland nicht sein Selbsteintrittsrecht in vielen Fällen ausübte.[336]

Die letzte Alternative betrifft die (wegen der geografischen Lage Deutschlands inzwischen seltenen) Fälle der Einreise aus einem sonstigen (sicheren)

b) über ein gesetzlich festgelegtes Asylverfahren verfügt und
c) die Europäische Konvention zum Schutz der Menschenrechte und Grundfreiheiten ratifiziert hat und die darin enthaltenen Bestimmungen, einschließlich der Normen über wirksame Rechtsbehelfe, einhält."

334 Die Vorschrift ist erst im 07/2016 (durch Art. 6 Nr. 7 des Integrationsgesetzes (BGBl. 2016 I 1939) grundlegend neu gefasst worden. Der Katalog der Unzulässigkeitsgründe enthält Tatbestände, die früher in § 27a AsylG aF sowie im § 29 (Unbeachtliche Asylanträge) enthalten waren. Dies ist bei der Lektüre früherer Urteile und Literatur zu berücksichtigen. Vgl. Günther, BeckOK AuslR/Günther, 15. Aufl. 01.08.2017, AsylG § 29, Rn. 12.

335 Günther, BeckOK AuslR/Günther, 15. Aufl. 01.08.2017, AsylG § 29, Rn. 3.

336 Es liegt grundsätzlich im Ermessen jedes Mitgliedstaates, sich in Form des Selbsteintritts für zuständig zu erklären (Art. 17 (1) Dublin-III-VO); vgl. EuGH, C-394/12, Abdullahi, Rn. 57); Günther, BeckOK AuslR/Günther, 15. Aufl. 01.08.2017, AsylG § 29, Rn. 61; statistische Angaben zur Entscheidungspraxis in Deutschland werden vom Bundesamt für Migration und Flüchtlinge veröffentlicht, die letzten bei der Vorbereitung dieses Berichts zur Verfügung stehenden Zahlen ergeben betreffen den November 2017.

Drittstaat. § 27 (1) AsylG legt fest, dass *„ein Ausländer, der bereits in einem sonstigen Drittstaat vor politischer Verfolgung sicher war, nicht als Asylberechtigter anerkannt* [wird]." Ausländern, denen schon ein Ausweis über ihre Stellung als Flüchtling nach der Genfer Konvention ausgestellt wurde, werden als vor politischer Verfolgung sicher betrachtet. Weiter heißt es, dass wenn *„sich ein Ausländer in einem sonstigen Drittstaat, in dem ihm keine politische Verfolgung droht, vor der Einreise in das Bundesgebiet länger als drei Monate aufgehalten* [hat], [...] *vermutet* [wird], *dass er dort vor politischer Verfolgung sicher war."* § 27 AsylG beschreibt damit im Wesentlichen das deutsche Konzept eines „sicheren Drittstaats" (i. S. v. Art. 38 der Richtlinie 2013/32) für Staaten, die nicht „(europäische) sichere Drittstaaten" (i. S. v. § 26a AsylG bzw. Art. 39 der Richtlinie 2013/32) sind.

2. Die deutsche Rechtsprechung zu Fragen des sicheren Drittstaates

a. Der Grundsatz der Subsidiarität im Flüchtlingsrecht

In Deutschland wurde der Ausschluss des Anspruchs auf internationalen Schutz in den Fällen, in denen der Antragsteller bereits Schutz in einem (sicheren) Drittstaat gefunden hat, ursprünglich aus dem Grundsatz der Subsidiarität im Flüchtlingsrecht abgeleitet. Das BVerwG hat dazu Folgendes ausgeführt:[337]

> *„Auch der Flüchtlingsschutz nach der Genfer Flüchtlingskonvention ist vom Grundsatz der Subsidiarität des Konventionsschutzes sowohl im Verhältnis zum Schutz durch den Staat* [...] *der Staatsangehörigkeit des Betroffenen als auch im Verhältnis zum einmal erlangten Schutz in einem anderen (Dritt)Staat geprägt. Er vermittelt grundsätzlich kein Recht auf freie Wahl des Zufluchtlandes und insbesondere kein Recht auf freie Wahl eines Zweit oder Drittzufluchtlandes, sondern stellt insoweit lediglich sicher, dass der Flüchtling nicht in den Verfolgerstaat abgeschoben oder der Gefahr einer solchen Abschiebung in einem Drittstaat (Kettenabschiebung) ausgesetzt werden darf (Refoulement-Verbot). Hat der Flüchtling bereits ausreichende Sicherheit vor Verfolgung in einem anderen Staat gefunden, kann er – unbeschadet des in jedem Falle unbedingt zu beachtenden Verbots der Abschiebung in den Verfolgerstaat – darüber hinaus grundsätzlich nicht mehr seine Anerkennung als Flüchtling sowie das damit verbundene qualifizierte Aufenthaltsrecht in der Bundesrepublik Deutschland beanspruchen."*

Vor dem Hintergrund der Entwicklung des Unionsrechtes im Zusammenhang mit der Richtlinie 2004/83 hat das Bundesverwaltungsgericht dann seine Rechtsprechung modifiziert. Entscheidend sei nicht mehr die Frage, ob ein Betroffener in einem Drittstaat materiell Schutz gefunden habe, sondern ob ein solcher Schutz verfahrensrechtlich offensichtlich sei. Dazu führt das BVerwG aus:[338]

[337] BVerwG, Urt. v. 08.02.2005 1 C 29/03, NVwZ 2005, 1087, 1090.
[338] BVerwG, Urt. v. 04.09.2012 – 10 C 13/11, NVwZ-RR 2013, 431 (Rn. 15, 16).

„Art. 12 I der Richtlinie 2004/83/EG sieht einen materiellrechtlichen Ausschluss von der Flüchtlingsanerkennung aus Gründen der Subsidiarität nur in Fällen des Schutzes oder Beistands einer Organisation oder Institution der Vereinten Nationen mit Ausnahme des UNHCR oder dann vor, wenn der Betr. von den Behörden des Aufenthaltsstaates als Person anerkannt wird, welche die Rechte und Pflichten eines Staatsangehörigen dieses Landes oder gleichwertige Rechte und Pflichten hat. Die Möglichkeit anderweitig bestehender Sicherheit vor Verfolgung greift die Qualifikationsrichtlinie im Übrigen nur mit Blick auf den internen Schutz (Art. 8 der Richtlinie 2004/83/EG) auf, nicht aber im Hinblick auf die Verfolgungssicherheit in einem anderen Staat. Das Unionsrecht verfolgt insoweit keinen materiellrechtlichen, sondern einen verfahrensrechtlichen Ansatz [wird unter Hinweis auf Art. 25 II lit. b und Art. 26 Richtlinie 2005/85/EG sowie den 22. Erwägungsgrund der Richtlinie 2005/85/EG näher ausgeführt].

Der deutsche Gesetzgeber hat dieses verfahrensrechtliche Konzept des ersten Asylstaats in § 29 I AsylVfG in der Weise umgesetzt, dass ein Asylantrag – und damit auch ein Antrag auf Zuerkennung der Flüchtlingseigenschaft (§ 13 I und II AsylVfG) – unbeachtlich ist, wenn offensichtlich ist, dass der Ausländer bereits in einem sonstigen Drittstaat vor politischer Verfolgung sicher war [...]. *Das Asylverfahrensgesetz knüpft somit an die Offensichtlichkeit, dass der Ausländer in einem sonstigen Drittstaat vor politischer Verfolgung sicher war* [...], *mit der verfahrensrechtlichen Folge, dass eine Abschiebungsandrohung in einen sicheren Drittstaat ohne umfassende Sachprüfung des Asylbegehrens ergehen kann.*"

Das BVerwG knüpfte daran die für die Betroffenen günstige Folge, dass wenn deutsche Behörden (trotz der Möglichkeit, einen Antrag auf internationalen Schutz als (verfahrensrechtlich) unzulässig zurückzuweisen) den Antrag als zulässig behandeln und in der Sache entscheiden, sie eine materielle Abweisung von Anträgen auf internationalen Schutz insoweit nicht mehr auf die Subsidiarität des Schutzes stützen können. Dies spielt in Deutschland deshalb eine Rolle, weil im Rahmen der großen Migrationsbewegung in den Jahren 2015/16 sehr viele Ausländer nach Deutschland kamen, hinsichtlich derer Deutschland von der Möglichkeit des „Selbsteintritts" Gebrauch machte, sie also nicht in die Erstaufnahmeländer zurückschickte und über deren Anträge auf internationalen Schutz selbst entschied.

b. Zum Begriff des sicheren (europäischen) Drittstaats

Deutschland war nach der Vorstellung seines verfassungsändernden Gesetzgebers von 1993 von „sicheren (europäischen) Drittstaaten" umgeben. Landgrenzen hat Deutschland nur zu Mitgliedstaaten der Union und mit der Schweiz. Seegrenzen gibt es an der Ost- und Nordsee. Anrainer der Ostsee sind ebenfalls EU-Mitgliedstaaten sowie Norwegen und Russland. Anrainer der Nordsee sind – jedenfalls in für Flucht- und Asylfragen realistischer Entfernung – nur

Mitgliedstaten der Union und Norwegen (ggf. Island). Flucht und Migration aus Russland[339] und Island nach Deutschland sind – im Vergleich zu anderen Herkunftsländern – praktisch unbedeutend. Die Einreise über Flughäfen unterliegt Sonderregelungen. Der Schwerpunkt der Rechtsprechung zur Flucht und Einwanderung über sichere Drittstaaten betrifft deshalb Ausländer, die über die südlichen Nachbarstaaten nach Deutschland kamen und mithin über „sichere (europäische) Drittstaaten" i. S. v. § 26a AsylG (d. h. EU-Mitgliedstaaten,[340] die Schweiz und Norwegen) einreisten.

Angesichts der ursprünglich großen praktischen Bedeutung des Begriffs sind in Deutschland nicht nur die wesentlichen Kriterien im Grundgesetz selbst angelegt, sondern auch die betreffenden Staaten unmittelbar durch Gesetz identifiziert. Dem liegt das (vom BVerfG so genannte) „Konzept der normativen Vergewisserung" zugrunde, d. h. der Gesetzgeber selbst prüft und entscheidet, welcher Staat „sicher" ist; die Behörden und Gerichte sind im Grundsatz (zu den Ausnahmen sogleich) davon befreit, die Sicherheitssituation in Drittstaaten im Einzelfall zu prüfen.[341] Schon das Grundgesetz selbst bestimmt, dass die Mitgliedstaaten der Europäischen Union als sicher gelten,[342] und das AsylG regelt, dass die Schweiz und Norwegen weitere „sichere Drittstaaten" sind (§ 26a i. V. m. Anlage I).

§ 26a AsylG unterstellt damit pauschal, dass Ausländer in den so bezeichneten Drittstaaten sicher sind bzw. Schutz vor politischer Verfolgung hätten finden können. Damit sollte dem Ausländer das Argument entzogen werden, dass er auch im konkreten Fall in dem betreffenden Drittstaat nicht sicher sei.[343] Das Bundesverfassungsgericht hat deshalb die Feststellung des Gesetzgebers, ein Drittstaat biete die nötige Sicherheit vor Verfolgung, an eine ausführliche (aber nur beschränkt gerichtlich nachprüfbare) Prüfung durch den Gesetzgeber gebunden, dass die Anwendung der Genfer Konvention und der EMRK im Drittstaat sichergestellt ist (dazu genügt nicht der Beitritt zu den Übereinkünften; diese müssen innerstaatlich als verbindliche Rechtsquellen anerkannt und

[339] Die Zahl der Antragssteller aus Russland ist nicht völlig unbedeutend, im Jahr 2017 (bis einschl. November) stellten 4627 Personen russischer Staatsangehörigkeit Asylanträge in Deutschland, das sind 2,5% aller Anträge (vergl. die November 2017 Zahlen des Bundesamts für Migration und Flüchtlinge).

[340] Zu den EU-Mitgliedstaaten siehe oben Rn. 231 und Fn. 325, 329.

[341] Günther, in: BeckOK Ausländerrecht, 15. Aufl., Stand: 01.08.2017, § 26a AsylG, Rn. 9; ähnl., mit Zweifeln, Bergmann, in: Bergmann/Dienelt, Ausländerrecht, 11. Aufl. 2016, § 26a AslyG, Rn. 3 f.

[342] Es handelt sich hier um eine dynamische Verweisung, es sind also alle Mitgliedstaaten erfasst, die jeweils zum Zeitpunkt der Einreise Mitglieder der Europäischen Union sind, vgl. BVerfG, Urt. v. 14.05.1996 – 2 BvR 1938/93, u. a., BVerfGE 94, 49 = NVwZ 1996, 700 (705), Rn. 161, ebenso Günther, in: BeckOK Ausländerrecht, 15. Aufl., Stand: 01.08.2017, § 26a AsylG, Rn. 9.

[343] BVerfG, ibid., ähnlich Günther, in: BeckOK Ausländerrecht, aaO. § 26a AsylG, Rn. 9.

tatsächlich angewendet werden, einschließlich insbesondere des Verbots des Refoulement).[344]

Dennoch hat die Rechtsprechung die Möglichkeit und Notwendigkeit einer Einzelfallprüfung in engen Grenzen anerkannt. Schon das Bundesverfassungsgericht selbst hatte auf die Gefahren hingewiesen, die sich aus einer normativen Bestimmung eines sicheren Drittstaates ergeben und die auch eine Berufung auf außergewöhnliche Umstände im Einzelfall ausschließen.[345] Es erlaubt deshalb, dass ein Ausländer sich gegen eine Abschiebung in einen sicheren (europäischen) Drittstaat unter Hinweis auf solche außergewöhnlichen Umstände wenden kann, die im Rahmen der normativen Bestimmung von sicheren Drittstaaten nicht hätten berücksichtigt werden können.[346] Man mag sich dennoch fragen, ob dieser Ansatz (und die Gesetzessystematik) den Anforderungen aus Art. 38 (2) c) bzw. 39 (3) der Richtlinie 2013/32 voll entspricht.

Nachdem das BVerfG im Rahmen der Prüfung der Verfassungsmäßigkeit des Asylkompromisses im Detail festgestellt hatte, dass Österreich (bevor es Mitglied der Europäischen Gemeinschaft wurde) vom deutschen Gesetzgeber zurecht als sicherer Drittstaat eingestuft worden war,[347] wird heute vor allem die Frage gestellt, ob diese Kriterien z. B. eine Abschiebung nach Bulgarien ausschließen. Darüber ist es zwischen den deutschen Verwaltungsgerichten und in der Literatur zu einem vielstimmigen Meinungsstreit gekommen,[348] dem sich z. B. das OVG Koblenz mit dem Hinweis entzogen hat, die Einreise aus Bulgarien in den von ihm zu entscheidenden Fällen sei über Österreich erfolgt, das unstreitig ein sicheres Drittland sei.[349] Folgt man dem jüngsten Vorlagebeschluss des BVerwG[350] an den EuGH, wonach der Begriff EU-konform auf Nicht-Mitgliedstaaten zu beschränken ist, wäre diese Diskussion weitgehend entschärft.

Die Praxis[351] und auch des Bundesverwaltungsgericht, unter Bezugnahme auf die Entscheidung des EuGH in Abdullahi,[352] prüfen Risiken für einzelne

[344] BVerfG, Urt. v. 14.05.1996 – 2 BvR 1938/93, u. a., BVerfGE 94, 49, Rn. 158-173.

[345] BVerfG, Urt. v. 14.05.1996 – 2 BvR 1938/93, u. a., BVerfGE 94, 49, Rn. 188.

[346] BVerfG, Urt. v. 14.05.1996 – 2 BvR 1938/93, u. a., BVerfGE 94, 49, Rn. 189 f.; dabei hat das BVerfG fünf Fallgruppen erwähnt: drohende Todesstrafe, staatlich nicht verhinderte Verbrechen gegen den Asylbewerber, Versagung der Prüfung der Flüchtlingseigenschaft im Drittstaat, plötzliche Lageänderung und Einzelverfolgung durch den Drittstaat, vgl. Bergmann, in: Bergmann/Dienelt, Ausländerrecht, 11. Aufl. 2016, § 26a AsylG, Rn. 14.

[347] BVerfG, Urt. v. 14.05.1996 – 2 BvR 1938/93, 2 BvR 2315/93, BVerfGE 94, 49, Rn. 218 ff.

[348] Siehe z. B. VG Köln, Urt. v. 26.11.2015 – 20 K 712/15.A, BeckRS 2015, 55745; ECLI:DE:VGK:2015:1126.20K712.15.0A;

[349] OVG Koblenz v. 18.02.2016, 1 A 11081/14 OVG, mit einem Überblick über den Streitstand in Rn. 29.

[350] BVerwG, Beschluss v. 23.03.2017 1 C 20.16, aaO. (Fn. 325), Rn. 12-14.

[351] Günther, in: BeckOK Ausländerrecht, 15. Aufl., Stand: 01.08.2017, § 26a AsylG, Rn. 9.

[352] EuGH, C394/12, Abdullahi, ECLI:EU:C:2013:813, NVwZ 2014, 208 Rn. 60.

Ausländer ggf. auf anderer Basis, nämlich im Rahmen der Frage, ob diese (zwangsweise) in bestimmte Staaten abgeschoben werden können (gemäß §§ 34, 34a, 35 ff. AsylG). Das BVerwG hat entschieden, dass unabhängig von der Gewährung von Asyl jedenfalls eine Abschiebung von Asylsuchenden in einen sicheren (europäischen) Drittstaat dann nicht erfolgen darf, wenn der Betroffene *„systemische Mängel des Asylverfahrens und der Aufnahmebedingungen für Asylbewerber in diesem Mitgliedstaat geltend macht, die ernsthafte und durch Tatsachen bestätigte Gründe für die Annahme darstellen, dass er tatsächlich Gefahr läuft, einer unmenschlichen oder erniedrigenden Behandlung i. S. v. Art. 4 der GRCh ausgesetzt zu werden.*“[353]

c. Zum Begriff des „sonstigen (sicheren) Drittstaats“

Gemäß § 27 (2) AsylG gilt die (widerlegliche) Vermutung, dass ein Ausländer, der sich vor seiner Einreise nach Deutschland mehr als drei Monate in einem Drittstaat aufgehalten hat, dort vor politischer Verfolgung sicher war. Bei der Prüfung von Einwänden gegen eine solche Vermutung werden von den Gerichten vor allem drei Kriterien berücksichtigt: (i) bestand tatsächlich Verfolgungssicherheit? (ii) kann der Betroffenen im Drittstaat mit einer Mindestexistenzsicherung rechnen? und (iii) hatte der Ausländer seine Flucht im Drittstaat wirklich beendet (oder nur zur Vorbereitung der Weiterreise vorübergehend unterbrochen)? Dabei betrifft § 27 (2) AsylG zunächst nur den Ausschluss vom materiellen Asylrecht und nicht das Recht auf internationalen Schutz.[354] Über die Verfahrensvorschrift des Art. 29 (1) Nr. 4) AsylG wirkt sich der Schutz in einem (sicheren) Drittstaat aber auch auf Anträge auf internationalen Schutz aus, weil § 29 AsylG für Asylanträge und Anträge auf internationalen Schutz gleichermaßen anwendbar ist.[355]

(i) Zur Frage der Prüfung der Sicherheit vor Verfolgung ist ein Urteil des BVerwG instruktiv, das einen türkischen Staatsangehörigen betrifft, der als Kämpfer für die PKK tätig war, im Nordirak gelebt und sich dann aber von der PKK abgewandt hatte und nach Deutschland floh:[356]

> „[Die Vorinstanz geht davon aus, dass der türkische] *Kläger mehrere Jahre im Nordirak gelebt hat. Nach den tatrichterlichen Feststellungen spricht alles dafür, dass er dort vor einer Verfolgung durch den türkischen Staat sicher war und eine Lebensgrundlage nach Maßgabe der dort bestehenden Verhältnisse gefunden hat,*[357] *eine Verfolgung seitens des Irak hat*

[353] BVerwG, Urt. v. 27.10.2015 – 1 C 32/14, NVwZ 2016, 154.

[354] BVerwG, Urt. v. 04.09.2012 – 10 C 13/11, NVwZRR 2013, 431, Rn. 14; Günther, in: BeckOK Ausländerrecht, 15. Edition, § 27 AsylG, Rn. 38.

[355] Günther, in: BeckOK Ausländerrecht, 15. Aufl. § 29 AsylG, Rn. 3.

[356] BVerwG, Urt. v. 04.09.2012 – 10 C 13/11, NVwZRR 2013, 431, Rn. 12 f.

[357] Unter Hinweis auf BVerwGE 78, 332 [344 ff.] = NVwZ 1988, 737.

der Kläger selbst nicht behauptet. Damit greift die widerlegbare gesetzliche Vermutung des § 27 III 1 AsylVfG ein.

Daher hätte [die Vorinstanz] *der Frage nachgehen müssen, ob der Kl. durch seine Abkehr von der PKK die im Nordirak bestehende Verfolgungssicherheit verloren hat. Denn § 27 AsylVfG findet keine Anwendung und die Schutzbedürftigkeit des Betroffenen lebt wieder auf, wenn der in einem anderen Land gewährte Schutz vor politischer Verfolgung durch Widerruf, praktischen Entzug oder aus anderen Gründen entfällt; dies gilt auch dann, wenn sich der Asylbewerber längere Zeit in dem Drittstaat aufgehalten hat. Einem Asylanspruch steht die anderweitige Verfolgungssicherheit allerdings dann entgegen, wenn der Asylbewerber auf den Verfolgungsschutz freiwillig verzichtet, etwa durch eine nicht erzwungene Ausreise aus dem Gebiet des ihm Schutz gewährenden Staates.*[358] *Der Wegfall des Schutzes oder das Entstehen neuer Verfolgungsgefährdung durch die Abkehr von einer terroristischen Organisation – wie der PKK – steht einer freiwilligen Aufgabe der anderweitigen Sicherheit aber nicht gleich.* [Die Vorinstanz] *hätte daher prüfen müssen, welche Konsequenzen der Kläger als abtrünniges PKK Mitglied im Irak zu befürchten hatte und ob seine Verfolgungssicherheit durch ggf. erfolgende Nachstellungen der PKK entfallen ist.*"

Das Urteil bestätigt, dass der Schutz vor Verfolgung im Drittstaat auf Dauer gewährleistet sein muss. Fällt der Schutz nachträglich weg, lebt das Recht, internationalen Schutz zu suchen, wieder auf, es sei denn, der Betroffene habe freiwillig auf seinen Schutz verzichtet.[359]

Für die Beurteilung der Frage, ob ein Ausländer in einem Drittstaat vor politischer Verfolgung sicher ist, ist nach der Rechtsprechung ein rein objektiver Maßstab anzulegen.[360] Ob Schutz vor politischer Verfolgung besteht, ist anhand von drei Hauptkriterien zu prüfen, nämlich (i) dass der Drittstaat selbst den Flüchtling nicht politisch verfolgt, dass er ihn (ii) bei der Einreise nicht zurückweist und dass er ihn (iii) nicht in einen Staat abschiebt, in dem ihm politische Verfolgung droht bzw. der ihn seinerseits im Wege der Kettenabschiebung in einen solchen Staat abschiebt.[361] Im Drittstaat muss zudem gewährleistet sein, dass der Ausländer dort nicht Opfer von politischer Verfolgung durch den Herkunftsstaat werden kann (z. B. weil der Drittstaat dem Herkunftsstaat Entführungen oder Anschläge gegen „ihre" Flüchtlinge erlaubt).

(ii) Zweitens gehört nach deutschem Verständnis zum Begriff der Sicherheit vor Verfolgung, dass dem Ausländer im Drittstaat ein gewisses

[358] Mit dem Hinweis: "*so bereits: BVerwGE 90, 127* [135] = *NVwZ 1992, 893, m. w.W. II*"

[359] Kritisch Bergmann, in: Bergmann/Dienelt, Ausländerrecht, 11. Aufl. 2016, § 27 AsylG, Rn. 9-14.

[360] BVerwGE 79, 347 = NVwZ 1988, 1136 (1136), BVerwGE 77, 150 = NVwZ 1987, 812 (812).

[361] Einhaltung des RefoulementVerbots nach Art. 33 (1) GFK; vgl. BTDrs. 10/6416, S. 20 f.; 9/1630, S. 16; BVerfG NVwZ 1992, 659 (659); BVerwGE 69, 289 = NVwZ 1984, 732 (733)).

Existenzminimum garantiert wird.[362] Dazu dürften Wohnung, ausreichende Ernährung, Zugang zu medizinischer Grundversorgung, Schutz der körperlichen Unversehrtheit, die Möglichkeit der Religionsausübung, Zugang zu einfacher Schulbildung und ein Mindestmaß an Bewegungsfreiheit gehören.[363] Nicht erforderlich ist ein mit Deutschland (oder dem ursprünglichen Heimatland) vergleichbarer Lebensstandard.[364]

(iii) Für den Ausschluss eines Menschen vom internationalen Schutz in Deutschland gemäß § 27 (1) AsylG ist außerdem erforderlich, dass er seine Flucht in dem Drittstaat beendet hat, aus dem er einreist. War seine Flucht in dem Drittstaat noch nicht beendet, weil zwischen Verfolgung und Flucht des Ausländers und seiner Einreise nach Deutschland – trotz des Zwischenaufenthalts im Drittstaat – noch ein kausaler Zusammenhang besteht, begründet § 27 AsylG nach überwiegender Auffassung in Rechtsprechung und Literatur keinen Ausschluss.[365] Besonders darin unterscheidet sich der Ausschluss in § 29 (1) 4) i. V. m. § 27 AsylG von dem in § 29 (1) 3) i. V. m. § 26a AsylG.

Dies ist dem Wortlaut von § 29 (1) 4) i. V. m. §27 (1) AsylG zwar nicht unmittelbar zu entnehmen. Allerdings ist in § 27 (3) AsylG davon die Rede, Schutz im Drittstaat werde (erst) vermutet, wenn sich der Ausländer drei Monate dort aufgehalten habe (weil dies ein Indiz für Eingewöhnung dort ist). Außerdem wird auf die Gesetzesmaterialien verwiesen: Im Innenausschuss des Deutschen Bundestages[366] seien Zwischenaufenthalte während der Flucht als mögliche unschädliche Ereignisse angesehen worden.[367] Schließlich entspricht dieser Ansatz auch der Gesetzessystematik: Der Gesetzgeber hat bei der Einführung von § 26a AsylG (der ausdrücklich nur auf die Einreise des Ausländers aus einem sicheren (europäischen) Drittstaat abstellt) den Wortlautunterschied zu § 27 AsylG entstehen lassen, obwohl bekannt war, dass die Rechtsprechung für einen Ausschluss des Rechts auf internationalen Schutz gemäß § 27 AsylG (oder seiner Vorgängervorschrift) ein Ende der Flucht im Drittstaat forderte.[368]

[362] BVerwG NVwZ 1988, 737 (740); dessen Umfang ist allerdings umstritten, der Gesetzgeber hat wohl versucht, als Reaktion auf das vorgenannte Urteil, das Kriterium zu relativieren, vgl. dazu Bergmann, in: Bergmann/Dienelt, Ausländerrecht, 11. Aufl. 2016, § 27 AsylG, Rn. 38 f., m.w.N.

[363] Vgl. Günther in: BeckOK AuslR/ AsylG § 27, Rn. 1315; Ott in: GKAsylVfG, §27, Rn. 83 ff.

[364] Günther in: BeckOK AuslR/ AsylG § 27, Rn. 14.

[365] BVerwG InfAuslR 1990, 206 (208); NVwZ 1988, 737 (740); Bergmann, in: Bergmann/Dienelt, Ausländerrecht, 11. Aufl. 2016, § 27 AsylG, Rn. 27-31.

[366] Vgl. Bergmann, in: Bergmann/Dienelt, Ausländerrecht, 11. Aufl. 2016, § 27 AsylG, Rn. 28, unter Hinweis auf BTDrs. 10/3678, S. 5; 10/6416, S. 21.

[367] Vgl. BVerwG NVwZ 1988, 1136 (1137); Ott in: GKAsylVfG §27 Rn. 42; kritisch, hinsichtlich der Berücksichtigung der Gesetzesmaterialien, Günther in: BeckOK AuslR/ AsylG § 27, Rn. 17.

[368] Vgl. Günther in: BeckOK AuslR/ AsylG § 27, Rn. 17.

Insgesamt lässt sich feststellen, dass Fragen der Konsequenzen von Schutz in sicheren Drittstaaten in Deutschland bisher vornehmlich anhand der im nationalen Bereich entwickelten Kriterien diskutiert werden. Die Mindestanforderungen der Richtlinie 2013/32/EU werden dabei inhaltlich weitgehend eingehalten[369] und die Notwendigkeit einer EU-rechtskonformen Auslegung des deutschen Asylrechts betont,[370] aber ihre Relevanz für die Auslegung der nationalen Begriffe ist bisher nur selten im Einzelnen erörtert worden.[371] Der Beschluss des BVerwG[372] vom März 2017 mag insoweit einen Wendepunkt in der Wahrnehmung der Bedeutung des EU-Rechts auch in diesem Bereich darstellen.

Frage 24

Gemäß Art. 68 AEUV legt „*der Europäische Rat die strategischen Leitlinien für die gesetzgeberische und operative Gesamtplanung im Raum der Freiheit, der Sicherheit und des Rechts fest*." Dabei handelt der Rat in der für das Gremium üblichen Form, nämlich durch die Annahme von Schlussfolgerungen.[373]

Die Rechtsnatur solcher Leitlinien ist in der deutschen Literatur umstritten. Einige sehen die Aufgaben des Europäischen Rats im Rahmen von Art. 68 AEUV als Ausprägung seiner allgemeinen politischen Funktion i. S. v. Art. 15 EUV an, sodass seine Beschlüsse keinen Legislativcharakter und keine Bindungswirkungen für die Kommission und ihr Initiativerecht entfalten.[374] Andere sehen Art. 68 AEUV eher als *lex specialis*, die es dem Europäischen Rat ermöglicht, der Kommission auch rechtlich bindende Leitlinien vorzugeben (die allerdings Raum lassen müssen für ein Umsetzungs- und Initiativermessen der Kommission).[375] Deren Verbindlichkeit würde die Kommission verpflichten, sich bei Vorschlägen für Legislativakte nicht in Gegensatz zu den Vorgaben des Europäischen Rates zu stellen, ohne zugleich echte Legislativmaßnahmen des Europäischen Rates

[369] Fragen hinsichtlich der Einhaltung europarechtlicher Vorgaben mögen sich z. B. hinsichtlich der Frage stellen, ob die Rechtsprechung Antragstellern ausreichend Raum gibt, um ihre gesetzlich vermutete Verfolgungssicherheit (§ 26a AsylG) im Einzelfall zu wiederlegen (gemäß Art. 38 (2) c) und Art. 39 (2) Richtlinie 2013/32, aaO. (Fn. 322)).

[370] Bergmann, in: Bergmann/Dienelt, Ausländerrecht, 11. Aufl. 2016, § 26a AsylG, Rn. 1.

[371] Vgl. etwa den Überblick bei Bergmann, in: Bergmann/Dienelt, Ausländerrecht, aaO. Vorbemerkung, Rn. 20-35.

[372] BVerwG, Beschluss v. 23.03.2017 1 C 20.16, aaO. (Fn. 325), Rn. 12-14.

[373] Vgl. Breitenmoser/Weyeneth, in: von der Groeben, Europäisches Unionsrecht, aaO. (Fn. 2), Art. 68 AEUV, Rn. 11.

[374] Vgl. Breitenmoser/Weyeneth, in: von der Groeben, Europäisches Unionsrecht, aaO. (Fn. 2), Art. 68 AEUV, Rn. 11, 13 ff.; unter Hinweis auf Herrnfeld, in: Schwarze, aaO. Art. 68 Rn. 2.

[375] Röben, in Grabitz, aaO. (Fn. 2), Art. 68 AEUV, Rn. 5, wohl auch Hoppe, in Lenz, aaO. (Fn.); Art. 68, Rn. 2).

(in den Handlungsformen von Art. 288 AEUV) zu ermöglichen.[376] Der Rat hatte Vorschläge der Kommission, die von dem vom Europäischen Rat vorgegebenen Rahmen abwichen, ausdrücklich missbilligt,[377] ein Zeichen für eine wohl mehr als nur politische Bindung der Kommission.[378]

Angesichts der historisch engen Bindung der Zusammenarbeit im Bereich Justiz und Inneres an die Vorgaben der Mitgliedstaaten und der „Souveränitätsnähe" der Vorschriften spricht manches dafür, die Regelungen zur Rolle des Europäischen Rates als *lex specialis* einzuordnen und ihren Leitlinien (die ja sogar operationelle Fragen mit umfassen können) eine gewisse rechtliche Verbindlichkeit zuzuschreiben, die über die unstreitig bestehende politische Bindung hinausgeht. Andererseits ist der Europäische Rat als Institution mit der erklärten Absicht geschaffen worden, darin ein politisches Entscheidungs- und Koordinationsorgan zu schaffen, zu dessen Aufgaben der Erlass verbindlicher Rechtsakte (jedenfalls in den Handlungsformen des Art. 288 AEUV) gerade nicht gehört. Jedenfalls aber muss der Kommission ein eigener Handlungs- und Ermessensspielraum bei der Umsetzung der Vorgaben des Europäischen Rates erhalten bleiben. Dabei wird es nicht erforderlich sein, dass der Europäische Rat immer zuerst Leitlinien erlässt und dann die Kommission Vorschläge formuliert, vielmehr wird in der Praxis die Kommission oft – in Konsultationen mit den Mitgliedstaaten – Vorschläge machen, die der Europäische Rat dann nachträglich gutheißt.

Hinsichtlich der Frage nach dem Verhältnis der verschiedenen in Frage 24 erwähnten Rechtsakte ist deshalb erstens festzustellen, dass der „Gesamtansatz" der Kommission,[379] sich in die Vorgaben des Europäischen Rates einfügt,

[376] So etwa Röben, in Grabitz, aaO. (Fn. 2), Art. 68 AEUV, Rn. 9 (*„keine Durchbrechung von Art. 15 (1) 2) EUV, wonach der ER nicht gesetzgeberisch tätig wird"*), unter Hinweis auf die Tatsache, dass der Rat die abschließende Entscheidung über verbindliche Maßnahmen treffe.

[377] Der Rat Justiz und Inneres beschloss auf seiner Sitzung v. 03./04.06.2010 (Dokument 10630/2010, S. 34) die Schlussfolgerungen des Rates *„zur Mitteilung der Kommission „Ein Raum der Freiheit, der Sicherheit und des Rechts für die Bürger Europas – Aktionsplan zur Umsetzung des Stockholmer Programms"* (Dokument 9935/10), in denen er *„nachdrücklich betont, dass das Stockholmer Programm den alleinigen Bezugsrahmen für die politische und operative Agenda der Europäischen Union im Bereich des Rechts, der Sicherheit und der Freiheit darstellt"*; lediglich *„Kenntnis nimmt"* von der Mitteilung der Kommission *"Ein Raum der Freiheit, der Sicherheit und des Rechts für die Bürger Europas"* und zugleich feststellt *„dass einige der von der Kommission vorgeschlagenen Maßnahmen nicht im Einklang mit dem Stockholmer Programm stehen und andere, die zum Stockholmer Programm gehören, in der Mitteilung der Kommission nicht behandelt werden"*, und die *„Kommission in dieser Hinsicht nachdrücklich* [auffordert]*, nur die Initiativen zu ergreifen, die voll und ganz mit dem Stockholmer Programm im Einklang stehen."*

[378] Siehe dazu V. Mitsilegas, European Criminal Law and Resistance to Communautarisation after Lisbon, 1 New Journal of European Criminal Law [2010], 458 (467), Suhr, in: Callies Ruffas, aaO. (Fn.), Art. 68 AEUV, Rn. 5.

[379] Mitteilung der Kommission (...), Gesamtansatz für Migration und Mobilität v. 18.11.2011, KOM(2011) 743 endg. („Gesamtansatz").

wie sie sich aus dem sog. Stockholmer Programm als auch den Schlussfolgerungen des Europäischen Rates vom 23. und 24. Juni 2011 ergaben.[380] Der „Partnerschaftsrahmen"[381] wurde von der Kommission als Teil der Implementierung der Europäischen Migrationsagenda[382] vorgeschlagen und vom Europäischen Rat am 28. Juni 2016 gebilligt[383]. Daher sind sowohl der Gesamtansatz als auch der Partnerschaftsrahmen von Beschlüssen des Europäischen Rates und damit dessen Leitlinien gedeckt.

Der Gesamtansatz stammt aus 2011 und mithin vor der Zeit der großen Migrationsströme der Jahre 2015/16. Er widmet sich zwar auch den Fragen der Migrationssteuerung und der Abwehr illegaler Migration, der Blickwinkel ist aber weiter, denn es geht bei dem Gesamtansatz um *„eine engere Verzahnung zwischen den relevanten EU-Politikbereichen und zwischen der externen und der internen Dimension der Politik in diesen Bereichen*."[384] Der „Gesamtansatz" betont seinen globalen Ansatz und nennt vier „Säulen", um die es geht, nämlich (i) um legale Migration, z. B. für hochqualifizierte Bewerber, die außerhalb von Flucht und Vertreibung als für die wirtschaftliche Entwicklung notwendig oder wenigstens wünschenswert angesehen werden, (ii) irreguläre Migration, (iii) internationalen Schutz und Asyl und (iv) die Auswirkung von Migration auf Entwicklung.

Die Vorschläge zur Migrationsagenda (2015) und auf deren Basis den Partnerschaftsrahmen sind demgegenüber auf die konkreten Probleme im Zusammenhang mit der Flüchtlingskrise von 2015/16 fokussiert. Ziel ist die effektive Steuerung von irregulären Migrationsströmen, vor allem aus dem Nahen Osten und Nordafrika, die mögliche Identifizierung und Rückführung illegaler Migranten sowie die Bekämpfung von Fluchtursachen, auch unter Einsatz finanzieller Mittel der Union.

Drei Faktoren bestimmen deshalb aus juristischer Sicht das Verhältnis zwischen dem Gesamtansatz einerseits und der Migrationsagenda mit den Partnerschaftsrahmen andererseits: Beide Programme sind zulässige Beschreibungen des politischen Handlungswillens der Union, aber letztere sind zum einen als *lex*

[380] Das Stockholmer Programm: Ratsdokument 17024/09 – Annahme durch den Europäischen Rat am 1./2.12.2009; Schlussfolgerungen des Europäischen Rates v. 23/24.06.2011; EUCO 23/11.

[381] Mitteilung der Kommission (...) über einen neuen Partnerschaftsrahmen für die Zusammenarbeit mit Drittländern im Kontext der Europäischen Migrationsagenda, v. 07.06.2016, COM(2016) 385, sowie Mitteilung der Kommission, Erster Fortschrittsbericht über den Partnerschaftsrahmen für die Zusammenarbeit mit Drittländern im Kontext der Europäischen Migrationsagenda, v. 18.10.2016, COM(2016) 700; („Partnerschaftsrahmen").

[382] Mitteilung der Kommission an das Europäische Parlament, den Rat, (...): Die europäische Migrationsagenda, v. 13.05.2015, COM(2015) 240 final.

[383] Tagung des Europäischen Rates (28.06.2016) – Schlussfolgerungen, EUCO 26/16 Abschnitt Migration.

[384] Gesamtansatz, aaO. (Fn. 379), S. 3.

posterior und zum anderen als *lex specialis* gegenüber dem Gesamtansatz vorrangig, aber eben nur soweit die Migrationsagenda und die Partnerschaftsrahmen geographisch und inhaltlich Themen abdecken, die auch im Gesamtansatz enthalten sind. Soweit der Gesamtansatz andere Themen und Regionen anspricht, bleiben diese Regelungen wirksam und Ausdruck der politischen Agenda der Union.

Insoweit wird der Gesamtansatz teilweise durch die Migrationsagenda und die Vorschläge zu Partnerschaftsrahmen verdrängt, aber nicht ersetzt.

Deutschland pflegt keine besonderen Beziehungen mit afrikanischen Drittstaaten oder Drittstaaten im Nahen Osten[385], *„die auf jahrzehntelang gepflegte politische, historische und kulturelle Bindungen und Kontakte zurückzuführen sind"* und *„zum Nutzen der EU voll ausgeschöpft werden"* sollten, und/oder *„umfassende bilaterale Beziehungen zu einem bestimmten Partnerland."* Dennoch wird es wegen seiner Rolle in der Union und angesichts der besonders vielen Flüchtlinge, die in Deutschland aufgenommen wurden, ein Interesse haben, *„in vollem Umfang an den Diskussionen zwischen der EU und diesem Land"* (also den Ländern, aus denen ein Großteil der Flüchtlinge kommt) beteiligt zu sein.

Deutschland hat, mit Ausnahme verschiedener Rückführungsabkommen (dazu unter Frage 25), keine besonderen bilateralen oder multilateralen Übereinkünfte mit afrikanischen Staaten abgeschlossen, die als Beispiel für Übereinkünfte zwischen der EU und den vorrangigen afrikanischen Ländern dienen könnten.

Frage 25

Die Frage 25 der Generalberichterstatter betrifft das Verhältnis der Vertragsschlusskompetenz nach Art. 79 (3) AEUV und dem Bestand an sekundärrechtlichen Regelungen über die Ausreise und von Rücknahmeabkommen der EU und der Mitgliedstaaten zu der allgemeinen Vorschrift in Art. 3 (2) hinsichtlich der Außenkompetenzen der Union in diesem Bereich.

Zur Analyse der Frage empfiehlt es sich, zunächst vor dem Hintergrund von Art. 3 (2) AEUV und des sekundärrechtlichen Bestandes an Regelungen zu Ausreisepflichten und Rücknahme die Kompetenzen zu Art. 79 (3) AEUV zu betrachten, um sodann hinsichtlich der Abkommen Deutschlands zu prüfen, ob die Vereinbarung weiterer Abkommen oder die Änderungen bestehender Abkommen gemäß Art. 3 (2) AEUV unzulässig wären und ob der Inhalt der Abkommen im Vergleich mit den Vorgaben der völkerrechtlichen Verpflichtungen problematisch ist.

[385] Die besonderen Beziehungen Deutschlands zu Israel spielen in diesem Zusammenhang keine Rolle.

1. Die Kompetenzstruktur im Bereich von Art. 79 (3) AEUV

Die ausdrückliche Vertragsschlusskompetenz der Union aus Art. 79 (3) AEUV begründet gemäß Art. 216 (1) 1. Alternative AEUV das Recht der Union, „*mit einem oder mehreren Drittländern oder einer oder mehreren internationalen Organisationen eine Übereinkunft* [zu] *schließen*", weil „*dies in den Verträgen vorgesehen ist.*" Diese Vertragsschlusskompetenz wird der Union im Bereich des „Raums der Freiheit, der Sicherheit und des Rechts" zugewiesen, einem Bereich der geteilten Zuständigkeit zwischen Mitgliedstaaten und Union gemäß Art. 4 (2) j) AEUV; dies gilt deshalb zunächst auch für die Außenkompetenz.

Die geteilte Zuständigkeit kann aber, wenn die Union in einem Bereich sekundärrechtliche Maßnahmen erlässt und insbesondere wenn sie einen Bereich im Wesentlichen vollständig regelt (z. B. im Sinne einer „Vollharmonisierung"), gemäß Art. 3 (2) AEUV zu einer „*ausschließlichen Zuständigkeit für den Abschluss internationaler Übereinkünfte*" erstarken (3. Alternative), „*soweit* [der Abschluss von Abkommen der Mitgliedstaaten][386] *gemeinsame Regeln beeinträchtigen oder deren Tragweite verändern könnte.*"

Fragen der Ausreise und Rückführung von Staatsangehörigen von Drittstaaten, insbesondere der erzwungenen Ausreise für den Fall, dass ein Aufenthaltsrecht in der Union nicht oder nicht mehr besteht, regelt die Richtlinie 2008/115/EG,[387] die auf der Grundlage von ex-Art. 63 (3) b) EGV (der fast wortgleichen Vorgängervorschrift zum heutigen Art. 79 (2) c) AEUV) erlassen wurde.

Die Richtlinie regelt die grundsätzliche Rückkehrpflicht von Drittstaatsangehörigen, denen kein Aufenthaltsrecht mehr zusteht, und eine Pflicht der Mitgliedstaaten, entsprechende Rückkehrentscheidungen zu treffen, die Möglichkeit, dieser Pflicht durch freiwillige Ausreise zu entsprechen, sowie die Möglichkeit, insbesondere wenn eine freiwillige Ausreise nicht erfolgt, die Ausreise zwangsweise durchzusetzen (Abschiebung). Die Richtlinie regelt eine Reihe von Ausnahmen und Grenzen (für Minderjährige, sonstige Schutzbedürftige etc.) und verpflichtet die Mitgliedstaaten, *„im Einklang mit den Grundrechten als allgemeinen Grundsätzen des Gemeinschafts- und des Völkerrechts, einschließlich der Verpflichtung zum Schutz von Flüchtlingen und zur Achtung der Menschenrechte,"* vorzugehen. Dazu werden eine Reihe von Verfahrensgarantien vorgesehen.

Zugleich heißt es in der Richtlinie (Ziffer 8 der Erwägungsgründe): „*Die Notwendigkeit gemeinschaftlicher und bilateraler Rückübernahmeabkommen mit Drittländern zur Erleichterung des Rückkehrprozesses wird hervorgehoben. Die internationale*

[386] Zu der missverständlichen Formulierung von Art. 3 (2) 3. Alternative AEUV siehe oben Kapitel 1, Rn. 15, a.E., m.w.N. in Fn. 28.

[387] Richtlinie 2008/115/EG des Europäischen Parlaments und des Rates v. 16.12.2008 über gemeinsame Normen und Verfahren in den Mitgliedstaaten zur Rückführung illegal aufhältiger Drittstaatsangehöriger, ABl. 2008 L 348/98.

Zusammenarbeit mit den Herkunftsländern in allen Phasen des Rückkehrprozesses ist eine Voraussetzung für die Erzielung nachhaltiger Rückführungen." Außerdem ist in Art. 4 der Richtlinie geregelt, dass „*günstigere Bestimmungen von* [...] *bilateralen oder multilateralen Vereinbarungen zwischen einem Mitgliedstaat oder mehreren Mitgliedstaaten und einem Drittland oder mehreren Drittländern*" von den Regelungen der Richtlinie unberührt bleiben.

Hinweise auf die fortbestehende Bedeutung bilateraler Abkommen in diesem Bereich enthält auch die in Frage 25 erwähnte Verordnung 2016/1624:[388] „*Das etwaige Bestehen einer Vereinbarung zwischen Mitgliedstaaten und einem Drittstaat kann die Agentur oder die Mitgliedstaaten nicht von ihren Verpflichtungen nach dem Recht der Union oder dem Völkerrecht, insbesondere hinsichtlich der Einhaltung des Grundsatzes der Nicht-Zurückweisung, entbinden*" (Punkt 36).

Soweit die Union schließlich selbst Rückführungsabkommen abgeschlossen hat, hat sie in diesen die Möglichkeit für Mitgliedstaaten vorgesehen, Zusatzprotokolle abzuschließen. Als Beispiel mag das Rückübernahmeabkommen mit Serbien aus 2007 dienen.[389] Dieses Abkommen regelt die Bereitschaft der Vertragspartner, ihre eigenen Staatsangehörigen auch dann „zurückzunehmen" (sie also wiedereinreisen zu lassen), wenn diese keine Reisedokumente (Pässe, Personalausweise etc.) (mehr) haben oder deren Gültigkeit abgelaufen ist. In dieser Situation ist nämlich die Durchführung von Abschiebungen und anderen Formen der Ausreise unter Zwang praktisch unmöglich. Es ist deshalb erforderlich, dass der Zielstaat der Ausreise den Ausreisepflichtigen auch einreisen lässt und dafür die technischen Verfahren geregelt werden, in deren Rahmen das Zielland seine Bereitschaft bestätigt, die Staatsangehörigen zurückzunehmen (zumeist durch Anerkennung auch abgelaufener Reisedokumente des Ziellandes oder (bei deren Fehlen) durch Ausstellung eines Heimreisedokuments als Passersatz. Art. 19 des EU-Abkommens mit Serbien sieht ausdrücklich den Abschluss von Durchführungsprotokollen mit einzelnen Mitgliedstaaten vor, die weitere Details regeln können. Vier Jahre später vereinbarten Deutschland und Serbien ein solches bilaterales Durchführungsprotokoll.[390]

Vor dem Hintergrund dieser Situation spricht zunächst viel für die Annahme einer ausschließlichen Zuständigkeitsbegründung für die Union gemäß Art.

[388] Verordnung (EU) 2016/1624 des Europäischen Parlaments und des Rates v. 14.09.2016 über die Europäische Grenz- und Küstenwache, ABl. 2016 L 251/1.

[389] Beschluss des Rates v. 08.11.2007 (2007/819/EG) über den Abschluss des Abkommens zwischen der Europäischen Gemeinschaft und der Republik Serbien über die Rückübernahme von Personen mit unbefugtem Aufenthalt, ABl. 2007 L 334/45 ff.

[390] Durchführungsprotokoll v. 11.03.2011 zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Serbien zum Abkommen zwischen der Europäischen Gemeinschaft und der Republik Serbien über die Rückübernahme von Personen mit unbefugtem Aufenthalt, BGBl. 2011 Nr. 34 II-1367 ff.

3 (2) AEUV. Der Umfang und die Regelungsdichte der Richtlinie 2008/115 zeigen, dass die Union auf der Grundlage ihrer geteilten Zuständigkeit zum Erlass von Binnenregelungen tatsächlich weitreichende Regelungen erlassen hat. Abkommen der Mitgliedstaaten könnten deshalb gemäß Art. 3 (2) 3. Alternative *„gemeinsame Regeln beeinträchtigen oder deren Tragweite verändern"*, wie allein schon die Tatsache zeigt, dass die Richtlinie bestehende Abkommen der Mitgliedstaaten insofern unberührt lässt, als diese Abkommen für die Drittstaatsangehörigen günstigere Regelungen vorsehen als die Richtlinie.

Gegen eine ausschließliche Zuständigkeit der Union könnte Folgendes sprechen:

- Die sekundärrechtlichen Regeln sind vor allem als Richtlinien ausgestaltet, die den Mitgliedstaaten einen gewissen Umsetzungsspielraum überlassen, den diese deshalb auch im Bereich der Außenzuständigkeiten haben sollten.
- Die sekundärrechtlichen Regeln betonen selbst die Notwendigkeit auch bilateraler Rückführungsabkommen der Mitgliedstaaten.
- Die von der EU abgeschlossenen Rückführungsabkommen enthalten die Möglichkeit für die Mitgliedstaaten, Zusatzprotokolle zu vereinbaren.

Allerdings zeigen die tatsächlich abgeschlossenen Rückführungsabkommen der Union, dass (i) ein gemeinschaftliches Vorgehen das Ziel, einheitliche Regelungen zu erzielen, umfassender und konsistenter erreicht, (ii) technische Regelungsbedürfnisse der Mitgliedstaaten durch das Recht gewahrt werden können, eigene Zusatzprotokolle zu vereinbaren, und (iii) solche Zusatzprotokolle auf der Grundlage eines gemeinsamen Abkommens leichter auch für andere Mitgliedstaaten erreichbar sind.[391]

Deshalb komme ich vor dem Hintergrund des Detailreichtums des Sekundärrechts und der Risiken von Störungen für die Entwicklung einer gemeinsamen Politik in diesem Bereich zu dem Ergebnis, dass die besseren Argumente dafür sprechen, der Union auch hinsichtlich ihrer Außenbeziehungen beim Abschluss von Rückführungsabkommen eine ausschließliche Kompetenz zuzugestehen. Eine herrschende Meinung zu dieser Frage habe ich in der deutschen juristischen Literatur allerdings nicht feststellen können.

Mit einem solchen Ergebnis ist allerdings die Frage der verbleibenden Zuständigkeiten der Mitgliedstaaten noch nicht abschließend beantwortet. Art. 2 (1) AEUV regelt nämlich: *„Übertragen die Verträge der Union für einen bestimmten*

[391] Vgl. etwa Art. 19 (3) des Abkommens mit Serbien: *„Serbien erklärt sich bereit, jede Bestimmung eines mit einem Mitgliedstaat vereinbarten Durchführungsprotokolls auch in seinen Beziehungen zu jedem anderen Mitgliedstaat anzuwenden, der darum ersucht."*

Bereich eine ausschließliche Zuständigkeit, so kann nur die Union gesetzgeberisch tätig werden und verbindliche Rechtsakte erlassen; die Mitgliedstaaten dürfen in einem solchen Fall nur tätig werden, wenn sie von der Union hierzu ermächtigt werden, oder um Rechtsakte der Union durchzuführen.“ [392] (Hervorhebung durch den Verfasser).

Die verschiedenen, oben zitierten Bezugnahmen (Rn. 270-271) auf die fortbestehende Bedeutung von bilateralen Abkommen der Mitgliedstaaten haben gerade vor diesem Hintergrund rechtliche Wirkungen. Sie sind jedenfalls als ausdrückliche Ermächtigung an die Mitgliedstaaten zu verstehen, bestehende bilaterale Abkommen beizubehalten und entsprechend den unionalen Regelungen fortzuentwickeln. Das gleiche gilt hinsichtlich der bereits abgeschlossenen Rückführungsabkommen der Union für die ausdrückliche Zulassung von Zusatzprotokollen.

2. Die Abkommen Deutschlands

Deutschland hat mit einer Reihe von Mitgliedstaaten und Drittstaaten Abkommen über die Rückführung von Personen vereinbart, die nicht (mehr) berechtigt sind, sich in Deutschland aufzuhalten. Eine Liste solcher Abkommen hat das deutsche Bundesministerium des Innern veröffentlicht.[393]

Diese Abkommen (z. T. in der Form einfacher Protokolle) regeln (ähnlich wie die unionseigenen Abkommen, siehe oben Rn. 272) (i) die Bereitschaft der Vertragspartner Deutschlands, ihre eigenen Staatsangehörigen, die zur Ausreise aus Deutschland verpflichtet sind, auch dann wiedereinreisen zu lassen, wenn diese keine gültigen Reisedokumente (Pässe, Personalausweise etc.) (mehr) haben, und (ii) deren Fehlen durch Ausstellung eines Heimreisedokuments („laissez passer“)[394] zu kompensieren. Darüber hinaus gibt es einige Durchreise- oder Durchbeförderungsabkommen im Zusammenhang mit der Rückkehr von ehemals jugoslawischen Staatsangehörigen in das Kosovo, die heute keine große praktische Bedeutung mehr haben.[395]

Seit dem Inkrafttreten des Vertrages von Lissabon sind vergleichbare bilaterale Abkommen vor allem als Durchführungsabkommen in Ergänzung zu

[392] Diese Möglichkeit der Rückermächtigung war auch vor dem Vertrag von Lissabon bereits von der Rechtsprechung anerkannt, Art. 2 (1) AEUV kodifizierte also nur die bestehende Rechtslage; vgl. EuGH, Urt. v. 18.2.1986, Rs 174/84, Bulk Oil, Slg. 1986, 559.

[393] Bundesministerium des Innern, Abkommen zur Erleichterung der Rückkehr ausreisepflichtiger Ausländer, Stand 04/2017.

[394] Vgl. etwa das Protokoll zwischen der Bundesrepublik Deutschland und der Demokratischen Volksrepublik Algerien über die Identifizierung und die Rückübernahme v. 14.02.1997, BGBl. 2004 II-16 ff., Art. 1 (2) und 1 (3), sowie passim; ähnlich Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Armenien über die Übernahme und Durchbeförderung von Personen ohne Aufenthaltsrecht (Rückübernahmeabkommen), BGBl. 2006 II – 1405 ff.

[395] Siehe Liste, Fn. 393, S. 3.

EU-Abkommen abgeschlossen worden.[396] Als Beispiel mag das oben erwähnte EU-Abkommen mit Serbien dienen, hinsichtlich dessen (und auf der Basis von Art. 19 des EU-Abkommens) Deutschland und Serbien 2011 ein bilaterales Durchführungsprotokoll vereinbart haben, das Detailregelungen zur Kommunikation zwischen den Behörden und zur Identifikation der Ausreisepflichtigen enthält.[397]

Rechtlich interessant ist insoweit die bereits im Rahmen von Kapitel 1 (s.o. Rn. 70 ff.) diskutierte EU-Türkei-Erklärung zur Steuerung von Migrationsströmen im Rahmen des am 15. Oktober 2015 vereinbarten gemeinsamen Aktionsplans der Türkei mit der EU zur Verbesserung der Migrationssteuerung. Im Anschluss an ein Treffen des Europäischen Rates mit dem türkischen Ministerpräsidenten am 18. März 2016 veröffentlichte der Rat eine Presseerklärung.[398] Darin heißt es (unter Bezugnahme auf den Aktionsplan): „[...] *haben die EU und die* [Türkei] *heute beschlossen* [...]: *1) Alle neuen irregulären Migranten, die ab dem 20. März 2016 von der Türkei auf die griechischen Inseln gelangen, werden in die Türkei rückgeführt.*"

Das Gericht der EU hat dazu festgestellt,[399] es handele sich bei der EU-Türkei-Erklärung nicht um eine Vereinbarung, an der die EU beteiligt gewesen sei, vielmehr hätten die Mitglieder des Europäischen Rates als Vertreter der Mitgliedstaaten gehandelt. Träfe das zu, dann müsste es sich um ein multilaterales Abkommen zwischen der Türkei und den Mitgliedstaaten handeln. Deutschland hat keine innerstaatlichen Verfahren zur Genehmigung und/oder Ratifikation eines entsprechenden Abkommens eingeleitet (und es ist dem Verfasser auch nicht bekannt, dass dies in anderen Mitgliedstaaten geschehen wäre). Nicht einmal der Wortlaut eines solchen „Übereinkommens" ist von Deutschland amtlich bekannt gemacht worden. Es muss deshalb bezweifelt werden, ob juristisch überhaupt von einem verbindlichen Abkommen Deutschlands die Rede sein kann, auch sonst gibt es für einen wirksamen Vertragsschluss für Deutschland keine Anhaltspunkte. In Deutschland herrscht dazu wohl die

[396] Soweit erkennbar gibt es davon nur eine Ausnahme: das Rückführungsabkommen mit Kasachstan v. 10.12.2009, BGBl. II 2010, Nr. 3, S. 63, das unmittelbar nach dem Inkrafttreten des Vertrages von Lissabon am 01.12.2009 unterzeichnet wurde [und noch nicht in Kraft getreten ist. Dabei dürfte eine Rolle gespielt haben, dass das Inkrafttreten des Vertrages von Lissabon nach langen Verzögerungen zum 01.12.2009 etwas überraschend kam und der erreichte Verhandlungserfolg nicht gefährdet werden sollte.

[397] Durchführungsprotokoll v. 11.03.2011 zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Serbien zum Abkommen zwischen der Europäischen Gemeinschaft und der Republik Serbien über die Rückübernahme von Personen mit unbefugtem Aufenthalt, BGBl. 2011 (Nr. 34) II-1367 ff.

[398] http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

[399] EuG, Urt. v. 28.2.2017, T-192/16, NF/Europäischer Rat, ECLI:EU:T:2017:128, (sowie die Urteile in den Parallelsachen T-193/16 und T-257/16).

Auffassung vor, es handele sich um eine (rechtlich unverbindliche) politische Erklärung.[400]

Insgesamt hat Deutschland seit dem Inkrafttreten des Vertrages von Lissabon den Abschluss von Rückführungsabkommen im Wesentlichen der Union überlassen. Eine Verletzung auch einer ausschließlichen Zuständigkeit der Union durch Deutschland ist deshalb nicht erkennbar. Die Beibehaltung der bestehenden Abkommen und Durchführungsprotokolle ist durch die (zumindest konkludent erklärte) Genehmigung der Union gedeckt, die die Notwendigkeit des Fortbestandes solcher nationaler Abkommen hervorgehoben hat (siehe oben Rn. 278).

[400] In amtlichen Dokumenten wird überwiegend von der EU-Türkei-Erklärung gesprochen (vgl. z.B. die Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Frank Tempel, u.a. und der Fraktion DIE LINKE, BT- Drucksache 18/9506, Antwort auf Frage 15 h, S.9); selbst wenn in Presseerklärungen u.ä. gelegentlich auch von einem EU-Türkei-Abkommen die Rede ist.

GREECE

Eleftheria Neframi*

CHAPITRE 1: RÉPARTITION DES COMPÉTENCES ENTRE L'UNION EUROPÉENNE ET LES ETATS MEMBRES

Question 1

L'arrêt *AETR*[1], à l'origine de la théorie des compétences externes implicites, consacre le critère d'affectation des règles communes, en application duquel la compétence externe implicite de l'Union est exclusive[2]. Le point de départ pour l'appréciation de l'exclusivité de la compétence externe implicite de l'Union est l'exercice préalable de la compétence interne lui correspondant, et l'adoption des règles communes que la conclusion de l'accord international par les Etats membres pourrait affecter.

Sur le plan externe, l'effet préemptif de l'exercice de la compétence interne de l'Union dépasse l'étendue du dessaisissement des Etats membres sur le plan interne. Selon l'appréciation récente de l'effet *AETR*, l'affectation des règles communes est établie lorsque le domaine concerné par l'accord international est couvert en grande partie par les règles communes. Même si les dispositions de l'accord international portent sur une question non réglementée par les actes déjà adoptés par les institutions sur le plan interne, mais si la comparaison des

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[1] Arrêt de la Cour du 31 mars 1971, *Commission c/ Conseil,* 22-70, ECLI:EU:C:1971:32.

[2] E. Sachpekidou, *Droit européen (*en grec), Athènes-Théssalonique, Sakkoulas, p. 246 et s. O. Spiliopoulos, *Les accords internationaux de l'Union européenne et les relations économiques externes,* (en grec), Athènes-Thessalonique, Sakkoulas, 2013, p. 22-42.

dispositions de l'accord et des règles internes révèle des interférences, la Cour de justice admet l'exclusivité de la compétence externe de l'Union par le risque d'affectation des règles communes, considérant que les règles internes couvrent en grande partie le domaine concerné. En d'autres termes, le domaine est considéré comme couvert en grande partie par des règles communes s'il est avéré que, étant donné la nécessité de garantir leur application uniforme et effective, la réalisation des objectifs dans le domaine concerné nécessite l'intervention de l'Union. Dans ce cas, l'intervention peut se faire par le biais de la conclusion d'un accord international.

La jurisprudence récente de la Cour de justice illustre clairement cette approche.

Dans l'arrêt *Commission c/ Conseil* du 4 septembre 2014, relatif à la participation de l'Union européenne et de ses États membres à une convention du Conseil de l'Europe sur la protection des droits des organismes de radiodiffusion en ce qui concerne la fixation de leurs émissions[3], l'effet *AETR* concerne la protection des droits voisins du droit d'auteur. La Commission a soutenu que, sur le plan interne, les différentes directives déjà adoptées ont institué un ensemble de droits que l'accord international envisagé vise à consolider en améliorant la protection des titulaires concernés. L'argumentation de la Commission est retenue par la Cour de justice, contrairement aux conclusions de l'Avocat Général : sur le plan externe, le dessaisissement des Etats membres de leur compétence dépend du critère d'affectation des règles communes, qui couvre l'existence d'un risque d'affectation, et va donc au-delà de l'étendue des règles communes.

L'avis 1/13, relatif à la compétence pour accepter l'adhésion d'Etats tiers à la Convention de la Haye sur les aspects civils de l'enlèvement international d'enfants[4], réitère la même interprétation du critère d'affectation des règles communes, considérant le risque d'atteinte à l'application uniforme et cohérente des règles de l'Union et au bon fonctionnement du système qu'elles instituent. Après avoir comparé les dispositions de la convention avec les règles du règlement nº 2201/2003, relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale, la Cour constate leur chevauchement et leur lien étroit.

Dans l'avis 3/15, concernant la compétence de l'Union pour conclure le traité de Marrakech visant à faciliter l'accès des aveugles, des déficients visuels et des personnes ayant d'autres difficultés de lecture des textes imprimés aux œuvres publiées[5], la Cour de justice constate le risque d'affectation de la

[3] C-114/12, ECLI:EU:C:2014:2151.

[4] Avis de la Cour du 14 octobre 2014, ECLI:EU:C:2014:2303.

[5] Avis de la Cour du 14 février 2017, ECLI:EU:C:2017:114.

directive 2001/29, harmonisant certains aspects du droit d'auteur et des droits voisins dans la société de l'information. Elle rejette l'argument des Etats membres selon lequel la directive 2001/29 n'aurait pas harmonisé les exceptions et les limitations à ces droits, considérant qu'une harmonisation complète n'est pas nécessaire pour que l'Union acquière une compétence externe exclusive. Pour la Cour, la marge d'appréciation que la directive laisse aux Etats membres ne concerne pas leur compétence pour prévoir une protection plus importante des droits d'auteur et des droits voisins, mais plutôt leur compétence pour prévoir une exception ou une limitation auxdits droits. Or, si les États membres disposent de la faculté de mettre en œuvre une exception ou une limitation aux règles harmonisées par la directive 2001/29 en faveur des personnes affectées d'un handicap, il s'agit d'une faculté accordée par le législateur de l'Union qui est fortement encadrée par les exigences de droit de l'Union. Dans ce contexte, le traité de Marrakech prévoit une obligation d'introduire une telle exception ou limitation. Il en résulte une interférence avec la directive 2001/29 propre à établir que le traité de Marrakech relève du domaine d'application des règles communes. La Cour souligne que la constatation d'un risque d'affectation ne présuppose pas une concordance complète entre le domaine couvert par les engagements internationaux et celui de la réglementation de l'Union[6].

Dans l'avis 2/15, relatif à la compétence de l'Union pour conclure l'accord de libre échange avec la République de Singapour[7], l'effet *AETR* est examiné sous deux angles différents.

Tout d'abord, la Cour de justice précise que l'effet *AETR* ne peut concerner que les règles de droit dérivé. Plus précisément, la Cour n'adopte pas la position de la Commission, selon laquelle les dispositions de l'accord UE-Singapour, relatives aux investissements de portefeuille, exclues de la politique commerciale commune (v. infra, 16), pourraient relever de la compétence exclusive de l'Union. La Commission a en effet soutenu que les investissements de portefeuille sont un mouvement de capitaux au sens de l'article 63 TFUE et que les normes de traitement prévues au chapitre neuf de l'accord UE-Singapour sont, à tout le moins, couvertes en grande partie par les règles communes établies dans cette disposition du traité. En particulier, les normes essentielles du traitement national, du traitement juste et équitable et de la protection contre l'expropriation sont couvertes par l'interdiction énoncée à l'article 63, paragraphe 1, TFUE. Pour la Commission, l'expression «règles communes» l'effet *AETR* couvre à la fois les dispositions du traité et les règles de droit dérivé, étant donné que l'effet *AETR* repose sur la protection de l'unité du marché commun et sur l'application

[6] Paragraphes 102-127.

[7] Avis de la Cour du 16 mais 2017, ECLI:EU:C:2017:376.

uniforme du droit de l'Union. Or, le Conseil a soutenu que, indépendamment de la considération des règles de droit primaire de règles communes, la Commission n'a pas démontré en quoi le domaine des investissements de portefeuille a été «couvert en grande partie» par les «règles communes» qu'elle allègue. Mais surtout, la Cour de justice, suivant le Conseil, considère que l'effet *AETR* concerne uniquement le droit dérivé et l'exercice préalable de la compétence interne de l'Union, cette exigence étant inhérente à la notion de pouvoirs implicites[8].

En outre, dans l'avis 2/15, la Cour de justice admet l'interprétation large de l'effet *AETR* dans le domaine des transports, selon laquelle le risque d'affectation existe lorsque les engagements internationaux relèvent du domaine d'application des règles communes. La Cour rappelle que la constatation d'un tel risque ne présuppose pas une concordance complète entre le domaine couvert par les engagements internationaux et celui couvert par la réglementation de l'Union[9]. Elle constate ainsi que les règles de droit dérivé portant sur les transports maritimes, ferroviaires, par route, aériens et par voie navigable intérieure relèvent de la compétence exclusive de l'Union. Or, l'Avocat Général Sharpston a considéré que l'effet *AETR* porte sur les seuls les transports ferroviaires et par route. Il est intéressant de noter que la Cour de justice a consacré le critère d'affectation des règles communes par absorption, concernant les dispositions relatives aux transports par voie navigable intérieure. Plus précisément, elle a considéré que, même si l'effet *AETR* ne permet pas de conclure à l'exclusivité de la compétence externe de l'Union, ces dispositions contiennent des engagements d'une portée extrêmement limitée, dont il n'y a pas lieu de tenir compte. «Dès lors, en l'occurrence, il convient de déterminer la nature de la compétence de l'Union en ce qui concerne les engagements contenus au chapitre 8 de l'accord envisagé dans le domaine des transports en tenant compte des engagements relatifs aux transports maritimes, ferroviaires et par route. L'Union étant (...) exclusivement compétente, en application de l'article 3, paragraphe 2, TFUE, pour approuver ces engagements, il s'ensuit (...) qu'elle est exclusivement compétente à l'égard dudit chapitre 8 dans son intégralité»[10].

Nous constatons ainsi une interprétation large de l'effet *AETR* qui n'est pas partagée par la Grèce. Dans le cadre de l'avis 2/15, la Grèce s'est alignée sur la position de l'Avocat Général, considérant que l'effet *AETR* doit se fonder sur une analyse concrète de la relation existant entre l'accord international envisagé et le droit de l'Union en vigueur en tenant compte, notamment, de la nature et du contenu des règles en cause. La Grèce n'a pas soutenu l'application de

[8] Paragraphe 92.
[9] Paragraphe 181.
[10] Paragraphe 217.

l'effet *AETR* sur le droit primaire et s'est opposée à l'exclusivité de la compétence de l'Union en matière des transports, et notamment à l'application du critère d'absorption. De manière plus générale, la Grèce a une approche restrictive concernant l'exclusivité de la compétence de l'Union en matière de transports maritimes[11].

Question 2

L'effet *AETR* est exprimé dans l'article 3, paragraphe 2, TFUE. La codification de l'effet *AETR* implique que ladite disposition concerne les compétences externes implicites, qui sont exclusives si l'affectation des règles communes est établie. Les deux autres cas d'exclusivité de la compétence externe, à savoir lorsque la conclusion de l'accord est prévue dans un acte législatif interne et lorsque l'exercice de la compétence externe est nécessaire pour l'exercice de la compétence interne selon 1/76, n'ont pas donné lieu à une jurisprudence récente. Le critère d'affectation des règles communes de l'article 3, paragraphe 2, TFUE reçoit ainsi la même interprétation que l'effet *AETR* (v. supra 1).

L'article 3, paragraphe 2, TFUE consacre les critères d'exclusivité de la compétence externe de l'Union, qui peut exister comme compétence partagée. La doctrine hellénique admet la distinction entre existence et exercice de la compétence externe de l'Union[12]. Selon cette distinction, l'Union peut exercer seule sa compétence externe uniquement si celle-ci a le caractère de compétence exclusive. En revanche, si l'exclusivité de la compétence externe n'est pas établie, l'Union peut conclure un accord international en tant qu'accord mixte, conjointement avec ses Etats membres. Or, l'article 216, paragraphe 1, TFUE soulève la question de savoir si l'absence d'exclusivité de la compétence externe de l'Union implique nécessairement la conclusion d'un accord mixte.

Question 3

L'article 216, paragraphe 1, TFUE concerne l'existence d'une compétence externe de l'Union indépendamment de sa nature de compétence exclusive. Il se réfère tant aux compétences externes explicites, qu'aux compétences externes implicites. La possibilité pour l'Union de conclure un accord international ne signifie pas pour autant que l'accord peut être conclu par l'Union seule. Lorsque l'Union dispose d'une compétence externe explicite, mais non exclusive, comme dans le domaine environnemental, l'exclusivité de sa compétence externe dépend du dessaisissement des Etats membres en fonction de l'exercice de la compétence

[11] A. Tsadiras, "Sécurité des navires et des installations portuaires" (en grec), *Revue hellénique de droit européen (ΕΕΕυρΔ)*, nº 2/2009, p. 249.

[12] K. Boskovits, *Le juge communautaire et l'articulation des compétences normatives entre la Communauté européenne et ses États membres*, Athènes/Bruxelles, A. Sakkoulas/Bruylant, 1999, p. 567.

interne, ce qui conduit à l'examen du critère d'affectation des règles communes selon l'arrêt *AETR* et l'article 3, paragraphe 2, TFUE. D'ailleurs, la conclusion de plusieurs accords environnementaux en tant qu'accords mixtes confirme que l'existence d'une compétence externe explicite n'implique pas son caractère exclusif.

L'article 216, paragraphe 1, TFUE se réfère également à la possibilité pour l'Union de conclure un accord international en vertu d'une compétence externe implicite. Il reprend de manière identique le critère d'affectation des règles communes de l'article 3, paragraphe 2, TFUE, mais de manière similaire le critère de nécessité. Plus précisément, selon l'article 216, paragraphe 1, TFUE, l'Union peut conclure un accord international lorsque la conclusion est nécessaire pour réaliser un des objectifs du traité, alors que l'article 3, paragraphe 2, TFUE, se réfère à la nécessité pour permettre à l'Union d'exercer sa compétence interne.

La question est ainsi de savoir si l'article 216, paragraphe 1, TFUE, consacre la possibilité pour l'Union de conclure seule un accord international même si sa compétence externe n'est pas exclusive, est en cas de réponse négative, quel est le rôle de cette disposition par rapport à l'article 3, paragraphe 2, TFUE (v. infra, 4).

Question 4

L'article 216, paragraphe 1, TFUE a une portée autonome par rapport à l'article 3, paragraphe 2, TFUE. Les deux dispositions se rencontrent toutefois lorsque la compétence externe de l'Union est exclusive. Ainsi, lorsque le critère d'affectation des règles communes est établi, l'article 216, paragraphe 1, TFUE est absorbé par l'article 3, paragraphe 2, TFUE. En dehors de ce cas, la question est de savoir si l'article 216, paragraphe 1, TFUE est susceptible de permettre la conclusion par l'Union seule d'un accord international est considéré ainsi comme complémentaire à l'article 3, paragraphe 2, TFUE.

Nous pouvons considérer que tel peut être le cas lorsque l'Union dispose d'une compétence externe explicite et partagée, qui pourrait acquérir l'exclusivité en application du principe de subsidiarité. En revanche, en cas de compétence externe implicite, l'article 216, paragraphe 1, TFUE devrait être considéré comme permettant la conclusion par l'Union d'un accord international seule, si les critères de l'article 3, paragraphe 2, TFUE, sont réunis, ou conjointement avec les Etats membres, en tant qu'accord mixte dans les autres cas.

En effet, la position en faveur du caractère facultatif de la mixité d'un accord international, qui pourrait se fonder sur l'article 216, paragraphe 1, TFUE, si l'on considère que l'Union peut exercer seule une compétence externe qui n'est pas exclusive, n'est pas soutenue pas la Grèce, et ne semble pas être entérinée par la Cour de justice. Dans l'avis 2/15 la Cour de justice a clairement indiqué que, lorsque l'Union n'a pas une compétence externe exclusive, l'accord envisagé

ne saurait être approuvée par l'Union seule[13]. Par ailleurs, nous ne pouvons pas considérer que l'Union exerce sa compétence externe partagée avec effet préemptif pour les Etats membres lorsqu'elle conclut un accord mixte, étant donné que la Cour insiste sur le respect de la répartition des compétences lors de l'application d'un accord mixte (v. infra, chapitre 3). En outre, le Conseil et les Etats membres, y compris la Grèce, ont soutenu dans le cadre de l'avis 2/15, que l'exercice de compétences internes en matière de protection des investissements de portefeuille étrangers et l'exercice de compétences externes ayant le même objet ne devraient pas être concomitants, ce qui implique que l'exercice de la compétence externe par l'Union seule dépend de son exclusivité selon les critères de l'article 3, paragraphe 2, TFUE.

La question est alors de savoir quelle est la signification du pouvoir de conclusion d'un accord international selon l'article 216, paragraphe 1, TFUE. Nous pouvons considérer que le terme de conclusion d'un accord international n'est pas synonyme de conclusion par l'Union seule. En effet, lorsque l'Union conclut un accord mixte elle exerce sa compétence externe partagée, sans effet préemptif, ce qui permet à la Cour d'affirmer le respect de la répartition des compétences dans la mise en œuvre de l'accord mixte, mais en même temps de considérer l'accord mixte dans son ensemble comme un acte des institutions (v. infra, chapitre 3).

CHAPITRE 2 : QUESTIONS EN RELATION AVEC LA NÉGOCIATION ET LA CONCLUSION DES ACCORDS INTERNATIONAUX (ARTICLE 218 DU TRAITÉ FUE)

Questions 5-11

La Grèce exprime le souhait d'une meilleure coopération avec la Commission et le comité spécial de l'article 218, paragraphe 3, TFUE, et d'une transparence renforcée lors de la négociation des accords internationaux. Dans le cadre des négociations de l'accord économique et commercial global (CETA) avec le Canada, les autorités helléniques ont considéré que la Commission n'a pas suffisamment soutenu la revendication grecque d'inclusion du fromage feta dans la liste des indications géographiques protégées. Dans sa déclaration interprétative[14] la Grèce a noté que les résultats obtenus en ce qui concerne la protection de la feta ne constituent pas un précédent pour de futurs accords commerciaux de l'Union européenne avec des pays tiers. La Grèce s'est toutefois félicitée de la déclaration de la Commission qui a pris note finalement de ses préoccupations et s'engage à atteindre le meilleur niveau de protection possible pour les indications géographiques dans le cadre des négociations actuelles et futures avec des pays tiers.

[13] Paragraphes 244 et 304.
[14] *JO* L 11 du 14.1.2017, p. 9.

Concernant l'application provisoire des accords internationaux, la Grèce considère qu'elle devra porter uniquement sur la partie de l'accord qui relève de la compétence exclusive de l'Union. La détermination de la partie de l'accord qui fera l'objet de l'application provisoire relève du Conseil.

La Constitution hellénique ne prévoit pas l'application provisoire des accords internationaux. Concernant l'application provisoire d'un accord mixte, pour la partie qui relève de la compétence étatique, aucune loi de ratification n'est adoptée, mais l'application provisoire peut être assurée à travers des actes réglementaires.

La Grèce est en faveur de l'association du Parlement européen à la procédure de négociation et de conclusion des accords internationaux, elle considère toutefois que dans le cadre de la politique étrangère et de sécurité commune, l'information du Parlement européen devrait relever de la discrétion du Conseil.

Concernant la prise de position au sein des instances internationales, la Grèce est en faveur de l'application du devoir de coopération loyale, elle considère toutefois que l'obligation d'expression d'une position commune dans les cas relevant de la compétence partagée de l'Union et de ses Etats membres ne devrait être considérée comme une obligation de résultat. De manière générale, la Grèce est hostile à la perte de l'autonomie de son action internationale dans le domaine maritime, étant donné les intérêts nationaux en jeu et sa forte présence dans le secteur de la navigation maritime internationale. Cela a conduit à sa condamnation par la Cour de justice pour violation du devoir de coopération loyale, lorsqu'elle s'est exprimée individuellement au sein de l'Organisation Maritime Internationale[15]. Il convient de noter que la Grèce est en faveur de la recherche d'une position commune avec les Etats membres qui partagent les mêmes intérêts dans le domaine maritime, notamment Chypre et Malte[16].

CHAPITRE 3 : EFFETS JURIDIQUES DES ACCORDS INTERNATIONAUX

Questions 12-15

L'article 28 de la Constitution hellénique consacre la primauté du droit international sur le droit interne et prévoit la possibilité de transfert de compétences au

[15] Arrêt de la Cour du 12 février 2009, *Commission contre Grèce,* C-45/07, ECLI:EU:C:2009:81. Pour un commentaire, E. Neframi, (en grec), *Europoliteia,* 2009. E. Neframi, "Renforcement des obligations des Etats membres dans le domaine des relations extérieures", *Revue trimestrielle de droit européen,* 2009, p. 601. A. Tsadiras, "Sécurité des navires et des installations portuaires" (en grec), *Revue hellénique de droit européen (ΕΕΕυρΔ),* nº 2/2009, p. 248-249

[16] G. Samiotis, D. Grekos, «La dimension institutionnelle et les problèmes d'une forte projection des positions helléniques dans le domaine maritime au sein de l'Union européenne et de l'Organisation Maritime Internationale», *Revue hellénique de droit européen,* nº 3/2014, p. 161.

profit d'une organisation internationale, ainsi que la possibilité de procéder à de restrictions de l'exercice de la souveraineté nationale lorsque cela est imposé par un intérêt national important, dans le respect des droits fondamentaux. Selon la déclaration interprétative insérée lors de la révision de la Constitution de 2001, l'article 28 «constitue le fondement de la participation du pays au processus d'intégration européenne». Il est considéré que l'article 28 consacre un statut spécial au droit de l'Union européenne, par la constitutionnalisation des objectifs de l'Union, qui conduit le juge ordinaire, chargé d'un contrôle décentralisé de constitutionnalité, à concilier les exigences constitutionnelles avec les exigences européennes[17].

C'est dans ce contexte constitutionnel que les juridictions et la doctrine helléniques acceptent l'intégration des engagements internationaux de l'Union dans l'ordre juridique interne. Malgré le fait que la Grèce opte souvent pour la conclusion conjointe d'un accord envisagé, par une approche réservée quant à l'exclusivité de la compétence externe de l'Union (v. supra, Chapitre 1), un accord mixte, une fois conclu, est considéré comme faisant dans son ensemble partie du droit de l'Union. L'approche conciliatrice entre les objectifs constitutionnels et ceux de l'Union a pour conséquence que la considération d'un accord mixte dans son ensemble comme source du droit de l'Union ne soulève pas de questions quant à sa compatibilité avec le principe d'attribution.

Le juge national, ainsi que la doctrine grecque, acceptent la position de la Cour, exprimée pour la première fois à l'occasion de l'interprétation de l'accord d'association avec la Grèce[18], selon laquelle, les accords mixtes sont considérés, dans l'ordre juridique de l'Union, comme source dans leur ensemble du droit de l'Union, selon l'article 216, paragraphe 2, TFUE. Une telle position est fondée sur la complémentarité des compétences étatiques et de l'Union au sein d'un accord mixte, et sur l'approche pluraliste des ordres juridiques qui permet la conciliation entre la primauté du droit international et la préservation de l'autonomie de l'ordre juridique de l'Union[19]. Plus précisément, la Cour de justice a consacré le respect de la répartition des compétences entre l'Union et ses Etats

[17] J. Iliopoulos-Strangas, "Le rapport de l'ordre juridique grec avec l'ordre juridique européen", (en grec), *La Constitution (ToΣ)*, nº 6/2000, p. 1118. A. Manitakis, «Cession de compétences à l'Union européenne et la réserve de souveraineté selon l'article 28 par. 2 et 3 de la Constitution» *Revue hellénique de droit européen,* nº 4/2003, p. 741. E. Neframi, «Quelques réflexions sur le rapport entre le droit communautaire et le droit constitutionnel à la lumière de la révision de la Constitution hellénique»,*Revue de la recherche juridique,* 2003, p. 1289. E. Venizelos, «Le rapport de l'ordre juridique grec avec l'ordre juridique communautaire et le droit international comme objet de la révision de la Constitution» (en grec), *La Constitution (ToΣ)*, nº 3/2000, p. 499.

[18] Arrêt de la Cour du 30 avril 1974, *Haegeman,* 181/73, ECLI:EU:C:1974:41.

[19] A. Pliakos, "Les rapports du droit international avec le droit de l'Union européenne: monisme, dualisme ou un espace constitutionnel ouvert" (en grec), *Nomiko Vima (Νομικό Βήμα),* nº 65/2017, p. 3.

membres lors de la mise en œuvre d'un accord mixte, en ce sens que l'appréciation de l'effet direct des dispositions de l'accord mixte qui relèvent de la compétence des Etats membres et qui ont conduit à la mixité relève de la compétence du juge national. Toutefois, la délimitation des compétences et la détermination de ces dispositions relève de la compétence du juge de l'Union, chargé de l'interprétation de l'accord mixte dans son ensemble, en tant que source du droit de l'Union[20]. Dans le cadre de l'affaire *Daiichi Sankyo,* issue d'un renvoi préjudiciel du Tribunal de première instance d'Athènes, le juge grec a posé à la Cour de justice la question de savoir si l'article 27 de l'accord TRIPs relève de la compétence étatique ou de la compétence de l'Union. Même si la Grèce a soutenu la position selon laquelle la Partie II de l'accord TRIPs, relative aux normes concernant l'existence, la portée et l'exercice des droits de propriété intellectuelle, parmi lesquelles figure l'article 27 dudit accord, ne relève pas de la compétence exclusive de l'Union en vertu de l'article 207 TFUE, la formulation de la question préjudicielle témoigne de l'acceptation par le juge hellénique de la compétence de la Cour de justice pour l'interprétation d'un accord mixte dans son ensemble[21]. Cela a pour conséquence la considération de la violation par l'Etat d'une disposition d'un accord mixte relevant de la compétence étatique comme une violation du droit de l'Union susceptible de fonder un recours en manquement[22].

La Grèce applique les accords mixtes en tant qu'obligations issues du droit de l'Union et selon l'interprétation de la Cour de justice[23] et aucune procédure en manquement ne la concerne à cet égard jusqu'à présent. Les juridictions helléniques n'ont pas eu l'occasion de se prononcer sur l'effet direct des dispositions des accords mixtes relevant de la compétence étatique et il n'existe pas de jurisprudence nationale relative à la contestation d'accords internationaux conclus uniquement par l'Union européenne ou d'accords mixtes, sans qu'il y ait eu de renvois préjudiciels en interprétation de validité.

[20] En ce sens: Arrêt de la Cour du 16 juin 1998, *Hermès International/FHT Marketing Choise BV*, C-53/96, ECLI:EU:C:1998:292. Arrêt de la Cour du 14 décembre 2000, *Parfums Christian Dior c/ Tuk Consultancy,* C-390&392/98, ECLI:EU:C:2001:456. Arrêt de la Cour du 11 septembre 2007, *Merck Genéricos-Produtos Farmacêuticos,* C-431/05, ECLI:EU:C:2007:496. E. Neframi, Note sous l'arrêt *Merck Genéricos-Produtos Farmacêuticos* (en grec), *Europoliteia,* 2008.

[21] A. Dimopoulos, P. Bantsiouri, «Of TRIPs and Traps : the Interpretative Jurisdiction of the Court of Justice of the EU over Patent Law», in M. Kanellopoulou-Mpoti, E. Laskari (dir), *Liber amicorum E. Laskari,* Athènes, Nomiki Vivliothiki, 2013, p. 261.

[22] V. arrêt de la Cour du 19 mars 2002, *Commission c/ Irlande*, C-13/00, ECLI:EU:C:2002:184. Arrêt de la Cour du 7 octobre 2004, *Commission c/ France,* C-239/03, ECLI:EU:C:2004:598.

[23] Par exemple, concernant l'accord TRIPS, v. arrêts 6105/2011 et 2221/2015 du tribunal de première instance d'Athènes.

Il convient de noter que, dans le cadre de l'affaire *Lessochranaske zoskupenie*[24], la Grèce a soutenu la position adoptée par la Cour de justice, selon laquelle, l'article 9, paragraphe 3, de la convention d'Aarhus sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement, accord mixte, est source d'obligation d'interprétation conforme incombant au juge national.

Concernant la jurisprudence de la Cour de justice relative à l'effet direct des accords internationaux, la doctrine hellénique a critiqué la non-invocabilité des accords OMC et des rapports de l'Organe de règlement des différends à l'appui d'un recours en annulation ou d'un recours en indemnité[25]. On notera toutefois l'absence d'analyse de la jurisprudence récente et l'absence d'intervention du gouvernement hellénique devant la Cour de justice[26].

Par ailleurs, il n'y a pas actuellement de recours en manquement contre la Grèce pour non-respect des engagements internationaux qui lient l'Union européenne. Le contrôle du respect des accords internationaux de l'Union se fait de manière décentralisée, par les autorités administratives compétentes selon le domaine dont relève d'accord, et, théoriquement, par le juge national en tant que contrôle de constitutionnalité diffus, concret et *a posteriori*[27].

On notera enfin que concernant la déclaration UE-Turquie du 18 mars 2016, publiée sous la forme du communiqué de presse nº 144/16[28], en matière de gestion de l'immigration irrégulière en Grèce (v. infra, chapitre 5), la doctrine a exprimé la position selon laquelle ladite déclaration, interprétée de manière téléologique, devrait être considérée comme un accord international liant les institutions et les Etats membres, et, par conséquent comme susceptible de contrôle juridictionnel, contrairement à la position du Tribunal de l'Union[29].

[24] Arrêt de la Cour du 8 mars 2011, C-240/09, ECLI:EU:C:2011:125.

[25] A. Papapaschalis, "L'OMC et l'accord TRIPs devant la Cour de justice : à l'occasion de l'arrêt du 14 décembre 2000, aff. jtes C-300/98 et C-392/98" (en grec), *Revue hellénique de droit européen (ΕΕΕυρΔ)* nº 3/2001, p. 583. V. Skouris (dir), *Interprétation des traités sur l'Union européenne et de la Communauté européenne* (en grec), Athènes- Komotini, Sakkoulas, 2003, p. 1658 et s. O. Spiliopoulos, «Le cadre de l'exercice de la politique commerciale extérieure de la Communauté européenne sous la lumière de la jurisprudence communautaire» (en grec), *Revue hellénique de droit européen (ΕΕΕυρΔ)*, nº 1/2003, p. 59.

[26] Arrêt de la Cour du 13 janvier 2015, *Conseil, Parlement européen et Commission c/ Vereiniging Milieudefensie,* C-401/12 P à C-403/12P, ECLI:EU:C:2015:4. Arrêt de la Cour du13 janvier 2015, *Conseil et Commission c/ Stichting Natuur,* C-404/12P) C-405/12 P, ECLI:EU:C:2015:5.

[27] C. Yannakopoulos, «L'influence du droit de l'Union européenne sur le système de contrôle de constitutionnalité des lois : les paradigmes français et grec», *Revue française de droit constitutionnel,* nº 3/2012, p. 537.

[28] http://www.consilium.europa.eu/fr/press/press-releases/2016/03/18-eu-turkey-statement/.

[29] V. Ordonnances du Tribunal du 28 février 2017, *NF, NG et NM c. Conseil européen,* T-192/16, T-193/16, T-257/16, ECLI:EU:T:2017:128; ECLI:EU:T:2017:129, ECLI:EU:T:2017:130. V. D. Gampa, «La déclaration

CHAPITRE 4: COMMERCE ET PROTECTION DES INVESTISSEMENTS

Question 16

La Grèce avait suivi la tendance d'extension du champ d'application de la politique commerciale aux accords commerciaux sur les services et la propriété intellectuelle depuis les révisions de l'ancien article 113/133 CE par les traités d'Amsterdam et de Nice. Toutefois, les autorités helléniques avaient insisté sur l'exclusion des domaines des investissements et des transports de la portée de la politique commerciale[30]. Avec la réforme du traité de Lisbonne, la politique commerciale commune couvre les investissements étrangers directs, alors que la politique des transports est exclue du champ d'application de l'article 207 TFUE[31].

Concernant la compétence de l'Union dans le domaine des investissements étrangers directs, la doctrine avait analysé les insuffisances des dispositions relatives à la libre circulation des capitaux (articles 63-65 TFUE) comme base juridique d'une compétence de l'Union[32]. Avec la réforme de la politique commerciale commune l'ambiguïté, découlant aussi de l'interférence de l'article 49, paragraphe 2, TFUE, relatif à la liberté d'établissement, est levée, au moins pour ce qui concerne la base juridique de la compétence. L'Union dispose désormais d'une compétence externe explicite et exclusive pour conclure des accords internationaux en matière d'investissements étrangers directs.

Il était déjà établi dans la doctrine, et confirmé par la Cour de justice dans l'avis 2/15, relatif à la compétence de l'Union pour conclure l'accord de libre échange avec la République de Singapour[33], que l'extension de la politique commerciale commune aux investissements étrangers directs ne couvrait pas les investissements autres que directs, ou investissements dits «de portefeuille». Ces derniers peuvent, aux termes de la Cour, « avoir lieu sous la forme d'acquisitions de titres de société dans l'intention de réaliser un placement financier sans intention d'influer sur la gestion et le contrôle de l'entreprise»[34] et relèvent ainsi des dispositions du traité relatives à la libre circulation des capitaux.

UE-Turquie concernant la crise migratoire» (en grec), *Revue hellénique de droit européen (ΕΕΕνρΔ)*, nº 1-2 /2017, p. 135-137.

30 R. Giovannopoulos, "Politique commerciale commune", in V. Skouris (dir.) *Commentaire du traité sur l'Union européenne et du traité établissant la Communauté européenne*, (en grec), Athènes, Sakkoulas, 2003, p. 979 et s. O. Spiliopoulos, «Article 113 TCE. La base juridique de la politique commerciale de la Communauté» (en grec), *Nomiko Vima*, 2002, p. 906 et s.

31 G. Kalavros, T. Georgopoulos, *Le droit de l'Union européenne* (en grec), Athènes, Nomiki Vivliothiki, 2010, p. 296 et s. O. Spiliopoulos, *Les accords internationaux de l'Union européenne et les relations économiques externes*, (en grec), Athènes-Thessalonique, Sakkoulas, 2013, p.42-61.

32 A. Dimopoulos, *EU Foreign Investment Law*, Oxford University Press, 2011, p. 76 et s.

33 Avis de la Cour du 16 mais 2017, ECLI:EU:C:2017:376.

34 Avis 2/15, paragraphe 227.

Toutefois, l'extension de la politique commerciale commune aux investissements étrangers directs ne lève pas toute ambiguïté quant à sa portée. La Grèce fait partie des Etats membres qui ont considéré, avec le Conseil, dans le cadre de l'avis 2/15, que la réforme couvre les accords internationaux relatifs à l'admission des investissements et non pas les dispositions relatives à leur protection. Il a été ainsi soutenu que la protection des investisseurs contre les expropriations relève de la compétence des Etats membres, étant donné que, selon l'article 345 TFUE, les traités ne préjugent en rien le régime de la propriété dans les États membres.

Le rapport entre l'article 345 TFUE et l'article 207 TFUE a fait l'objet d'une analyse approfondie partant de la limite de l'extension de la portée de la politique commerciale commune, exprimée dans le paragraphe 6 de l'article 207 TFUE, qui stipule que l'exercice de compétence de politique commerciale commune n'entraîne pas une harmonisation des dispositions législatives ou réglementaires des Etats membres dans la mesure où les traités excluent une telle harmonisation. Il a été soutenu par la doctrine[35] que l'article 345 TFUE devrait être interprété strictement, en ce sens qu'il concerne la compétence des Etats membres pour décider des nationalisations ou privatisations, mais n'a pas pour effet de soustraire les régimes de propriété existant dans les États membres aux règles fondamentales des traités, dont, notamment, à celles de non-discrimination, à celles concernant la liberté d'établissement et la liberté des mouvements de capitaux[36] . En ce sens, les conditions d'expropriation peuvent faire l'objet de mesures d'harmonisation sur la base des articles 114 et 115 TFUE et, par conséquent, la limite de l'article 207, paragraphe 6, TFUE est neutralisée. Il en résulte que l'article 345 TFUE n'exclut pas la compétence de l'Union pour réglementer la protection des investissements contre l'expropriation. Comme l'Avocat Général Sharpston l'a remarqué dans ses conclusions dans le cadre de la procédure de l'avis 2/15, l'Union ne peut pas conclure un accord international qui priverait les États membres de leur droit d'exproprier, mais peut convenir avec un pays tiers qu'aucune partie à l'accord ne peut nationaliser ou exproprier les investissements effectués par des investisseurs de l'autre partie, sauf lorsque certaines conditions sont remplies. Un tel accord n'harmonise pas les conditions d'expropriation dans l'Union et peut relever de l'article 207 TFUE[37]. Cette position a été confirmée par la Cour de justice dans l'avis 2/15, qui n'a pas considéré l'article 345 TFUE comme un obstacle à l'inclusion des dispositions de l'accord UE-Singapour

[35] A. Dimopoulos, *EU Foreign Investment Law, op. cit.,* p. 108 et s.

[36] V. par exemple, et concernant la compatibilité d'une loi nationale sur les privatisations avec l'article 63 TFUE, arrêt de la Cour du 4 juin 2002, *Commission c/ Portugal,* C-367/98, ECLI:EU:C:2002:326.

[37] Paragraphe 341 des conclusions.

relatives à la protection des investissements étrangers directs au champ d'application de la politique commerciale commune[38].

Indépendamment de la réserve de compétence étatique dans l'article 345 TFUE, le gouvernement hellénique a contesté l'application de l'article 207 TFUE aux dispositions relatives à la protection des investissements contre l'expropriation également en raison de la notion de politique commerciale. Il a ainsi été soutenu dans le cadre de l'avis 2/15 que la régulation des investissements étrangers directs ne poursuit pas nécessairement des objectifs commerciaux et, en ce sens, l'article 207 TFUE couvre seulement les règles relatives à l'admission. Or, la Cour de justice a rappelé qu'un acte de l'Union relève de la politique commerciale commune «s'il porte spécifiquement sur les échanges internationaux en ce qu'il est essentiellement destiné à promouvoir, à faciliter ou à régir ces échanges et a des effets directs et immédiats sur ceux-ci»[39]. La politique commerciale commune comprend ainsi, outre les mesures qui rendent possible ou améliorent l'entrée d'investissements étrangers directs dans le pays d'accueil, les mesures qui protègent de tels investissements dans la mesure où la disponibilité de cette protection a des effets directs et immédiats sur la décision d'effectuer l'investissement étranger direct et sur la jouissance des bénéfices de cet investissement. Par ailleurs, « l'article 207, paragraphe 1, TFUE se réfère de manière générale aux actes de l'Union en matière d'«investissements étrangers directs», sans distinguer selon qu'il s'agit d'actes ayant pour objet l'admission ou la protection desdits investissements»[40].

La Grèce a soutenu une position stricte quant à la portée de l'article 207 TFUE pour ce qui concerne l'exclusion des transports de son champ d'application. Dans le cadre de l'avis 2/15, cette position a été présentée par l'Avocat Général, qui a considéré que l'exclusion des transports du champ d'application de la politique commerciale selon le paragraphe 5 de l'article 207 TFUE comprend tous les services fournis dans le cadre du secteur des transports. Il a été notamment soutenu, au nom de la cohérence de l'action extérieure de l'Union, que l'exclusion de la politique commerciale commune des accords internationaux dans le domaine des transports couvre les services de transport en tant que tels (transport des marchandises ou des personnes par air, par route, par voie ferrée, par mer ou par voies et plans d'eau navigables), mais également les services qui sont intrinsèquement et indissociablement liés à de tels services, c'est-à-dire des services qui sont à la fois spécialement liés au service de transport et qui

[38] Avis 2/15, paragraphe 107.

[39] Arrêt de la Cour du 18 juillet 2013, *Daiichi Sankyo et Sanofi-Aventis Deutschland*, C-414/11, ECLI:EU:C:2013:520, paragraphe 51.

[40] Avis 2/15, paragraphe 87.

leur sont subordonnés[41]. Selon cette approche, seuls les services qui ne sont pas intrinsèquement et indissociablement liés aux services de transport, tels que les services de dédouanement, ne relèvent pas de l'exception énoncée à l'article 207, paragraphe 5, TFUE. Or, la Cour a considéré dans l'avis 2/15 que les services de réparation et de maintenance d'aéronefs au cours desquels l'aéronef est retiré du service, la vente ou la commercialisation de services de transport aérien ainsi que les services liés aux systèmes informatisés de réservation, ne sont pas intrinsèquement liés aux services de transport. Il s'agit de services commerciaux qui relèvent ainsi de la politique commerciale commune et qui ne sont pas couverts par l'exception du paragraphe 5 de l'article 207 TFUE[42].

De manière générale, la Grèce suit une approche stricte du champ d'application de la politique commerciale commune. Le gouvernement hellénique considère également que les droits moraux doivent être exclus du champ d'application de la politique commerciale, en ce qu'ils constituent des aspects non commerciaux de la propriété intellectuelle. En outre, même si la finalité commerciale de l'accord TRIPs est incontestable, le gouvernement hellénique a considéré que l'accord dans son ensemble a un objet plus vaste que les seuls «aspects de la propriété intellectuelle» visés à l'article 207 TFUE. Selon cette approche, des dispositions telles que les articles 27 et 70 de l'accord TRIPs, qui déterminent le cadre de la protection des brevets, visent davantage le droit matériel des brevets que les aspects commerciaux de la propriété intellectuelle.

Ce dernier argument a été avancé dans le cadre de l'affaire *Daiichi Sankyo,* concernant la question préjudicielle du tribunal de première instance hellénique quant à l'interprétation et l'effet direct de ces dispositions de l'accord TRIPs. L'affaire *Daiichi Sankyo* a donné à la Cour de justice l'occasion de se prononcer sur la portée de la réforme de la politique commerciale commune depuis l'entrée en vigueur du traité de Lisbonne[43]. La Cour a constaté l'évolution significative du droit primaire, qui implique un revirement de jurisprudence par rapport à l'arrêt *Merck Genéricos,* lorsqu'elle avait considéré que les dispositions de l'accord TRIPs relatives à la protection des brevets relevaient de la compétence partagée de l'Union et de ses Etats membres[44]. Sous le régime du traité de Lisbonne, la politique commerciale commune doit être lue dans la perspective de l'approche globale des objectifs de l'action extérieure de l'Union, consacrée dans l'article 21 TUE et visant à l'affirmation de l'Union comme acteur international global. Au-delà de la finalité commerciale d'une disposition précise, la Cour examine la finalité

[41] Paragraphe 217 des conclusions.

[42] Avis 2/15, paragraphes 64-68.

[43] Arrêt de la Cour du 18 juillet 2013, *Daiichi Sankyo Co. Ltd,* C-414/11, ECLI:EU:C:2013:520.

[44] Arrêt de la Cour du 11 septembre 2007, *Merck Genéricos – Produtos Farmacêuticos,* C-431/05, ECLI:EU:C:2007:496.

de l'accord dans son ensemble. Elle constate que les normes de l'accord TRIPs présentent un lien spécifique avec les échanges internationaux, comme ledit accord fait partie intégrante du régime de l'OMC et constitue l'un des accords multilatéraux principaux sur lesquels ce régime est fondé[45]. Ayant démontré la spécificité du lien de l'accord dans son ensemble avec les échanges internationaux, la Cour rejette l'argument des Etats membres, dont la Grèce, qui ont soutenu que les dispositions de la Partie II de l'accord TRIPs, relative aux normes concernant l'existence, la portée et l'exercice des droits de propriété intellectuelle, parmi lesquelles figure l'article 27 dudit accord, relèvent du domaine du marché intérieur en vertu, notamment, des articles 114 TFUE et 118 TFUE. La Cour de justice a souligné que l'objectif premier de l'accord TRIPs est de renforcer et d'harmoniser la protection de la propriété intellectuelle à l'échelle mondiale[46]. Par conséquent, l'ensemble des dispositions l'accord présentent un lien spécifique avec les échanges commerciaux internationaux[47].

Malgré le lien établi par la Cour de justice entre l'objectif d'une disposition et l'objectif de l'accord international dont il relève, la Grèce, comme d'autres Etats membres, continue à défendre l'approche basée sur la finalité commerciale des dispositions des accords internationaux au cas par cas. Dans le cadre de l'avis 2/15, il a été soutenu que le chapitre 11 de l'accord UE-Singapour, qui contient des engagements en matière de propriété intellectuelle, couvre également des aspects non commerciaux de la propriété intellectuelle au motif que son article 11.4 renvoie, au sujet du droit d'auteur et des droits voisins, à des conventions multilatérales qui comportent une disposition relative aux droits moraux. La Cour de justice a rejeté cet argument, considérant que cette disposition est absorbée par la finalité commerciale du chapitre 11 dans son ensemble[48].

En revanche, la Cour de justice a donné raison à la Grèce et autres Etats membres et au Conseil dans le cadre de l'avis 3/15, concernant la compétence de l'Union pour conclure le traité de Marrakech visant à faciliter l'accès des aveugles, des déficients visuels et des personnes ayant d'autres difficultés de lecture des textes imprimés aux œuvres publiées[49]. Si quelques dispositions de ce traité instituent certaines obligations relatives à l'échange transfrontalier d'exemplaires en format accessible, le traité de Marrakech a pour finalité d'améliorer la condition des personnes bénéficiaires en facilitant, par divers moyens, l'accès de ces personnes aux œuvres publiées et non de promouvoir, de faciliter ou de régir le commerce international des exemplaires en format accessible. On notera

[45] Daiichi Sankyo, paragraphe 53.
[46] *Ibid.*, paragraphe 58.
[47] Paragraphes 49 -52.
[48] Avis 2/15, paragraphe 127.
[49] Avis de la Cour du 14 février 2017, ECLI:EU:C:2017:114.

toutefois que la Cour, même si elle a exclu l'application de l'article 207 TFUE en l'espèce, s'est précisément fondée sur l'appréciation des objectifs de l'accord envisagé dans son ensemble.

Question 17

La République hellénique considère que les accords bilatéraux d'investissement, conclus avec les Etats tiers cessent d'exister lorsque l'Union exerce sa compétence et conclut un accord en la matière. Comme la Cour l'a souligné dans l'avis 2/15, la compétence exclusive de l'Union en matière d'investissements étrangers directs couvre la compétence pour approuver une disposition qui stipule que les engagements en matière d'investissements directs contenus dans des accords bilatéraux antérieurement conclus entre des États membres de l'Union et un État tiers doivent, dès l'entrée en vigueur de l'accord conclu par l'Union, être considérés comme étant remplacés par celui-ci[50]. Cette position est acceptée en Grèce[51], qui est en faveur d'une approche définie au niveau de l'Union.

Une question qui est particulièrement discutée auprès des administrations helléniques concerne la compatibilité avec le droit de l'Union des clauses d'arbitrage dans les accords bilatéraux d'investissement internes, conclus entre Etats membres de l'Union. La question est actuellement traitée dans le contexte de l'affaire *ACHMEA*[52], concernant la demande d'annulation devant les juridictions allemandes d'une sentence arbitrale rendu par un tribunal arbitral constitué conformément au traité bilatéral d'investissement conclu en 1991 entre les Pays Bas et l'ancienne République fédérale tchèque et slovaque, et applicable à l'égard de la Slovaquie. Le gouvernement hellénique, dans ses observations écrites, s'est positionné en faveur de l'incompatibilité du mécanisme de règlement des différends entre investisseurs et Etat avec les articles 18, paragraphe 1, 267 et 344 TFUE. Plus précisément, la Grèce, déjà défenderesse dans des procédures d'arbitrage d'investissement internes à l'Union[53], a d'abord soutenu que l'article 344 TFUE, qui prévoit l'exclusivité de la compétence de la Cour de justice pour les différends entre Etats membres, concerne également les différends entre un investisseur et un État membre, comme c'était le cas en l'espèce, et non seulement les différends entre Etats membres. Par conséquent, le consentement des parties à l'inclusion d'une clause de soumission d'un différend à l'arbitrage ne suffit pas pour pallier l'incompatibilité d'une telle clause avec l'article 344

[50] Avis de la Cour du 16 mais 2017, ECLI:EU:C:2017:376, paragraphe 249.

[51] M. Perakis, «L'accord du 18 mars 2016 entre l'Union européenne et la Turquie : une première évaluation juridique et pratique» (en grec), *Revue trimestrielle de droit européen (ΕΕΕυρΔ)*, nº 2/2016, p. 149.

[52] C-284/16.

[53] Poštová banka, a.s. et Istrokapital SE c/ République hellénique (affaire CIRDI no ARB/13/8). Cyprus Popular Bank Public Co. Ltd c/ République hellénique (affaire CIRDI no ARB/14/16).

TFUE. Le gouvernement hellénique rappelle la condamnation de l'Irlande, dans l'affaire *Mox Planck*, pour violation de l'article 344 TFUE en combinaison avec l'obligation de coopération loyale prévue dans l'article 4, paragraphe 3, TFUE[54]. L'incompatibilité de la clause d'arbitrage avec l'article 344 TFUE a été le principal argument du gouvernement hellénique dans ses observations dans l'affaire *ACHMEA*.

De manière subsidiaire, le gouvernement hellénique s'est également référé à la méconnaissance des articles 267 TFUE et 18 TFUE. Plus précisément, la Grèce a avancé que les juridictions nationales ont de possibilités très limitées ou inexistantes pour effectuer un contrôle de la sentence arbitrale au regard du droit de l'Union et de saisir, de ce fait, la Cour de justice d'un renvoi préjudiciel en interprétation, notamment lorsque les traités bilatéraux renvoient aux règles de l'arbitrage international. Enfin, la Grèce a soutenu que la clause d'arbitrage est contraire à l'article 18 TFUE et à l'article 63 TFUE, en ce qu'elle méconnaît le principe de non-discrimination dans le cadre de la libre circulation des capitaux, en permettant aux investisseurs européens d'invoquer leur citoyenneté européenne et d'avoir accès privilégié au mécanisme d'arbitrage.

Les arguments de la Grèce n'ont pas été retenus par l'Avocat Général Wathelet dans ses conclusions présentées le 19 septembre 2017[55]. L'Avocat Général se place tout d'abord sur le terrain de la non-discrimination, sous un angle différent que celui du gouvernement hellénique en l'espèce, mais qui exprime les préoccupations de la Grèce dans le débat sur les clauses arbitrales des accords d'investissement internes. Plus précisément, l'Avocat Général traite de l'argument du traitement préférentiel dont bénéficient les investisseurs du Royaume des Pays-Bas qui ont investi en République slovaque, alors que les investisseurs des États membres qui n'ont pas conclu un traité bilatéral avec la République slovaque ne bénéficient pas de ce traitement. L'Avocat Général considère que le droit de l'Union n'interdit une discrimination, par un État membre, d'un ressortissant d'un autre État membre que au regard du traitement que le premier État membre accorde à ses propres ressortissants. En revanche, les discriminations à rebours et les avantages accordés aux ressortissants d'un autre État membre ne sont pas visés et ne sont pas incompatibles avec le droit de l'Union. Il propose ainsi à la Cour de considérer que le droit de recours à l'arbitrage international à l'encontre de la République slovaque ne constitue pas une discrimination fondée sur la nationalité interdite par l'article 18 TFUE[56].

[54] Arrêt de la Cour du 30 mai 2006, *Commission c/ Irlande*, C-450/03, ECLI:EU:C:2006:345.
[55] ECLI:EU:C:2017:699.
[56] Paragraphe 82 des conclusions.

Toutefois, les administrations et fonctionnaires grecs considèrent qu'il s'agit d'un traitement discriminatoire, inhérent au maintien en vigueur des traités bilatéraux d'investissement parmi les Etats membres. Cette situation est différente de celle évoquée dans l'avis 2/15, où la Cour de justice a en effet considéré que la disposition de l'accord de libre-échange avec la République de Singapour qui instaure l'arbitrage international comme mécanisme de règlement des différends «ne saurait revêtir un caractère purement auxiliaire»[57]. Dans un traité d'investissement conclu par l'Union le droit des investisseurs de recourir à l'arbitrage international est une disposition essentielle puisqu'elle est en soi une garantie indispensable qui incite et protège les investissements. Or, dans un traité d'investissement entre Etats membres le droit des investisseurs de recourir à l'arbitrage international ne s'applique qu'aux investisseurs ressortissants des Etats parties au traité. De cette façon, une discrimination au sein de l'Union est établie. Cependant, les autorités grecques sont d'avis que la dénonciation individuelle des traités bilatéraux internes ne saurait pallier les inconvénients d'une telle situation. En effet, un Etat membre peut mettre fin à un des traités bilatéraux et maintenir d'autres, de manière à ce que ses propres investisseurs continuent à bénéficier des traités conclus avec des Etats membres qui formerait un groupe avec l'Etat en question. Par conséquent, la seule solution envisageable pour la Grèce est l'adoption d'une procédure coordonnée au niveau de l'Union.

Question 18

Les accords de libre-échange «nouvelle génération» reprennent le régime de règlement des différends entre investisseurs et Etats, qui a fonctionné dans le cadre des accords bilatéraux d'investissement conclus par les Etats membres, et concerne les différends opposant un ressortissant d'une partie à l'accord à l'autre partie en raison d'un traitement ayant occasionné une perte ou un préjudice. Ils comportent également de dispositions relatives au règlement des différends entre parties, portant sur les divergences concernant l'interprétation et l'application des dispositions de l'accord.

Toutefois, l'Union, sur proposition de la Commission, est en train de négocier avec ses partenaires la mise en place d'une future juridiction multilatérale en matière d'investissements, qui remplacerait les systèmes juridictionnels bilatéraux des investissements. L'accord commercial signé entre l'Union et le Canada (AECG/CETA) et celui conclu entre l'Union et le Viêt Nam comportent tous les deux une référence à la mise en place d'une juridiction multilatérale permanente en matière d'investissements. En outre, l'Union européenne inclut des références similaires dans toutes ses négociations en cours concernant les investissements.

[57] Avis 2/15, précité, paragraphe 292.

La Grèce ne s'est pas différenciée de la position du Conseil qui soutient la Commission dans sa volonté d'œuvrer en vue de l'établissement d'une Cour multilatérale d'investissement. La Grèce est, de manière générale, en faveur de l'européanisation du règlement des différends en matière d'investissements et soutient la révision du statut du CIRDI (ICSID) afin de permettre la participation de l'Union.

Cependant, les mécanismes de règlement des différends en matière d'investissements soulèvent la question du respect de l'autonomie de l'ordre juridique de l'Union. Dans la perspective de mise en place d'une juridiction multilatérale dans le cadre de la CETA, la Cour de justice est saisie par la Belgique pour un avis consultatif en vertu de l'article 218, paragraphe 11, TFUE. La question de l'autonomie est également soulevée dans le cadre des systèmes juridictionnels bilatéraux.

Le régime de règlement des différends entre investisseurs et Etats peut toucher la question de l'autonomie dans la mesure où les Etats membres pourront être parties au différend, que l'accord d'investissement soit conclu comme un accord mixte ou par l'Union seule, et il sera ainsi nécessaire de déterminer la répartition de la responsabilité entre l'Union et ses Etats membres. Or, le règlement nº 912/2014 (v. infra, question 19) répond à cette préoccupation. La compétence de la Cour de justice pour interpréter le droit de l'Union n'est pas en question[58], cependant, dans le cadre de l'affaire *ACHMEA,* qui concerne le régime de règlement des différends entre investisseurs et Etats dans le cadre des accords bilatéraux conclus entre Etats membres (v. supra, question nº 17), le recours à l'arbitrage est vu sous l'angle de sa compatibilité avec le mécanisme de renvoi préjudiciel et, partant, avec le principe d'autonomie. L'Avocat Général Wathelet considère toutefois que le contrôle que les juridictions étatiques peuvent exercer sur les sentences rendues par les tribunaux arbitraux garantit le fonctionnement du mécanisme de renvoi préjudiciel et, ainsi, le respect de l'autonomie de l'ordre juridique de l'Union[59]. Il convient de noter à cet égard que le gouvernement hellénique, dans ses observations dans le cadre de l'affaire *ACHMEA*, n'a pas soulevé la question du respect de l'autonomie de l'ordre juridique de l'Union. Il a en revanche contesté la compatibilité du recours à l'arbitrage avec l'article 267 TFUE, en raison du pouvoir de contrôle limité des tribunaux nationaux en fonction du règlement d'arbitrage appliqué, sans ériger le mécanisme de renvoi préjudiciel en composante du principe d'autonomie. De manière générale, nous pouvons observer que la doctrine hellénique ne lie pas l'impact des

[58] A. Dimopoulos, «The Compatibility of Future EU Investment Agreements with EU Law», *Legal Issues of Economic Integration*, vol. 39, nº 4/2012, p. 447, spec. 468-469.

[59] Conclusions de l'AG, ECLI:EU:C:2017:699 paragraphes 239-249.

engagements internationaux sur le fonctionnement du renvoi préjudiciel au principe d'autonomie[60].

La Cour de justice de l'Union ne s'est pas prononcé, dans l'avis 2/15, sur la compatibilité du régime de règlement des différends entre un investisseur et un Etat membre avec le principe d'autonomie. Elle a mis à l'écart la question de l'autonomie de l'ordre juridique de l'Union également pour ce qui concerne le régime de règlement des différends entre parties. La Cour a considéré que la demande d'avis sur l'accord de libre-échange entre l'Union et la République de Singapour ne concernait pas la compatibilité de l'accord avec le droit de l'Union, mais uniquement la question de compétence[61]. Elle a ainsi constaté que les dispositions relatives su régime de règlement des différends entre parties constituent de dispositions institutionnelles qui sont absorbées par les dispositions substantielles, en ce sens qu'elles ne donnent pas lieu à l'examen de la répartition des compétences. La Cour a rappelé que « la compétence de l'Union pour contracter des engagements internationaux inclut celle d'assortir ces engagements de dispositions institutionnelles. Leur présence dans l'accord n'a pas d'incidence sur la nature de la compétence pour conclure celui-ci»[62]. En revanche, le régime de règlement des différends entre investisseurs et États est susceptible de soustraire des différends à la compétence des juridictions des États membres ou de l'Union. La Cour considère dans l'avis 2/15 que les dispositions relatives à un tel régime ne sauraient être considérées comme auxiliaires, ce qui implique qu'elles ne sont pas absorbées par la compétence pour conclure les dispositions de fond[63]. De telles dispositions constituent au contraire une base autonome de compétence, et la Cour considère qu'elles ne peuvent être conclus par l'Union seule, mais requièrent le consentement des Etats membres. Nous pouvons noter à cet égard qu'il s'agit d'une approche non-substantielle de la notion de compétence partagée, qui ne peut être expliquée qu'au regard de son lien avec le principe d'autonomie. Le régime de règlement des différends entre investisseurs et États étant susceptible d'affecter les principes fondamentaux de mise en œuvre du droit de l'Union et, partant, le principe d'autonomie, les dispositions à sa base ne sauraient échapper à la compétence des Etats membres, maîtres des traités.

[60] V. par exemple, V. Pergantis, «L'adhésion de l'Union européenne à la CEDH : L'avis 2/13 de la Cour de justice de l'Union européenne» (en grec), *Revue hellénique de droit européen (ΕΕΕυρΔ)*, nº 1/2016, p. 27-37, not. p. 32.

[61] Avis 2/15, précité, paragraphes 300-301.

[62] Paragraphe 276.

[63] Paragraphe 292.

Question 19

Le règlement des différends entre investisseurs et Etats, dans le cadre des accords de libre échange de nouvelle génération, soulève la question de la répartition de la responsabilité financière entre l'Union et ses Etats membres. Cette question est régie par le règlement nº 912/2014[64], qui définit la responsabilité financière comme l'obligation de payer une somme d'argent allouée par un tribunal arbitral ou convenue dans le cadre d'un accord transactionnel, y compris les frais résultant de l'arbitrage»[65]. La Grèce se rallie sur le principe à la base dudit règlement, à savoir l'engagement de la responsabilité financière de l'auteur du fait illicite. Toutefois, l'allocation de la responsabilité financière est dissociée de la responsabilité sur le plan international et la détermination de la partie défenderesse, ce qui soulève de questions de sécurité juridique et de compatibilité avec les règles du droit international[66].

Plus précisément, selon le considérant 3 du règlement nº 912/2014 «la responsabilité au niveau international d'un traitement faisant l'objet d'une procédure de règlement des différends est déterminée sur la base de la répartition des compétences entre l'Union et les Etats membres. En conséquence, l'Union devra, en principe, assurer la défense en cas de plainte fondée sur la violation de règles inscrites dans un accord relevant de sa compétence exclusive, que le traitement en question ait été accordé par l'Union elle-même ou par un État membre». Or, concernant la répartition de la responsabilité financière, les principes spécifiques consacrés dans le règlement consistent dans la liaison entre l'attribution de la responsabilité et l'imputation du fait illicite. Ainsi, selon l'article 3 du règlement nº 912/2014, premièrement, l'Union porte la responsabilité financière de tout traitement accordé par ses institutions, organes ou organismes, deuxièmement, les États membres assument la responsabilité financière de tout traitement qu'ils ont accordé et, troisièmement, l'Union doit assumer la responsabilité financière du traitement accordé par les États membres lorsque celui-ci était requis par le droit de l'Union. Dans ce dernier cas, il s'agit, selon le règlement, du «traitement pour lequel l'État membre concerné n'aurait pu éviter la violation alléguée de l'accord qu'en ne tenant pas compte d'une obligation lui incombant en vertu du droit de l'Union, comme dans les cas où il ne dispose d'aucun pouvoir

[64] Règlement (UE) nº 912/2014 du Parlement européen et du Conseil du 23 juillet 2014 établissant un cadre pour la gestion de la responsabilité financière liée aux tribunaux de règlement des différends entre investisseurs et États mis en place par les accords internationaux auxquels l'Union européenne est partie, *JO* L 257 du 28 août 2014, p. 121.

[65] Art. 2 g) du règlement nº 912/2014.

[66] A. Dimopoulos, «The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities», *Common Market Law Review*, vol. 51, nº 6, 2014, p. 1671-1720, spec. 1677 et s.

discrétionnaire ni d'aucune marge d'appréciation quant au résultat à atteindre»[67]. Enfin, lorsque l'État membre était requis d'agir pour remédier à une situation d'incompatibilité avec le droit de l'Union, il reste le responsable financier. Il en résulte que, même si l'accord international est conclu par la seule Union, et n'a pas le caractère d'accord mixte, et même s'il relève de sa compétence exclusive, l'Union ne doit pas assumer la violation émanant des Etats membres, à moins que le traitement accordé par un Etat membre ait été requis par le droit de l'Union.

Nous constatons ainsi que l'imputabilité est fonction des interactions normatives au sein de l'Union et c'est la raison pour laquelle la délimitation de la responsabilité financière est une question interne à l'Union, régie par le règlement nº 912/2004. Un des principes spécifiques qui s'expriment dans le règlement est celui de la protection de l'investisseur indépendamment de l'éventuel désaccord entre l'Union et les Etats membres, qui peut conduire à la contestation de la décision de la Commission par l'Etat membre concerné.

Toutefois, le régime instauré par le règlement nº 912/2014 s'inscrit dans le cadre des principes qui régissent l'action extérieure de l'Union, à savoir la coopération loyale et l'unité de représentation internationale. Cela implique que la désignation de la partie défenderesse par l'ensemble européen ne s'aligne pas forcément sur la répartition de la responsabilité financière. Ainsi, l'Union peut être partie défenderesse lorsque l'Etat membre est l'auteur du fait illicite, dans les cas prévus à l'article 9 du règlement nº 912/2014. Plus précisément, un Etat notifie à la Commission qu'il ne souhaite pas agir comme partie défenderesse, ou la Commission peut décider que l'Union doit agir en qualité de partie défenderesse, «lorsqu'un traitement semblable est mis en cause dans une plainte connexe introduite à l'encontre de l'Union auprès de l'OMC, lorsqu'un panel arbitral a été constitué et que la plainte concerne le même point de droit spécifique et lorsqu'il est nécessaire d'assurer une argumentation cohérente dans l'affaire portée devant l'OMC". La mise en œuvre de cette possibilité pour l'Union, d'être partie défenderesse lorsque l'Etat membre est l'auteur du fait illicite, implique un devoir de coopération étroite entre la Commission et l'Etat membre concerné. De même, l'obligation de coopération étroite concerne le cas où la partie défenderesse serait un Etat membre.

La Grèce ne s'oppose pas à la désignation de l'Union, représentée par la Commission, comme partie défenderesse, mais remarque l'absence de consécration des modalités de la coopération étroite dans le règlement[68]. Les autorités helléniques sont toutefois de l'avis que si le traitement est clairement imputable à

[67] Art. 2 l) du règlement nº 912/2014.

[68] G. Karipsiadis, «Les investissements étrangers directs après Lisbonne et le droit dérivé de l'Union : une présentation sommaire» (en grec), *Revue hellénique de droit européen (ΕΕΕυρΔ)*, nº 1/2014, p. 32.

l'Etat, la représentation par la Commission devra rester exceptionnelle. Mais la Grèce accorde une importance particulière au respect du principe de coopération loyale également au cas où elle serait partie défenderesse[69]. Par ailleurs, le principe de désignation de la partie défenderesse par l'Union européenne est accepté dans la doctrine hellénique[70], qui ne l'analyse pas particulièrement sous l'angle du principe d'autonomie auquel porterait atteinte la détermination de la partie défenderesse par l'instance de règlement des différends.

La doctrine grecque soulève également l'incertitude liée à la problématique de l'engagement de la responsabilité de l'Etat membre au cas où l'accord conclu par l'Union ne serait pas un accord mixte, et où l'Etat ne serait pas partie contractante[71]. En revanche, il est soutenu que si l'accord de libre-échange de nouvelle génération a le caractère d'accord mixte, il devrait consacrer la responsabilité conjointe et solidaire de l'Union et de ses Etats membres, comme il résulte du régime des accords mixtes[72].

Enfin, la Grèce a réussi à faire annexer aux accords de libre-échange de nouvelle génération une réserve selon laquelle l'Etat est dispensé de sa responsabilité internationale dans le cas où le préjudice proviendrait des conséquences de la restructuration de la dette publique.

Question 20

L'exigence de conduite de la politique commerciale commune dans le cadre des principes et objectifs de l'action extérieure de l'Union européenne, selon l'article 207 TFUE, doit être lue à la lumière de l'article 21 TUE, qui exprime l'approche globale des objectifs de l'action extérieure de l'Union. Le rapport entre les deux dispositions a été pour la première fois précisé dans l'avis 2/15 de la Cour de justice concernant l'accord de libre-échange entre l'Union et Singapour, accord de nouvelle génération[73].

En effet, comme la Cour le rappelle, un accord de libre-échange «nouvelle génération» est un accord de commerce qui comprend, outre les éléments classiques d'un accord commercial, d'autres aspects pertinents, indispensables pour

[69] A. Dimopoulos, «The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities», *op. cit.,* p. 1680.

[70] G. Karipsiadis, «Les investissements étrangers directs après Lisbonne et le droit dérivé de l'Union : une présentation sommaire» (en grec), *op. cit.,* p. 31.

[71] A. Dimopoulos, «The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities», *op. cit.,* p. 1688 et s.

[72] A. Dimopoulos, *op. cit.*. Sur la responsabilité conjointe et solidaire de l'Union et de ses Etats membres dans le cadre des accords mixtes, v. I. Drossos, *Ordre constitutionnel hellénique et Communautés européennes dans les relations internationales* (en grec), Athènes, Sakkoulas, 1987, p. 167 et s., 242 et s. E. Neframi, *Recherches sur les accords mixtes de la Communauté européenne*, Bruxelles, Bruylant, 2007, p. 524 et s.

[73] Avis de la Cour du 16 mais 2017, ECLI:EU:C:2017:376.

les échanges commerciaux[74]. En l'espèce, l'accord UE-Singapour vise à renforcer les relations économiques, commerciales et en matière d'investissements conformément à l'objectif de développement durable. Selon le chapitre 13 de l'accord, les composantes du développement durable consistent dans la protection des travailleurs et de l'environnement. La question s'est ainsi posée de savoir si les dispositions relatives au développement durable relèvent des bases juridiques y correspondant ou si elles font partie des objectifs des relations commerciales entre l'Union et la République de Singapour.

Il convient tout d'abord de rappeler que, jusqu'à l'avis 2/15, la coexistence de l'objectif commercial avec d'autres objectifs donnait lieu au contentieux de la base juridique[75]. Selon la théorie du centre de gravité, ou d'absorption, le choix de la base juridique d'une mesure unilatérale ou d'un accord international se fait selon l'objectif prépondérant. La base juridique à laquelle correspond l'objectif prépondérant absorbe ainsi les bases juridiques auxquelles correspondent les objectifs secondaires. Or, dans les accords «nouvelle génération», l'objectif commercial n'a pas à être pondéré avec les autres objectifs, comme, par nature, lesdits accords peuvent se fonder sur une pluralité de bases juridiques.

Cependant, dans l'avis 2/15, la Cour de justice n'a pas considéré les dispositions de l'accord UE-Singapour relatifs au développement durable comme l'expression d'objectifs et, donc, de bases juridiques autonomes. Elle a considéré en revanche l'extension du domaine de la politique commerciale commune, qui absorbe les objectifs de développement durable[76].

Il convient de noter à cet égard que l'extension de la portée de la politique commerciale commune ne résulte pas de l'analyse de l'objectif commercial. En effet, selon la définition de la politique commerciale, retenue depuis l'entrée en vigueur du traité de Lisbonne, tout accord qui vise essentiellement à promouvoir, faciliter ou régir les échanges et il a donc des effets directs et immédiats sur le commerce, relève du champ d'application de la politique commerciale commune[77]. On aurait pu considérer en ce sens que le fait que les normes internationaux en matière environnementale et de protection des travailleurs, auxquelles renvoie le chapitre 13 de l'accord UE-Singapour, conditionnent les échanges (en permettant à l'autre partie d'adopter des sanctions commerciales en cas de

[74] Paragraphe 140.

[75] Stanislas Adam, 'The Legal Basis of International Agreements of the European Union in the Post-Lisbon Era' in in Inge Govaere, Erwan Lannon, Peter Van Elsuwege, Stanislas Adam (eds) *The European Union in the World; Essays in Honor of Marc Maresceau* (Martinus Nijhoff 2014) 78.

[76] Paragraphe 141.

[77] Arrêts du 18 juillet 2013, Daiichi Sankyo et Sanofi-Aventis Deutschland, C-414/11, EU:C:2013:520, points 51 et 52 et jurisprudence citée, et du 22 octobre 2013, Commission/Conseil, C-137/12, EU:C:2013:675, paragraphes 57 et 58.

non-respect de pareilles conditions ou en subordonnant l'octroi d'un avantage commercial spécifique au respect des normes en matière de travail et d'environnement), implique leur qualification de normes commerciales, ayant des effets directs et immédiats sur le commerce international. La Cour de justice a déjà considéré que l'objectif de coopération au développement est assez large pour inclure d'autres objectifs, liés à d'autres politiques, comme la migration, les transports et l'environnement[78]. De la même façon, elle aurait pu considérer que l'objectif commercial est assez large pour inclure des objectifs de développement durable, vu aussi le caractère transversal de ces derniers.

Or, la Cour de justice, dans l'avis 2/15 a justifié l'absorption des objectifs de développement durable par l'objectif commercial par l'article 207 TFUE et l'exigence de conduite de la politique commerciale dans le cadre des principes et objectifs de l'action extérieure de l'Union. Par conséquent, les objectifs de protection de l'environnement et des droits sociaux sont intégrés dans l'objectif commercial. L'article 207 TFUE complète ainsi l'article 21 TUE, en ce qu'il précise les effets de l'approche globale des objectifs listés[79]. La conséquence de cette approche dans l'avis 2/15 est que les dispositions de l'accord UE-Singapour relatives au développement durable ne donnent pas lieu à l'existence d'une compétence autre que la compétence exclusive en matière de politique commerciale[80].

La Grèce, comme la plupart des Etats membres et le Conseil n'ont pas soutenu cette position mais ont proposé de considérer des dispositions relatives au développement durable comme relevant de bases juridiques autonomes. Cette position a été exprimée par l'Avocat Général Sharpston, qui a notamment souligné que, bien que le chapitre 13 de l'accord UE-Singapour présente un lien avec le commerce, il réglemente également des aspects du travail et de la protection de l'environnement qui n'ont aucun lien avec le commerce et qu'il vise à promouvoir le travail et la protection de l'environnement[81]. Pour l'Avocat Général, et le gouvernement hellénique, l'absorption des objectifs liés au développement durable par l'objectif commercial correspond à une extension de la compétence exclusive de l'Union vers les domaines de compétence partagée, contrairement au principe d'attribution. Or, la Cour de justice a souligné que l'Union n'exerce aucune compétence pour réglementer les niveaux de protection sociale et environnementale et, ainsi, les dispositions en questions expriment un objectif commercial[82].

[78] Arrêt du 11 juin 2014, Commission/Conseil, C-377/12, EU:C:2014:1903, paragraphes 38 et 49.
[79] Paragraphe 143.
[80] Paragraphe 163.
[81] Conclusions présentées le 21 décembre 2016, ECLI:EU:C:2016:992, paragraphe 475.
[82] Avis 2/15, paragraphe 164.

Question 21
V. supra, Chapitre 2.

CHAPITRE 5: ESPACE DE LIBERTÉ, DE SÉCURITÉ ET DE JUSTICE (POLITIQUES RELATIVES AUX CONTRÔLES AUX FRONTIÈRES, À L'ASILE ET À L'IMMIGRATION)

Question 22
La compétence externe de l'Union dans le domaine de l'espace de liberté, de sécurité et de justice, compétence partagée, peut devenir exclusive selon les critères codifiés dans l'article 3, paragraphe 2, TFUE, dont celui d'affectation des règles communes, ou effet *AETR*. L'application de ce critère dans le domaine des visas de court séjour a conduit à établir l'exclusivité de la compétence externe de l'Union. L'Union a en effet conclu des accords bilatéraux sur les conditions de délivrance des visas, en vertu de sa compétence externe implicite, issue de l'exercice de sa compétence interne ayant conduit à une harmonisation complète.

Cependant, le protocole nº 23 annexé au traité de Lisbonne (qui reprend le protocole annexé au traité d'Amsterdam), concernant les mesures relatives au franchissement des frontières extérieures, précise que l'article 77, paragraphe 2 b), TFUE ne préjuge pas la compétence des Etats membres de négocier ou de conclure des accords avec des pays tiers, pour autant que lesdits accords respectent le droit de l'Union et les autres accords internationaux pertinents. La question est de savoir si ce protocole doit être interprété en ce sens que l'effet de préemption est exclu.

Or, l'interprétation du protocole nº 23 dans le sens que la compétence externe de l'Union n'a pas vocation à devenir exclusive se heurterait à l'objectif d'établissement d'une politique commune en matière de franchissement des frontières extérieures. En outre, exclure la compétence externe de l'Union en matière de franchissement des frontières serait en contradiction avec l'activité croissante de l'Agence Frontex, qui conclut des accords «de travail» (working arrangements) avec des pays tiers. Enfin, le règlement «code frontières Schengen»[83] prévoit dans son annexe I que «les États membres peuvent conclure ou maintenir des accords bilatéraux avec des pays tiers voisins concernant l'établissement de points de passage frontaliers communs».

Il peut être ainsi soutenu que le protocole nº 23 confirme l'effet de préemption au lieu de le réfuter : lorsque l'Union exerce sa compétence interne et aboutit à une harmonisation complète, les Etats membres sont dessaisis de leur compétence et ne peuvent conclure ou maintenir des accords internationaux que

[83] Règlement nº 610/2013 du 26 juin 2013, *JO* L 182 du 29 juin 2013, p. 1.

sur autorisation. De surcroit, le protocole nº 23 prévoit que les accords que les Etats membres négocient ou concluent doivent respecter le droit de l'Union. Par conséquent, le protocole souligne le fait que l'exclusivité de la compétence externe de l'Union ne soit pas issue du traité, mais dépend de son exercice sur le plan interne. Certes, la portée du protocole nº 23 ne se limite pas à confirmer l'effet *AETR*. Son annexion aux traités pourrait clarifier le rapport entre l'article 3, paragraphe 2, TFUE et l'article 216, paragraphe 1, TFUE (v. supra question 4). Précisément, il pourrait signifier que l'exercice de la compétence externe de l'Union, même nécessaire au regard de ses objectifs (selon l'article 216, paragraphe 1, TFUE), est subordonné aux critères d'exclusivité de l'article 3, paragraphe 2, TFUE. Selon une telle approche, en l'absence d'harmonisation sur le plan interne, la compétence externe des Etats membres est préservée. Cela est d'autant plus important que les mesures relatives au franchissement des frontières extérieures ont un caractère procédural ou technique, et la coopération avec les Etats tiers est indispensable. Or, la coopération technique par le biais d'accords internationaux ne suffit pas pour établir un critère de nécessité susceptible de dessaisir les Etats membres de leur compétence externe selon l'article 3, paragraphe 2, TFUE.

On notera que la Grèce n'a pas conclu et n'a pas en vigueur des accords internationaux de franchissement des frontières.

Question 23

La doctrine hellénique accorde une importance particulière à la protection des droits fondamentaux dans le cadre de la politique d'asile et d'immigration[84]. Cependant, la Grèce, en raison de sa position géographique, est particulièrement touchée par la situation récente de crise en Méditerranée et connaît un afflux sans précédent des migrants, dont des demandeurs de protection internationale. Il faut, certes, noter que le régime d'asile de la Grèce a été jugé, tant par la Cour de justice de l'Union, dans l'arrêt *N.S.*[85], que par la Cour européenne des droits de l'homme, dans les arrêts *M.S.S. c. Belgique et Grèce*[86] et *Sharifi c. Italie et Grèce*[87], non-conforme aux exigences de protection des droits fondamentaux, en raison des défaillances systématiques de la procédure d'asile et des conditions d'accueil des demandeurs d'asile. Il est bien connu que la constatation de telles

[84] Pour une critique de la directive-retour, v. P. Stangos, «Droits de l'homme et politique d'immigration : une relation problématique dans ses dimensions européenne et national (héllenique)», (en grec), in *Le droit public en évolution, Mélanges en l'honneur du Professeur P. Pararas,* Athènes-Komotini, Sakkoulas, 2012, p. 945-986, not. p. 975 et s.

[85] Arrêt de la Cour du 21 décembre 2011, *N.S.*, aff. jtes C-411/10 et C-493/10, ECLI:EU:C:2011:865.

[86] Arrêt de la CourEDH du 21 janvier 2011, *M.S.S. c. Belgique et Grèce*, requête nº 30696/09.

[87] Arrêt de la CourEDH du 21 octobre 2014, requête nº 16643/09.

défaillances a conduit la Cour de justice à admettre une dérogation à l'application des critères de détermination de l'Etat responsable de l'examen d'une demande d'asile selon le règlement nº 343/2003 du 18 février 2013[88], modifié par le règlement nº 604/2013 du 26 juin 2013[89]. De telles défaillances constituent des motifs sérieux et avérés de croire que le demandeur d'asile court un risque réel d'être soumis à des traitements inhumains ou dégradants, contraires aux dispositions de la Charte et de la Convention européenne des droits de l'homme[90]. Toutefois, dans l'arrêt *République slovaque et Hongrie c/ Conseil*[91], la Cour de justice a considéré que la Grèce, comme l'Italie, se trouve dans une situation d'urgence, en raison de l'afflux de migrants au cours de l'année 2015, qui a conduit le Conseil à adopter la décision (UE) 2015/1601, du 22 septembre 2015, instituant des mesures provisoires en matière de protection internationale au profit de l'Italie et de la Grèce[92]. La décision introduit, sur la base du principe de solidarité consacré dans l'article 80 TFUE, un mécanisme contraignant de relocalisation depuis l'Italie et la Grèce. La Slovaquie et la Hongrie ont demandé l'annulation de la décision en invoquant, entre autres, des moyens tirés d'une violation des principes de nécessité et de proportionnalité. La Cour a rejeté l'ensemble des moyens d'annulation, considérant qu'il était essentiel de faire preuve de solidarité à l'égard de la Grèce et de l'Italie et de compléter les mesures prises jusqu'alors par des mesures provisoires. Il est significatif que la Cour a retenu l'argument du gouvernement hellénique, selon lequel les déficiences structurelles constatées en termes de manque de capacité d'hébergement et de traitement des demandes n'affectent pas la constatation factuelle d'une situation d'urgence. La Cour de justice note en effet que «l'ampleur de l'afflux de migrants auquel étaient confrontés les régimes d'asile grec et italien au cours de l'année 2015 était telle qu'elle aurait perturbé tout régime d'asile, y compris un régime ne connaissant pas de faiblesses structurelles»[93].

Dans ce contexte exceptionnel de crise, l'efficacité du mécanisme de relocalisation concernant les personnes ayant un besoin manifeste de protection internationale dépend de la volonté des autres Etats membres de l'Union, la Commission ayant constaté dans ses rapports une gestion efficace de la part de la Grèce[94]. Mais la Grèce est surtout particulièrement concernée par l'accord

[88] Règlement Dublin II, *JO* L 50 du 25 février 2003, p. 1.
[89] Règlement Dublin III, *JO* L 180, du 29 juin 2013, p. 31.
[90] Ch. Synodinos, «Règlement judiciaire européen commun des problèmes des demandeurs d'asile» (en grec), *Revue hellénique des droits de l'homme*, nº 55/2012, p. 703-726.
[91] Arrêt de la Cour du 6 septembre 2017, aff. jtes C-643/15 et C-647/15, ECLI:EU:C:2017:631.
[92] *JO* L 248 du 29 septembre 2015, p. 80.
[93] Paragraphe 128.
[94] V. le quatorzième rapport sur la relocalisation et la réinstallation, du 26 juillet 2017, COM(2017) 405 final.

entre l'Union européenne et la Turquie, qui interfère avec le deuxième mécanisme de solidarité au bénéfice de pays tiers, celui de réinstallation. C'est dans ce contexte que la question de l'application du concept de pays tiers sûr se pose.

Plus précisément, il est bien connu que la déclaration UE-Turquie du 18 mars 2016, publiée sous la forme du communiqué de presse nº 144/16[95], établit un lien entre le mécanisme de réinstallation en faveur de la Turquie et la gestion de l'immigration irrégulière en Grèce. Conformément à la déclaration UE-Turquie, dont la nature juridique est contestée[96], la Turquie s'engage à réadmettre les migrants retenus dans les «hotspots» grecs et arrivant depuis ses côtes, ne demandant pas l'asile ou dont la demande d'asile a été jugée infondée ou irrecevable, en contrepartie de soutien financier, d'une perspective d'assouplissement de la politique de visas et du fonctionnement du mécanisme de réinstallation des demandeurs d'asile qui se trouvent sur son territoire. Dans ce contexte, l'application de l'accord entre l'Union et la Turquie interfère avec la pratique de la Grèce quant au concept de pays tiers sûr, au sens de la directive 2013/32/UE du 26 juin 2013[97]. En effet, l'article 60 de la loi 4375/2016 qui transpose la directive 2013/32/UE entérine la procédure prévue dans la déclaration UE-Turquie, ce qui soulève la question de savoir si la mise en œuvre de la déclaration constitue une reconnaissance implicite de la Turquie comme pays tiers sûr[98].

Or, la Grèce est liée par l'obligation de renforcer les garanties procédurales de l'examen des demandes d'asile, notamment après sa condamnation par la Cour européenne des droits de l'homme[99], et d'adapter son système aux exigences de la directive 2013/32/UE. Ladite directive a été transposée par les lois 4375/2016 et 4399/2016, qui ont mis en place une nouvelle autorité de recours, auprès du

[95] http://www.consilium.europa.eu/fr/press/press-releases/2016/03/18-eu-turkey-statement/.

[96] La déclaration a fait l'objet d'un recours en annulation devant le Tribunal de l'Union, qui a considéré, par trois ordonnances, qu'il n'était pas compétent pour connaître du recours, étant donné que la déclaration ne pouvait pas être considérée comme un acte adopté par le Conseil européen, ni par une autre institution, organe ou organisme de l'Union. V. Ordonnances du Tribunal du 28 février 2017, *NF, NG et NM c. Conseil européen*, T-192/16, T-193/16, T-257/16, ECLI:EU:T:2017:128; ECLI:EU:T:2017:129, ECLI:EU:T:2017:130. V. M. –D. Marouda, V. Saranti, *Droit des réfugiés,* (en grec), Athènes, Nomiki Vivliothiki, 2016, p. 222 et s. M. Perakis, «L'accord du 18 mars 2016 entre l'Union européenne et la Turquie : une première évaluation juridique et pratique» (en grec), *Revue trimestrielle de droit européen (ΕΕΕνρΔ)*, nº 2/2016, pp. 145-153.

[97] Directive relative à des procédures communes pour l'octroi et le retrait de la protection internationale, *JO* L180 du 29 juin 2013, p. 60.

[98] M. –D. Marouda, V. Saranti, *Droit des réfugiés,* (en grec), Athènes, Nomiki Vivliothiki, 2016, p. 234.

[99] Les décrets présidentiels nº 113/2013 et 167/2014 ont modifié la procédure de recours contre les rejets des demandes d'asile. Concernant les garanties procédurales au sein des anciennes commissions de recours v. E. Poularakis, «Les commissions de recours sur les demandes de protection internationale. Un nouveau modèle de règlement de différends administratifs ?» (en grec), *Dioikitiki Diki (ΔιΔικ)*, nº 2/2015, p. 174-186.

ministère de la politique migratoire, qui comprend des commissions indépendantes d'appel[100]. Les autorités helléniques doivent ainsi examiner au cas par cas si la Turquie est un pays tiers sûr à l'égard du demandeur d'asile, étant donné que le concept de pays tiers sûr est, entre autres, fonction du lien de connexion qui doit exister entre le demandeur et le pays tiers concerné, sur la base duquel il serait raisonnable que le demandeur se rende dans ce pays.

Le concept de pays tiers sûr, dont l'application conduit au rejet pour irrecevabilité de la demande d'asile, est analysé dans la littérature juridique nationale en dehors du contexte de la déclaration UE-Turquie et bien avant la crise actuelle[101]. Il convient de noter que la Grèce, exerçant la discrétion que le législateur de l'Union lui a laissée, n'a pas établi de liste de pays tiers sûrs et n'applique pas le concept de pays tiers super-sûr, concernant un pays tiers européen, l'article 39 de la directive 2013/32/UE, n'étant pas transposé dans l'ordre interne.

C'est toutefois dans le contexte actuel de crise que son application revêt une importance particulière, notamment à l'égard de la Turquie et prenant en considération la déclaration UE-Turquie. L'interprétation de l'article 54 de la loi 4375/2016, qui transpose les dispositions des articles 33 et 38 de la directive 2013/13/UE, se pose à l'égard de demandeurs d'asile syriens venant de la Turquie. La considération de la Turquie comme pays tiers sûr est critiquée par Amnesty international[102], par la doctrine[103] et par la Commission nationale grecque des droits de l'homme (ΕΕΔΑ)[104], étant donné que la Turquie limite aux réfugiés européens l'application de la Convention de Genève.

Avant l'établissement des commissions indépendantes d'appel, l'ancienne commission de recours avait annulé les décisions d'irrecevabilité de premier ressort, considérant que la Turquie n'était pas un pays tiers sûr, en raison de l'absence de possibilité, dans ce pays, de solliciter la reconnaissance du statut de refugié, et, si ce statut est accordé, de bénéficier d'une protection conformément à la Convention de Genève[105]. De même, dans sa première décision du 19

[100] M. –D. Marouda, V. Saranti, *Droit des réfugiés,* (en grec), Athènes, Nomiki Vivliothiki, 2016, p. 161 et s. La composition de ces commissions comprend deux juges et une personne nommée par le Haut-Commissariat des Nations unies pour les réfugiés ou par la Commission nationale des droits humains. Le Conseil d'Etat grec a jugé une telle composition conforme aux exigences constitutionnelles (Symvoulio Epikrateias, (ΣτΕ), ass. arrêt nº 1237/2017.

[101] E. Sachpekidou, «Jurisprudence récente de la Cour de justice de l'UE relative à l'asile et les réfugiés», (en grec), *Armenopoulos,* nº 69/2015, p. 390.

[102] https://www.amnesty.org/fr/countries/europe-and-central-asia/greece/report-greece/.

[103] M. Perakis, «L'accord du 18 mars 2016 entre l'Union européenne et la Turquie: une première évaluation juridique et pratique» (en grec), *Revue trimestrielle de droit européen (ΕΕΕνρΔ),* nº 2/2016, pp. 145-153, not. 150.

[104] Rapport publié dans *Revue du droit des migrations* (en grec), nº 2-3/2015, p. 161.

[105] Décision nº 29994/17.5.2016.

mai 2016, la nouvelle commission indépendante d'appel a annulé la décision du premier ressort, et a considéré qu'en l'espèce le séjour du demandeur en Turquie de quelques mois en vue de réunir la somme nécessaire pour lui permettre de continuer son voyage ne témoigne pas d'un lien de connexion sur la base duquel il serait raisonnable que le demandeur se rende dans ce pays. Dans la même décision, la commission indépendante d'appel a constaté les difficultés quant à la reconnaissance du statut de refugié en Turquie[106].

Cependant, dans deux affaires récentes concernant les demandeurs d'asile syriens venant de la Turquie, les commissions indépendantes d'appel ont admis l'application du concept de pays tiers sûr, considérant qu'il est suffisant que le demandeur d'asile bénéficie d'une protection analogue à celle issue de l'application de la Convention de Genève et qu'il existe un lien de connexion raisonnable avec le pays tiers concerné. Ces décisions ont fait l'objet d'un recours devant le Conseil d'Etat grec (Symvoulio Epikrateias), appelé à interpréter le lien de connexion qui doit exister entre le demandeur et le pays tiers afin que celui-ci puisse être considéré comme pays tiers sûr.

Selon l'opinion de la chambre qui a renvoyé les affaires en assemblée plénière[107], le lien de connexion raisonnable doit être apprécié en fonction des circonstances concrètes qui concernent le demandeur d'asile, telles la durée de son séjour ou le voisinage du pays tiers de passage avec son pays d'origine. Toutefois, un des conseillers a exprimé la position selon laquelle l'article 56 de la loi nº 4375/2016 transposant l'article 38 de la directive 2013/32/UE doit être interprété en ce sens que le lien de connexion raisonnable est établi lorsque le pays tiers concerné constitue pour le demandeur d'asile un pays «accueillant», dans le sens où les conceptions et mœurs morals, sociaux et culturels du pays de transit s'alignent sur la conscience culturelle et sociale du réfugié et, par conséquent celui-ci est convaincu de l'existence du lien de connexion.

La juridiction administrative suprême a rendu ses décisions en assemblée plénière le 22 septembre 2017[108]. Le Conseil d'Etat a jugé que la réserve géographique à l'application de la Convention de Genève n'exclut pas la considération de la Turquie comme un pays tiers sûr, étant donné qu'il n'existe aucun risque d'atteintes graves aux droits fondamentaux des demandeurs d'asile. Le Conseil d'Etat a souligné que la Turquie respecte le principe de non-refoulement et qu'elle offre une protection analogue à celle issue de l'application de la Convention de Genève. En outre, le Conseil d'Etat a admis l'existence d'un lien de connexion raisonnable fondé sur la durée du séjour en Turquie (un mois et demi), le

[106] M. Perakis, op. cit. p. 151.
[107] Symvoulio Epikrateias (ΣτΕ), arrêts nº 445/2017 et nº 446/2017.
[108] Symvoulio Epikrateias (ΣτΕ), ass. arrêt nº 2347/2017 et arrêt nº 2348/2017.

voisinage au pays d'origine ou le fait que d'autres habitants du village du demandeur en Syrie demeurent en Turquie. Enfin, le Conseil d'Etat a considéré que l'article 38 de la directive 2013/32/UE ne laisse place à aucun doute raisonnable quant à son interprétation, ce qui dispense la juridiction suprême de son obligation de renvoi préjudiciel.

Il convient toutefois de noter qu'une opinion dissidente a été exprimée tant quant à la protection offerte par la Turquie et à l'établissement du lien de connexion, que quant à l'obligation de renvoi préjudiciel selon l'article 267 TFUE. Il est significatif que dix conseilleurs d'Etat et les deux vice-présidents considèrent que l'existence d'une opinion dissidente quant à l'interprétation des critères de pays tiers sûr à l'égard de la Turquie et quant aux critères d'établissement du lien de connexion est la preuve de l'existence de doutes quant à l'interprétation de l'article 38 de la directive 2013/32/UE, ce qui ne permet pas à la jurisprudence *CILFIT* de trouver application en l'espèce et constitue une violation de l'article 267 TFUE susceptible de conduire à l'engagement de la responsabilité de l'Etat selon l'arrêt *Köbler*[109].

Les décisions de l'assemblée du Conseil d'Etat ont été immédiatement critiquées dans la presse grecque et par Amnesty International[110]. Elles soulèvent la question de savoir dans quelle mesure la considération de la Turquie comme pays tiers sûr est liée à la déclaration UE-Turquie, à laquelle se réfèrent les deux décisions. Il est soutenu que le concept de pays tiers sûr devrait recevoir une appréciation autonome, conformément aux critères de la directive 2013/32/UE et cela indépendamment tant de l'intérêt de l'application de la déclaration UE-Turquie, que de l'appréciation de l'Etat de droit en Turquie[111]. En effet, malgré la considération de la Turquie comme un pays tiers sûr par la Grèce, le bénéfice des contreparties de la déclaration UE-Turquie est conditionné par le respect par ce pays des droits de l'homme et du principe démocratique. Dans cet état d'incertitude et d'éventuel conflit entre les exigences de la directive 2013/32/UE et l'efficacité de la gestion de la crise migratoire à travers la coopération avec la Turquie, la précision des critères de qualification d'un pays tiers de sûr par une décision préjudicielle de la Cour de justice aurait été indispensable.

Question 24

Le contrôle extraterritorial de l'immigration n'est pas un objectif explicite de la politique migratoire de l'Union. D'une part, selon l'article 67 TFUE, les Etats membres ont assigné à l'Union l'objectif de mettre en place un espace de liberté,

[109] Arrêt de la Cour du 8 avril 2003, C-224/01, ECLI:EU:C:2003:513.

[110] https://www.amnesty.org/fr/latest/news/2017/09/greece-court-decisions-pave-way-for-first-forcible-returns-of-asylum-seekers-under-eu-turkey-deal/.

[111] M. Perakis, op. cit. p. 151.

de sécurité et de justice au profit de ses citoyens, d'autre part, la gestion des migrations ne figure pas parmi les objectifs d'action extérieure de l'Union énumérés dans l'article 21 TUE et précisés dans le cadre des différentes compétences et instruments d'action extérieure dans la cinquième partie du Traité FUE. Ainsi, la gestion extraterritoriale de l'immigration constitue l'aspect externe de l'espace de liberté, de sécurité et de justice, qui sert un objectif interne à travers l'action sur le plan international. Or, l'action internationale en tant qu'aspect externe de la politique migratoire n'est pas isolée, mais s'intègre dans le cadre d'autres politiques externes, servant, elles, un objectif d'action extérieure, notamment la coopération au développement. Il s'agit de l'approche globale des questions migratoires sur le plan international, qui font de la politique migratoire une composante des politiques externes, conformément au principe de cohérence horizontale entre les politiques externes de l'Union et l'aspect externe de ses politiques internes (article 21, paragraphe 3, TUE).

L'approche globale de la question des migrations s'inscrit dans le cadre de partenariats pour la mobilité, qui constituent un cadre politique de coopération sur les questions migratoires à travers l'implication des partenaires et l'action dans différents domaines[112]. Ainsi, la coopération avec les pays tiers sur les questions migratoires constitue un volet des accords d'association ou de coopération conclus par l'Union et ses Etats membres, qui comportent une clause sur la gestion conjointe des flux migratoires ainsi que sur la réadmission obligatoire en cas d'immigration illégale.

La Grèce est favorable au maintien de telles clauses, comme l'article 13 de l'accord de Cotonou[113], ainsi qu'à leur révision en vue du renforcement de la coopération en matière de réadmission par le biais de clauses obligatoires, qui n'auront pas besoin de conclusion d'accords bilatéraux de réadmission.

L'intégration des questions relatives à la gestion des migrations dans les instruments de politique de coopération au développement ou des instruments plus larges de la politique de voisinage, permet d'accentuer le renforcement des capacités locales, y compris pour le contrôle aux frontières, l'asile, la lutte contre le trafic de migrants et les efforts de réintégration. L'Union peut ainsi s'attaquer aux causes profondes des migrations irrégulières et des déplacements forcés de populations.

Par conséquent, dans le cadre de l'Approche globale de la question des migrations et de la mobilité, la gestion des flux migratoires est un objectif absorbé par l'objectif de la coopération au développement ou autres objectifs externes.

[112] P. Koutrakos, "The External Dimension of the AFSJ and Other EU External Policies", in M. Cremona, J. Monar, S. Poli (dir), *The External Dimension of the European Union's Area of Freedom, Security and Justice*, Bruxelles, P. Lang, 2011, p. 139 et s.

[113] *JO* L 317 du 15 décembre 2000, p. 3.

Cependant, dans un contexte de crise migratoire aux dimensions internationales, l'Approche globale est également adoptée sur le plan universel, dans le cadre des Nations unis. La déclaration de New York, adoptée par l'Assemblée générale des Nations Unis le 13 septembre 2016[114] exprime la position selon laquelle le problème global des migrations nécessite une approche globale et des solutions globales. Par exemple, la mise en place d'un programme de réinstallation au niveau mondial soutenu par les Nations unies pour permettre la réinstallation rapide et efficace des réfugiés dans des pays sûrs pourrait être envisagée. Dans un tel contexte, l'Union a besoin de s'affirmer comme acteur international en matière de contrôle de l'immigration.

Or, une telle affirmation n'est pas favorisée par l'intégration de l'aspect externe de la politique migratoire dans le cadre des politiques externes, telle la coopération au développement. L'Union doit se doter d'un objectif externe autonome de contrôle de l'immigration qui lui permet d'être influente sur le plan international. L'aspect externe de la politique d'immigration permet ainsi à l'Union d'afficher un objectif d'action extérieure dans ce domaine, même si l'objectif assigné dans les traités s'inscrit dans le cadre de l'espace de liberté, de sécurité et de justice.

Le nouveau concept de coopération axé sur les résultats, à savoir le nouveau cadre de partenariat avec les pays tiers dans le cadre de l'Agenda européen en matière de migration[115] exprime l'«externalisation» de l'objectif de gestion des migrations, en permettant à l'Union d'afficher un véritable objectif d'action internationale dans ce domaine. A la différence de l'Approche globale de la question des migrations et de la mobilité, le nouveau cadre de partenariat avec les pays tiers a pour objectif principal la gestion efficace de l'immigration et instrumentalise l'objectif de coopération au développement à cet effet. En ce sens, nous pouvons considérer que le nouveau cadre de partenariat vise à remplacer l'approche globale, en inversant l'objectif principal affiché sur le plan international.

La question qui se pose est de savoir si une telle approche respecte pleinement le principe d'attribution des compétences.

Il convient tout d'abord de noter qu'il ne s'agit pas de doter l'Union de nouveaux moyens. Les pactes forment en effet un cadre politique aux fins d'une coopération continue et opérationnelle par la mobilisation des instruments existants, tels les accords de réadmission ou la lutte contre les causes profondes de la migration à travers la coopération au développement, qui servira l'objectif de politique migratoire. Dans ce cadre, les pactes présentent l'avantage d'être adaptés

[114] A/71/L.1.

[115] Communications de la Commission du 7 juin 2016, COM(2016) 385 final, et du 18 octobre 2016, COM(2016) 700 final. Conclusions du Conseil européen du 20/21 octobre 2016, SN 77/16.

à la situation spécifique de chaque pays partenaire. En effet, pour chaque pays partenaire, de mesures incitatives positives et négatives seront élaborées, dont l'utilisation devrait se fonder sur le principe clair selon lequel la relation globale entre l'Union et ce pays sera guidée notamment par la capacité et la volonté de celui-ci de coopérer en matière de gestion des migrations.

Cependant, l'efficacité de la nouvelle approche dépend de la coordination entre l'Union et ses Etats membres et de l'unité de leur action internationale. La Commission souligne dans ses communications, qu'un mécanisme de coordination entre les institutions de l'Union et les États membres doit être mis en place. Cela implique d'exploiter pleinement, au profit de l'Union et des États membres concernés, les relations particulières que les États membres peuvent avoir nouées avec des pays tiers.

Il ne s'agit pas toutefois de dessaisissement des Etats membres de leur propre compétence. Selon la Commission, il s'agit d'un changement dans la manière dont l'Union, conjointement avec ses Etats membres, gère ses relations en matière de migration. Nous pouvons considérer que, selon le principe de coopération loyale de l'article 4, paragraphe 3, TUE, les Etats membres devront s'abstenir d'entraver la réalisation des objectifs de l'Union, ce qui implique l'unité de l'action internationale. Quant à l' «externalisation» de l'objectif poursuivi, nous pouvons considérer que l'approche globale des objectifs d'action extérieure, exprimée dans l'article 21 TUE, qui comporte les aspects externes des autres politiques, justifie une telle démarche. Bien que la Grèce n'ait pas conclu de pactes bilatéraux ou multilatéraux avec les pays africains, qui sont prioritaires pour le lancement des pactes de l'Union, nous pouvons considérer qu'elle s'alignera sur ses obligations de loyauté en faveur de l'efficacité de l'externalisation de la politique migratoire de l'Union. Nous pouvons toutefois noter, que dans le contexte de crise actuelle, la Grèce met en question la considération de certains pays comme prioritaires, mettant au second plan les pays de l'Asie comme le Bangladesh. Elle salue toutefois la déclaration entre l'Union et la Turquie (v. supra question 23), laquelle, bien qu'elle ne s'inscrive pas dans le nouveau cadre de partenariat, témoigne de l'articulation de la gestion des migration de part et d'autre de la mer Égée, par l'instauration d'un degré de coopération sans précédent entre l'UE et un partenaire extérieur.

Question 25

L'article 79, paragraphe 3, TFUE attribue à l'Union une compétence externe explicite pour conclure des accords de réadmission[116]. Avant l'entrée en vigueur du traité de Lisbonne, les accords de réadmission soit étaient conclus sur la base

[116] "L'Union peut conclure avec des pays tiers des accords visant la réadmission, dans les pays d'origine ou de provenance, de ressortissants de pays tiers qui ne remplissent pas ou qui ne remplissent plus les conditions d'entrée, de présence ou de séjour sur le territoire de l'un des Etats membres".

de la compétence externe implicite de l'Union, soit les clauses de réadmission étaient incluses dans les accords de coopération avec les pays tiers[117]. Cette compétence externe explicite est partagée, selon l'article 4, paragraphe 2, TFUE et, par conséquent, son exclusivité est fonction des critères de l'article 3, paragraphe 2, TFUE. En application de cette disposition la conclusion d'un accord de réadmission par l'Union seule devrait être possible si sa conclusion est susceptible d'affecter les règles communes ou si elle est nécessaire pour permettre à l'Union d'exercer sa compétence interne. Dans un de ces cas, les Etats membres sont dessaisis de leur compétence de conclure des accords de réadmission. Toutefois, il résulte du considérant 36 du règlement 2016/1624 et de la pratique, que les Etats membres maintiennent leur compétence en la matière.

Au regard des dispositions du traité, le maintien de la compétence étatique peut s'expliquer par la distinction entre l'article 3, paragraphe 2, TFUE et l'article 216, paragraphe 1, TFUE. Selon cette dernière disposition l'Union peut conclure un accord international, même lorsque sa compétence externe n'est pas exclusive, si cela est prévu dans les traités (comme cela est le cas depuis l'entrée en vigueur du traité de Lisbonne), ou si cela est nécessaire au vu de la réalisation d'un objectif de l'Union (ce qui justifie l'exercice d'une compétence externe implicite, avant l'entrée en vigueur du traité de Lisbonne). L'article 216, paragraphe 1, TFUE régit ainsi l'exercice de la compétence de l'Union sur le plan externe indépendamment de son exclusivité (v. supra Chapitre 1). En outre, au vu de l'objet et le contenu des accords de réadmission, leur interaction avec les règles internes reste limitée, de manière à ne pas pouvoir établir l'exclusivité de la compétence de l'Union sur les critères de l'article 3, paragraphe 2, TFUE.

La question est toutefois de savoir si la compétence de l'Union devient exclusive après la conclusion d'un accord de réadmission, en vertu du critère d'affectation des règles communes et, précisément, au regard des règles de l'accord conclu.

La pratique montre à cet égard que l'effet de préemption est déterminé par l'accord même conclu par l'Union. Si la conclusion d'un accord de réadmission par l'Union n'est pas dictée par l'affectation des règles communes, ni par le critère de nécessité, de manière à laisser la compétence des Etats membres intacte tant que l'Union ne décide pas de l'exercer à l'égard d'un Etat tiers, l'exercice de la compétence de l'Union conduit à l'adoption de règles qui seraient affectées par le maintien de la compétence des Etats membres. Or, les termes de l'accord peuvent prévenir le conflit en excluant la compétence étatique ou, au contraire, autoriser la coexistence des normes, selon une approche géographique au cas par cas.

[117] M. Papakonstandis, *Les politiques de l'Union européenne : externe, agricole, migratoire,* (en grec), Athènes-Thessalonique, Sakkoulas, 2016, p. 297 et s. La Cour de justice a considéré en effet que les dispositions relatives à la réadmission des migrants irréguliers contribuent également à la poursuite des objectifs de la coopération au développement et ne nécessitent pas le recours à d'autres bases juridiques. V. arrêt de la Cour du 11 juin 2014, *Commission c Conseil,* C-377/12, ECLI:EU:C:2014:1903.

Ainsi, les accords de réadmission conclus par l'Union prévoient l'élaboration des protocoles d'application entre les Etats membres et l'Etat tiers cocontractant, sur certaines questions, comme la désignation des autorités compétentes ou les modalités de retour selon une procédure accélérée. Selon les clauses d'autres accords de réadmission, les Etats membres sont dessaisis de leur compétence dans la mesure où les questions sont traitées par l'accord conclu par l'Union[118] où dans la mesure où les dispositions de l'accord conclu par les Etats membres sont incompatibles avec celles de l'accord conclu par l'Union[119].

La Grèce a signé les protocoles d'application des accords de réadmission conclus par l'Union[120] et a des accords bilatéraux de réadmission avec la Bosnie- Herzégovine[121] et la Turquie. Concernant l'accord avec la Turquie, il s'agit du protocole mettant en œuvre la clause de réadmission de l'article 8 de l'accord de coopération policière entre la Grèce et la Turquie [122]. Dans tous les cas, la position dominante auprès des autorités compétentes grecques consiste dans la reconnaissance de l'effet préemptif de la conclusion par l'Union d'un accord de réadmission avec un Etat tiers.

La Grèce n'a pas conclu de nouveaux accords de réadmission après l'entrée en vigueur du traité de Lisbonne, mais applique les accords conclus par l'Union. A cet égard, les autorités grecques remarquent le bon fonctionnement de l'accord conclu entre l'Union et la Géorgie et déplorent les failles dans l'application de l'accord de réadmission UE-Pakistan, soulignant notamment l'absence de coopération de la part des autorités pakistanaises qui n'éditent pas les documents de voyage nécessaires pour faciliter la réadmission[123].

Concernant les accords de réadmission conclus déjà entre la Grèce et un pays tiers, il est considéré que ceux-ci sont remplacés par l'accord conclu par l'Union[124]. Pour la doctrine hellénique, la conclusion de l'accord entre l'Union et le pays tiers exprime le consentement tant du pays tiers que de la Grèce de mettre fin à leur accord bilatéral, qui sera remplacé par le nouveau avec l'Union[125].

[118] V. par exemple, l'accord de réadmission UE-Russie, *JO* L 129 du 17 mai 2007.

[119] V. par exemple, l'accord de réadmission UE-Pakistan, *JO,* L 287, du 4 novembre 2010.

[120] Le protocole d'application de l'accord de réadmission UE-Russie est ratifié par la loi 4466/2017. La Grèce a signé, mais pas encore ratifié, les protocoles d'application des accords de réadmission UE-Serbie (le 11 septembre 2013), UE-Moldavie (le 28 mars 2014)

[121] Loi 3547/2007, *JO* A 67 du 20 mars 2007.

[122] Loi 3030/2002, *JO* A 63 du 15 juillet 2002

[123] Rapport de l'Institut des Relations Internationales de l'Université Panteion d'Athènes, pour le Ministère des Affaires Intérieures, 2014. V. http://emn.ypes.gr/images/docs/EMN_FOCUSED_STUDIES/EMN_STUDIES_2014/12b_greece_emn_national_report_return_reintegration_el.pdf (en grec).

[124] Le protocole d'application de l'accord de réadmission UE-Bosnie-Herzégovine est en cours d'élaboration.

[125] M. Perakis, «L'accord du 18 mars 2016 entre l'Union européenne et la Turquie : une première évaluation juridique et pratique» (en grec), *Revue trimestrielle de droit européen (ΕΕΕνρΔ)*, nº 2/2016, p. 149.

Il convient toutefois de noter le cas particulier du protocole mettant en œuvre la clause de réadmission de l'article 8 de l'accord de coopération policière entre la Grèce et la Turquie. Ce protocole, entré en vigueur le 5 août 2002, continue à s'appliquer pendant une période transitoire de 3 ans, à partir de l'entrée en vigueur de l'accord de réadmission entre l'Union européenne et la Turquie, le 1er octobre 2014[126]. Or, à partir du 1er octobre 2017, l'accord de réadmission UE-Turquie se substitue au protocole bilatéral conclu entre la Grèce et la Turquie.

Pendant la durée d'application du protocole bilatéral Grèce-Turquie la procédure qui y est prévue s'applique aux cas de retour des migrants irréguliers, suivant le rejet de leurs recours contre les décisions des commissions d'appel par les juridictions administratives. La déclaration UE-Turquie est ainsi mise en application selon le protocole de réadmission. Dans ce cadre, l'article 60 de la loi 4375/2016, transposant la directive 2013/32/UE (supra, nº 23) et modifié par l'article 86 de la loi 4399/2016[127], met en place une procédure accélérée de rapatriement des migrants irréguliers lorsque ceux-ci proviennent d'un pays d'origine sûr, comme il est prévu par l'article 31, paragraphe 8, de ladite directive. Le Conseil d'Etat hellénique, dans ses décisions du 22 septembre 2017[128] (supra, nº 23), a considéré que la procédure accélérée selon l'article 31 de la directive 2013/32/UE est une *lex specialis* qui déroge aux garanties procédurales prévues par les dispositions d'autres textes de l'Union (comme le directive 2001/55/CE [129]). Par conséquent, sa mise en application ne nécessite pas l'adoption d'une décision ministérielle préalable, ni une décision du Conseil qui constate l'afflux massif de personnes. Cela est le sens l'article 80 de la loi 4375/2016, par dérogation à l'article 60 de la même loi, dispositions qui donnent la possibilité aux groupes vulnérables de ne pas être inclus dans cette procédure accélérée, suivant un examen individuel au sein duquel la charge de preuve incombe au requérant. Le Conseil d'Etat hellénique a en outre confirmé la légalité de l'implication du Bureau européen d'appui en matière d'asile (BEAA ou EASO) dans la procédure d'entretien individuel et a considéré comme conforme à l'article 47 de la Charte des droits fondamentaux et le droit à une protection juridictionnelle effective l'absence d'entretien individuel en deuxième ressort sous condition d'accès à la transcription de l'entretien en première instance, à moins que l'autorité compétente l'estime nécessaire.

[126] *JO* L 134 du 7 mai 2014, p. 3.

[127] *JO* A 117 du 22 juin 2016.

[128] Symvoulio Epikrateias (ΣτΕ), ass. arrêt nº 2347/2017 et arrêt nº 2348/2017, paragraphes 30-34.

[129] Directive 2001/55/CE du Conseil du 20 juillet 2001 relative à des normes minimales pour l'octroi d'une protection temporaire en cas d'afflux massif de personnes déplacées et à des mesures tendant à assurer un équilibre entre les efforts consentis par les États membres pour accueillir ces personnes et supporter les conséquences de cet accueil, *JO* L 212 du 7 août 2001, p. 12.

HUNGARY

Balázs Horváthy
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Introduction

The Treaty of Lisbon had significant implications for the EU external relations, which has not been manifested only in the attempt to bring the whole Union's action under one 'umbrella' of values, objectives and principles, but the Treaty amendment has also modified the institutional balance to some extent, as it slightly strengthened the position of the European Parliament in the related decision making procedures. Considering also the massive changes in the competence structure – e.g. the extension of the scope of the Common Commercial Policy –, it is obvious, that today the Member States have to act and promote their interests in a profoundly reshaped landscape. In addition to the challenges arising from this new institutional setting, the topics covered by the report requires careful analysis and evaluation, inasmuch as the underlying questions – specifically the topics concerning the policies on border controls, asylum and immigration – are implying sensitive issues at the core of interests of the Member States.

This factor had also effects on the methodology and instruments we could apply for the elaboration of the questionnaire. First, there were difficulties encountered in involving Government officials, public servants and other professionals, and the interviews mostly resulted only in expressing general information, personal views etc. Second, there was also a restricted availability of coherent and practical source of information on strategic and policy objectives of Hungary, which could have been beneficial for shed light on the official position of Hungary in several topics raised by the report.[1] With the aim of overcoming

[1] For instance, the last coherent foreign policy strategy of Hungary has been published in 2011 with prioritizing the Euro-Atlantic relations of Hungary, see: Hungary's Foreign Policy after the Hungarian

these difficulties and delivering a balanced assessment, the analysis predominantly relies upon the views and positions of the academia, the scholarly literature, the relevant EU and domestic law as well as case law, other publicly available information, and our personal view.

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

Following the extension of areas subject to internal EU legislation, the AETR effect has been perceived in new areas recently. The following recent examples for EU exclusive competence under the AETR doctrine can be mentioned here: 1) The exclusive competence of the EU encompasses the acceptance of the accession of a third State to the Convention on the civil aspects of international child abduction concluded in The Hague on 25 October 1980.[2] 2) The content of the Convention of the Council of Europe on the protection of neighbouring rights of broadcasting organisations, also falls the exclusive competence of the European Union.[3] 3) Having regard to the existence of Directive 2001/77 on the promotion of electricity produced from renewable energy sources in the internal electricity market[4] the EU enjoys exclusive external competence to conclude international agreement regulating the import of green energy, because the AETR affect precludes a provision of national law, which provides for the grant of exemption from the obligation to acquire green certificates owing to the introduction, onto the national consumer market, of electricity imported from a third State, by means of the prior conclusion, between the Member State and the third State concerned, of an agreement under which the electricity thus imported is guaranteed to be green.

We have no information on problems raised at the national level in this regard.

Presidency of the Council of the European Union, Ministry of Foreign Affairs, 2011, available at: https://eu.kormany.hu/admin/download/f/1b/30000/foreign_policy_20111219.pdf) After the 2014 parliamentary election, the policy and strategic goals have been markedly changed and shifted with the objectives of the 'Eastern Opening ', which might be regarded as certain type of realism in trade and economic relations, however coherent strategy has not been published. Today only statements of the Government, concrete policy decisions, press releases etc. might help to describe a strategy the Government follows.

[2] Opinion 1/13 of the CJEU (Convention on the civil aspects of international child abduction), ECLI:EU:C:2014:2303

[3] Judgment in the case C-114/12 *Commission v Council*, ECLI:EU:C:2014:2151

[4] OJ 2001 L 283, p. 33

Question 2

The case-law of the CJEU confirmed that the question as to whether the options for EU exclusive competence set out in Article 3(2) TFEU are met must be examined in the light of the Court's AETR judgment, as well as the subsequent case-law interpreting AETR conditions. The Court, set out a few typical examples in which exclusive EU competence should be recognized:[5]

- where the conclusion of an agreement by the Member States would be incompatible with the unity of the common market (internal market) and the uniform application of EU law,
- where the existing internal EU legislative measures contain clauses relating to the treatment of nationals of non-member countries or to the complete harmonisation of a particular issue
- the Court did not find that the EU had exclusive competence where, both the Community provisions and those of an international convention laid down (only) minimum standards, because, in such cases, there was nothing to prevent the full application of EU law by the Member States
- the Court did not recognise the need for exclusive EU competence where there was a chance that bilateral agreements would lead to distortions in the flow of services in the internal market,

As regards the scope of the second option for implied exclusive competence under Article 3(2) TFEU, the case-law of the CJEU confirmed that the conclusion of the international agreement being thus necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules.[6]

In its decisions interpreting AETR conditions the CJEU already examined the question what if the third option provided by Article 3(2) TFEU is not exercised internally. The leading decision is Opinion 2/91 here where the Court established that the scope of EU rules may be affected or altered by international commitments where such commitments are concerned with an area which is already covered *to a large extent* (i. e. not completely) by such rules.[7] However, after the entry into force of the Lisbon Treaty, it was not clear whether the interpretation given by the Court in Opinion 2/91 is still applicable when understanding the scope of the third option for implied exclusive competence according to

[5] See judgment in the case C-467/98, EU:C:2002:625 *Commission* v *Denmark* and the following opinions of the CJEU: *Opinion 1/94* (Competence of the Community to conclude international agreements concerning services and the protection of intellectual property), ECLI:EU:C:1994:384; *Opinion 1/03* (Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), ECLI:EU:C:2006:81

[6] C-467/98, EU:C:2002:625 *Commission* v *Denmark*, paragraph 57

[7] Opinion 2/91, EU:C:1993:106, paragraphs 25 and 26

Article 3(2) TFEU. The majority of Member States represent the view that that this interpretation is irrelevant since it was not included in Article 3(2) TFEU, so an exclusive external competence cannot arise merely because the area in which an international agreement applies is covered to a large extent by equivalent internal rules of EU law.[8] Contrary to that opinion of the Member States, the Court confirmed in its recent case-law that the interpretation given by Opinion 2/91 (and subsequent case-law interpreting Opinion 2/91) remained relevant, in the context of Article 3(2) TFEU, for the purpose of ascertaining whether the condition pertaining to the risk of EU common rules being affected, or of their scope being altered, is met.[9] That means that such a risk does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully.[10] Where the test of 'an area which is already covered to a large extent by [EU internal] rules' is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of EU law in the area in question but also its future development, insofar as that is foreseeable at the time of the analysis. Furthermore, the existence in an agreement of a so-called 'disconnection clause' providing that the agreement does not affect the application by the Member States of the relevant provisions of EU law does not constitute a guarantee that the EU internal rules are not affected by the provisions of the agreement because their respective scopes are properly defined but, on the contrary, may provide an indication that those rules are affected.[11]

Question 3

For the scope of the provision according to the case-law of the CJEU, see answer given to Question 4.

No information can be obtained on the understanding of the Member States regarding this provision.

[8] This was the view, for instance, of the Belgian, Czech, German and Estonian Governments, Ireland, the Greek, Spanish, French, Cypriot, Latvian, Lithuanian, Austrian, Polish, Portuguese, Romanian, Slovak, Finnish, Swedish and United Kingdom Governments concerning the exclusive external competence of the European Union to accept (by way of an international act) the accession of a non-Union country to the Convention on the civil aspects of international child abduction concluded in the Hague on 25 October 1980. (See Opinion 1/13, paragraph 63).

[9] See judgment in *Commission* v *Council*, EU:C:2014:2151, paragraphs 70, 72 and 73; Opinion 1/13, paragraph 73.

[10] *Commission* v *Council*, EU:C:2014:2151, paragraph 69; Opinion 1/13, paragraph 72.

[11] Opinion 1/03, paragraphs 126 and 130.

Question 4

There is definitely a link between Article 216 TFEU and Article 3 (2) TFEU. In this respect, the role of the former provision in EU external relations law seems to be quite similar to that of the latter. In case C-81/13, Opinion AG Kokott establishes that the ERTA doctrine has essentially been codified in Article 216(1) TFEU since the entry into force of the Treaty of Lisbon, noting that Article 3(2) TFEU has a similar effect.

Apart from the basically similar function of these provisions, their scope is not exactly the same. Article 216 draws no distinction according to whether the European Union's external competence is shared or exclusive: that provision covers both the shared external competence and the exclusive external competence of the European Union.[12] Article 216(1) TFEU determines the *existence* of EU external competence but not its exclusive nature — the latter is determined by Article 3(2) TFEU.[13] In other words, Article 216(1) TFEU sets out the conditions for the existence, while Article 3(2) sets out the conditions for the exclusivity of EU implied external competences under the ERTA doctrine.

This is the reason why the conditions determined in these provisions are not exactly the same. The second option ('necessary in order to achieve, within the framework of the [European Union's] policies, one of the objectives referred to in the Treaties') mentioned in Article 216(1) TFEU reaches beyond the scope of the ERTA doctrine. This option for granting implied external competence for the EU originates in Opinion 1/76 of the CJEU where the Court established that, in such cases, the EU acquired (implied) external (but not necessarily exclusive!) competence.

[12] ECLI:EU:C:2017:645. Opinion of Advocate General Saugmandsgaard Øe delivered on 7 September 2017 in Case C-687/15 Commission v Council, paragraph 37. Most of the legal literature supports that approach. See, for example, Piet Eeckhout: *EU External Relations Law*, 2nd ed., Oxford University Press, Oxford, 2012, p. 112; Trevor Hartley: *The foundations of European Union law*, 8th ed., Oxford University Press, Oxford, 2014, p. 186; Rudolf Geiger: Article 216 TFEU, point 3, in Rudolf Geiger, R., Daniel-Erasmus Khan and Marcus Kotzur: *European Union Treaties*, Hart, Oxford, 2015; and Rudolf Mögele: Artikel 216 AEUV, point 29, in Rudolf Streinz (ed.): *EUV/AEUV (Kommentar)*, 2nd ed., C. H. Beck, Munich, 2012.

[13] Opinion of Advocate General Sharpston in Opinion 2/15 (*EU-Singapore Free Trade Agreement*, EU:C:2016:992, paragraph 64); Opinion of Advocate General Szpunar in *Germany* v *Council*) C-600/14, EU:C:2017:296, paragraph 80); Opinion 2/15 (*EU-Singapore Free Trade Agreement*) of 16 May 2017 (EU:C:2017:376, paragraphs 171 and 172); Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303, paragraphs 67 to 74).

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

No practical information could be obtained, which might explain profoundly the perception of Hungary (as well as the Government of Hungary) to the functioning of the '218 (4)' special committee, or to the positions of the institutions. The overall attitude to the special committee, which has been noted and observed, is that the committee are regarded as a certain 'focal point' of the member states' domestic policy concerns, and can be easily used to channel the national interest into the negotiations. Moreover, attention has been drawn to the recent CJEU case law regarding the scope of Article 218 (4) and the extent or detail, to which the Council is empowered to set down rules on the negotiations as well as regarding the role of the special committee. In C-425/13 *Commission v Council* the Commission[14] argued that the special committee plays merely consultative role, however the Council – alongside with several Member States intervened in the procedure[15] – represented a view that the Council is empowered to lay down binding rules regarding the negotiations *vis-à-vis* the Commission. However the Court refused the latter position and annulled certain parts of the negotiation mandate, which enacted detailed provisions regarding the negotiations as it infringed the principle of institutional balance. As a result, the special committee can lay down neither binding nor detailed provisions about the negotiating positions. The Court maintained and repeated this argument in its later case law as well.[16]

Question 6

The ratification of the Comprehensive Economic and Trade Agreement (CETA) gave rise to debate on the provisional application of the agreement in Hungary. Previously, the Hungarian Parliament (*Országgyűlés*) adopted a decision on the requirements relating to the trade and investment agreements concluded by

[14] Judgement of 16 July 2015, Commission v Council, C-425/13, ECLI:EU:C:2015:483.

[15] Czech Republic, Denmark, Germany, France, Netherlands, Poland, Sweden, and UK. Hungary did not join the case.

[16] See Judgement of 24 June 2014, European Parliament v Council, C-658/11, ECLI:EU:C:2014:2025. For detailed analysis, see Ildikó Bartha: The External Side of Parliamentary Democracy – Comment on the Case C-658/11 European Parliament v. Council of the European Union, Hungarian Yearbook of International Law and European Law, 2016; Ricardo Passos: The External Powers of the European Parliament, In The European Union's External Action in Times of Crisis (Eds.: Piet Eeckhout, Manuel Lopez-Escudero), Hart, 2016, pp. 109–112.

the EU.[17]The decision 'urged' the Government that the CETA, the TTIP and the TiSA are mixed agreements, requiring the ratification of all member states, therefore "[the agreements] should not enter into force provisionally until all member states of the European Union ratify these agreements." Leaving the inaccuracy of this provision out of consideration,[18] it is important that the Hungarian Parliament expressed concerned about the ongoing negotiations and has sent a strong message to the Government.

Before the signature of CETA, the *Országgyűlés* put again the agreement to be concluded with Canada down in agenda and adopted another decision.[19] The decision emphasized the Hungarian Parliament's view on the exclusion of provisional application of CETA, highlighting that the "[...] Parliament considers the objectives [laid down in the decision] in the ratification procedure under the condition that the Parliament does not give authorization for the provisional application of the Agreement [falling into the competence of the Member States]".[20]

Consequently, a slight shift in the position of the *Országgyűlés* could be observed as the Parliament has excluded only the provisional application of provisions relating to the competence of the member states, and not to the full agreement. Even though this second decision has been more permissive, the position of the Hungarian Parliament has been more restrictive than the standard practice of conclusions and ratification of mixed agreements, when the provisional application is limited not only to matters of EU exclusive competence, but consent has been given regularly for matter in which the European Union has been authorised to exercise shared competence.[21]

[17] 11/2016. (VI. 17.) OGY határozat az Európai Unió harmadik országokkal kötött kereskedelmi és beruházási megállapodásaival kapcsolatos követelményekről [Decision 11/2016. (VI. 17.) of the Parliament on the requirements relating to the trade and investment agreements concluded by the European Union with third countries]

[18] I.e. using the imprecise term of 'provisional entering into force' instead of 'provisional application' and it is logically nonsense to require the whole ratification process to be done for the provisional application, as the full ratification leads to the 'standard' application of the agreements.

[19] 22/2016. (X. 14.) OGY határozat az egyrészről az Európai Unió és tagállamai, másrészről Kanada között az Átfogó Gazdasági és Kereskedelmi Megállapodás (Comprehensive Economic and Trade Agreement – CETA) aláírásával kapcsolatos álláspontról [Decision 22/2016. (X. 14.) of the Parliament on its viewpoint on the signature of the Comprehensive Economic and Trade Agreement (CETA) to be concluded between the European Union and its Member States, on the one part, and Canada, on the other part].

[20] Decision 22/2016. (X. 14.) of the Parliament, para. 1.

[21] And not to mention here several exceptions, in which the agreement could be applied even in matters, in which member States can exercise competence, see the Association Agreements concluded, e.g. with Georgia or Ukraine.

Question 7

When approving the proposal to sign the mixed agreement, the Council can also decide to provisionally apply the agreement according to Article 218(5) TFEU). Although the Treaties give the right to decide to the Council, politically important trade agreements are usually not applied provisionally before the European Parliament has given its consent. In case of mixed agreements, only those parts of the agreements can be provisionally applied which fall under the EU's exclusive competence.[22]

It follows from the fundamental constitutional principles of EU law (especially from those relating to the division of powers between the EU and the Member States[23]) that a renegotiated mixed agreement can only be concluded alone by the European Union with the third State if, as a result of the renegotiation procedure, the renegotiated text contains only provisions covering areas falling under the exclusive external competence of the EU.

On the other hand, the requirement of sincere cooperation between the EU and the Member States (Art. 4(3) TEU) also has a relevance here. The Member States are obliged to complete their national ratification procedure in due time and avoid blocking the conclusion of the mixed agreement by delays in their internal processes.[24] As an instrument for controlling Member State action, the Council often sets as a recommendation a deadline for the Member States to complete the ratification process. However, it is not possible for the EU to create a legally binding obligation for the Member States in this regard.[25]

Question 8

Given that most agreement involving a cooperation procedure establish some sort of institutional framework, the distinguishing feature of the 'agreements establishing a specific institutional framework by organising cooperation procedures' within the meaning of Article 218 (6) (a) (iii) TFEU proved to be difficult to define in the practice. In any case, agreements on the accession to an International Organisation often qualify as agreements of that kind.[26] The

[22] http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/586597/EPRS_ATA(2016)586597_EN.pdf.

[23] See Article 5 TEU, Articles 3-6 ZFEU.

[24] Jenő Czuczai: Mixity in Practice: Some Problems and Their (Real or Possible) Solution, in Cristophe Hillion and Panos Koutrakos (eds.): *Mixed Agreements Revisited – The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, pp. 233-4.

[25] Joint Guideline 1/2005 of the Minister of Foreign Affairs and the Minister of Justice [Hungary] on the application of Act L of 2005 in the procedure for international treaty-making, point 169

[26] See for instance the accession of the EU to the Hague Conference on International Private Law (Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, L 297, 26.10.2006, pp.1-2). The legal basis of the accession

CJEU already have the chance to examine the issue in case Parliament v Council C-566/08. In that case, the European Parliament sought the annulment of Council Decision 2008/780/EC of 29 September 2008 on the conclusion, on behalf of the European Community, of the Southern Indian Ocean Fisheries Agreement. However, the Parliament withdrew the case after the entry into force of the Treaty of Lisbon, presumably because of its significantly enlarged powers under other provisions of Article 218 TFEU with regard to the conclusion of international agreements.[27]

Question 9

Any assessment of or view on the suspension of application of international agreements has not been expressly nor officially formulated, however some concerns has been raised relating to the emerging position of the European Parliament in the suspension cases. According to these views, the suspension of agreements on the grounds e.g. of human rights violations are regarded first and foremost as foreign policy tools, therefore these cases are touching upon politically sensitive issues not only at EU but also at national level. For this reason, the interest of the member states would be to fully maintain their control over the suspension procedures and reject any attempts made by the European Parliament in order to be involved in these cases. This argument is based purely on the grounds of the national interest, however, our assessment differs to some extent from the latter approach. First, one of the most important aims of the Lisbon Treaty was the democratization of the EU external relations, specifically the objective to strengthen the position of the European Parliament, therefore involvement of the Parliament (e.g. in form of non-binding resolutions)[28] could fully comply with this goal. Second, as the Parliament can exercise definite rights in the procedure of conclusion of international agreements, it is reasonable that the Parliament wants to have insight into the suspension of those agreements. For that reason, even if the TFEU excludes completely any strong legal function of the Parliament in the suspensions of agreements,[29] it is well understandable that the

procedure was – among other provisions – Article 300 (3) of the EC Treaty which is the former version of the current Article 218 (6) (a) (iii) TFEU.

[27] Pieter Jan Kuijper, Jan Wouters, Frank Hoffmeister, Geert de Baere, Thomas Ramopoulos:The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor. Oxford University Press, 2013

[28] E.g. the European Parliament adopted a non-binding resolution with the aim at proposing the suspension of the EU-US Swift Agreement on data privacy, see European Parliament resolution of 23 October 2013 on the suspension of the TFTP agreement as a result of US National Security Agency surveillance (2013/2831(RSP))

[29] See Article 218 (9) TFEU.

Parliament is striving after setting, at least, the political scene of the debates in the suspension cases.

Question 10

In 2011, the Commission launched infringement procedures against the 20 EU states having found that certain resolutions adopted in the framework of the OIV (Organisation of Vine and Wine (OIV)[30] affected, in the sense of the '*ERTA* doctrine', the EU *acquis*, especially the rules of Regulation 1234/2007/EC.[31] It argued that the OIV resolutions had failed to observe both the EU's exclusive competences in the area and the principle of loyal cooperation under Article 4(3) TEU.[32] Finally, at least according to our information, the Commission did not refer the matter to the CJEU.[33]

Question 11

The Government of Hungary is on the opinion that, in case of review of legality of legislative acts of EU external relations, the obligation (of the Council) to immediately and fully inform the European Parliament at all stages of the (legislative or treaty-making) procedure is a matter which the CJEU must take into account of its own motion (i. e. irrespective of the fact whether is it a ground for review in the action for annulment submitted before the Court). Hungary represented this view before the Court in case C-399/12 Germany v Council (OIV case).

According to our information, national parliaments may have only an indirect role in this matter in Hungary: they take part in the procedure of adoption of the negotiation position of the Government within the Council of the EU (in case their legislative competence is concerned).

[30] The OIV is an intergovernmental scientific and technical organization with 44 contracting states among which 20 are EU Member States (Hungary among them). The EU is not a member of the OIV.

[31] Regulation 1234/2007/EC establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products, OJ L 299/1.

[32] Commission staff working document – Accompanying the document Report from the Commission 29th annual report on monitoring the application of EU law (2011) /* SWD/2012/0400 final.

[33] It should be noted, however, that, parallel to the infringement procedures, the Commission submitted a proposal for a Council decision concerning the position to be adopted on behalf of the European Union with regard to certain resolutions proposed in the OIV framework. This decision was adopted on 18 June 2012 under Article 218(9) TFEU. Germany then brought an action for annulment against the decision before the CJEU which resulted in the judgment in the case C-399/12 Germany v Council, ECLI:EU:C:2014:2258.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

No information can be obtained on national cases on the application and/or interpretation of international agreements concluded solely by the European Union or of mixed agreements, or on cases concerning the challenge of such agreements which were not source of references for a preliminary ruling.

Question 13

Specific discussions regarding the CJEU case law on direct effect of international agreements has not taken place in Hungary, however, the scholarship focused on the most important developments in this area. Articles reflected on the Court's jurisprudence even before the accession of Hungary to the EU,[34] and later, the case law (Ikea wholesale; F.T.S. International, FIAMM-Fedon) has been examined in the Hungarian scholarly literature.[35]

Question 14

The actions for failure to fulfil obligations brought by the Commission against Hungary to the Court did not concern directly international commitments binding on the European Union.[36] Similarly, no infringement procedures initiated by the Commission against Hungary are known that are implying directly such international obligations, however, certain cases (but not Court cases) involved indirectly international commitments. In 2015, the Commission commenced infringement procedure against Hungary in connection with the directive on certain issues concerning the ILO Maritime Labour Convention.[37] The formal

[34] Viktor Luszcz: A WTO és az EU jogának kapcsolatrendszere [The relationship of the WTO and EU law], Jogtudományi közlöny, 2003/3. pp. 131–144.

[35] Attila Vincze: A WTO és az EU jog viszonyának újabb felvonása a dömpingellenes jog díszletei között. [The recent act of the relationship of the WTO and EU law in the scene of the anti-dumping la], Európai Jog, 2007/6. p. 20; Balázs Horváthy: A GATT-WTO-normák helye az uniós jogrendszerben, [The position of the GATT-WTO-law in the Union's legal order], Állam- és Jogtudomány, 2008/3, pp. 355–392; Bartha Ildikó: Nemzetközi szerződések mozgásban [International agreements in action], Dialóg Campus, Budapest, 2015, pp. 86–88.; Blutman László: Az Európai Unió joga a gyakorlatban [The Law of the European Union in practice] (e-book), HVG-Orac, Budapest, 2014, pp. 218–220.

[36] The 18 cases referred by the Commission to the Court affected mostly compliance with the internal market regulations. The list of the cases are available here: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&r_dossier=&noncom=0&decision_date_from=&decision_date_to=&active_only=0&EM=HU&title=&d_type=5&submit=Search

[37] Formal notice issued in infringement no.: 20150194 (28/05/2015) Directive 2013/54/EU of the European Parliament and of the Council concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention, 2006.

notice has been sent to Hungary, however in 2016, the infringement procedure has been closed without publishing any details on the dispute.[38] The recent case regarding the implementation of EU asylum and migration *acquis* might imply indirectly international obligations.[39] The formal notice has been issued on 17 May 2017, setting out concerns raised by the amendments to the Hungarian asylum law. The Commission considered that three of the five issues identified in the letter of formal notice from 2015 remained to be addressed, in particular in the area of asylum procedures. In addition, the letter outlined new incompatibilities of the Hungarian asylum law, as recently modified by the amendments of 2017.[40] The incompatibilities focused mainly on three areas: asylum procedures, rules on return and reception conditions.[41]

Question 15

No relevant information on specific tools, instruments or practices could be obtained relating to control measures taken by Hungary in order to ensure compliance with international agreements binding on the European Union. Therefore the question can be answered only hypothetically, referring to the standard and implicit mechanisms and principles for fulfilling obligations arising from EU law (legislation, role of the Hungarian Parliament, Government's instruments, control mechanisms over the public administration as well as municipal law making and administration, role of domestic courts in this regard, etc.).[42]

[38] Case closed in infringement no. 20150194 (25/02/2016) Directive 2013/54/EU of the European Parliament and of the Council concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention, 2006. In addition to this case, the Commission initiated another infringement procedure relating to the Maritime Labour Convention concerned by an agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF), however, also this procedure has been closed without any further action in 2017. See infringement no. 20140511 (27/04/2017) Directive 2009/13/CE du Conseil du 16 février 2009 portant mise en œuvre de l'accord conclu par les Associations des armateurs de la Communauté européenne (ECSA) et la Fédération européenne des travailleurs des transports (ETF) concernant la convention du travail maritime, 2006, et modifiant la directive 1999/63/CE.

[39] Infringement no. 20152201 (17/05/2017), Incorrect implementation of EU asylum and migration *acquis*.

[40] Commission follows up on infringement procedure against Hungary concerning its asylum law (European Commission – Press release, Brussels, 17 May 2017).

[41] The EU legal acts concerned are particularly the Directive 2013/32/EU on Asylum Procedures, Directive 2008/115/EC on Return, Directive 2013/33/EU on Reception Conditions, which can be indirectly contextualized within the international law framework.

[42] See for a general commitment in this regard in the Hungarian law, Act L of 2005 on procedures relating to international agreements, § 4 (3): "From the preparation of an international agreement it has to be constantly observed, whether the agreement is in accordance with the Fundamental Law, laws; as well as obligations arising from the European Union law and international law. The conformity should be established by modification of the content of the agreement, modification or enacting of

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16

Official position of Hungary could not been obtained regarding the scope of the common commercial policy and the extent of its exclusive character. However, the Hungarian scholarly literature examined the related issues and defined the 'foreign direct investment' as a wide concept,[43] which has been inspired by the international economic law (e.g. comparing its scope with the concept of the TRIMs,[44] definitions of the OECD and IMF[45] etc.), and the Court's case law.[46] In spite of the wide extent of the concept, the portfolio investments have been excluded from the scope of CCP in terms of this interpretation, arguing that the investors of portfolio investments generally does not intend to have control directly over the assets that underlie the financial claims, consisting mostly of holdings of corporate equities and corporate, government bonds etc. On the other hand, direct investment gives the investor a long-term controlling interest in an undertaking, therefore the direct investments are less volatile than the speculative, portfolio investment.

laws, or – if feasible – by modification or termination of obligations arising from the European Union law and international law."

[43] See Attila Vincze: EUMSZ 207. cikk [Article 207 TFEU] in András Osztovits (ed.): Az Európai Unióról és az Európai Unió működéséről szóló szerződések magyarázata [Commentary on the Treaty on the European Union and Treaty on the Functioning of the European Union], vol 2 , Complex, Budapest, 2011.; Péter Balázs – Pál Sonnevend: Közös kereskedelempolitika [Common Commercial Policy] in Tamás Kende: Bevezetés az Európai Unió politikáiba [Introduction to Policies of the European Union], Complex, Budapest, 2015.; Balázs Horváthy: A közös kereskedelempolitika jogi feltételrendszere a Lisszaboni Szerződést követően [The provisions concerning the Common Commercial Policy after the Lisbon Treaty] in Imre Vörös – Balázs Horváthy (Eds.): Az európai uniós jogfejlődés irányai a Lisszaboni Szerződés után [The trends of the European Union's legal development after the Lisbon Treaty], MTA TK JTI, Budapest, 2012. pp. 157–188.

[44] The scope of the TRIMs ('Trade-Related Investment Measures') is narrower that the notion of the Treaty ('Foreign Direct Investments'). It was argued, that the competence for the issues covered by the TRIMs existed even before the Treaty of Lisbon entered into force. See Eberhard Grabitz – Meinhard Hilf – Martin Nettesheim: Das Recht der Europäischen Union [Law of the European Union], C.H. Beck, München, 2011, Article 207, para. 44; Markus Krajewski: External Trade Law and the Constitutional Treaty, CMLRev 2005. 91. p. 114

[45] See OECD Benchmark Definition of Foreign Direct Investment, 4th ed., 2008. Available at: https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf

[46] See for instance: Judgment of 12/12/2006, C-446/04, Test Claimants in the FII Group Litigation, ECLI:EU:C:2006:774, para. 181; Judgment of 24/05/2007, C-157/05, Holböck, ECLI:EU:C:2007:297, para. 34; Judgment of 23/10/2007, C-112/05, Commission v Germany, ECLI:EU:C:2007:623, para. 18; Judgment of 18/12/2007, C-101/05, A, ECLI:EU:C:2007:804, para. 46; Judgment 20/05/2008, C-194/06, Orange European Smallcap Fund, ECLI:EU:C:2008:289, para 100; Judgment of 14/02/2008, C-274/06, Commission v Spain, ECLI:EU:C:2008:86, para 18; Judgment of 26/03/2009, C-326/07, Commission v Italy, ECLI:EU:C:2009:193 para. 35.

The exclusion of the portfolio investments from the scope of CCP has been recently confirmed by the CJEU in Opinion 2/15. The Court held that "[t]he acquisition of company securities with the intention of making a financial investment without any intention to influence the management and control of the undertaking ('portfolio' investments) [...] constitute[s] movements of capital for the purposes of Article 63 TFEU [...]" and this form of investment has been defined as 'non-direct investment'.[47] However, uncertainty remained, how to qualify a concrete transaction, whether it is an 'investment without influence'. The Court refers to the 'intention' of the investor ("[...] without any intention[...]"), however this component alone is not able to determine the status of an investment beyond reasonable doubt, but it is plausible, that not the investors' intention alone, but a real control – or an 'effective voice' of the investors – could be qualify objectively the nature of an investment (otherwise, the investor would be alone to qualify the transaction depending on the fact, whether he or she has or not intention to control. In other terms, the investors' intention could subjectively determine the scope of the EU competence). This method is fully complying with the previous CJEU case law, which held that the effective control is depending not only on the share of the investor, but the on investor's participation in the administration, decision-making of the company, or specific provisions regarding the assets.[48]

Moreover, it is worth mentioning that the IMF and OECD terminology applies a threshold in determining and qualifying an investment. The interest of control is formally deemed to exist when a direct investor owns 10% of the ordinary shares or voting shares of a foreign company, conversely, it is presumed that an investment below the 10% threshold doesn't give the investor a controlling interest.[49]

Question 17

Hungary's BITs were also influenced by the modifications of the Treaty of Lisbon which in Article 207(1) TFEU provides for the exclusive competence of the EU on foreign direct investment. The changes affecting the more than 1000 BITs of the Member States with third countries were indicated in a regulation (the so called BIT regulation) adopted on 12 December 2012 by the Parliament and the Council establishing the terms, conditions and the procedure under which

[47] Opinion of the Court of 16 May 2017, Opinion 2/15, Request for an opinion pursuant to Article 218(11) TFEU, ECLI:EU:C:2017:376

[48] Judgement of 12/12/2006, C-446/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, ECLI:EU:C:2006:774 para 182.

[49] However, that definition is flexible, as there are instances where effective controlling interest in a firm can be established with less than 10% of the company's voting shares. See Balance of Payment Manual. 5th ed., IMF, Washington, 1993. p. 87, available at: http://www.imf.org/external/np/sta/bop/bopman.pdf

Member States are authorized to maintain in force, amend or conclude bilateral agreements with third countries relating to investment.[50]

The BIT regulation permits Member States to maintain in force BITs with third countries signed before 1 December 2009 or before the date of their accession which have been notified in accordance with the regulation. Member State autonomy in this domain is allowed as long as the EU does not exercise its powers under Article 207 TFEU to conclude a bilateral investment agreement with the third state concerned. According to the Commission's first publication of the list of the BITs affected, Hungary wished to maintain 37 agreements[51] covering all its agreements concluded with third states but not those with other EU Member States.[52]

Question 18

Even if Hungary has been supportive towards the negotiations on the recent EU trade and investment agreements according to the official statements,[53] arguing that a balanced deal might benefit the Hungarian economy significantly,[54] the Government provides this support cautiously. A realistic approach is represented and it is always emphasized that only compromise is acceptable that is fully kept in line with the 'national interest' of Hungary. In this respect, distinctive attention has been paid for the dispute settlement mechanism of CETA. In 2015, it was expressed that the Government might not support the CETA because the

[50] Regulation 1219/2012/EU establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L351/40.

[51] List of the bilateral investment agreements referred to in Article 4(1) of Regulation 1219/2012/EU establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ C131/2.

[52] Before the entry into force of the BIT regulation, the new Article 207 TFEU had no real influence on the legality of Hungary's agreements.

[53] See for instance: The signing of the free trade agreement between the European Union and Canada is in Hungary's interests, published by Ministry of Foreign Affairs and Trade, based on press release of the Hungarian Press Agency (MTI) (October 25, 2016), available at: http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-signing-of-the-free-trade-agreement-between-the-european-union-and-canada-is-in-hungary-s-interests; and The lack of agreement on CETA is frustrating for Hungary, published by Ministry of Foreign Affairs and Trade, based on press release of the Hungarian Press Agency (MTI) (October 25, 2016), http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-lack-of-agreement-on-ceta-is-frustrating-for-hungary

[54] "It is primarily IT companies that are in favour of the proposed Transatlantic Trade and Investment Partnership (TTIP) agreement between the EU and the United States; environmental protection groups and human rights activists are against the treaty." See: It is primarily IT companies that are in favour of the TTIP, Press Release, Ministry of Foreign Affairs and Trade (May 20, 2016), available at: http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/it-is-primarily-it-companies-that-are-in-favour-of-the-ttip. It was also predicted, that the Hungarian automobile, pharmaceutical and food industries could gain significant ground on the Canadian market after the CETA enters into force. The signing of the free trade agreement... op. cit.

investor-state dispute settlement system, and a 'political consensus' was reported for refusing the ISDS mechanism in the Parliament.[55]Moreover, the impact assessment report on the TTIP commissioned by the National Council for Sustainable Development has given rise to criticism over the draft chapter on dispute settlement provisions.[56] This 'resistance', however, has been stimulated also by the harsh debates triggered in Europe on the model and necessity of investor-state dispute settlement in 2014-2015 that led to a public consultation announced by the European Commission on this issue and elaboration of a new approach to the dispute settlement mechanism. After the Commission announced the proposal on international arbitration court[57] and the provisions of the new model has been integrated into the text of CETA in 2016, the debates on the ISDS have been slightly calmed down also in Hungary.

Question 19

No relevant information about the position of Hungary regarding the liability of the Union and the member states could be obtained. The political discourse went into only the question of the competence allocation between the EU and member states.[58] The Hungarian scholarly literature examines issues concerning the responsibility only on general level, but neither the liability regarding the trade and investment treaties, nor specific questions (e.g. financial responsibility directive)[59] has been at the centre of attention of the academia.

Question 20

As a result of the Lisbon Treaty that established a general framework for values, principles and objectives, requiring that the Union shall pursue these concepts

[55] See the statements made by István Mikola, secretary of states in the Ministry of Foreign Affairs and Trade: Magyarország nem kér a választott bíróságokból [Hungary do not want to take the arbitration courts], Bruxinfo.hu (8.05.2015).

[56] Gábor Baranyai – Erik Szarvas – Zsófia Wagner: A Transzatlanti Kereskedelmi és Beruházási Partnerségről szóló Megállapodás lehetséges hatásai a Fenntartható fejlődésre Magyarországon [The potential impacts of the Transatlantic Trade and Investment Partnership on the sustainable development in Hungary], ELDH Consulting Kft., Budapest, 2015. Available at: http://www.nfft.hu/documents/1238941/1240165/NFFT_mt_24_TTIP_jogi_elemzes_2015_kezirat.pdf/48b94e87-7691-4ff3-9eba-0a577307b9c1

[57] CETA: EU and Canada agree on new approach on investment in trade agreement, Press release, European Commission, (Brussels, 29 February 2016), available at: http://europa.eu/rapid/press-release_IP-16-399_en.htm

[58] But only superficially, see the above cited parliamentary decisions, Decision 11/2016. (VI. 17.) and Decision 22/2016. (X. 14.) of the Parliament (*Országgyűlés*).

[59] Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

in the whole range of the EU external relations, the Common Commercial Policy has become an integral part of the European Union's external action. Therefore, the functioning of the CCP is based on a two-level structure of values, principles and objectives, which encompasses not only the proper, trade-related goals, such as progressive liberalization, but includes several non-trade concerns, like protection of human rights, or promotion of sustainable development as well. Even though no relevant evidence could be obtained regarding the role of these concepts in the common commercial policy, the Hungarian legal scholarship partly addressed the main questions posed by the report.[60]

At first glance, the changes introduced by the Lisbon Treaty seem to be unimportant, knowing that the European Union has been committed to implementing an inclusive, 'values-driven' trade policy for many decades. The reform is indeed significant, because the Treaty succeeded in merging the diverging areas of the EU external action first time, however, the apparently more coherent construction does not firmly answer the question how the values, the general objectives, the principles might relate to the specific concerns of the CCP, and what role these concepts are playing in the operation of the trade policy. Earlier, the possible conflict between the trade-related objectives and general objectives of the Community could be resolved by the specificity of the trade policy, i.e. the goals of the CCP, as *lex specialis*, was deemed to prevail over the general objectives of the Community.

The Treaty of Lisbon added the consistency requirement to the unified structure of external objectives and principles, ensuring the consistency of general and specific, trade-related principles and objectives. The consistency requirement might be interpreted as institutional cooperation as well, as the Council and the Commission, assisted by the High Representative for Foreign Affairs and Security Policy are obliged to cooperate in order to ensure this consistency.[61] The consistency requirement is still handled more clearly on the level of the CCP, because the provisions of Article 21 TEU on consistency is repeated in Article 205 TFEU. In addition, the reference to the principles and objectives of Union's external action is stressed – unnecessarily again – in Article 207 TFEU. According to the grammatical and systematic interpretation of these provisions it is plausible that the inherent principles and objectives of CCP governed by free trade ideas are not strictly subordinate to the general principles of external relations, but the

[60] Ildikó Bartha: Nemzetközi szerződések… [International agreements…] op. cit., pp. 41–44; Balázs Horváthy: A közös kereskedelempolitika alapelvei és célkitűzései az integrált uniós külkapcsolatrendszer tükrében [The principles and the objectives of common commercial policy in the light of the integrated external relations of the Union], Iustum Aequm Salutare, X., 2014/1, pp. 51–69; Péter Balázs – Pál Sonnevend op. cit.

[61] Article 21 (3) TEU

EU trade policy should be 'guided' by the principles and objectives of general level. In other terms, the EU, at least, has to take into account these concepts, which encompasses a sort of non-economic and non-trade factors.

However, if several principles and objectives are incorporated in a systematic order, the question concerning the potential conflicts between the different areas, principles and objectives might always arise. It is crucial concerning the CCP, as Article 21 TEU contains several principles and objectives which could be hardly reconciled with the logic of the trade policy and principally with the objective of liberalization. Therefore, conflicts or tensions can be expected in the relation of trade and non-trade concerns, e.g. in issues of trade and human rights, trade and environment, trade and labour rights and social policy concerns, etc. Since the EU has been always a dominant promoter of the inclusion of social policy concerns into the external trade policy, the aforementioned conflict potential is less concentrated at the level of the European Union's decisions making mechanism,[62] than relating to international dimension, i.e. in trade negotiations, or in implementation of the international economic law. This tendency and the potential conflicts are palpable in the EU new generation of free trade agreements, which go already beyond the 'classic' free trade agreements, including also rule of law and human rights clauses, environmental objectives, and sustainable development. In a similar way, some EU autonomous trade preference schemes involve the labour rights, environmental consideration, and promotion of fair trade specifically.[63]

Even the recent trade and investment partnership agreements aim at integrating several non-trade concerns into the body of the agreements. Despite of the normative nature, the formulation of the principles – including also the principle of uniformity – seems to be relatively abstract and restrictive, therefore the principles do not establish strict obligations within the Common Commercial Policy. Due to the soft formulations in the Treaty – "shall be guided", "promote" etc. – it can be concluded, that the principles are not able to give obvious signal of what concrete trade policy decision the EU institutions should adopt. The Treaty objectives were seen more than mere declaration, but according to the Treaty formulations, and in light of the Court's interpretation, the objectives

[62] However, conflicts are neither at the Union's level conceptually excluded, e.g. institutional conflicts can be presumed, as the European Parliament has made clear that the Union has to involve non-economic, socio-political approaches closely in its external action for a long time. From this perspective, it seems to be significant, that the Treaty of Lisbon has considerably strengthened the position of the European Parliament in the field of the Common Commercial Policy (see e.g. the consent requirement of the European Parliament for the conclusion of international agreements in Article 207 (2) TFEU.

[63] However, these preferential agreements can be seen as not fully compatible with the WTO law, se e.g. European Communities – Conditions For The Granting Of Tariff Preferences To Developing Countries, WT/DS246/AB/R (7 April 2004). http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm

are expressing only an orientation, or direction of the Union's action. Consequently, both the principles and the objectives in this context have legal quality, but might imply only an orientative, guiding function in the decision-making procedures. However the EU institutions may overlook neither the principles, nor the objectives. The institution has to take into account these concepts; but it enjoys a wide margin of discretion.[64]

Question 21

Observations on particular aspects of conclusion of agreements have not been highlighted and no remarks has been expressed regarding the procedural exceptions listed in Article 207 (4) TFEU. However, if considering the overall stance of the Hungarian Government to the EU external trade policy, namely the fact that the Government lays stress upon the 'national interest' of Hungary frequently, the exceptions listed in Article 207 (4) TFEU might pertain to the core of the national interest, therefore Hungary presumably would think these issues over (e.g. cultural, social health services, etc.) before coming to a decision.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

Although the Lisbon Treaty has taken significant steps to clarify the competence allocation between the EU and the Member States, the competence debate – specifically regarding the external competences in the field of the area of freedom, security and justice – has not been resolved. Moreover, the Protocol No 23 on the external relations of the Member States with regard to the crossing of external borders has been interpreted uniformly neither by the scholarship nor by the Member States. The legal scholarship approaches the Protocol No 23 from different angles. After the "Communitarization" of the third pillar, the major part of the scholarly literature accepted the argument that the EC acquired implicitly

[64] Additionally, it is also important, how this 'values-driven' trade policy of the EU is related to the international trade law, specifically to the WTO law. Even though the WTO has becoming more open to the non-trade concerns in the last two decades, in light of the current legal framework of the WTO, all trade measures, which are underpinned by the social policy considerations, as the human rights, environmental protection, cultural aspects, or other social policy objectives, can be regarded as potential trade restrictions, conflicting with the WTO's main concern on free trade and liberalization. Therefore, the main question is how the potential measures of the EU underpinning the values, principles and objectives can comply with the WTO law (e.g. with the exceptions of the Article XX GATT, Article XIV GATS etc.), and how these conflicts can be resolved at the level of the World Trade Organization. Taking into consideration that the EU is an important *demandeur* of integration of these concerns, conflict cannot be excluded between the levels of the WTO and the European Union.

exclusive powers in terms of the AETR doctrine.[65] However, later the arguments became more complex and offered alternative conclusions to the relationship of ERTA doctrine to the scope and objective of the Protocol. The politically sensitive character of the migration policy has been highlighted,[66] which might explain why the distribution of powers between the EU and the Member States are difficult and why the Member States are reluctant to confer powers explicitly on the European Union in this field.[67]However, it is also argued that the external relations Protocol itself implies the inapplicability of the AETR doctrine.[68]

The Hungarian doctrine does not address substantially the meaning and scope of the Protocol, nor the practice of Hungary is showing any unique characteristics that might be considerably different from approaches applied in other Member States. Hungary has been maintained as well as concluded certain types of agreements containing provisions on external relations with regard to the crossing of external borders after its accession to the European Union, however these provisions might presumably fall outside the scope of Article 77 (2) (b) TFEU. Such provisions are covered by agreements on border control cooperation concluded with neighbouring countries,[69] agreements addressing issues relating the local border traffic.[70] Moreover also specific agreements have been

[65] Steve Peers: EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law, OUP, Oxford, 2015, p. 51; Steve Peers – Nicola Rogers: EU Immigration and Asylum Law: Text and Commentary, Martinus Nijhoff Publishers, Leiden, 2006. pp. 887-889.

[66] Georgia Papagianni: Institutional and Policy Dynamics of Eu Migration Law, Brill, 2006, p. 79

[67] Bernd Martenczuk: Migration policy and EU external relations, In Loïc Azoulai – Karin de Vries (eds.): EU Migration Law. Legal Complexities and Political Rationales, OUP, 2014. pp. 84–85.

[68] Kay Heilbronner: Immigration and asylum policy of the European Union, Kluwer Law International, The Hague 2000. pp. 65-66.

[69] See e.g. Act CIV of 2005 on promulgation of Agreement concluded between the Hungarian Republic and Romania (Bucharest, 27 April 2004) on cross-border road and railway traffic control ; Act XXXV of 2006 on promulgation of Agreement concluded between the Hungarian Republic and Romania (Bucharest, 20 October 2005) on the order of the Hungarian-Romanian state border, cooperation and mutual assistance; Act IV of 2012 on promulgation of Agreement concluded by the Government of Hungary and the Government of Republic of Serbia on road, railway and waterway border traffic control; Act LXVIII of 2012 on Agreement concluded by the Government of Hungary and the Ministerial Cabinet of Ukraine on the control of road and railway cross-border traffic at crossing points; Act LVII of 2014 on promulgation of Agreement between the Government of Hungary and the Government of Federal Republic of Austria on border crossing points at the common state border, as well as on cooperation in control of cross-border road and waterway traffic; Act LVIII on promulgation of Agreement between the Government of Hungary and the Government of Republic of Serbia on road passenger and goods transport.

[70] E.g. Act CLIII of 2007 on promulgation of Agreement between the Government of the Republic of Hungary and the Cabinet of Ministers of Ukraine on the rules of local border traffic. However, concerning these agreements there is a specific authorization on behalf the EU by the Regulation (EC) No 1931/2006 of the European Parliament and of the Council; for detailed analysis, see Ildikó Bartha: Hungary's international agreements..., op. cit. p. 351.

concluded, regarding e.g., visa requirements for their nationals holding diplomatic passports; or agreements governing the cross-border transport with the neighbouring countries.[71]

Question 23

Until 2012, the concept of safe third country has been shaped by the interpretation and application of the Hungarian authorities and courts on case-to-case basis. The Hungarian Asylum Act[72] laid down only framework provisions regarding the concept,[73] therefore the courts had to establish the criteria, whether the relevant country has to be assessed as safe third country.[74] In 2012 the 'jurisprudence-analyzing working group,' a specialized body of the Curia of Hungary (*Kúria*)[75] adopted an interim report on the concept of safe third country and found substantial contradictions in the previous case law of the Hungarian Courts.[76] Based on these findings and the proposals elaborated by the working group, the Curia adopted an opinion for establishing consistency in the case law

[71] Act XI of 2009 on promulgation of Agreement between the Government of the Republic of Hungary and the Government of the Arab Republic of Egypt on the abolition of visa requirements for their respective nationals holding diplomatic passport; Act IX of 2013 on the promulgation of Agreement between the Government of Hungary and the Government of the Republic of Indonesia on the exemption of visa requirements for their respective nationals holding diplomatic and service passport; Act XXVIII of 2014 on promulgation of Agreement between the Government of Hungary and the Government of the State of Kuwait on the exemption of visa requirements for holders of diplomatic, service and special passports; Act of XIV of 2016 on promulgation of Agreement between The Government of Hungary and The Government of Mongolia on the exemption of visa requirements for holders of diplomatic and service/official passports; Act LXXII of 2016 on promulgation of Agreement between the Government of Hungary and the Government of the Republic of Ghana on the mutual visa exemption for holders of diplomatic and service passports.

[72] Act LXXX of 2007 on Asylum.

[73] See § 2 i) of Act LXXX of 2007: Safe third country is „[a] country in connection to which the refugee authority has ascertained that the applicant is treated in line with the following principles: ia) his/her life and liberty are not jeopardised for racial or religious reasons or on account of his/her ethnicity/nationality, membership of a social group or political conviction and the applicant is not exposed to the risk of serious harm; ib) the principle of *non-refoulement* is observed in accordance with the Geneva Convention; ic) the rule of international law, according to which the applicant may not be expelled to the territory of a country where s/he would be exposed to treatment/behaviour stipulated by Article XIV(2) of the Fundamental Law, and id) the option to apply for recognition as a refugee is ensured, and in the event of recognition as a refugee, protection in conformity with the Geneva Convention is guaranteed."

[74] However, it is important that the concept may only be applied as an inadmissibility ground where the applicant stayed or travelled there and had the opportunity to request effective protection; has relatives there and may enter the territory of the country; or has been requested for extradition by a safe third country. In the practice of the Hungarian authorities and Courts, transit or stay is a sufficient connection, even in cases where a person was smuggled through the country. See § 51(3) of Act LXXX of 2007.

[75] I.e. the Supreme court in Hungary.

[76] 2012.El.II.F. 1/9/4-28-1 *A menekültügyi és idegenrendészeti joggyakorlat elemző csoport együttes részjelentése: a biztonságos harmadik ország megítélése a menekültügyi nemperes eljárásokban* [Joint interim report of the

regarding the assessment at the end of 2012.[77] The opinion highlighted the following major assumptions regarding the assessment method:

- the Hungarian courts are obliged to consider all accurate and authentic information on the third country in question, which are available when the judgment is entered;
- the relevant country reports of the office of the United Nations High Commissioner for Refugees (UNHCR) have to be assessed in any case;
- if there is doubt about the assessment, the court can turn to the Hungarian Immigration and Asylum Office and require information in order to clarify the conditions concerning the third country in question;[78]
- the opinion of the Curia has explicitly declared, that an overloaded administrative asylum system of a third country might impede the enforcement of the rights of asylum seekers, therefore, in such case, the country *should not* qualify as safe third country;[79]
- if the asylum seeker has not applied for asylum in the third country concerned previously, this fact cannot be considered in a way that the country in question should be assessed necessarily as a safe third country.[80]

The inconsistent case law of the Hungarian courts has also drawn criticism from the civil society and non-governmental organizations. The Hungarian Helsinki Committee argued even before the adoption of the Curia's opinion that the application of safe third country standards can hinder the asylum seekers from being able to apply for effective protection.[81] The striking example has been Serbia, a non-EU member that lays on the Balkan 'migration route' and shared its border partly with Hungary. A large part of asylum seekers arrived through Serbia, consequently it was decisive, whether Serbia can be assessed as safe or not safe third country. The lack of access to effective procedures, an effective remedy, legal aid and information has been well documented,[82] even in the 2012

jurisprudence-analyzing working groups in asylum and immigration: the assessment of country as safe third country in the out-of-court proceedings], p. 3.

[77] 2/2012 (XII.10) opinion of Administrative-Labour Department of Curia on certain questions relating to the assessment of a country as a safe third country.

[78] 2/2012 (XII.10) opinion of Administrative-Labour Department of Curia, Part I.

[79] 2/2012 (XII.10) opinion of Administrative-Labour Department of Curia, Part II.

[80] 2/2012 (XII.10) opinion of Administrative-Labour Department of Curia, Part III.

[81] *Megjelent a Kúria iránymutatása a biztonságos harmadik ország koncepciójáról* [The Curia's opinion on the concept of the safe third country has been released], Hungarian Helsinki Committee, 19 December 2012. Available: http://www.helsinki.hu/megjelent-a-kuria-iranymutatasa-a-biztonsagos-harmadik-orszag-koncepciojarol/

[82] Ibid. See also Serbia as a safe third country: a wrong presumption, Hungarian Helsinki Committee, September 2011. Available at: http://helsinki.hu/wp-content/uploads/Serbia_as_a_safe_third_

UNHCR report,[83] moreover, it might have been also an indication that between 2008 and 2012, there has not been any asylum seeker, who received refugee status by the Serbian authorities.[84] Despite these concerns, the Hungarian Immigration and Asylum Office qualified Serbia permanently as safe third country and later this position was supported by several court judgments. For this reason, the Hungarian Helsinki Committee has welcomed the opinion adopted by the Curia.[85]

In 2015, the concept of the 'safe third country' has been at the forefront of discussions again, when the Hungarian Parliament has enabled the Government to lay down decree on list of safe third countries.[86] Under this mandate, the Government adopted the list[87] and considered as safe third country among others[88] Serbia, Bosnia-Herzegovina, Kosovo, Turkey,[89]or interestingly, also the EU Member States are referred in the text as 'safe third country'.[90] It was also criticized that the Decree restricted itself only to establish the list of countries, but has not given any explanation or justification as to how the Government arrived to the conclusion that each country listed qualifies as safe.[91]

country_A_wrong_presumption_HHC.pdf; Celebrating 30 years of the ELENA Network: 1985-2015, European Council of Refugees and Exiles, 26 October 2015, p. 2. Available at: https://www.ecre.org/wp-content/uploads/2016/05/ELENA-Celebration.26.10.2015.final_.pdf; Case law fact sheet: Prevention of Dublin transfers to Hungary, European Council of Refugees and Exiles, January 2016, pp. 5–6. Available at http://statewatch.org/news/2016/jan/eu-ecre-factsheet-dublin-transfers-to-hungary-1-16.pdf

[83] Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia, UNHCR, August 2012. Available at: http://www.refworld.org/docid/50471f7e2.html

[84] *Megjelent a Kúria iránymutatása…*, Hungarian Helsinki Committee, 19 December 2012.

[85] Ibid.

[86] Act CVI of 2015 on the amendment Act LXXX of 2007 on Asylum.

[87] Government Decree 191/2015 on national designation of safe countries of origin and safe third countries.

[88] The list includes all member and candidate countries of the EU, members of the European Economic Area, the US States not applying death penalty, Switzerland, Bosnia-Herzegovina, Kosovo, Canada, Australia and New Zealand. See §2 of Act CVI of 2015.

[89] In the original version of the Decree Turkey was exempted from the list, however, after the deal between the EU and Turkey on asylum matters has been concluded, Turkey's position was changed. Today Turkey, as a candidate country of the EU is defined as 'safe third country' by the Decree. See Boldizsár Nagy: Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation, 17 German L.J. 1033 (2016), p. 1045.

[90] Ibid p. 1045–1046: "Nobody in the government noted that 'safe third countries' may not refer to an EU member state, only to a State outside the EU. Nor did they note that by failing to designate Japan and many other countries as safe countries of origin, those left out may feel insulted."

[91] Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016. UNHCR, May 2016, p. 15. Available at: http://www.refworld.org/docid/57319d514.html

The status of the countries covered by the list can be regarded as a presumption, because the Decree enables the applicants to prove that there was no opportunity to apply for effective protection in the third country concerned. Therefore the presumption is rebuttable, however, it is important to note that the applicant itself is required to prove those concerns. In other terms, the standard of proof is relatively high, if considering that in most of the cases the asylum seeker is smuggled through the third country without any real connection, which could establish evidence to prove the above requirement. Moreover, it is also questionable, whether the assessment of a third country can really rely upon on the asylum seeker's individual and personal factors at all, or it is rather resulted by structural and functional deficiencies of the asylum system of the third country.

As the Decree was in contradiction with the Curia's aforementioned opinion of 2012, and in 2016, the Curia has withdrawn its former opinion on the ground that legislation has since changed and its application based on current asylum and migration laws is no longer possible.[92] However, the inconsistency in the courts' case law has not be dissolved and the inadmissibility decisions based on Serbia being a safe third country has been varying. For instance, the Szeged Regional Court (*Szegedi Törvényszék*) commenced to reject almost all appeals after the revision of the Curia's opinion, but its practice reversed again towards the end of 2016.By contrast, the practice of the Budapest Regional Court (*Fővárosi Törvényszék*) has been inconsistent throughout 2016.[93]

After the adoption of the Government Decree in 2015, the Debrecen Administrative and Labour Court (*Debreceni Közigazgatási és Munkaügyi Bíróság*) initiated preliminary ruling procedure in order to clarify the consistency between the concept of safe third country after the adoption of the Decree and the EU law.[94] The case concerned a Pakistani citizen, who entered Hungary from Serbia in 2015 and submitted an application for international protection, then left the country to the Czech Republic. The applicant was delivered to the Hungarian authorities in the framework of Dublin Regulation, but his application was rejected later and as a consequence, the applicant has been expelled to Serbia, as the authority considered it to be a 'safe third country.' The asylum seeker lodged an appeal against the decisions before the Debrecen Administrative and Labour Court. The Court requested a preliminary ruling in December 2015 asking, in brief words, whether a Member State, after having applied the framework of the Dublin System, is able to assess the fact, whether the applicant has arrived from

[92] 1/2016 (III.21.) opinion of Administrative-Labour Department of Curia on revision of department opinion. Se also: Safe third country – Hungary. Hungarian Helsinki Committee, Asylum Information Database. Available at: http://www.asylumineurope.org/reports/country/hungary/asylum-procedure/safe-country-concepts/safe-third-country

[93] Ibid.

[94] Judgement of 17 March 2016, *Mirza*, C-695/15 PPU, ECLI:EU:C:2016:188.

a safe third country or not.[95] The CJEU stated in C-695/15 PPU *Mirza* that the fact that a responsible Member State in terms of the Dublin Regulations receives an applicant from another Member State, does not preclude that the applicant thereafter will be sent to a safe third country according to the Dublin III Regulation. The Hungarian Government interpreted the decision in a way, that the "Hungarian reasoning was approved" by the CJEU and consequently, the Government Decree 191/2015 is fully compatible with the EU law.[96]

Question 24

The Global Approach to Migration and Mobility (GAMM) has been established even before the refugee crisis deepened the strains between the Member States of the European Union. Until 2013-2014 also Hungary expressed concerned about the cooperation within GAMM and has participated intensively in the dialogues. Specifically, the idea of 'Budapest Process' has been backed up by Hungary in order to involve third countries alongside the 'Silk Road'. In 2013, Hungary as co-chair of the presidency of the 'Budapest Process' took part in the elaboration of the priorities and main objectives of the Partnership. The Ministerial Declaration,[97] which launched the Partnership, has covered priority goals such as improvement of conditions for legal migration, support for the integration of migrants and counteracting phenomena of discrimination, racism and xenophobia; or strengthening the positive impact of migration on development, both in countries of origin and of destination. Hungary explicitly reinforced its commitment to cooperate within the Partnership and wanted to "[...] play active role in the coordination of practical projects carried out within the Declaration [...]".[98] In addition to the Silk Routes Partnership for Migration, Hungary has also supported the 'Rabat Process' on the Africa-EU Partnership on Migration, Mobility and Employment,[99] which also aims at organizing the legal migration.[100]

[95] For the exact questions, see: Application, C-695/15 PPU, OJ 2016 c 90, p. 10. Available at: http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2016.090.01.0010.01.ENG

[96] The Hungarian reasoning was approved by the Court of Justice of the European Union, Press release, Immigration and Asylum Office, 17/03/2016. Available at: http://www.bmbah.hu/index.php?option=com_k2&view=item&id=841:the-hungarian-reasoning-was-approved-by-the-court-of-justice-of-the-european-union&lang=en

[97] The Istanbul Ministerial Declaration on A Silk Routes Partnership for Migration, 19 April 2013, para. (1). Available at: https://www.budapestprocess.org/silk-routes-partnership/istanbul-ministerial-declaration

[98] Selyemút Migrációs Partnerség [*Silk Routes Migration Partnership*], Press release, Ministry of Interior, 19. April 2013. Available at: http://2010-2014.kormany.hu/hu/belugyminiszterium/hirek/selyemut-migracios-partnerseg

[99] Afrikai migráció hatékony kezelése [*Effective control of the African migration*], Press release, 1 December 2014. Available at: http://www.kormany.hu/hu/kulgazdasagi-es-kulugyminiszterium/

However, as the refugee crisis in Europe worsened significantly in 2015, Hungary has changed its stance to the migration and asylum policy, which also triggered a shift in the political landscape. The former cooperative attitude to the priorities of the emigration policy represented within the GAMM turned into an anti-immigrant rhetoric.[101] As reflection on the largest migration wave European Union has ever faced, the Hungarian Government responded by building a fence along its borders with Serbia and Croatia.[102] Hungary has opposed the regulation on provisional mechanism for the mandatory relocation of asylum seekers discussed and adopted by the Council in 2015, and later brought action against the quota mechanism before the CJEU.[103] In consequence of the current circumstances described above, at this moment, the future prospects of the Global Approach to Migration and Mobility cannot be assessed from the perspective of Hungary. In other words, without any significant change at policy level, neither strong commitments, nor proactive engagement can be awaited from Hungary. For similar reasons, at this time no relevant examples can be highlighted from the bilateral relations of Hungary with African countries which could serve as an example for the launch of the pacts between the EU and the priority African countries.

Question 25

Since 1995, Hungary has concluded 28 agreements (including the bilateral implementing protocols to EU agreements), which contains provisions regarding the readmission. Most of the treaties entered into force even before Hungary joined the European Union (19), more than half of the agreements have set down relations with the EU member states (16),[104] and there are 7 bilateral implementing

biztonsagpolitikai-es-nemzetkozi-egyuttmukodesert-felelos-allamtitkar/hirek/afrikai-migracio-hatekony-kezelese

[100] The Rome Programme For 2015-2017 (annex to the Rome Declaration), 27 November 2014, part I. Available at: https://www.rabat-process.org/images/RabatProcess/Documents/declaration-programme-rome-ministerial-conference-rome-2014-rabat-process.pdf

[101] Top 10 of 2015 – Issue #6: Refugee Crisis Deepens Political Polarization in the West, Migration Policy Institute, 11 December 2015. Available at: https://www.migrationpolicy.org/article/top-10-2015-%E2%80%93-issue-6-refugee-crisis-deepens-political-polarization-west

[102] Hungary's Orban urges EU migration debate, sees threat to democracy, Reuters, 22 October 2015. Available at: http://www.reuters.com/article/us-europe-migrants-hungary-pm-idUSKCN0SG0M320151022

[103] The CJEU dismissed the action in September 2017, see Judgement of 6 September 2017, *Slovakia and Hungary v Council*, Joined Cases C-643/15 and C-647/15, ECLI:EU:C:2017:631.

[104] Hungary has agreements with Austria, Belgium, Croatia, Estonia, France, Germany, Italy, Latvia, Luxembourg, The Netherlands, Poland, Portugal, Czech Republic, Romania, Slovakia, Slovenia. The remaining agreements and bilateral protocols have been concluded with Western Balkan and Eastern

protocols that are linked to a readmission agreement concluded by the EU with third country.[105]

Apart from the bilateral protocols, the Hungary-Kazakhstan agreement is the only bilateral readmission agreement, which has been concluded after the accession of Hungary to the EU. The ratification of the agreement triggered harsh debate in the Parliament, refuting the necessity of an agreement, which would govern the readmission to a country facing complicated human rights challenges.[106] Also the question of compatibility of the agreement with the EU and international law obligations was raised, however, the Government clearly expressed its conviction that the agreement is fully compatible with the relevant sources of law.[107] Regarding the human rights concerns, it was pointed out that the agreement did not jeopardized the rights of the refugees, because the requirement of the *non-refoulement* principle should apply and it would hinder the readmission of refugees into an 'unsafe third country'.[108] Consequently the legality of the bilateral readmission agreements is not disaffirmed by Hungary, and it is argued that Member States has wide competences to conclude agreements with third countries. Following this line of arguments, the readmission agreements concluded with third countries by the Member States might be correct under Article 79(3) and Article 3(2) TFEU.

European Countries (Albania, Bosnia Herzegovina, Georgia, Kazakhstan, Kosovo, FYROM Macedonia, Moldova, Montenegro, Serbia, Russia, Ukraine).

[105] Albania, Bosnia Herzegovina, Georgia, Moldova, Montenegro, Serbia, and Russia.

[106] See Letter of L. Trócsányi, minister of justice to MP Cs. Molnár on written reply to MP' s question 'On the basis of which human rights concerns has the agreement been concluded? (27. June 2014.). Available at: http://www.parlament.hu/irom40/00256/00256-0001.pdf

[107] Letter of L. Trócsányi... p. 2.

[108] Letter of L. Trócsányi...

IRELAND

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CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

Before answering this question, 'the AETR effect' requires some explanation. *AETR*[1] involved a dispute in relation to arrangements for a new agreement on the work of crew members of vehicles involved in international transportation by road, an area covered by Council Regulation 543/69. Article 3 of that Regulation had provided that the Community would conduct any future negotiations with third countries necessary for the purpose of implementing the Regulation. However, the Council had passed a resolution which provided that revisions of the AETR agreement would be negotiated by the Member States. The Court of Justice ("CJEU") held that at the time of the Council resolution the Community was competent to conclude the AETR. However, the CJEU also said that since the other parties to the AETR would be surprised by the substitution of the Member States with the Community in the middle of the negotiations, the former were to act on behalf of the latter in their conduct of those negotiations.

The CJEU's decision in *AETR* has since been understood to enshrine the following key principle:

> *"treaty-making power becomes the sole prerogative of the Community, once measures have been adopted by the institutions pursuant to an objective authorised by the Treaty, in so far as*

[1] Case 22/70 *Commission v. Council* [1971] E.C.R. 263.

> *the acceptance of international commitments by the Member States might interfere with the operation of those measures."*[2]

De Baere summarises the principle established in *AETR* as being *"that Community external competence exists whenever Community 'common rules' could be affected."*[3]

The principle first articulated in *AETR* has since been expanded. *European Laying-Up Fund for Inland Waterway Vessels*[4] was a case involving an agreement between the EU and Switzerland, the objective of which was to manage excess capacity in the inland waterway freight market on the Rhine-Moselle waterway system. The scheme established under the agreement involved levying a contribution on all vessels navigating the waterways in order to compensate other carriers, in return for withdrawing their vessels from the market during periods of excess capacity. No internal EU law rules had been adopted in the area and no provision of the treaties conferred on the EU a competence to conclude an international agreement in the area in question. The issue which arose was whether an implied EU external competence could arise in those circumstances. The CJEU held that the EU enjoyed an implied competence in the circumstances to conclude the agreement. It said:

> *"whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of express provision in that connexion."*[5]

The court went on to state that the implied power of the EU to conclude international agreements was not confined to circumstances where internal measures of EU law had been adopted but, rather, could flow from the fact that the participation of the EU in the international agreement concerned was necessary for the attainment of one of the objectives of the EU.[6]

This holding was subsequently affirmed in the *WTO Case*,[7] where the court held that some aspects of the General Agreement on Trade in Services (**"GATS"**) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (**"TRIPS"**) were within the exclusive competence of the EU to conclude, whereas the Member States enjoyed a concurrent competence in respect of other aspects of those agreements.

[2] A Dashwood and C Hillion, *The General Law of E.C. External Relations* (Sweet & Maxwell, 2000) 5.
[3] De Baere, *Constitutional Principles of EU External Relations* (OUP, 2008) 23.
[4] Opinion 1/76 *(European Laying-Up Fund for Inland Waterway Vessels)* [1977] E.C.R. 741.
[5] Opinion 1/76 *(European Laying-Up Fund for Inland Waterway Vessels)* [1977] E.C.R. 741, §3.
[6] Opinion 1/76 *(European Laying-Up Fund for Inland Waterway Vessels)* [1977] E.C.R. 741, §4.
[7] Opinion 1/94 *WTO Case.*

While it is plain that the EU has the competence to conclude an international agreement with a third country in any situation, where that is necessary to achieve one of the objectives of the EU, and where legislative powers have been conferred on the EU for the attainment of that objective, it is tolerably clear that the competence of the EU to conclude an international agreement in a particular area does not become exclusive until the EU has enacted legislation to regulate the field concerned: *North-East Atlantic Fisheries Convention (Kramer)*.[8] Until such legislation is passed, the competence to conclude international agreements is shared between the EU and the Member States.

AETR and *European Laying-Up Fund for Inland Waterway Vessels* established the two key principles of the EU's implied external competence to conclude international agreements. These are:

"the principle of parallelism, on the one hand, according to which the internal and external competences of the Union mirror each other, and of the principle of complementarity, on the other hand, according to which external competence may be implied whenever it is necessary to attain the objective in respect of which express internal competence is conferred."[9]

The decision in *AETR* and its progeny have generated some commentary in Ireland. The decision has been criticised as exceeding the text of the treaties, on the basis that no provision of the treaty expressly conferred an exclusive competence on the EU to enter into international agreements in the field of transportation.[10] Other commentators have expressed similar views concerning the CJEU's expansive conception of the EU's implied competence to conclude international agreements.[11] However, this is far from a consensus view and other treatments of the decision in *AETR* have been more positive.[12] The decision has also been mentioned in passing and without comment in three judgments of the Irish superior courts.[13]

[8] Cases 3,4,6/76, *North-East Atlantic Fisheries Convention (Kramer* [1976] ECR 1279.

[9] David Fennelly, *International Law in the Irish Legal System* (Round Hall, 2014) 112n.

[10] S Brittain, 'The EU Charter of Fundamental Rights and the Member States: an Originalist Analysis' (2013) 36 *Dublin University Law Journal* 277, 284-285. See also, TC Hartley, *The Foundations of European Union Law* (8th edn, OUP, 2014) 177.

[11] PT Eicher, 'International Forum Shopping: the Mox Plant Case and the ECJ' (2008) *Dublin University Law Journal* 367.

[12] V Power, 'The International Legal Personality of the European Community and the European Union' (2007) 7 *Hibernian Law Journal* 143.

[13] *Crotty v. An Taoiseach* [1987] IR 713, 724; *Hennessey v. Aer Lingus* [2012] IEHC 124, §§79-81; *Pringle v. Government of Ireland* [2012] IEHC 296, §4.1.

Question 2

Article 3(2) of the TFEU sets out the circumstances in which the EU has exclusive competence to conclude an international agreement. It provides as follows:

"The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

Hartley interprets Article 3(2) TFEU as establishing exclusive EU competence to conclude an international agreement in three circumstances, to wit where:

- its conclusion is provided for in a legislative act of the Union;
- its conclusion is necessary to enable the Union to exercise its internal competence; or
- in so far as its conclusion may affect common rules or alter their scope.[14]

The first of Hartley's categories is self-explanatory. The second category listed is intended to codify a basis for exclusive external competence which has been implied into the decision of the CJEU in *European Laying-Up Fund for Inland Waterway Vessels*, namely that which arises where the asserted external competence can only be effectively exercised at the same time as the internal competence and where exclusive competence must, therefore, be implied, even in the absence of EU regulations in the area.[15] One difficulty with the text of Article 3(2) in relation to this second category of exclusive implied external competence is that it says that such competence will be implied where this is *"necessary"* to enable the exercise of an internal competence. If the term *"necessary"* is given a broad interpretation this will represent an expansion of the jurisprudence of the CJEU, under which an exclusive implied external competence would only be recognised, in the absence of EU regulation in the field concerned, in extremely limited circumstances.[16]

The third category of exclusive EU external competence in Hartley's list represents the enshrinement of the *AETR* principle, which we have already discussed, in the text of the treaties.[17]

[14] Hartley (n10) 186.

[15] Alan Dashwood, Michael Dougan, Barry Rodger, Eleanor Spaventa, and Derrick Wyatt, *Wyatt and Dashwood's European Union Law* (6th edn, Hart Publishing, 2011) 924 (noting that though this is not explicitly stated by the court its decision has subsequently been interpreted as recognising this principle).

[16] Wyatt and Dashwood *et al* (n15) 924.

[17] Wyatt and Dashwood *et al* (n15) 921.

One Irish commentator has said of Article 3(2) TFEU that it represents an attempt to synthesise the previous case law of the CJEU on the issue of exclusive implied external competence.[18] The provision has been criticised on the basis that it "fail[s] to distinguish between a priori exclusivity and pre-emptive exclusivity (or pre-emption) [but] also conflates the separate questions of the existence of implied external competence and the exclusivity of that competence."[19]

Questions 3 and 4

I shall consider these questions together.

The authors of *Wyatt and Dashwood's European Union Law*[20] interpret Article 216 TFEU as recognising the competence of the EU to enter into international agreements in four instances:

- Where the Treaties so provide;
- Where the conclusion of an agreement is necessary in order to achieve, within the framework of the union's policies, one of the objectives referred to in the Treaties;
- Where the conclusion of an agreement is provided for in a legally binding Union act;
- Where the conclusion of an agreement is likely to affect common rules or alter their scope.[21]

The first category listed is self-explanatory. The second category is not without difficulty, in that it seems to expand the basis for recognising EU external competence recognised in *European Laying-Up Fund for Inland Waterway Vessels*. In that case, as discussed above, the CJEU said that the EU would be deemed to enjoy an external competence to conclude an international agreement where this was necessary to achieve an objective laid down in the treaties and where the treaties conferred a relevant legislative competence upon the EU. In referring solely to the achievement of an objective specified in the treaties, without mentioning the requirement that the EU should enjoy a legislative competence to ground the pursuit of that objective, Article 216(1) might be read superficially as "detaching the implication of external competence from the objectives

[18] Fennelly (n9) 114. See also, TC Hartley, The Foundations of European Union Law (8th edn, OUP, 2014) 185. For other articles briefly mentioning Article 3(2) TFEU, see R O'Gorman, '*Thomas Pringle v. Government of Ireland, Ireland and the Attorney General*' (2013) 50 *Irish Jurist* 221, 224-22.

[19] Marise Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in Dashwood and Maresceau (eds), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (CUP, 2008) 61, quoted in Fennelly (n9) 114.

[20] Wyatt and Dashwood *et al* (n15).

[21] Wyatt and Dashwood *et al* (n15) 918.

specifically authorised by a given legal basis." However, this would be an extremely radical innovation and it seems likely that the CJEU will choose instead to interpret Article 216(1) in accordance with its pre-existing jurisprudence, under which the identification of a relevant legislative competence was a pre-condition to the recognition of an implied external competence.

The third circumstance in which an EU external competence will be implied under Article 216(1) TFEU is broadly equivalent to the first category of external competence discussed in connection with Article 3(2) TFEU and the same concerns arise in relation to both provisions.

The fourth circumstance in which an implied EU external competence will be implied is equivalent to the third basis for recognising exclusive implied EU external competence under Article 3(2) TFEU and, as noted above, is intended to enshrine the *AETR* principle, which has already been considered above.

Cremona has stated that the purpose of Article 216(1) TFEU is to make it plain that "[a]lthough exclusive competence is necessary in some external policy situations, it does not need to be the norm."[22] Thus, on this view, while Article 3(2) TFEU expressly deals with situations in the which the EU has an exclusive competence to conclude an international agreement, the purpose of Article 216(1) TFEU is to make it plain that there are situations in which the EU's competence to conclude an international agreement will not be an exclusive one but, rather, will be shared with the Member States.

However, one difficulty with this theory on the interaction between Article 3(2) TFEU and Article 216(1) TFEU is that the two provisions are extremely similar. This means that the text of the TFEU itself is unlikely to be of any great assistance in delineating the respective spheres of the EU's exclusive and shared external competence .[23]

Another potential difficulty, which arises from the text of both Article 3(2) TFEU and Article 216(1) TFEU, is that they recognise the competence of the EU to enter into an international agreement where a competence to do so is conferred by, respectively, "a legislative act of the Union" or "a legally binding Union act." One might legitimately query how a provision of secondary EU legislation could possibly confer a competence on the EU to enter into an international agreement, where such a competence arose neither expressly nor by implication from the text of the treaties themselves.[24]

The views which Irish commentators have expressed concerning Article 216(1) TFEU mirror to a significant extent those in relation Article 3(2), namely

[22] Cremona (n19).

[23] For a detailed analysis of the close similarity between the two provisions, see Hartley (n10) 186.

[24] Wyatt and Dashwood *et al* (n15) 920.

that, while its objective may have been to bring clarity as to the scope of the EU's implied external competence to conclude international agreements, it may not prove to be entirely successful in that objective. David Fennelly has said that "while the Treaty's provisions were designed to increase certainty... and to achieve a clearer definition of competence, it remains to be seen whether this will be their effect."[25]

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

This Chapter addresses important questions regarding the negotiation and the conclusion of international agreements. As acknowledged at the outset of this exercise, difficulties arise in relation to access to information on Member States' positions and priorities in negotiations. This is particularly so in the case of live negotiations. Some of the questions which follow refer to issues which are currently at the negotiating table between the Member States, and will subsequently emerge for negotiation between the Institutions. In respect of inter-institutional issues, negotiations continue following the conclusion of the Inter-Institutional Agreement on Better Law-Making[26] (*"the IIA"*) in April 2016.

Under heading IV, Transparency and Coordination of the Legislative Process, paragraph 40 of the IIA relates to international agreements and states as follows:

"The three Institutions acknowledge the importance of ensuring that each Institution can exercise its rights and fulfil its obligations enshrined in the Treaties as interpreted by the Court of Justice of the European Union regarding the negotiation and conclusion of international agreements.

The three Institutions commit to meet within six months after the entry into force of this Agreement in order to negotiate improved practical arrangements for cooperation and information-sharing within the framework of the Treaties, as interpreted by the Court of Justice of the European Union."

At time of writing, follow-on negotiations on Paragraph 40 continue on how exactly the Institutions will interact. It appears that a Council position has yet to be finalised, and as a result, commentary on relative positions of Member States and of Institutions in this process will be rendered more difficult. This interinstitutional coordination, as it relates to international agreements, appears partly motivated by the need to strike a balance between the efficient and effective

[25] Fennelly (n9) 112 (internal quotation marks omitted). See also, Wyatt and Dashwood *et al* (n15) 909.
[26] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ:L:2016:123

coordination of the Union's institutions with the need to protect information confidential and/or sensitive to the negotiations at a given point in time.

To inform an examination of Ireland's approach at Union level to the conclusion of international agreements, it is also of benefit to consider its practice at the national level.

Various provisions of Bunreacht na hÉireann, the Irish Constitution, address international agreements and treaty making. The generally recognised principles of international law are accepted as a basis for Ireland's conduct of international relations[27] – which are exercised – exclusively – by or on the authority of the Government.[28]

In terms of parliamentary procedures, Article 29.5.1° provides that every international agreement to which the State becomes a party shall be laid before Dáil Éireann (the lower house of the Irish parliament). Although the Constitution allows for agreements of a technical and administrative character to be excluded from this requirement,[29] State practice has developed in such a way that all agreements are laid before the Dáil. In practice, this takes place when the State has consented to be bound by an international agreement and it has entered into force.

Of potential relevance at Questions 2.2 and 2.7 below, where an international agreement involves a charge on public funds, the Constitution requires approval by Dáil Éireann of the terms of an agreement in order for the State to be bound by that agreement.[30] In terms of Government decisions, after approval by Parliament – or as a first step in the case of an agreement which would not impose a charge upon public funds – a Government decision authorising signature, ratification or accession is sought.[31] A further Government decision authorising ratification is required in the case of international agreement approved subject to ratification.

Question 5

For the purposes of what follows, the understanding of special committee of Article 218 (4) TFEU is taken to be the current system in operation at the Council of the EU whereby specialised working parties composed of officials from the Member States and the Institutions and formed with a specific focus, geographical or thematic, with a view to carrying forward the work of the Council.

In general, Ireland holds a positive view on interaction between negotiator/negotiating team and the special committee of Article 218 (4) TFEU. While the Article 50 process is to a degree *sui generis*, insofar as it bears resemblance to

[27] Bunreacht na hÉireann (Constitution of Ireland), Article 29.3°.
[28] Article 29.4.1°.
[29] Article 29.5.3°.
[30] Article 29.5.2°.
[31] In accordance with Article 29.4.1° above.

normal operations under Article 218, Ireland's interaction with the Commission's Article 50 Taskforce is worthy of particular note. Brexit is an issue which is accorded the highest priority in Ireland. The close cooperation with Chief Negotiator, Michel Barnier, may be illustrated best, perhaps, in the succession of visits he has made to Ireland, meeting the Taoiseach (Prime Minister), Minister for Foreign Affairs and Trade, and being afforded the rare honour of addressing a joint committee sitting of Dáil and Seanad Éireann (the upper and lower houses of the Irish parliament).[32] As to the similarity in evidence between the work of the Article 50 committee and the work of other special committees, this must necessarily be understood as an endorsement – both by Member States and by Institutions – of the working methods of the Council under Article 218 and their effectiveness in preparing the work of the Council of Ministers.

There have been instances in which Ireland has raised issues regarding the scope and action of the negotiator. Ireland supported the UK in three separate actions for annulment against the Council. The cases addressed the choice of legal basis in Council Decisions on the position to be taken by the EU in amending provisions on the coordination of social security systems in the agreements with Switzerland[33], the EEA[34] and Turkey[35]. In each Council Decision, it appears that Ireland and the UK were the only Member States to vote against adoption.

In all cases, Ireland supported the argument that the appropriate legal basis for adopting such a decision was not Article 48 TFEU but Article 79(2)(b) TFEU, and advanced a case that by using the Art. 48 provision, the Council had denied the United Kingdom the so-called "Title V opt-in" right that it derives from Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the EU and FEU Treaties, not to take part in the adoption of that decision and not to be bound by it. The Court found that Article 79(2) TFEU cannot form the basis for the adoption of a measure such as the contested decision.

In the EEA case, the comment of the CJEU re choice of legal basis was definitive:

> "[S]uffice it to note that, in accordance with settled case-law, the legal basis for an act must be determined having regard to its own aim and content and not to the legal basis used for the adoption of other EU measures which might, in certain cases, display similar characteristics"[36]

[32] Exchange of views with Mr. Michel Barnier, Chief Negotiator of the Taskforce for the Preparation and Conduct of Negotiations with the United Kingdom, Dáil Éireann Debate, 11 May 2017, available at https://beta.oireachtas.ie/en/debates/debate/dail/2017-05-11/4/.

[33] C-656/11 *United Kingdom v Council*.

[34] C-431/11 *United Kingdom v Council*.

[35] C-81/13 *United Kingdom v Council*.

[36] C-431/11 *United Kingdom v Council*, §67, see also *inter alia*, Case C-94/03 *Commission v Council* [2006] ECR I-1, §50 and the case-law cited.

In the third case, Ireland noted the view of the Court in the two preceding cases, that the European Union was able, on the basis of Article 48 TFEU, to extend to third-country nationals provisions relating to the coordination of social security systems applicable within the European Union, that related to the specific nature of the EEA Agreement and the EC-Switzerland Agreement on the Free Movement of Persons. It sought to distinguish the Switzerland and EEA agreements from the EEC-Turkey Agreement and its Additional Protocol, which "do not permit Turkish workers and European Union workers to be placed on the same footing".[37]

Given that the arguments raised by Ireland in the cases above have not been accepted by the Court, the margin may be narrowing for future legal basis arguments arising out of Title V considerations.

Question 6

It seems that Ireland has not expressed a position on how to determine which provisions are to be applied provisionally, and no formal review of provisional application of EU international agreements has been officially conducted. Irish scholars do not appear to have targeted provisional application as a particular area of interest.

Some commentators have pointed to the risk of 'competence creep' in circumstances where provisional application of agreements not limited to areas of exclusive Union competence.[38] There is some suggestion that negotiators in certain cases have taken steps to attenuate such charge by proposing provisional application in areas of Union competence only.

As to provisional application of provisions in areas of Union-only competence, it appears to be the case that Council and Member States will more readily grant approval, on the basis that the content of all agreements will have already been subject to Government approval by the Member States. It appears that Ireland has active in examining whether proposals for provisional application are in compliance with Union competence, and have been supportive heretofore of provisional application of such proposals pending their ratification. With reference to parliamentary procedures at national level required by the Irish Constitution, issues are flagged at Question 2.7 below which may have a bearing on the provisional application of agreements which involve a charge on public funds.

In the context of Brexit, certain commenters have suggested that the negotiations on Brexit will have significant impacts on other agreements, such a CETA,

[37] C-81/13 *United Kingdom v Council* §28.

[38] See, for example, Vaughne Miller, 'EU External Agreements: EU and UK procedures,' UK House of Commons Library Briefing Paper Number CBP 7192, 28 March 2016, at p. 11.

which may be rendered inapplicable or only have provisional application until such time as the withdrawal of the UK is complete.[39]

Question 7

The authors have not found a distinct position on provisional application in these circumstances of non-ratification by a Member State of a mixed agreement. Experience in the past year suggests a predominance of political resolution over legal resolution in such cases, which may be favoured by the Council and the large part of Member States.

Question 8

There does not appear to be an expressed policy position on Article 218 (6) (a) (iii) and (iv) TFEU in Ireland's case, and no Irish scholarship, which the authors have been able to identify, specifically addresses the interpretation of these Treaty provisions.

Questions 9 and 10

These two questions shall be addressed together. Suspension of application or agreements under Article 218 does not appear to be an area of particular interest for Irish scholarship, and the authors are not aware of examples of decisions challenged and/or discussed strictly within the parameters described above.

In *Opinion 1/13,*[40] however, Ireland was one of approximately 20 Member States which made submissions for the CJEU's consideration regarding the role of the Commission in procedures for permitting new countries to join the Hague conference. The question put to the Court was whether or not the acceptance of the accession of third States to the Hague Convention on the Civil Aspects of International Child Abduction fell within the exclusive competence of the European Union in a post-Lisbon context.

A proposal had been brought by the Commission to Council for Decision, and it was opposed by the Council and a large majority of Member States – most of whom had "already accepted the accession to the convention of at least one third State."[41]

In finding exclusive competence in this area, in the face of opposition from the Council and some twenty Member States, Advocate General Jääskinen confirmed

[39] See, for example, Clifford Sosnow, Alexandra Logvin and Kevin Massicotte, 'The Brexit vote: its impact on the Canada-EU Comprehensive Economic and Trade Agreement and the UK's obligations under Comprehensive Trade and Economic Trade Agreement,' (2017) 12 *Global Trade and Customs Journal*, 125-130.

[40] Opinion 1/13 of Advocate General Jääskinen delivered on 13 May 2014, and adopted by the Court.

[41] Ibid, §3.

that the existing case-law of the Court applied to the new post-Lisbon provisions: it was "perfectly obvious that the case-law in question was taken into account by the authors of the FEU Treaty and that the criteria developed by the Court still apply, given the historic and regulatory context of the provision in question."[42]

Question 11

In *Parliament v. Council*[43] the CJEU recognised that the obligation, prescribed in Article 218(10) TFEU, to ensure that the Parliament is immediately and fully informed at all stages of the procedure for the conclusion of an international agreement also extends to the stages that precede the conclusion of such an agreement, and therefore covers, in particular, the negotiation phase.[44] In the more recent *Parliament v Council* Case C-263/14[45] the Court gave a thoroughgoing discussion of this obligation, in particular as it relates to CFSP, setting a high bar for the Council to fulfil in its provision of information to the Parliament. Ireland did not intervene or express a position on either case.

Recent developments indicate a high-level of political engagement on the agenda towards greater transparency in decision making and in negotiations. In his State of the Union address, President Juncker stated:

> "From now on, the Commission will publish in full all draft negotiating mandates we propose to the Council.
>
> Citizens have the right to know what the Commission is proposing. Gone are the days of no transparency. Gone are the days of rumours, of incessantly questioning the Commission's motives.
>
> I call on the Council to do the same when it adopts the final negotiating mandates."[46]

Council's obligation under Article 218 (10) TFEU represents one of the major items for negotiation currently on the table in the context of Paragraph 40 of the IIA. It appears, in this context, that Member States accept their obligations to keep the Parliament "immediately and fully informed", as has been interpreted by the Court. Their task now appears to be to negotiate within those parameters a standard timeframe for the provision of information by the negotiator to the special committee and to the Parliament, which allows for the integrity of

[42] Ibid, §69.
[43] Case C-658/11.
[44] Case C-263/14, §86.
[45] Case C-263/14 *European Parliament v Council of the European Union*.
[46] President Jean-Claude Juncker, *State of the Union Address 2017*, Brussels, 13 September 2017, available at http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm. Brussels, 13 September 2017.

the negotiations to be preserved and for confidential and sensitive information to be protected.

As regards participation by national parliaments, no additional role appears to be foreseen. In Ireland, normal Oireachtas (parliamentary) scrutiny procedures apply, as provided for in the European Union (Scrutiny) Act, 2002. In terms of parliamentary role in the Irish context, therefore, only where there is a charge on public funds evident in an international agreement would full treatment be had. In this case, a Dáil motion would be required prior to the signing of the agreement, as required by the Constitution. There is the prospect of high procedural burden and/or delay at national level in cases where the provisional application of an agreement would entail a charge on public funds, then the Dáil would be required to approve it before it is provisionally applied.

Gavin Barrett of University College Dublin has discussed elsewhere[47] the dynamic of expanding powers of the European Parliament in the following terms:

The simultaneous *"parliamentarisation"* at the Union level can be regarded as a response to the original marginalisation of Parliaments (de-parliamentarisation) in the European integration process, and particularly of national legislatures in favour of the executives.

However, as the present case regarding Article 218 illustrates, a concomitant expansion of the role of national parliaments does not necessarily follow.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

The Irish Constitution is dualist in nature, as evidenced by Article 29. International and national law are separate, and international law only has effect in Ireland when it is incorporated into national law. In Ireland, this would be by way of legislation or an amendment to the Constitution. The law is absolutely clear that an international agreement cannot prevail over domestic law, save to the extent that such agreements have been made part of Irish domestic law: *In re O Laighléis*.[48] There have been some limited oblique references to the status of international agreements concluded by the European Union in the context of attempts to rely on international agreements in the Irish courts.

In *D.F. v. Garda Commissioner & ors (No.3)*[49] the plaintiff claimed damages under *inter alia* the United Nations Convention on the Rights of Persons with

[47] See, for example, Dr Gavin Barrett, *Written evidence to the UK House of Lords EU Select Committee on The Role of National Parliaments in the European Union*, 27 September 2013, available at https://www.parliament.uk/documents/lords-committees/eu-select/Role%20of%20national%20parliaments/national-parliaments-evidence.pdf.

[48] [1960] IR 93.

[49] [2014] IEHC 213.

Disabilities 2006 arising out of his arrest by the Irish police. The UN Convention has not been incorporated into Irish law under the provisions of Article 29 of the Irish Constitution. Hogan J, in the Irish High Court, acknowledged that the EU has by virtue of Decision 2010/48 approved the UN Convention, so that it is part of the European Union legal order. He also acknowledged that the Court of Justice further confirmed that Directives dealing with employment rights and non-discrimination (such as the Equal Treatment Directive 2000/78/EC) must be interpreted in the light of that Convention and cited *HK Danmark/Ring*[50] in this regard. However, Hogan J noted that, insofar as the UN Convention is justiciable at all in an Irish court in the absence of legislation giving effect to that Convention as part of the domestic law of the State, it can be only so insofar as the matter raised is within the scope of application of European Union law. The circumstances of the case involved the application of a domestic statute to a set of facts which are wholly internal to Ireland, and thus no question of the application of European Union law arose.

Similarly, the same judge, this time in the Irish Court of Appeal, was called on to consider the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (**"***the Aarhus Convention***"**), in *McCoy & Anor v. Shillelagh Quarries Ltd & Ors.*[51] The plaintiff sought a protective costs order under the provisions of the Environment (Miscellaneous Provisions) Act 2011 and the question for determination by the Court was to what extent the interpretation of these provisions should be informed by the provisions of the Aarhus Convention. Section 8 of the 2011 Act provided that judicial notice should be taken of the terms of that Convention. Hogan J again acknowledged that the Aarhus Convention has been subsumed into EU law (either by virtue of the fact that it is an international agreement adopted by the EU or its provisions have been incorporated into primary EU legislation such as the new consolidated version of the Environmental Impact Assessment Directive 2011/92/EU), and that an Irish court would be obliged, in an appropriate case, to give effect to the terms of that Convention as part of these wider EU law obligations. Hogan J held that it could not be said that either the existence of the Aarhus Convention in general or specific articles thereof could or should decisively influence the interpretation of the Irish legislation.

Question 13

While there have been no specific discussions, the Irish High Court acknowledged the recent case law of the Court of Justice on the direct effect of inter-

[50] Case C-335/11; [2013] 2 CMLR 21.

[51] [2015] IECA 28.

national agreements in *Swords v. The Minister for Communications, Energy and Natural Resources & ors.*[52] The plaintiff had argued that Article 9(4) of the Aarhus Convention was directly effective and that the Irish court was required, as a matter of EU law, to interpret the domestic rules in relation to costs so as to ensure that it will not be prohibitively expensive to bring proceedings seeking to challenge decisions of national authorities in the area of environmental policy. However, the Supreme Court concluded that it is unnecessary to express a view on the plaintiff's argument as the State had conceded that it would not seek costs from the plaintiff.

Question 14
No.

Question 15
There are no specific control measures.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16
i. Foreign Direct Investment ("FDI")
The attraction of foreign direct investment has been a cornerstone of Irish economic policy since the dismantling of protectionist policies, with the adoption of the First Programme for Economic Expansion in 1958.[53]

Ireland has enjoyed significant success in attracting foreign direct investment. In December 2016, FDI in Ireland was valued at €25 billion.[54] The Industrial Development Authority (**"IDA"**) estimates: that 174,448 workers rely upon FDI directly for their employment; that it supports another 122,000 jobs indirectly; that FDI supports exports to the value of €124.5 billion annually; that corporation tax arising from FDI contributes €2.8 billion to the national exchequer; and that FDI supports €1.4 billion in investment in research and development annually. In short, FDI is of central importance to the Irish economy and the continued attraction of FDI is a key priority of government policy.

The definition of FDI used by Irish officials excludes portfolio investments. FDI means the acquisition of ten per cent or more of the voting shares of a direct investment enterprise located in another economy or acquiring less than ten per cent and still maintaining an effective voice in management of the direct

[52] [2016] IEHC 503.
[53] TK Whitaker, *Interests* (Institute of Public Administration, 1983) 74.
[54] https://tradingeconomics.com/ireland/foreign-direct-investment [visited at 18:31 on 29 October 2017]

investment enterprise. By way of contrast, equity investments worth less than ten per cent of the voting shares of a direct investment enterprise are classified as portfolio investments.[55]

ii. TRIPS

As regards the agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), the judgment of the CJEU in *Opinion 1/94*[56] held that not all aspects of that agreement came within the exclusive competence of the Union. However, since the ratification of the Lisbon Treaty, the "commercial aspects of intellectual property law" are now within the exclusive competence of the EU.[57]

The scope of the CJEU's jurisdiction in relation to TRIPS has given rise to a somewhat inconsistent jurisprudence. In *Hermes*,[58] an issue arose concerning whether the CJEU had the jurisdiction to interpret Article 50 in a case relating to trademarks. Article 50 is a procedural provision, dealing *inter alia* with provisional measures which may be obtained to protect one's rights under TRIPS. Several Member States argued that since the trademarks at issue were national trademarks the CJEU did not have jurisdiction. The EU had introduced legislation governing EU trademarks prior to the ratification of TRIPS. The court held that, since the EU was a party to TRIPS, and since Article 50 could apply to EU trademarks, the court held that it had jurisdiction to interpret Article 50. The court justified this assertion of jurisdiction to determine the effect of Article 50 in the domestic legal orders of the Member States on the basis of the need for uniformity.[59]

In *Parfums Christian Dior*,[60] the CJEU held that it had the jurisdiction to interpret Article 50 of TRIPS in its application to industrial designs where, unlike the trademark context, there was no EU law governing that area.

A somewhat different approach was adopted by the CJEU in the case of *Merck Genéricos*.[61] The CJEU began by affirming that it had jurisdiction to interpret the obligations of the EU under a mixed agreement, *i.e.* one concluded by both the EU and the Member States with a third party. However, the court also stated

[55] Mary Everett, 'Foreign Direct Investment: An Analysis of its Significance' https://centralbank.ie/docs/default-source/publications/quarterly-bulletins/quarterly-bulletin-signed-articles/foreign-direct-investment.pdf?sfvrsn=6.[visited at 19:57 on 29 October 2017]

[56] [1994] ECR I-5267.

[57] For a recent decision in relation to this issue, see , C-389/15 *Commission v. Parliament*, where it was held that the EU enjoyed exclusive competence to conclude revised Lisbon Agreement on Appellations of Origin and Geographical Indications, an international agreement in the field of intellectual property.

[58] Case C-53/96 *Hermes* [1998] ECR I-3603.

[59] Case C-53/96 *Hermes* [1998] ECR I-3603, §§28-32.

[60] Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior* [2000] ECR I-11307.

[61] Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2006] ECR I-7001.

that it did not have jurisdiction to determine the effects of a mixed agreement in the internal law of a Member State, if there was no EU legislation in the area. Therefore, in the case before it, the court held that it did not have jurisdiction to interpret Article 33 TRIPS, dealing with patents, since there was no EU legislation in that area. Since there was no EU legislation in the area of patents, the court held that it did not fall within the field of EU law.[62]

It is clear, therefore, that not all aspects of TRIPS comes within the scope of EU law.

Question 17

Since the ratification of the Lisbon Treaty the EU has enjoyed exclusive competence over the commercial aspects of FDI (see, Article 207 TFEU).[63]

However, notwithstanding the seemingly unambiguous ouster of a residual Member State role in the negotiation and conclusion of international investment agreements, the issue of whether Member States may still conclude BITs of their own is not a straightforward one. Under Article 207(6) TEU, the *exercise* of the competences conferred by Article 207 TFEU must "not affect the delimitation of competences between the Union and the Member States." Therefore, international investment agreements are perhaps best characterised as mixed agreements, requiring the *imprimatur* of both the EU and the Member States.[64]

This was the view expressed by the CJEU in *Opinion 2/15* on the Free Trade Agreement between the EU and the Republic of Singapore, where it was held that, since international investment agreements incorporating ISDS oust the jurisdiction of the domestic courts, and since types of investment other than FDI fall within an area of competence shared by the EU and the Member States, the agreement in issue was a mixed agreement.[65]

It has been suggested that this has the potential to create conflict with existing bilateral investment treaties ("BITs") into which Member States have entered. Specifically, it has been suggested that such tensions could emerge if the EU enters into international agreements with third countries for the protection of FDI containing provisions similar to those contained in BITs into which Member

[62] Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2006] ECR I-7001, §§40 and 46. For a useful discussion of these issues and cases, see Fennelly (n9) 128-130, upon which the authors have heavily relied.

[63] The definition of FDI under the TFEU will ultimately be a matter for elaboration by the CJEU. However, it is worth noting that the definition contained in Annex II to Regulation 184/2005 on Community statistics concerning balance of payments, international trade in services and foreign direct investment is consistent with the definitions used by Irish officials. See, Christian Pitschas, 'The Treaty of Lisbon and the 'new' common commercial policy of the European Union' (2010) *International Trade Law and Regulation* 37, 39.

[64] Pitschas (n34) 39-40.

[65] *Opinion 2/15*, §243-245, §292.

States have already entered. This is a matter which will ultimately require clarification in the jurisprudence of the CJEU.

However, it is not a matter of any great significance to Ireland, in circumstances where Ireland had not concluded a single bilateral investment treaty by the time the Treaty of Lisbon was ratified.[66]

Question 18

i. TTIP

The Trans-Atlantic Trade and Investment Partnership (**"**TTIP**"**) envisaged the establishment of a system for the resolution of disputes arising from that agreement, which is known as Investor State Dispute Settlement (**"**ISDS**"**). ISDS is the arbitration of investment disputes between companies and the states in which they have invested. Although it has given rise to significant controversy in the context of the TTIP proposal, the ISDS system is in widespread use in bilateral investment treaties ("BITs") entered into by the EU Member, which currently number approximately 1,500.

The following are the principal arguments made by critics of ISDS:

- that the arbitration is done privately rather in courts established by law;
- that there is no appeal from determinations of arbitrators;
- that arbitrators in this context are likely to be biased in favour of investors;[67]
- and that providing a mechanism by which states may be sued is likely to prejudice the interests of those states.

In response to public disquiet over the mooted ISDS procedure, the Commission conducted a public survey, which received the largest ever number of responses from members of the public, most of which were hostile to ISDS. This led the Commission to decide that the ISDS issue would be postponed to the final phase of the TTIP negotiations and to give public assurances that ISDS would not come into effect without guarantees being put in place to ensure that vital public interests would not be compromised by ISDS. In addition, the Commission has committed itself to improving transparency in the ISDS process, specifically by adopting the UNCITRAL Transparency Rules, which were incorporated into CETA.[68]

[66] Julie A. Maupin, 'Where Should Europe's Investment Path Lead? Reflections on August Reinisch "*Quo Vadis* Europe?" (2013) 12 *Santa Clara J Int'l L* 183, 185.

[67] Although Annex I of the Dispute Settlement Chapter of CETA contains express provisions designed to deal with potential conflicts of interest.

[68] Catharine Titi, 'International investment law and the European Union: towards a new generation of international investment agreements' (2015) *European Journal of International Law* 639, 659.

The Commission has also proposed the establishment of an investment court system on the model of that in CETA.[69]

It has been suggested that Ireland could prove to be an excellent jurisdiction in which ISDS might take place. Brian Hutchinson has said:

> "As a small country with a long, substantial and successful record of receiving foreign direct investment; a proud tradition of neutrality; a common-law English speaking legal system; and a healthy respect for the rule of law and the rights of the individual and the public interest; as well as having the modern legal structures and personnel to support arbitration; Ireland should be at the forefront of offering a venue for 21st century ISDS and/or a venue for ISDS appeals. This is a message which needs to be spread; and initiatives put in place to ensure that Ireland can deliver its potential in this important field."[70]

ii. CETA

The EU-Canada Comprehensive Economic and Trade Agreement ("CETA") did not follow the traditional ISDS system of dispute resolution. Instead, it envisages the establishment of an Investment Court System ("ICS"). In answer to the criticisms of ISDS, such as those set out above, CETA contains provisions for the protection of investments, while also enshrining the right of states to regulate foreign investments in the public interest (Article 8.9, CETA). Under CETA, there will be will a permanent investment tribunal and an appellate tribunal. Both will hold their proceedings in public and will publish documents submitted to them. They will be permanent tribunals manned by independent and professional judges nominated by the EU and Canada, rather than being assembled on an *ad hoc* basis, as under ISDS. The members of both tribunals will have the same qualifications as members of the International Court of Justice.[71] In addition, under ICS a state will not be compelled to change legislation; the most which may be required is the payment of compensation, the amount of which will be limited to losses actually suffered.[72]

[69] Markus Krajewski and Rhea Tamara Hoffmann, 'The European Commission's Proposal for Investment Protection in TTIP' http://library.fes.de/pdf-files/bueros/bruessel/12662.pdf [visited on 30 October 2017 at 13:29]

[70] See, Brian Hutchinson, 'Editorial' (2015) 22 *Commercial Law Practitioner* 30, upon which the authors have drawn heavily in this part of the report.

[71] Article 8.27-8.29, CETA.

[72] Article 8.39, CETA.

Question 19

i. CETA

CETA seeks to define precisely the standard of treatment to which investors are entitled. Article 8.10 thereof provides that the EU and Canada will only be liable to investors where there has been:

- Denial of justice in criminal, civil or administrative proceedings;
- A fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
- Manifest arbitrariness;
- Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- Abusive treatment of investors, such as coercion, duress and harassment.

CETA also defines investors' entitlement to rely on legitimate expectations narrowly, as only covering circumstances where the state has made a specific and direct representation to the investor concerned.[73]

The term "indirect expropriation" is similarly narrowly defined:

> "Legitimate public policy measures taken to protect health, safety or the environment do not constitute indirect expropriation. Only measures which are manifestly excessive in light of their objective (a rare occurrence) might amount to indirect expropriation. Indirect expropriation can only occur when the investor is substantially deprived of the fundamental attributes of property such as the right to use, enjoy and dispose of its investment; A detailed case-by-case analysis is introduced to determine whether an indirect expropriation has taken place. The sole fact that a measure increases costs for investors cannot give rise in itself to a finding of expropriation."[74]

CETA does not protect so-called *"shell"* or *"mailbox"* companies. Article 8(1) CETA states that such companies shall not be protected.

In addition to these substantive limitations on the liability of states to investors under CETA, there are also procedural limitations on the claims which investors can bring under CETA. Specifically, only concerns relating to non-discriminatory treatment and investment protection can be brought under CETA. All other claims arising under CETA must be brought by either the EU or Canada, *e.g.* claims involving the exclusion of a foreign investor (Article 8.18, CETA).[75]

[73] Krajewski and Hoffmann (n68).

[74] http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf. See also, Annex 8.12; Annex 8-A, CETA.

[75] http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.

ii. TTIP

The Commission has proposed a system of Member State liability analogous to that found in CETA[76] and provides that a state shall not be taken to have agreed not to alter its legal or regulatory framework.

Specifically, Article 3 of the Commission's draft TTIP, published in September 2015, provides as follows:

> "Article 3
>
> Treatment of Investors and of covered investments
>
> 1. Each Party shall accord in its territory to covered investments of the other Party and investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 5.
>
> 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or a series of measures constitutes:
>
> (a) denial of justice in criminal, civil or administrative proceedings; or
>
> (b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or
>
> (c) manifest arbitrariness; or
>
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
>
> (e) harassment, coercion, abuse of power or similar bad faith conduct; or
>
> (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."

As can be seen, this proposal essentially replicates the relevant provisions of CETA. The concept of *"legitimate expectation"* under the Commission's TTIP draft also essentially tracks that contained in CETA,[77] as does the definition of "*indirect expropriation*".[78] The Commission has also proposed that the tactical restructuring of an enterprise's activities for the purpose of bringing it within TTIP, such as the establishment of shell companies, should exclude the enterprise concerned from the protections of TTIP.[79]

iii. Irish Commentary

TTIP and CETA have not generated a significant amount of legal commentary in Ireland and the legal treatments of those agreements which have so far been

[76] See, Article 2(1) of Commission Proposal

[77] Commission Draft TTIP, Chapter 2, Article 3.

[78] Commission Draft TTIP, Chapter 2, Annex I.

[79] 'Questions and answers: public online consultation on investor protection in TTIP' 27 March 2014.

published have not engaged with the question of Member State or EU liability for breach of their provisions.

Question 20

Article 207 TFEU provides in relevant part as follows:

> "1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. *The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*"

Article 21 TEU sets out what the principles and objectives of the EU's external actions are and provides in relevant part as follows:

> "1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law..."

Titi argues that Article 21 TEU is one of the reasons why the EU has been more hospitable to host state regulation, in its negotiation of international investment agreements, than Member States had been previously. She says:

> "In contrast with EU FTAs, which are generally cognizant of the state's right to regulate, EU member concluded around 1,400 BITs, a number that, as mentioned, amounts to half of the world's BITs state BITs contain some of the last vestiges of international economic law's laissez-faire liberalism. They are for the most part short instruments, one-sidedly focused on investment protection, and do not incorporate exceptions relating to essential security, human rights, the environment or other public interests. "[80]

She goes on to say that, because of the pro-regulatory stance of the EU Commission, the newer investment treaties have *"little in common with the traditional BITs of the member states."*[81] She states that the TTIP and CETA agreements

[80] Titi (n67) 645.
[81] Titi (n67) 650.

permitted host states a degree of *"regulatory flexibility."* In that regard she specifically draws attention to provisions in these and other recent draft investment agreements in which the investor protection provisions therein are stated to be without prejudice to the entitlement of the State to adopt appropriate regulatory measures to safeguard important public policy interests.[82]

Question 21

i. The Council

As discussed above, the provisions governing the negotiation of international agreements by the EU are contained in Articles 207 and the general provisions of Article 218 TFEU. Article 207(4) provides that the Council shall act by qualified majority vote in the both the negotiation and conclusion of international agreements. There are a number of exceptions to this.

Article 207(1) TFEU deals with trade agreements in relation to cultural and audiovisual services and provides for a unanimous vote of the Council for the approval of such agreements, where they *"risk prejudicing the Union's cultural and linguistic diversity."* Pitschas has argued that the criterion of prejudice to cultural and linguistic diversity is a vague yardstick, since it would require a court, in determining whether the exception applied, to form a view concerning highly contingent and uncertain future events, something which is likely to be impossible to do, especially before the agreement in issue has even entered into force.

Article 207(2) TFEU deals with trade agreements in relation to social, education and health services. It provides for unanimity in the Council in the negotiation and conclusion of such agreements where *"where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them."* The criticisms which Pitschas makes of the exceptions provided for in Article 207(1) TFEU apply *a fortiori* to Article 207(2) TFEU.

Article 207(4) provides that agreements in relation to trade in services, agreements in relation to the commercial aspects of intellectual property, and agreements concerning FDI, are required to be adopted by unanimous vote in the Council, provided that unanimity is also required for the adoption of internal rules in the area concerned.

There is no express provision in Article 207 governing the negotiation and conclusion of mixed agreements, unlike its predecessor provision, ex-Article 133(6) of the EC.

[82] Titi (n67) 654-655.

ii. European Parliament ("EP")

Article 207(3) TFEU requires the Commission to report regularly to the EP concerning the progress of negotiations of trade agreements, although the EP has no entitlement to direct the Commission how to conduct such negotiations.

Article 218(6)(a) TFEU states that the consent of the EP is required for the conclusion of:

> "(i) association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required."

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

Ireland has opted out of Regulation No 539/2001 on the list of third countries whose nationals are subject to the visa requirement. This seems to be a good example of how Protocol No. 23 and article 3(2) TFEU interrelate. As Ireland is an island, the risk of unlawful secondary movements resulting from differences between non-visa required nationals for the purposes of entry to other member states who have opted in to this Regulation and non-visa required nationals under Irish law is lower than it might be if there was a land connection between Ireland and such other member states.

The United Kingdom also opted out of this Regulation and the Common Travel Area between Ireland and the United Kingdom has until now been more significant in influencing the list of non-visa required nationalities under Irish law. The result of the Brexit negotiations may have an impact upon this *status quo*.

Ireland has entered into bilateral visa waiver agreements with the following countries: Argentina, Czechoslovakia, Israel, Poland, Hungary, the Republic of Korea, Mexico, Japan, Spain, Greece, Finland, Turkey, Portugal, Monaco, Luxembourg, Iceland, Italy, Norway, Belgium, Sweden, Netherlands, Denmark, Switzerland, France.[83]

[83] See the Department of Trade and Enterprise, Treaty series page: https://www.dfa.ie/our-role-policies/international-priorities/international-law/find-a treaty/treatyresults/?its_no_1=&its_no_2=&search_depository=&search_keywords_title=visas&search_party=.

Schedule 1 of the Immigration Act 2004 (Visas) Order 2014 (S.I. No. 473 of 2014) as amended sets out classes of non-nationals specified as classes the members of which are not required to be in possession of a valid Irish visa when landing in the State on a unilateral basis under Irish law.

Question 23

Ireland has opted out of Directive 2013/32/EU on common procedures for granting and withdrawing international protection, however it opted in to the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, which contains similar safe third country standards in article 27 (except that there is no express safeguard against removal to the third state in question on the basis of a risk of serious harm as defined in Directive 2011/95/EU). Ireland has opted into the Dublin III Regulation 604/2013, which provides at article 3(3) that *"any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU."* While there is no judgment on how this discrepancy must be interpreted in Irish law, it can create problems in practice for applicants subject to the Dublin III system in Ireland.

The concept of a "super safe" third country is provided for in article 36 of Directive 2005/85/EC. This article differs from article 39 of Directive 2013/32/EU in two principal respects: first, the former does not permit an applicant to challenge the application of the concept of European safe third country on the grounds that the third country concerned is not safe in his or her particular circumstances. Second, in the former Directive, the designation of super safe countries is by way of Council Decision adopted by qualified majority on a proposal from the Commission and after consultation of the European Parliament. Article 36(3) of Directive 2005/85/EC requiring the adoption of a common list of European safe countries by the Council was, however, annulled by the European Court of Justice.[84] Consequentially, no common list of European safe third countries has been adopted and article 36 cannot be applied.

There is no national case law on the interpretation and application of the safe third country concept. As article 36 of Directive 2005/85/EC can no longer be applied (and Ireland has not opted into Directive 2013/32/EU), the concept of European safe third country *("super-safe third country"*) is not applicable.

Under Irish law, the European Communities (Asylum Procedures) Regulations 2011 amended s. 22(5) of the Refugee Act 1996, which governed designation of safe third countries. The Refugee Act 1996 was repealed and the 2011 Regulations revoked by the International Protection Act 2015. While s.

[84] C-133/06 *European Parliament v. Council of the European Union*.

72 provides for the designation of safe countries of origin, there are no provisions in respect of safe third countries.

In respect of the approach of national academic literature, there has been some commentary on the concept of 'safe third country' as it applied prior to the entry into force of the 2015 Act.

Mullally made observations on the implications of the *"safe third country"* provisions in the Irish Immigration Act 2003:

> "Anticipating the Procedures Directive, the changes introduced by the 2003 Act firmly entrenched safe third country and safe country of origin practices in Irish asylum law. In the Refugee Act (as amended), the concept of a safe third country' is referred to in the admissibility provisions and in provisions for 'prioritising' and accelerating asylum claims. The transposition of the Procedures Directive into Irish law may lead to some clarification of current practice in relation to safe third country practices. As presently drafted, there is considerable scope for inconsistencies between the safe third country concept as used in admissibility procedures and in accelerated or prioritized procedures.
>
> The reduction of rights of appeal in safe third country and Dublin II cases, provided for in the Procedures Directive is also anticipated in the 2003 Act. Appeals in such cases do not have suspensive effect and in the application of Dublin II provisions, reduced time limits apply. Further reductions in rights of appeal and time limits are provided for in the provisions on special accelerated procedures, which allow only a four-day time limit on appeals. These provisions allow for the application of specific 'border procedures' and the so-called 'super- safe' third country concept employed in the Procedures Directive.
>
> ...
>
> The erosion of procedural safeguards witnessed in the 2003 Act will not be checked by the adoption of the Procedures Directive. Indeed, transposition of the Directive could bring further erosion of procedural safeguards and a continuing diminution of due process in Irish asylum law. The recently published Scheme for an Immigration, Residence and Protection Bill retains the use of accelerated procedures, reduced rights of appeal and stringent time limits introduced by the 2003 Act. Given the increased barriers to access to the asylum process, accelerated procedures will become the norm rather than the exception, with the attendant risk of refoulement that such change brings. Introducing the Scheme for the Bill, the Minister commented that this Bill would lead to a 'radical overhaul' of the immigration process."[85]

[85] Siobhan Mullally, 'Asylum procedures: recent developments in EU law' (2006) 11 *The Bar Review* 212-216; see also Siobhan Mullally, 'Accelerated Asylum Determination Procedures: Fair And Efficient?' (2001) 23 *Dublin University Law Journal* 55-70.

In the particular context of separated children, Smyth sets out the following relevant passage:

> "Safe third country
>
> The "safe third country" concept involves denying an applicant admissibility to the asylum procedure on the basis that he is properly the responsibility of a third State with which he has some connection, and which is considered "safe" for asylum seekers. The applicant is then transferred to that country for refugee status determination purposes. The SCEP's general prohibition on the use of the safe third country concept in the context of separated children is less absolutist than it first appears. Elsewhere in the SCEP Statement, reference is made to the desirability of reuniting the separated child with family members in a European third country if this would meet the best interests of the child, or even a non-European third country, if this was a safe place for the child. The apparent clash between the general prohibition of "safe third country" and the promotion of the concept as a tool of family reunification highlights the fact that some modes of safe third country are inimical to separated children, while others may be beneficial.
>
> Ireland's current practice in the area of "safe third country" is governed by an EC regulation on the matter. Council Regulation (EC) No.343/2003 assumes that all Member States are "safe third countries". The assumption is based on the fact that the EU is in the process of developing a common asylum policy that meets minimum international standards. In the case of unaccompanied minors, two rules apply. Article 6 of Council Regulation (EC) No.343/2003 provides that where the applicant is an unaccompanied minor, the Member State where a member of the minor's family is legally present is the State responsible for examining the asylum application, provided that this is in the best interests of the minor. Family members of unaccompanied minors are listed, for this purpose, as the father, mother or guardian (and guardian is understood as an adult responsible for the child whether by law or by custom). Clearly, this is a beneficial mode of safe third country.
>
> Article 6 also provides that in the absence of a family member it is the Member State where the minor first lodged his application that is responsible for determining his status. Prima facie, this is an inimical mode of "safe third country." There is no reference to the best interests of the child. Moreover, the designation of all other EU member States as "safe" for separated children does not withstand scrutiny. EU asylum harmonisation is still a distant objective and there are large disparities in asylum standards between Member States. These disparities are even greater in the context of separated children, as evidenced by the fact that some countries deny separated children access to the asylum procedure. However, Ireland is not obliged to apply this mode of safe third country to separated children because Art.3.2 of the

> Regulation provides that any Member State can chose to process an asylum application that is properly the responsibility of another Member State."[86]

There is a clear link between, on the one hand, the policies and practices relating to the concept of a safe third country and, on the other hand, the extraterritorial control of immigration. While in the latter case, the aim is to prevent the arrival of immigrants to the territory of the European Union or the member states thus avoiding substantive legal oversight of the respect for human rights guarantees, the former is a mechanism whereby an immigrant (more specifically an applicant or international protection) may be removed to an extraterritorial location with the same effect. For this reason, it is crucial that rigorous safeguards against wrongful removal, by way of the application of the safe third country concept, are in place and enforced.

Question 24

The Global Approach to Migration and Mobility (GAMM) focused on migration management rather than control. Commission Communication COM(2011) 743 final observed that "despite the current economic crisis and unemployment rates, European countries are facing labour market shortages and vacancies that cannot be filled by the domestic workforce in specific sectors, e.g. in health, science and technology. Long-term population ageing in Europe is expected to halve the ratio between persons of working age (20-64) and persons aged 65 and above in the next fifty years. Migration is already of key importance in the EU, with net migration contributing 0.9 million people or 62 % of total population growth in 2010. All indicators show that some of the additional and specific skills needed in the future could be found only outside the EU ... In order to reap the benefits that well-managed migration can bring and to respond to the challenges of changing migration trends, the EU will need to adapt its policy framework". By way of a rights-based approach, the idea seemed to be to increase possibilities for mutually beneficial lawful migration from third countries to the EU.

Secondary EU legislation providing for such lawful immigration grew from Directive 2003/86 on the right to family reunification and Directive 2003/109 concerning the status of third-country nationals who are long-term residents to Directive 2011/98 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training

[86] Ciara Smyth, 'Refugee Status Determination of Separated Children: International Developments and the Irish Response Part II—The asylum procedure', (2005) *Irish Journal of Family Law* 21-27.

or voluntary service, Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research and Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast). However, among others, the European Parliament has notably called for more progress towards common rules on immigration policy which is not limited to highly skilled workers (European Parliament resolution of 22nd April 2009 on a common immigration policy for Europe, 2010/C 184 E/06, para. 18). Ireland has not opted into any of these measures to facilitate lawful migration and so the GAMM could not have had any practical impact in Ireland.

The new Partnership Framework with third countries seems to mark a shift from migration management to a focus on migration control. Commission Communication COM(2016) 385 final makes the new objective clear: that to respond to unlawful migration in a meaningful way, "the EU must use all means available and set itself clear priorities and measurable objectives. Development and neighbourhood policy tools should reinforce local capacity-building, including for border control, asylum, counter-smuggling and reintegration efforts. All actors – Member States, EU institutions and key third countries – need to work together in partnership to bring order into migratory flows". The emphasis is markedly on border control mechanisms and preventing the arrival of immigrants to the territory of the EU. The short term objectives are stated to be:

- To save lives in the Mediterranean sea;
- To increase the rate of returns to countries of origin and transit;
- To enable migrants and refugees to stay close to home and to avoid taking dangerous journeys.

Longer term objectives include credible and effective returns in order to break the business model of smugglers and increased aid to countries of origin to address the root causes of migration.

While the measures in respect of lawful migration to the EU remain in place, there does not seem to be any momentum or political will to expand on these. Unlawful immigration is often for economic reasons and there is no mechanism in place to allow such migrants enter the EU territory simply in order to work in primary or secondary employment. Until such secondary legislation is adopted and the possibilities for lawful migration are expanded, those attempting to enter the EU for this reason will by definition always be engaging in unlawful migration. Instead of expanding lawful means, the EU has turned its focus to increasing the efficiency of border controls through such measures as Regulation (EU) 2016/1624 on the European Border and Coast Guard, Regulation (EU) 2016/399

on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) and the EU-Turkey Statement 2016.

In respect of the question as to whether the new Partnership Framework with third countries displaces and replaces this global approach, to a significant degree it does on a political level. While mechanisms for lawful entry remain in place, the political drive going forward is for more control rather than more lawful migration.

Question 25

Ireland has opted out of Regulation 2016/1624 on the European Border and Coast Guard. Article 79(3) TFEU is permissive in its terms, providing that the Union *may* conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States. Whether or not the practice of member states concluding readmission agreements with third countries is in accordance with EU law depends more so on the provisions of article 3(2) TFEU. In light of the continuous development of the CEAS, it seems that the conclusion of readmission agreements with third countries is now necessary to enable the Union to exercise its internal competence. Furthermore, the conclusion of such agreements is likely to affect or alter the scope of the common rules of the CEAS. To this extent, there is a strong argument to contend that the Union has come to acquire exclusive competence in this field which would render the practice of member states in concluding readmission agreements with third countries of dubious standing under EU law.

If it was found to be the case that the EU did have exclusive competence for the adoption of readmission agreement with third countries, this would obviate the need to consider the complex issue of how on the one hand, readmission agreements concluded between the EU and a third country and, on the other hand readmission agreements concluded between a Member State and the same third country would relate.

Since July 2014 Ireland participates in 12 EU Readmission Agreements, with Hong Kong, Sri Lanka, Russia, Pakistan, Macao, Albania, Bosnia, Macedonia, Montenegro, Moldova, Serbia and Georgia. Ireland up to this point has never returned anyone on the basis of its EU Readmission Agreements. While there are only small numbers of citizens from the countries concerned taking up residence in Ireland, these agreements are viewed in a wider EU context as an important sign of solidarity with other member states and a closer alignment of Ireland's irregular migration policies and priorities with other EU states.[87]

[87] Written Answers – Readmission Agreements: Motions. Joint Committee on Justice, Defence and Equality Debate, Wednesday, 20 February 2013. Available at www.oireachtas.ie/parliament.

Ireland concluded a bilateral agreement with Nigeria in relation to immigration matters, including readmission in 2001 but has not yet been formally ratified by the Nigerian government. While the agreement is not binding on either State, both sides are "operating in the spirit of agreement, particularly in the area of repatriation."[88]

Ireland has no formal bilateral agreements other than the agreement with Nigeria, however informal readmission arrangements are in place with a number of third countries.

The Annual Program 2013 supported through the European Return Fund encouraged actions aimed at increasing cooperation with third countries to which Ireland has traditionally had difficulty in returning nationals due to difficulties in securing travel documents. These countries include Albania, Algeria, Bangladesh, Cameroon, Georgia, Ghana, Iraq, Kenya, Liberia, Moldova, Morocco, Pakistan, Russia, Rwanda, Serbia, Sierra Leone, Tanzania, Uganda, Burundi and Zimbabwe.[89]

INIS has stated that the Irish immigration service has actively cultivated links and informal readmission arrangements with those third countries to which Ireland regularly returns persons. While such arrangements have proven useful to INIS, officials noted that they have limitations and have no binding legal effect. Ireland, unlike many other EU Member States, does not have a framework of bilateral agreements with third countries for the readmission of their nationals found to be in an irregular situation in the State.

In light of the lack of formal procedures that apply to such readmission arrangements, strictly speaking, Ireland is not bound by readmission agreements containing *"problematic clauses"* such as the one providing for the repatriation of irregular migrants through simplified procedures, which was found to be contrary to the ECHR by the Strasbourg Court in *Khlaifia and others v. Italy*.[90]

[88] Quinn and Gusciute, 'Strategies Used to Support Return Policy in Ireland National Policy and Practice on Entry Bans and Ireland's use of Readmission Agreements,' July 2015, *ESRI Research Series*, No. 42.
[89] Repatriation Unit, 2013.
[90] Application no. 16483/12, § 45.

ITALY

Prof. Patrizia De Pasquale
Avv. Paolo Gonnelli

Introduction

It is with great pleasure that I take part in the debate of the next FIDE Congress 2018 and it is with great interest that I deal with the external dimension of EU policies, which presents – as is well illustrated by the submitted questions – many aspects still controversial. The division of competences between the European Union and the Member States and the role of the European Parliament in the process of concluding the international agreements are only some of the most important issues. These topics and others have already been the subject of numerous judgments of the Court of Justice, that can represent the beginning of a Copernican revolution of the competences of the institutions involved in the process of concluding the agreements, the outcome of which is not yet defined and not is even predictable.

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES[1]

Question 1

As known, the ETRA judgment[2] recognized the competence of the Community to conclude international transport agreements, even though there was no precise disposition. Specifically, the Court held that that competence had to be

[1] Chapters 1 to 4 were written by Prof. Patricia De Pasquale.
[2] ECJ 31 March 1971, 22/70, Commission c. Council.

established by taking into account both the Treaty and the single provisions and stated that it was not necessary that this competence was expressly provided for but which could also be inferred from other provisions of the Treaty and from acts adopted on these provisions by the institutions. In particular, whenever the Community has adopted provisions which, in any form, lay down common rules (for the implementation of a common policy provided for by the Treaty), Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope. In this way, the Court introduced the theory of "parallelism" between internal and external competences, authorizing institutions to conclude international agreements even where their internal competence had not already been exercised. Therefore, the Court has ruled that, whenever Union law has conferred on the institutions certain internal powers, in order to achieve a certain objective, the Union is competent to assume the international commitments necessary to achieve this objective[3]. With regard to the implementation of the provision of the Treaties, the system of internal competence may not be separated from that external relations. In Opinion 2/91, the Court has indicated that the implied competence of the Union to conclude agreements does not exist only if an agreement conflicts with common rules already adopted by the Union but also when it interferes with the application of Union's provision or its scope. In Open skies judgments[4] the Court pointed out that, in material matters largely governed by internal rules, the power to conclude agreements is of the Union irrespective of the demonstration of interference with those rules.

The theory of "parallelism" was then "codified" in the disposition of art. 216 TFEU which confers on the Union the power to conclude agreements when the Treaties provide for it, if it is necessary to achieve one of the objectives of the Treaties. This is therefore a very broad competence, which provides for the perfect parallelism between internal competences and external competences. With regard to the implementation of the provision of the Treaties, the system of internal competence may not be separated from that external relations.

Recently, ERTA effect has been perceived in the Comprehensive Economic and Trade Agreement (CETA). It's a free-trade agreement between Canada and the European Union[5]. The aim is to eliminate 98% of the tariffs between Canada and the EU. It's a mixed agreement, ratified by EU and by Member States; so, it could offer new suggestions of institutional innovations. It has brought Union

[3] See ECJ 24 December 1975, 3/6 and 4/76, and 2 January 1976, 6/76 Kramer; Opinion 1/76 e 1/13.

[4] ECJ 5 November 2002, C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98, C-476/98.

[5] https://en.wikipedia.org/wiki/Comprehensive_Economic_and_Trade_Agreement – cite_note-ec-1

to ratify an agreement in foreign direct investment (FDI) that falls within the exclusive competence of the European Union according to Lisboan Treaty.

ERTA effect has been perceived also in a Free Trade Agreement between the European Union and the Republic of Singapore (EUSFTA). It's a "new generation" trade agreement negotiated after the entry into force of the EU and FEU Treaties. It covers common commercial policy (Article 207, 1 TFEU); trade in goods and services; foreign direct investment; commercial aspects of intellectual property; competition; social protection of workers; environmental protection (Article 207, 5 TFEU); services in the field of transport. But, also, free movement of capital and of payments between Member States and third States; dispute settlement between the Parties.

The question has involved the Court of Justice in accordance with article 218, 11 TFEU[6]by which the EUSFTA falls within the exclusive competence of the European Union, with the exception of some provisions (such as Investment Protection, Investor-State, Dispute Settlement etc.) which fall within a competence shared between the EU and the Member States. As consequence, it will be important that the Member States ratify the convention afterwards.

Another recent case of tension between EU and Member States has been in occasion of Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled. The Italian Government submitted that the European Union does not have exclusive competence to conclude the Marrakesh Treaty under Articles 3(1) and 207 TFEU. According to the Italian Government, the exchanges covered by the Marrakesh Treaty are non-commercial, which means, in accordance with the Court's case-law, that they are out with the common commercial policy (paragraphs 40; 45; 49-59).

The Court (Grand Chamber) has given the opinion that the conclusion of the Marrakesh Treaty falls within the exclusive competence of the European Union. Instead, according to the European judge, the conclusion of the Marrakesh Treaty «may affect common rules or alter their scope'. In that regard, the Court has held that there is a risk that common EU rules may be adversely affected by international commitments undertaken by the Member States, or that the scope of those rules may be altered, which is such as to justify an exclusive external competence of the European Union, where those commitments fall within the scope of those rules (Opinion 1/13, 14 October 2014, paragraph 71, and judgment of 26 November 2014, Green Network, C-66/13,paragraph 29). A finding that there is such a risk does not presuppose that the area covered by the international commitments and that of the EU rules coincide fully (Opinion

[6] See Opinion of the Court (Full Court) of 16 May 2017 and Opinion of Advocate General Sharpston in Opinion 2/15, delivered on 21 December 2016, paragraphs 28-32; 241-245.

1/13 [...] paragraph 72, and judgment of 26 November 2014 [...] paragraph 30). In particular, such international commitments may affect EU rules or alter their scope when the commitments fall within an area which is already covered to a large extent by such rules (see, to that effect, Opinion 1/13 [...] paragraph 73, and judgment of 26 November 2014 [...] paragraph 31)»[7].

In the Opinion of the Advocate general Kokott, case 263/14[8], concerned the Agreement between the European Union and the United Republic of Tanzania, we read «As we know, the Union institutions may, under certain circumstances, also have implicit external competences. Such powers were originally derived from the existing competences for internal action in accordance with the 'ERTA principle'. Such external competences are now even expressly enshrined in the Treaties by Article 216(1) TFEU. If recourse is now had to the ERTA principle, Article 216(1) TFEU must also therefore be expressly cited in the Union measure concerned».

In the Opinion 2/15, of 16 May 2017, on the Free Trade Agreement between the European Union and the Republic of Singapore, the Court gives important clarifications in relation to some of the most controversial aspects of the competence to conclude the agreements. In particular, this "new generation" trade agreement has a content that goes beyond the traditional provisions concerning the reduction of duties and non-tariff barriers to trade in goods and services, extending also to further commitments in trade-related matters such as the protection of intellectual property, public procurement, competition, sustainable development and the protection of foreign investment (both direct and indirect). And it is precisely with regard to these last issues that have been manifested the main differences on the nature of the Union's competence to conclude the agreement, resulting uncertainties if the competence is solely on the part of the European Union or in a mixed form, with the joint participation of the Union and the Member States. In the case of transport, the Court finds the exclusive nature of the jurisdiction under art. 3 (2) TFEU, in accordance with the principle established in ERTA case. The Court also states that the "ERTA principle", of which the article 3 (2) TFEU constitutes a codification, the "common rules" are only the secondary law provisions that the Union introduces progressively, but not the rules of primary law. This conclusion is also supported by the need to maintain consistency in the hierarchy of the Union's sources of law: in particular, if the Treaties are intended to prevail over secondary law acts, including agreements concluded with third States, the latter do not could "affect" and exercise "an influence on the meaning or scope of the provisions" of the Treaties.

[7] Opinion 3/15 of the Court (Grand Chamber) 14 February 2017, paragraphs 104-107.

[8] Delivered on 28 October 2015.See also Opinion in United Kingdom v Council (C-81/13, p. 104); earlier, to the same effect, Opinion in United Kingdom v Council (C-431/11, p. 64 to 70)

In this context, Member States try to defend shared competences and own power to ratify international agreement. The causes of tensions emerge in front of recent agreements that cover several aspects. The risk is that European Union project falls definitely and that populist influences grow.

Question 2

Article 3 (2) TFEU specifies the exclusivity of the EU internally competences for the conclusion of an international agreement. Otherwise, there is a risk of international commitments undermining the common EU rules or altering their scope sufficiently to justify an exclusive external competence of the European Union where those commitments fall within an area in which those rules are applicable[9].

External exclusive competences are not limited to the five areas provided for in paragraph 1, since paragraph 2 sets out the general criteria for identifying the exclusive competence of the EU to conclude international agreements. In particular, it identifies three further bases of exclusive competence: 1) a legislative act of the Union; 2) the need to enable the Union to exercise its internal competence; 3) the conclusion of international agreement may affect common rules or alter their scope.

It should be noted that while paragraphs 1 and 3 presuppose that the EU has already exercised internal competence; the paragraph 2 suggests that the EU may conclude international agreements in areas where it has not yet intervened internally or is doing so at the same time. Therefore, in the absence of a corresponding clause in an EU legislative act, the first situation provided for in Article 3(2) TFEU must be immediately ruled out. The same applies to the second situation provided for in that article.

But how must the phrase "insofar as its conclusion [that is the conclusion of an international agreement] may affect common rules or alter their scope" (Article 3(2) TFEU) be interpreted?

As the Advocate General Szpunar said in the Opinion to the Case C-600/14 «That phrase corresponds to that used by the Court in paragraph 22 of the AETR judgment, in which it defined the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions, where common EU rules have been promulgated for the attainment of the objectives of the FEU Treaty. That phrase must, therefore, be interpreted in the light of the clarifications provided by the Court in the AETR judgment and in the case-law flowing from that judgment". That is to say the «Article 3(2) TFEU implies that EU rules must already exist in the area covered by the international agreement.

[9] ECJ judgments of 31 March 1971, AETR 22/70, 2, paragraph 30); of 5 November 2002, Commission v Denmark (C- 467/98, paragraph 82), and of 4 September 2014, Commission v Council (C- 114/12, paragraph 68).

If no such rules exist, it is difficult to imagine how the conclusion of the latter could affect or alter the scope of the former».

Moreover, the Court has noted that any EU competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and specific analysis of the relationship between the envisaged international agreement and the EU law in force. That analysis must consider the areas covered by the EU rules and by the provisions of the agreement envisaged, respectively, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish.

Member States try to defend their competences while acknowledging to the Union exclusive competence to ratify agreements in certain sectors (art. 3, n. 2 TFUE; art. 216 TFEU). The attempt, often fruitless, is normally implemented tying to the disputed agreement nature of mixed agreement, exercise of shared competence or others rules and/or policies of the treaty as its legal basis[10] .

Questions 3 and 4

Member States, in connection with the drafting of the Article 216 TFEU during the work of Lisbon, have recognized and transposed European case-law which defines a perfect parallelism between internal and external competence of EU. So, Lisbon Treaty, firstly, strengthens the external competences clearly reconfirmed by the treaty; secondly, reproduces the criteria for granting of external competences which appear in the EU case-law.

In few words, Member States accept external competence of the Community within the meaning of the case-law begun in the judgment in ERTA and developed therefrom[11].

[10] ECJ (Grand Chamber) 4 September 2014, case 114/12, European Commission v Council of the European Union, paragraphs 50-63; Opinion of Advocate General 3 April 2014, Case C-114/12, European Commission v Council of the European Union, paragraphs 71-80, 83; ECJ (Grand Chamber), 22 October 2013, case C-137/12, European Commission v Council of the European Union, paragraphs 52-53, 66, 68, 70, 74; Opinion of Advocate General 27 June 2013, Case C-137/12, European Commission v Council of the European Union, paragraphs 4, 19-20; ECJ 1 October 2009, case C-370/07, European Commission v Council of the European Union, paragraphs 29-36, 50-62. See also: (2011/708/EU) Decision of the Council and of the Representatives of the Governments of the Member States of the European Union, of 16 June 2011 (GUUE, L 283/1). And: ECJ 26 November 2014, case C-66/13, Green Network. In relation on the pre-Lisboan system: ECJ 6 May 2008, case C-133/06, European Parliament v. Council of the European Union, paragraph 54; Opinion of the Court (Full Court) 7 February 2006, 1/03; Opinion of the Court (Full Court) 30 November 2009, 1/08, paragraphs 115, 134.

[11] See also: ECJ 26 November 2014, case C-66/13, Green Network, paragraphs 29-33; ECJ 4 September 2014, case C-114/12, European Commission v. European Parliament, paragraph 68; European Commission, JOIN/2016/054 final – 2016/0366 (NLE).

Article 216 (1) reproduces, first of all, the principle of the attribution of competences in its most classic meaning: an international organization has exclusively the powers conferred by the Treaty. But, express attribution is mediated by other hypotheses of conferring external powers. Indeed, recalling art. 3 (2) TFEU, Article 216 (1) lists three other hypotheses for the attribution of external competences: 1. where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties; 2. or is provided for in a legally binding Union act; 3. or is likely to affect common rules or alter their scope.

The first hypothesis is the necessary and proper clause. This is a very broad and general attribution which is based on a complete parallelism between internal and external competences, provided, however, that the "need" for the conclusion of an agreement is "to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties". The control of the necessity implies an important interpretative operation that leaves a wide margin of discretion to the institutions, conditioned solely by the principle of the direct effect and by the principles of the subsidiarity and proportionality. Thus, the provision gives to the EU a very wide treaty-making power, in respect of which it is possible to speak of external powers parallel to the internal ones, among which it's possible to discern the exclusive ones, under art. 3(2).

In the recent Opinion 2/15, the Court has recognized the existence of an (implicit) external competency to take the commitments on art. 216 TFEU, by reason of the fact that the conclusion of international agreements contributing to the establishment of free movement of capital on a reciprocal basis with third States can be regarded as «necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope», and in particular the objectives referred in Part Three, Title IV, TFEU.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

It's possible to answer to the questions globally, not without a look to the past. The question touches, in particular, mixed agreements. In accordance whit EU case-law, «where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation

and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community»[12] .

An example has been the procedural mediation of European and national interests at UNESCO. In this occasion, Member States have participated to the negotiation through the Presidency, accordingly of the paragraph 1 of the «Code of conduct between the Council, the Member States and the Commission on the UNESCO negotiations on the draft Convention on the protection of the diversity of cultural contents and artistic expressions»[13]. Vice versa, the Commission has negotiated on behalf of the Community (par. 2 of the Code mentioned). In this way, dual external representation has been realized, although national interests were entrusted to the Presidency. Nevertheless, «if necessary, after having followed the procedures provided for in the preceding sub-paragraph, the Member States may ... express their point of view» (par. 7, sub-par. 1, of the Code mentioned). This possibility has been accompanied by the statement from UK, Irish and Greek delegations according to which «the procedure envisaged must be applied with regard to what is practicable in the context of negotiations and ensuring that the Community and Member States are best able to promote and defend their interests in those negotiations», no without the regret of the Commission. Anyway, no one of these possibilities have been used and EU has given proof of coherence and unity.

Also today, the Council's power to adopt negotiating directives and the fact that the Commission may be required to conduct the negotiations in consultation with a special committee, in accordance with Article 218(4) TFEU, presuppose continuous coordination and permanent dialogue between the Commission and the Council, without that process being limited to a particular stage of the negotiations. So, in accordance with Article 218(4) TFEU, when the Council has designated a special committee, the negotiations must be conducted in consultation with that committee. In those circumstances, the Commission must provide the special committee with all the information necessary for it to monitor the progress of the negotiations, such as, in particular, the general aims announced and the positions taken by the other parties throughout the negotiations. It is only in this way that the special committee is in a position to formulate opinions and advice relating to the negotiations. Since the Council is empowered to designate a special committee and the Commission is required to conduct the negotiations 'in consultation with' that committee under Article 218(4) TFEU,

[12] See Opinion pursuant to Article 228(6) of the EC Treaty, Opinion of the Court 15 November *1994, 1/94, paragraph 108.*

[13] 31 January 2005: http://data.consilium.europa.eu/doc/document/ST-5768-2005-INIT/en/pdf.

the Commission must inform the committee of all aspects of the negotiations in order that it may be properly consulted. It is only in this way that the special committee is in a position to formulate opinions and advice relating to the positions that the Commission must adopt in the negotiations. Indeed, EU judge held that Article 218(4) TFEU must be interpreted «as empowering the Council to set out, in the negotiating directives, procedural arrangements governing the process for the provision of information, for communication and for consultation between the special committee and the Commission, as such rules meet the objective of ensuring proper cooperation at the internal level»[14] .

Moreover, Member States concur with the argument relating to Council's active role in the course of the negotiations for an international agreement[15].

In others occasions, the Council has authorized Commission to open negotiations as the EU' negotiator, recognizing to Commission full powers[16]. But, to the extent that the subject matter of the negotiations falls within the competences of both the Union and its Member States, «the Commission and the Member States should cooperate closely during the negotiating process, with a view to ensuring unity in the international representation of the Union and its Member States» (art. 4 Council Decision (EU) 2016/455 of 22 March 2016 cit.).

At the same time, also the representatives of the governments of the Member States have authorized the Commission to negotiate «on behalf of the Member States of the European Union, the provisions of the Agreement that fall within the competence of the Member States», designating «[a] representative of the Member State holding the rotating Presidency of the Council may attend the negotiations alongside the Commission» [art. 2, Decision of the Council and of the Representatives of the Governments of the Member States of the European Union of 23 March 2012 authorizing the opening of negotiations for an

[14] ECJ 16 July 2015, case C-425/13, European Commission v Council of the European Union, paragraph 78.

[15] Czech Republic, Kingdom of Denmark and Kingdom of Sweden. See: ECJ 16 July 2015, case C-425/13, European Commission v Council of the European Union, paragraph 51. It must be considered that a decision adopted on the basis of Article 218(3) and (4) TFEU produces legal effects as regards relations between the European Union and its Member States and between the EU institutions: see ECJ 24 October 2014, case C-114/12, Commission v Council, paragraph 40.

[16] Council Decision of 23 March 2012 authorizing the opening of negotiations for an international agreement on the creation of the EU-LAC Foundation as an international organization (2012/493/EU); Council Decision of 10 June 2013 Authorizing the European Commission to participate, on behalf of the EU, in the negotiations for an international Convention of the Council of Europe to combat the manipulation of sports results with the exception of matters related to cooperation in criminal matters and police cooperation (2013/304/EU); Council Decision (EU) 2016/455 of 22 March 2016 authorizing the opening of negotiations on behalf of the European Union on the elements of a draft text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction.

international agreement on the creation of the EU-LAC Foundation as an international organization (2012/494/EU)].

Questions 6 and 11

The two questions should be considered jointly as they require a reflection on the role of the Member States and the European Parliament in the process of concluding the international agreements, ex art. 218 TFEU.

A. Under Article 218(5) TFEU, the decision authorizing the signing of international agreements and, if necessary, their provisional application by the European Union is adopted by the Council. No competence is granted to the Member States for the adoption of such a decision. The contracting parties to a mixed agreement concluded with third countries are the Member States just in second level. When such an agreement is negotiated and concluded, each of the parties (EU and Member States) «must act within the framework of the competences which it has while respecting the competences of any other contracting party»[17]. At the same way, it happens for an act relating to the provisional application of those agreements by the Member States, «without it being possible to discern which act reflects the will of the Council and which the will of the Member States»[18].

Vice versa, in the occasion of a provisional application of parts of the Agreement (Article 218, par. 5), Member States push for it to be clear that the provisional application does not prejudge the allocation of competences between the Union and its Member States in accordance with the Treaties[19].

[17] ECJ 28 April 2015, C-28/12, Commission v Council, paragraph 49.

[18] ECJ 28 April 2015, C-28/12, Commission v Council, point: 50. See also paragraphs: 39-40, 42, 44, 47.

[19] Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols (2014/668/EU); Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Brussels, 5 October 2016; Council Decision on the signing, on behalf of the Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, Brussels, 13 September 2016; Council Decision of 10 May 2010 on the signing and provisional application of the Geneva Agreement on Trade in Bananas between the European Union and Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Venezuela and of the Agreement on Trade in Bananas between the European Union and the United States of America (2010/314/EU); Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, 14 March 2017, OJ L67/3.

The Council, supported by several governments (included Italy), often considers that the adoption of a hybrid decision infringes none of the provisions of the Treaties. The representatives of the Member States meeting within the Council adopted two separate decisions which are contained in the contested decision. On the one hand, in accordance with Article 218 TFEU, in their capacity as members of the Council, they authorized the signing and provisional application by the EU of the agreements at issue. On the other hand, in their capacity as representatives of the Member States, they authorized the provisional application of those agreements by the Member States to the extent permitted under applicable national law. So, general opinion of Member States is that the adoption of a hybrid decision, of which the Member States are co-authors, is entirely consistent with the mixed nature of the underlying agreements and with the fact that the Member States are in certain respects exercising their own competences[20]. They think that the adoption of a hybrid decision would in practice lead to the same result as the adoption of two decisions or as the adoption of a single Council decision.

Differently, in the case of mixed agreements, EU case law says: «article 218 TFEU will apply only to the EU's participation in the mixed agreement and not to that of the Member States. The Member States' participation in mixed agreements will be governed, as regards the internal aspect of their participation, by national law in each case and, as regards the external aspect of their participation, by public international law»[21].

B. According to article 218 (10) «The European Parliament shall be immediately and fully informed at all stages of the procedure».

Member States seem underestimate the obligation to inform EU Parliament at all stages of the negotiation and conclusion procedure regarding international agreements. Not so the EU Court of justice that, in several occasions, reiterates the nature of obligation in question. An example is the annulment of Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, requested by EU Parliament and established since the Parliament was not immediately informed at all stages of the procedure for negotiating and concluding the EU Mauritius Agreement[22].

[20] ECJ 28 April 2015, C-28/12, cit.

[21] Opinion of Advocate general Mengozzi delivered on 29 January 2015, C-28/12, Commission v Council, paragraph 49. See also paragraphs: 26-28, 30, 48; followed by ECJ 28 April 2015, C-28/12, cit.

[22] ECJ 24 June 2014 (Grand Chamber), case C-658/11, European Parliament v. European Commission, paragraphs 76-86.

In this case, the Italian Republic has intervened in support of the form of order sought by the Council. That finding is not called into question by the Council's, such Italian Government's, argument that the contested decision had in any event been published in the Official Journal of the European Union, and therefore the Parliament had been in a position to take note of it. In fact, «the information requirement arising under Article 218(10) TFEU is prescribed in order to ensure that the Parliament is in a position to exercise democratic scrutiny of the European Union's external action and, more specifically, to verify that its powers are respected precisely in consequence of the choice of legal basis for a decision concluding an agreement. Lastly, as regards the consequences of infringement of Article 218(10) TFEU in terms of the validity of the contested decision, it should be noted that the procedural rule laid down in that provision constitutes an essential procedural requirement within the meaning of the second paragraph of Article 263 TFEU and its infringement leads to the nullity of the measure thereby vitiated. That rule is an expression of the democratic principles on which the European Union is founded». In particular, the Court has already stated that the Parliament's involvement in the decision-making process is the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly[23].

The Court confirmed these arguments in the case of the Agreement between the EU and the United Republic of Tanzania. It has stated that «While, admittedly, the role conferred on the Parliament in relation to the CFSP remains limited, since the Parliament is excluded from the procedure for negotiating and concluding agreements relating exclusively to the CFSP, the fact remains that the Parliament is not deprived of any right of scrutiny in respect of that European Union policy [...] the obligation, prescribed in Article 218(10) TFEU, to ensure that the Parliament is immediately and fully informed at all stages of the procedure for the conclusion of an international agreement also extends to the stages that precede the conclusion of such an agreement, and therefore covers, in particular, the negotiation phase [...] In that regard, with respect to the scope of the information obligation covered by that provision, it must be stated that the procedure for negotiating and concluding international agreements laid down in Article 218 TFEU includes, inter alia, the authorization to open negotiations, the definition of the negotiating directives, the nomination of the Union negotiator and, in some cases, the designation of a special committee, the completion of negotiations, the authorization to sign the agreement, where necessary,

[23] ECJ 24 June 2014 case C-658/11, cit., paragraphs 79-81.

the decision on the provisional application of the agreement before its entry into force and the conclusion of the agreement»[24].

It follows that Member States have to consider that the Treaty of Lisbon has even enhanced the importance of that rule in the treaty system by inserting it in a separate provision that is applicable to all types of procedures envisaged in Article 218 TFEU. On the contrary, «if the Parliament is not immediately and fully informed at all stages of the procedure in accordance with Article 218(10) TFEU, including that preceding the conclusion of the agreement, it is not in a position to exercise the right of scrutiny which the Treaties have conferred on it in relation to the CFSP or, where appropriate, to make known its views as regards, in particular, the correct legal basis for the act concerned. The infringement of that information requirement impinges, in those circumstances, on the Parliament's performance of its duties in relation to the CFSP, and therefore constitutes an infringement of an essential procedural requirement»[25].

In this context, national and/or regional parliaments are not involved. In fact, agreements between the Union and third countries or international organizations are negotiated and concluded with the involvement of the Council or the Commission and of the European Parliament under article 218 (10) TFEU. Anyway, national parliaments could urge – and regional ones trough them – the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties (art. 218, 11 TFEU).

Question 7

As known, the provisional application is usually approved by the Council decision upon signing the agreement. This means that a single Member State cannot block the provisional application of a mixed agreement, unless the agreement falls under one of the situations requiring unanimity.

In the case of mixed agreements, a single Member State can nevertheless block the provisional application of Union competences. The Member State can be overruled in the Council, but by refusing to sign, it can de facto also veto the provisional application of parts of the agreement falling under Union competences because this can only take place after the signature of the parties. This has almost happened when the Belgian federal government was first unable to sign CETA after the Walloon 'non'. This again would encroach upon the duty of sincere cooperation as the Member State would block the Union from exercising its competences.

[24] ECJ 14 June 2016 case C-263/14, European Parliament v. European Commission, paragraphs 69-76.
[25] ECJ 24 June 2014 case C-658/11, cit., paragraph 86; 14 June 2016 case C-263/14, cit. paragraph 84.

However, the duty of cooperation could be interpreted in such a way that it would oblige the Member States to sign the agreement. The situation is more complex in case a Member State refuses to ratify an agreement after it is signed and the provisional application has been initiated. Actually, the clauses on provisional application in mixed agreements or the respective Council decisions do not impose a 'deadline' on the provisional application. On top of that, the latter provides less legal certainty compared to the full entry into force of the agreement, especially for the third country, because the provisional application can be terminated immediately, contrary to the termination clauses of (mixed) agreements which require a notice of six months or more. Anyway, several mixed agreements include a specific procedure for the termination of the provisional application. The situation would change if a Member State would deposit a notification that it will not ratify the agreement. This would imply that the ratification procedure has failed and that the agreement cannot be concluded. The provisional application can only take place "pending its entry into force" or "pending the completion of the procedures for its conclusion". Therefore, the failure of the ratification procedure would require the termination of the provisional application, as also Council has noted in one of the many statements adopted in the context of the signature of CETA: «If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures».

It also should be mentioned that the Court has recognized that «no competence is granted to the Member States for the adoption of such a decision»[26]. The Court argued that the Council cannot set aside the procedural rules laid down in Article 218 TFEU and take the Member States on board in a decision concerning the EU's signature and provisional application of a mixed agreement, not even by invoking the duty of cooperation. Thus, only the Union can terminate the provisional application of the agreement «in accordance with EU procedures», although it is not entirely clear what the appropriate procedure would be. Not all mixed agreements include a specific procedure for the termination of the provisional application. Article 218 TFEU does not provide procedural rules for the Union's termination of the provisional application of an international agreement. However, it can be argued that the same procedure should be followed for the adoption of the provisional application (Article 218(5) TFEU), requiring a qualified majority, and in several cases even unanimity (Art. 218(8) TFEU), within the Council. Therefore, a single Member State cannot terminate the provisional application of a mixed agreement.

[26] Case C-28/12, Commission v. Council, paragraph 44.

Question 8

According to Article 218 (6) (a), several categories of agreements must be concluded after approval by the European Parliament. In these cases, the European Parliament has a veto power over the conclusion of the agreement. Among these are (iii) agreements establishing a specific institutional framework by organizing cooperation procedures; and those (iv) agreements with important budgetary implications for the Union. With regard to the former, these are modern partnership and cooperation agreements that often give rise to joint bodies responsible for administering the application of the agreement through various decision-making procedures and consultation, but also of the establishment of international organizations, not rarely of a technical nature. The latter, on the other hand, call for Parliament's approval as a budgetary authority.

The role assigned to Parliament reflects the distinction externally the division of powers between institutions that applies internally. The Treaty of Lisbon required the Parliament's consent for the conclusion of international agreements specifically in the case of agreements covering areas to which, in the internal field, the ordinary legislative procedure laid down in Article 294 TFEU applies, or the special legislative procedure, but only where that procedure requires the consent of the Parliament. Moreover, the Parliament is precluded from participating in the conclusion of such an agreement only where the agreement relates exclusively to the CFSP, in relation to which the Treaty of Lisbon conferred a limited role on the Parliament[27]. Thus, Article 218(6) TFEU establishes symmetry between the procedure for adopting EU measures internally and the procedure for adopting international agreements in order to guarantee that the Parliament and the Council enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties. In fact, the Court has well stated that «Article 218(6) TFEU establishes symmetry between the procedure for adopting EU measures internally and the procedure for adopting international agreements in order to guarantee that the Parliament and the Council enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties legal basis of a measure that determines the procedures to be followed in adopting that measure [...]– it is precisely in order to ensure that that symmetry is actually observed that the rule identified by the case-law of the Court – that it is the substantive legal basis of a measure that determines the procedures to be followed in adopting that measure [...– applies not only to the procedures laid down for adopting an internal act but also to those applicable to the conclusion of international agreements»[28].

[27] See Parliament v Council EU:C: 2012:472, paragraph 82.

[28] ECJ 24 June 2014 case C-658/11, cit., paragraphs 56-57.

Question 9
The decision of the European Union to suspend an international agreement or the recognition of equivalence of the laws and regulations is taken by the Commission. But, Member States can obtain that the Commission informs the representatives of the Member States before such a decision is taken [29].

Question 10
At moment, no.

Question 11
See answer to question n. 6.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12
Up until now, we have had no case of this kind.

Question 13
An international agreement concluded by the EU is binding on the EU institutions and the Member States (article 216, 2 TFEU). Member States agree with EU that such agreements form an "integral part" of EU law from their entry into force and have primacy over secondary EU law[30]. However, from the Member States' perspective, international agreements remain a product of diplomacy. So, international agreements must respect the constitutional values of the EU and their effects within the EU cannot be determined without taking into account their international origin[31]. Finally, they accept that it falls to the Court to determine whether the provisions of an international agreement confer on persons,

[29] See: art. 5, Council Decision on the conclusion of the Agreement between the European Union and the Republic of Chile on trade in organic products, Brussels, 15 February 2017 (OR. en) 5530/17 AGRI 31 AGRILEG 16 COMER 9,*http://data.consilium.europa.eu/doc/document/ST-5530-2017-INIT/en/pdf ;* see also: Council Decision on the signing, on behalf of the European Union, of the Agreement between the European Union and the Republic of Chile on trade in organic products, Brussels, 15 February 2017 (OR. en) 5529/17 AGRI 30 AGRILEG 15 COMER 8,*http://data.consilium.europa.eu/doc/document/ST-5529-2017-INIT/en/pdf;* Agreement between the European Union and the Republic of Chile on trade in organic products, *http://data.consilium.europa.eu/doc/document/ST-5551-2017-INIT/en/pdf.*

[30] ECJ, 4 February 2016, joined cases C-659/13 and C-34/14, C & J Clark International, paragraph 82; 3 June 2008, case C-308/06, Intertanko v. Secretary of State, paragraphs 42; 21 December 2011, case C-366/10, Air Transport Association of America, paragraph 50.

[31] ECJ 16 July 2015, case C-612/13 P, ClientEarth, paragraph 33; 13 January 2015, joined cases C-404/12 P and C-405/12 P, Council v Stichting Natuuren Milieu and Pesticide Action Network Europe, paragraph 44.

subject to Community law, the right to rely on that agreement in legal proceedings in order to contest the validity of a Community measure[32].

Up until now, no specific discussions at national level has been recorded in relation to this case law.

Question 14

Against the Member States for failure to comply with the international commitments that are binding on the European Union, the Commission may initiate infringement procedure under Article. 258 TFUE. In fact, a violation by a Member State of "one of its obligations under the Treaties" is to be interpreted broadly as including every obligations of EU law on the Member States. It covers the obligations directly imposed by the rules contained in the Treaties and the other acts of primary law, including the Protocols, such as those imposed by acts binding on the institutions. Among these, the international agreements stipulated by the Union pursuant to art. 216, para 2 TFEU[33]. In particular, the Court stated that «Since, according to article 228(2)of the Treaty, the Member States are bound, in the same manner as the institutions of the Community, by the international agreements which the latter are empowered to conclude, the fulfil, in ensuring respect for commitments arising from an agreement concluded by the Community institutions, an obligation not only in relation to the non-Member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement form an integral part of the Community legal system». Therefore, it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community.

Question 15

In Italy, several control measures have been taken to ensure compliance with the international agreements binding for European Union. First of all, the Chamber's Rules of Procedure, which provides that the EU Policy Commission shall give an opinion on the Community's compatibility profiles of the drafts of law contain relevant provisions in terms of European legislation. The "Commissioni di merito" are also required to consider, in the legislative process, the compatibility of the proposed legislation with EU law. Secondly, Law 24 December 2012, no. 234 provides for various provisions which, in so far as is relevant here: (i) Art. 18

[32] ECJ 9 September 2008, joined cases C-120/06 P and C-121/06 P, FIAMM and Fedon v. Council and Commission, paragraphs 108-109.

[33] ECJ 26 October 1982, C-104/81, Hauptzollamt Mainz c. Kupferberg & Cie; 10 September 1996, C-61/94, Commission c. Federal Republic of Germany.

stipulates that the coordination activities of policies deriving from Italy's membership of the European Union and the adaptation of national legislation to the obligations arising from this membership are carried out by the Department of the Presidency of the Council of Ministers "Dipartimento per le politiche europee"; (ii) art. 20 states that, in order to ensure Italy's more effective participation in the formation of European Union law and the timely implementation of it in national law, state authorities shall identify within them one or more bodies for the assessment of acts of the European Union; (iii) art. 28 stipulates that the President of the Council of Ministers or the Minister for European Affairs shall, with the cooperation of the administrations concerned, verify the state of compliance of the internal organization and the policy guidelines of the Government in relation to acts of the European Union and it shall transmit the findings promptly, and in any case every four months, also with regard to the measures to be taken to ensure that they comply with the relevant parliamentary bodies at the Permanent Conference on Relations between the State, Regions and Autonomous Provinces of Trento and Bolzano and to the Conference of Presidents of Legislative Assemblies of Regions and Autonomous Provinces, for the formulation of any appropriate observations.

In matters of their competence, the autonomous regions and provinces shall verify the status of their respective regulations in relation to the said acts and transmit, by 15 January of each year, the results of the verification to the Presidency of the Council of Ministers – Department of Policies with regard to the measures to be taken. At the end of this verification, the President of the Council of Ministers or the Minister for European Affairs, together with the Minister for Foreign Affairs and the other Ministers concerned, submits to Parliament a bill entitled "Provisions for The fulfillment of the obligations arising out of Italy's membership of the European Union", supplemented by the indication "Legge europea", which includes, inter alia, necessary provisions for the implementation of international treaties concluded in the framework of the external relations of European Union.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Questions 16, 17 and 18

The EU's common commercial policy extends its scope to direct foreign investment discipline (Articles 206 to 207 TFEU). the inclusion of foreign direct investment in the exclusive competence of the Union reflects the nature of the international economy, in which trade and investment are inextricably linked. Investment is, in fact, a central component of access to foreign markets and, more generally, an instrument of economic policy.

Although the notion of direct foreign investment is not defined by the Treaties, it is generally accepted that this expression concerns «any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity» (COM (2010) 343 final. The concept of FDI should be interpreted by reference to the Community rules on direct investment and, most importantly, in accordance with the notion of FDI in international law. As a result, portfolio investments, as well as other categories of foreign investment, for example IP rights, money claims and concession contracts, are excluded from the scope of the new competence. Furthermore, it was stated that the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) cannot be considered in the common commercial policy. It was also stated that international agreements in the field of transport are excluded from the scope of the common commercial policy; transport is the subject of a separate and specific title of the Treaty[34].

This exclusion does not mean that the EU will not enjoy competence to take external action with regard to these categories of foreign investment. On the contrary, the EU will remain competent to the extent that the current Treaty empowers the Union to regulate these categories of foreign investment.

The articles 206-207 TFEU can also be used with reference to the conclusion by the Union of Bilateral investment treaties ("BITs"), previously concluded exclusively by the Member States, or bilateral or regional free trade treaties containing, inter alia, provisions on foreign investment discipline.

This type of agreement represents the way chosen, to date, by the institutions of the Union. Indeed, the EU has negotiated two large-scale bilateral free trade agreements, containing a whole chapter on discipline and protection of foreign investment and related Member State / investor (Regulation 912/2014) dispute resolution (CETA, provisionally in force since 21 September 2017) and the Free Trade Agreement with Singapore[35].

At present, further negotiations are underway for the conclusion of large-scale bilateral agreements, containing investment protection provisions, with the US (Transatlantic Trade and Investment Agreement – TTIP), some ASEAN States (Malaysia, Vietnam, Thailand), Japan, India, MERCOSUR, Myanmar /

[34] See, inter alia, judgments of 12 December 2006, Test Claimants in the FII Group Litigation, C-446/04, paragraphs 181 and 182; of 26 March 2009, Commission v Italy, C-326/07, paragraph 35; and of 24 November 2016, SECIL, C-464/14paragraphs 75 and 76)» (Opinion 2/15 of the Court (Full Court) 16 May 2017.

[35] The Court, with Opinion 2/15, stipulates that the provisions of the Agreement on foreign investment other than direct and those relating to the settlement of disputes between investors and States are not the exclusive competence of the Union, so that the agreement cannot be concluded without the participation of the Member States.

Bourma and, the only case of fully bilateral investment negotiations, with China. All agreements are also included in a wider design that was launched before the entry into force of the Lisbon Treaty: in fact, starting with the Communication "Global Europe – Competing in the World" (COM (2006) 567 final) with the aim not only of overcome the stalling of multilateral negotiations within the WTO, but also to guarantee European companies more competitive conditions for access to foreign markets, the Commission had concluded free trade "new generation" agreements with Korea and the Andean Community (Columbia, Peru and later Equador). However, these first large-scale agreements did not contain any specific provisions on the protection of foreign investment, merely limiting the market access profiles to foreign market access. The relevant negotiating directives were conferred by the Council of the Union before the Union took over the competence in this area.

The competence of the European Union in the field of foreign investment overlaps with the many treaties in force between Member States and between these and third countries. Indeed, by virtue of the principle of the competence, the autonomous activity on the external side of the Member States cannot hinder or affect the exercise of Union competence, not least its acquis. In this perspective, it is necessary to set out the issues relating to the so-called "BIT's, Bilateral Investment Treaties'" (BITs), which have previously been concluded by the Member States, which are usually distinguished between intra-EU BITs (bilateral investment agreements concluded between Member States) and extra-EU BITs (Bilateral Investment Agreements concluded by Member States with Third States).

Bilateral investment agreements (BITs) are however overcome as they are incompatible with the EU Treaties. Regarding the nearly one thousand agreements in force between Member States and third countries, it is necessary to renegotiate them. The compatibility of extra-EU BITs concluded by the Member States (and partly related to the direct foreign investment sector) had also occurred before the entry into force of the Lisbon Treaty. In 2009, the Court found that three Member States (Austria, Sweden and Finland) had infringed the obligations imposed on them by virtue of Art. 351, second paragraph, TFEU (ex Article 307 TEC). In particular, the Member States «by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the investment agreements [...] has failed to fulfil its obligations under the second paragraph of Article 307 EC»[36].

[36] ECJ, 3 March 2009, C- 205/06, Commission v Austria; C-249/06 Commission v. Kingdom of Sweden; 19 November 2009, C-118/07 Commission v. Republic of Finland.

In the case Commission v. Slovak Republic[37], the Court stated that «in order to determine whether a Community rule may be deprived of effect by an earlier international agreement, it is necessary to examine whether that agreement imposes on the Member State concerned obligations the performance of which may still be required by non-member countries which are parties to it». It even added «although, in the context of Article 307 EC, the Member States have a choice as to the appropriate steps to be taken to eliminate any incompatibilities existing between a pre-Community convention and the EC Treaty, if a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot be excluded».

Indeed, Court stated that the duty of the Member States to extinct an international agreement is not absolute: firstly it is only the extreme ratio of a series of measures to be initiated primarily on an international level to introduce appropriate amendments to the agreement; secondly Article 351 does not impose any conduct on the part of the Member States in violation of international commitments; finally, the complaint is only due if it is lawful under the treaty's right[38].

Meanwhile it was adopted Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries. Member States are required to take the necessary measures to eliminate incompatibilities, where they exist, with Union law, contained in bilateral investment agreements concluded between them and third countries. The authorization to amend or conclude bilateral investment agreements provided for by this Regulation should notably allow Member States to address any incompatibilities between their bilateral investment agreements and Union law, other than incompatibilities arising from the allocation of competences between the Union and its Member States, which are addressed in this Regulation. So, this Regulation addresses the status of the bilateral investment agreements of the Member States under Union law, and establishes the terms, conditions and procedures under which the Member States are authorised to amend or conclude bilateral investment agreements.

The principle of the conferred powers can give rise to difficulties with regard to relations between foreign investors and the Union system. Concerning dispute resolution, the Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishes a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is part.The discussion

[37] ECJ, 15 September 2011, C- 264/09, Commission v. Slovak Republic
[38] ECJ 14 October 1980, C-812/79, Burgoa.

on this subject was particularly lively during TTIP negotiations; in fact, following the negative reaction of the stakeholders to the investment arbitration (ISDS), the negotiators' proposal was to create an international jurisdiction similar to those existing in the WTO in order to balance all the rules contained in the relevant agreements and not only to protect the investor.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)[39]

Introduction

It is for me an honour to take part in the debate of the next FIDE Congress 2018 and to have the chance to speak about such a current, delicate and, in some regard, "explosive" topic such as the migration policies, on which I have been actively working for some years, also with independent working groups, which have produced ideas regarding the need to revise the whole European legislation on the subject.[40]

The relevance and complexity of the matter makes it very hard to answer, in a few pages, to only the 15 questions present in chapter 5 of the Questionnaire.

1. Protocol (No.23) on the external relations of the Member States with regard to the crossing of external borders (1997), attached to the Treaty of Amsterdam and *confirmed in the Treaty of Lisbon in 2007, which, on the other hand, has abrogated other protocols*, must be assessed as a "special law" partially derogating the general principle of "shared competences" clearly stated in the "AETR" judgement, according to which, the Union ought to have acquired an *exclusive competence* to conclude international agreements in the thematic area of short-term visas, as a direct consequence of the total harmonisation operated by Regulation No 539/2001 of the list of third countries whose nationals are subject to the visa requirement when crossing the external borders of the Member States and the list of those exempted by it.

On the other hand, pursuant art.4 par.2 letter j) TFEU, the Union has only a shared competence with the Member States in the field of the "area of freedom, security and justice"; moreover, the following paragraph 4 expressly states

[39] This Chapter was written by Avv. Paolo Gonnelli.

[40] See on the matter, among others, the papers of the Congress that took place in Pescara on the 5th and 6th May 2016 "New perspectives for the international protection?" and the paper of the 24th January 2016 of the independent working group presented in that very same occasion and available at the link: http://www.aige.it/wp-content/uploads/2017/01/Ipotesi_regolamento_europeo.pdf, from which some suggestions have been taken and presented to the European Parliament as amendments to the Commission proposal to "recast" the so-called Dublin Regulation.

that "*In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs*".

It is true that art. 3 par 2. TFEU declares that "*The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*", but the new confirmation of Protocol No 23, after six years from the approval of the cited Reg. 539/2001, is an indicator of the fact that in such field there is still room for a Member States' competence to conclude international agreements with third countries, corroborated by the condition present in such Protocol that those agreements "respect Union law and other relevant international agreements".

2. After the publication of the abovementioned Protocol No 23 (1.5.1999, simultaneously with the entry into force of the Treaty of Amsterdam), Italy entered into several agreements, both "juridical" and "political" in nature on the topic of visas and to combat illegal immigration, with the following third countries: Algeria (22.11.1999), Libya (13.10.2000, 13.12.2000, 10.6.2009, 15.4.2010 and 2.2.2017)), Russian Federation (25.10.1999 and 15.6.2004), Mongolia (14.7.2014), Australia (1.10,2003), China (30.3.2006), Kazakhstan (5.11.2009),Vietnam (13.7.2010), Azerbaijan (7.12.2010), Jordan (2.4.2012), South Africa (22.2,2013), Ecuador (3.10.2013), Indonesia (9.11.2015), Cameroon (17.3.2016), Kirghizstan (30.3.2016), Serbia (11.9.2006), United States of America (1.9.2009) e Ghana (8.2.2010).

Are still maintained in force agreements on visas and the combat of illegal immigration, concluded previously the entry into force of Protocol No 23 with the following third countries: Brazil (8.10.1949, 6.9.1958 and 21.4.1960), Canada (10.10.1952), Gambia (24.9.1965), Malesia (29.4.1964), Princedom of Monaco (6.7.1949), Norway (31.7.1930),Thailand (30.12.1055), Uganda (24,2,1965), Russian Federation (25.2.1960 and 30.11.1989), Kenya (12.1.1999) Macedonia (26.2.1997), Nicaragua (12.11.1998), Panama (1998), Yugoslavia (19.6.1997), Tunisia (6.8.1998), Albania (4.9.1991), Argentina (19.11.1959 e 21.2.1968), Australia (19.6.1951), Bolivia, (6.12.1960), Chile (27.11.1957), Colombia (25.5.1962), Republic of Korea (south) (5.4.1975), Costa Rica (19.6.1972), Ecuador (16.4.1964), Egypt (28.12.1965 and 17.1.1993), El Salvador (31.10.1968), Philippines (10.11.1972), Japan (11.1.1956 and 15.3.1963), Guatemala (12.8.1969), Honduras (30.1.1970), Israel (10.3.1964), Yugoslavia (14.2.1955 and 18.9.1959), Morocco (25.11.1960), Mauritania, Mexico (7.6.1965), New Zealand (25.1,1961 and 20.11.1985), Panama (6.1.1964), Paraguay (26.1.1961 and 8.4.1965), Peru (8.2.1960), Somalia (22.2.1975),

Tunisia (15.8.1963), Turkey (22.10.1951 e 24.4.1952), Uruguay (21.11.1960), United States of America (26.2.1929 and 29.9.1948), Venezuela (5.3.1981 and 7.6.1988), Guatemala (20.11.1960), Norway (16.8.1990), Switzerland (10.3.1960).[41]

3. The Italian national case law is oriented, almost univocally, towards an interpretation of the "safe third country" concept to be assessed on a *case-by-case basis*, with specific reference to the personal situation of the interested party, or at least to the "category" of persons to which one belongs, and particularly to potential "vulnerable" situations, taking into account even the usages of the region of origin of such person.[42]

4. This case law does not seem to reflect the distinction between "safe third country" and "super-safe third country" as provided in art. 39 of Directive 2013/32/EU, because during the implementation process of such directive, by the means of Legislative Decree 18.08.2015, n. 142, the Italian state, using the competence provided for in the aforementioned article 39, did not introduce the accelerated procedure for applicants seeking international protection coming from a "super-safe" third country, pursuant the definition of the same article. The same Legislative Decree 142/2015 afforded only[43], on the one hand, the power to the national Commission of identifying periodically the countries of origin of the applicants or parts of such countries, in order to grant the applications lodged following the accelerated procedure as described by article 12, paragraphs 2 and 2-bis of Legislative Decree 28.1.2008, n. 25, as modified by article 25, par, 1, letter l) of Legislative Decree 142/2015, while, on the other, it provided[44] a faculty of the territorial commission to declare inadmissible an application and not to proceed to the examination of its merits only in the case of reiteration of an application without adducing new elements or if the applicant "*has been recognised the status of refugee in a country signatory to the Geneva Convention and can still access such protection"*, without any prejudice to the possibility for the applicant, even in this case, to produce elements to corroborate *"the admissibility of one's application in one's specific case", through a personal interview.* The national case law, therefore, has been oriented to identify the presence of a "safe country" of origin or not in

[41] Here are not mentioned the agreements concluded with other Member States, nor those concluded previously with countries that have become Member States.

[42] See, *ex plurimis*, : Cass. Ord. 30.07.2015, n. 16202; Cass. Ord. 30.07.2015, n. 16201; Cass. Ord. 16.07.2015, n. 14998; Cass. 18.02.2012, n. 2294; Cass. Ord. 10.04.2015, n. 7333; Cass. Ord. 12.02.2015, n. 2830; C. Appello Roma, 18.04.2013, n. 2248; C. Appello Napoli 09.07.2012, n. 2259.

[43] See art. 25, par. 1 letter d), n, 2, of Legislative Decree 142/2015.

[44] With par 1-bis of Legislative Decree 25/2008, added by art. 25, par 1, letter Z) of Legislative Decree 142/2015.

any case, in order to exclude the legitimacy of an application, by conducting a practical exam, on a case-by-case basis. See the national case law mentioned in the paragraph above.

5. There are many doubts about the opportunity for the European Union to create a classification of "safe third countries", binding for the member states inthe the decisions regarding the applications for international protection. Under these circumstances, the insertion of a "safe third countries" list in the proposal for transformation of the Directive 2013/32/UE in Regulation, concerning the procedures of the applications for international protection evaluation and submitted by the Commission to European Parliament and to the Council on 13 July 2016, is criticizable.

6. The Union law principles regarding the rigorous control of external borders, as a way to "dismantle" the internal borders, do not appear to have anything to do with the possibility for the Union of setting a list of "safe third countries", the provenance from which (or merely the transit though which) may or would constitute the reason for a refusal to international protection applications. One can be rigorous in the application of the discipline on "visas" and in the field of "immigration", without interfering with the possibility (or better, the necessity) of a correct exam, objective and specific to the single case, of the applications for international protection. Moreover, the list of third countries which should be considered as "safe" without admitting proving otherwise, is simply "questionable", to use a euphemistic term, by merely having regard to the incidents that take place in some of these countries concerning the failure to respect, practically, the fundamental rights. In view of all this, it seems as if the so-called "extraterritorial control" of immigration, made in international waters and out of the territorial ones, poorly fits the definition of correct evaluation of the personal situations of each "migrants", some of whom, if correctly informed, almost surely would possess the necessary requirements to apply for international protection. The so-called "extraterritorial control", thus, is likely to become a "collective refusal", in open contrast with the principle of "non-refoulement". See on the matter the decision against Italy of the Strasbourg Court in the case Hirsi.

7. The so-called "Global Approach to Migration and Mobility" of the European Commission does not seem to take into due account an indisputable historic fact.

In fact, recollecting the history of the people as we know it, "migrations" have always proved to be unstoppable events, as the tides. As opposed to the "occupations", determined by political choices of the governor of the occupying states ,

which have historically unravelled to be always "losers"[45] both on the short and long-run, "migrations", result of the spontaneous "pressure" generated by the choices of single individuals or groups of individuals, have unravelled to be "unstoppable", even when faced with organised attempts to resist by the people and/or States.[46] Therefore, if this is what history teaches us, the starting approach to face the dynamic of "migrations" should not be to "stop them whatever it takes", rather to regulate them as a matter of procedure, aiming at either "knowing" who is entering a specific State or the Union borders, either at "integrating" the people entering, in so a far as favouring their respect of the laws and usages of the hosting State, their integration in the productive mechanism of such State, avoiding that they are isolated in a situation of perpetual illegality, which inexorably will finish to push them in the hands or under the influence of the organised criminals or whatever form of criminal enterprise (illegal labour, recruiting of day labourers, exploitation of prostitution, drug dealing, etc..).

It must be highlighter that such reasoning is neither utopian, nor affected by "do-goodism", rather solidly "realistic", which cannot be said for the presumption of creating insuperable "barriers" without having detrimental consequences.

Obviously, this does not entail a refusal to intervene in order to circumvent or soothe those situations that push people to migrate (poverty, economical inequalities, famines, desertification, epidemies, wars, violations of human rights). But these processes are neither simple nor immediately effective, in a way to render them the only bound alternative to the stop of migration flows.

8. For the reasons explained directly above, the "Partnership Framework" proposed in the recent documents of the Union does not seem as a solution practically useful.

To conclude aid agreements (economic, industrial, to support the institutions) with a third country, substantially under the condition of its implementing "measures" aimed at contrasting the exodus of people towards the Union or the European State party to the agreement, appears to be very little fruitful: the leaders of that third country will likely put the monetary value those aids in their own pockets, while being still "authorised" to carry out "repressive" measures

[45] Suffices to think about, among others, to the colonialistic phenomena, to the invasion attempts of Russia by the hand of Napoleon or the Third Reich, to the occupational attempts of Afghanistan by the hand of the British and Russian.

[46] Suffices to think about, among the others to the descending of the so-called "barbaric" populations into the Roman Empire, to the uncontrolled migrations of Hispanic-speaking populations in the USA (where now Spanish is as a matter of fact the most diffused language), to the heavy migrations of European citizens (especially Italian, Irish, Polish, Russians, Jews) in the USA, notwithstanding the existence of very strict border controls, or even to the infiltration of Chinese people in almost every country.

against the weak population under the false pretence of stopping the "irregular migration" towards the partner State or the Union.

9. However, the partnership agreements, either at EU level or among and with Member States, may well be useful to "contain", without any detrimental direct or collateral effect, the migratory phenomenon, if negotiated with third countries from which the economic migration actually "originates" (and not with those of transit) and aimed exclusively at achieving a direct and effective improvement of the socio-economic situation of those countries, as far as the economic development, the education and the "assistance" for a better functioning of local institutions are concerned. All of this without anything back in exchange.

On the one hand, as far as the migration created by wars, persecution and violations of human rights are concerned, an agreement with such a country of origin may be conceivable only under the form of aids contingent to the full and effective respect of human rights, while, on the other, useful agreements may be negotiated with the countries of "first reception", those immediately next to the countries of origin[47], both for creating in such States qualified centres for receiving the applications for international protection[48], and for concluding with those same States "readmission" arrangements of those people whose application for international protection has been definitively denied.

10. In theory, Italy because of the political, historic and cultural ties fostered throughout the 20th century could have maintained special relations with third countries, especially the countries of the Dalmatian coast, Albania, the islands of the East Mediterranean, Somalia, Ethiopia, Eritrea, Libya. However, the brief and limited Italian "colonial" experience does not appear to have left such special bonds, also because from some of the countries that had been Italian colonies (or even "Italian territory"[49]) the Italian citizens have been forcefully sent away, for years now, at the request of the local governments.[50] Even when such events did not occur formally (for example in Somalia, which for some years had been part of a sort of "Protectorate" of Italy) the healthy relationships are no longer there or some incidents of absolute ungovernability have taken place, for which the mere hypothesis of a partnership appears to be futile. It is true that the Greek Islands, where the Italian memory seems to be still present in a good way, are part of the Greek State, member of the European Union. The only

[47] For example Jordan or Lebanon for Syrian refugee.

[48] Which will create easy "humanitarian corridors" aimed at suppressing the "traffic of migrants"

[49] As it was the case for the countries of the Giulian-Dalmatian coast.

[50] For example the flight of the Italian people from the lands fallen under the control of the former Yugoslavian Republic or the "banishment" of the Italian citizens from Libya and Ethiopia.

third country with which Italy has established some collaborative accords over the years is probably Albany, where Italy not only cooperated in the training of the police forces to contrast the illegal trafficking and the formation of public institutions personnel, it has also contributed effectively in the local economic recovery, deleting poverty situations that at the beginning of the 90's had created a remarkable migration flow.

11. Italy signed with Libya on February 2nd 2017 a "Memorandum of understanding on cooperation in the development sector, to combat illegal immigration, human trafficking and contraband and on reinforcing the border security".

This memorandum, however, *does not seem adequate* as an example for the conclusion of future agreements between the EU and the African countries. This for several reasons. First of all, it is an agreement concluded with a Government that, even if it has been recognised by the UN, still *does not possess the control of the entire territory* of the State, but it is formally opposed by another Government and other political factions. Secondly, it is *not a country of origin* of the migrations towards Europe, merely a transit country, hence the economic measures provided in the agreement are not suited at preventing the cause of migration. Thirdly, the forms of collaboration prospected in the agreement seem to have as a final end a *police control* both of the Mediterranean coast (to avoid the departures of boats towards Italy) and the terrestrial border in the south of Libya (to stop the entrance in Libya of migrants, thus creating, at least potentially, concentration zones of migration flows of people running away from wars, persecutions and famine, in areas which are almost entirely desert). Fourthly, it instructs Libya to keep and implement for those migrants that cannot go on to Europe, centres of "detention", which as of now do not respect in any way the human fundamental rights, but are actual managed, directly or indirectly, by criminal associations; these are places where rape, torture, and violence of any kind take place. On this aspect, the memorandum does not stipulate the possibility for Italy to control that these abuses present and/or future cease.

12. The reading together of art. 79, par.3 TFEU and articles 3, par. 2, and 4, par. 2 letter j), of the same Treaty, seems to induce, even in the ambiguity (probably on purpose) of such articles, that the Member States, while retaining a concurrent competence with the Union in the matter of "area of freedom security and justice", maintain their competence to conclude agreements with third countries of "readmission": a power that would result certain in the absence of Union level agreements with such third countries, while would be definitely more limited in the case of relationship with countries with which the Union already has in place readmission accords.

If such competence would have not been recognised to the Member States, some relationships among Member States and States in which the problematic of readmission is frequent but with which the Union does not have an agreement, would be without a conventional framework.

13. In the case of agreements of readmission concluded by the Union with a specific third country (agreements with a juridical value and not merely political, one hopes), it appears that the agreements of the single Member States with that same third country must, in any case, conform to the principles established in the Union level agreement and revolve principally on the operational aspects and the procedures, of an administrative-technical nature, to be followed during the readmission process.

14. After the entry into force of the Treaty of Amsterdam (1.5.1999), Italy has concluded agreements on the matter of "readmission" with the following third countries: Algeria (24.2.2000), Nigeria (19.2.2000), Serbia-Montenegro (28.1.2003 and 29.1.2003), Philippines (28.2.2004), Sri Lanka (24.9.2001), Moldavia (3.7.2002), Bosnia-Herzegovina (12.5.2004), Kosovo (15.4.2014), Montenegro 28.7.2014), Peru (12.10.2004), Egypt (9.1.2007), Russian Federation (3.12.2010), Serbia (13.11.2009); and it maintained the following accord concluded previously with the following third countries: Switzerland (10.9.1998), Tunisia (6.8.1998), Albania (18.11.1997), Macedonia (28.6.1997) and Serbia-Montenegro (19.6.1997).[51]

15. The judgement of the Strasbourg Court 1.9.2015 "Khlaifia case" was addressed to Italy regarding an application of the Treaty with Tunisia of 1998. It seems, thus, redundant to dwell any longer on the subject.

Conclusions

With the purpose of making some final remarks on what expressed in the 15 answers above, it seems plausible that a diplomatic activity of the Union and the Member States, respecting the abovementioned reciprocal competences, should aim, in this matter, at two main objectives: a) an improvement of the economic, cultural and institutional conditions of the third countries from which the "economic migrations" emanate; b) the creation of bilateral agreements with countries subject to severe calamities or famine and also the countries of "first reception" of refugees of wars and persecutions, in order to localise in such

[51] Also in this list are not mentioned the agreements concluded with other Member States, nor those negotiated previously with countries that later have become Member States.

countries several centres where to lodge the applications for international protection and therefore create regular "humanitarian corridors" for the applicants and reduce, in this manner, the "desperation journeys" through the transit countries and contain the criminal phenomenon of the "traffic of migrants".

MALTA

Dr. Jelena Agranovska*

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

Almost every textbook on European Union and EU law covers, to some extent, the issue of division of competence between the Member States and the Union.[1] A considerable volume of academic contributions explore this issue in comparative manner, assessing the status quo of competences both pre- and post-Lisbon.[2] The latter contributions, on the post-Lisbon period, often touch upon the aspects of EU's external competences, which have been explicitly codified with the entry into force of the Treaty of Lisbon.[3] In particular, Article 216(1) TFEU, which provides for general competences of the Union to conclude international

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[1] See, *inter alia*, R. Schütze, *EU Competences: Existence and Exercise*, in A. Arnull and D. Chalmers (eds.), *The Oxford Handbook of European Union Law*, OUP 2017, pp.75-103; K. St C. Bradley, *Legislating in the European Union*, in C. Barnard and S. Peers (eds.) *European Union Law,* 2nd ed., OUP 2017, pp.97-142; P. Craig and G. de Burca, *EU Law: Texts Cases and Materials*, 6th ed, OUP 2015, pp. 73-103.

[2] See, *inter alia*, P. Craig, *Competence: clarity, conferral, containment and consideration*, 29 *ELRev* (2004), pp.323-344; P. Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform*, OUP 2010, pp.155-192.

[3] See, *inter alia*, G. De Baele, *EU external action*, in C. Barnard and S. Peers, *loc. cit.* n. 1, at p.717; A. Arnull and D. Chalmers, *loc. cit.* n. 1, at p.87.

agreements, could be seen as codifying the 'implied competences' established by three famous judicial doctrines, first being the "ERTA doctrine" of 1971.[4]

By delivering the famous ERTA judgement, the CJEU established that the European Union has exclusive competence to conclude an international agreement where that agreement affects or is likely to affect internal rules of the Union. The break-through ERTA judgment shows that powers which, at the outset, do not fall under 'ordinary' competence categories and have not been conferred exclusively upon the Union may become so progressively through the exercise of those powers by the Union. In this case, the implementation of a common transport policy by the Union, through the laying down of common rules of an internal nature – adoption of a Regulation No 543/69 of the council on the harmonization of certain social legislation relating to road transport – excludes the possibility of concurrent powers on the part of the Member States in the area of transport.

The CJEU noted that the system of internal Union measures is inseparable from that of external relations, consequently concluding in the case of ERTA, that Member States' competence in the field of transport is thus excluded. Therefore, in the absence of the Member States' action, there exists implied competence of the Union: the "ERTA doctrine" is an 'implied powers doctrine'. Specifically speaking, the CJEU held that each time the Union '*adopts provisions laying down common rules*', '*the Member States no longer have the right, acting individually, or even collectively, to undertake obligations with third countries which affect those rules*'.[5] The "ERTA doctrine" has been recently perceived in the field of air and sea transport. In particular, the White Paper on the 'Future of European Transport Policy for 2010: time to decide'[6] underlines that the European Union plays its role in the adoption of the international rules which govern most of the transport policy. Yet, in the same White Paper the Commission also finds it to be '*paradoxical that the European Union carries so little weight in the adoption of the international rules which govern much of transport*.'[7]

The 'implied powers doctrine' established by the ERTA judgement has also been articulated by the CJEU's ambitious Opinion 1/76, which is now known as "Opinion 1/76 doctrine".[8] The Commission asked the Court for an opinion on whether the Draft Agreement Establishing a European Laying-up Fund for

[4] Judgment of 31 March 1971 in Case 22/70, *Commission v Council* (AETR/ERTA), [1971] ECR 263.

[5] Case 22/70, *Commission v Council*, *loc. cit.* n. 4, at para 18 – emphasis added.

[6] The White paper – 'European transport policy for 2010: time to decide' [COM(2001)370, 12/09/2001], at p.18, 97.

[7] *Ibidem*.

[8] Opinion 1/76 on *Agreement on the establishment of a European laying-up fund for inland waterway vessels* of [1977], ECR 741 also known as 'Opinion 1/76 doctrine'

Inland Waterway Vessels was compatible with the EC Treaty. In its Opinion, the CJEU articulated on the 'implied powers doctrine', declaring that if the Union has an internal competence to achieve a specific objective it implicitly holds the exclusive external competence on that subject.[9]

Another example of exclusive competence has been established by the CJEU in its Opinion 1/94 – the so-called 'WTO doctrine'.[10] In this Opinion 1/94 the CJEU assessed whether the WTO Agreement, which has been negotiated by the Commission and which established an institutional framework for the management of trade relations among the Member States, is compatible with the Treaty. The Court held that once the Union has included in its internal legislative act provisions related to the treatment of nationals of third countries or has expressly conferred upon its institutions a competence to negotiate with third countries, it acquires the exclusive competence on the measures covered by these acts.[11]

Such effects were also present in decisions taken by the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO). In the field of maritime safety, on the 6th December 2002 the Union has agreed to ban single-hull tankers from is ports by 2015.[12] This decision by the European Union has led the IMO to change its planned time table for phasing out such ships.

Question 2

Article 3(2) TFEU confers upon the EU the exclusive competence to conclude an international agreement when amongst other things its conclusion may affect common EU rules or alter their scope. Where negotiations concern issues which are already covered by the EU *acquis*, the competence in relation to those elements would exclusively belong to the EU. According to Article 3(2) TFEU, the Union may obtain exclusive treaty-making power, where one of three situations is fulfilled. These three situations are said to codify three judicial doctrines discussed above.

According to the first situation, the Union will obtain a subsequently exclusive treaty making power when the conclusion of an international agreement is provided for in a legislative act. This corresponds to the 'WTO doctrine'. In Opinion 1/94, on the compatibility of the WTO Agreement with the Treaties, the CJEU has stated, '*whenever the [Union] has concluded in its internal legislative acts provisions*

[9] *Ibidem*, papa.3-4.

[10] Opinion 1/94 on the WTO Agreements (GATS and TRIP' s) [1994] ECR I-5267.

[11] *Ibidem*, para 95.

[12] EU Commission Press Release (IP/01/633) *Action to combat oil spills: Loyola de Palacio welcomes the international agreement to phase out single-hull oil tankers and stresses the leading role of the EU*, Brussels, 2 May 2001.

relating to the treatment of nationals of non-member countries or expressly conferred on the institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the sphere covered by those acts'.[13] Article 3(2) TFEU codifies this judicial doctrine but is more restrictive as it excludes the first alternative from its scope.

The second situation mentioned in article 3(2) TFEU grants the Union an exclusive treaty power where this 'is necessary to enable the Union to exercise its internal competence'. This formulation appeared to codify the 'Opinion 1/76 Doctrine' in a much restrictive form.

The third situation in Article 3(2) TFEU appears to refer to the CJEU's 'ERTA doctrine'. Under this doctrine, Member States are deprived of their treaty making powers to the extent that their exercise affects internal European law. Each time the Union 'adopts provisions laying down common rules, whatever forms these may take, the Member States no longer have the rights, acting individually or even collectively, to undertake obligations with third countries which affect those rules'.[14] The third alternative strangely breaks the link between a Member State agreement and internal EU law and replaces it with an analysis of the effect of a Union agreement on European rules.

Analysing the Comprehensive Economic Trade Agreement (CETA), one can see the view of Member States upon the EU having exclusive competence to conclude an international agreement. Although the EU Commission considers CETA as falling within its sole competence it, decided following strong pressure from Member States to present CETA as a mixed agreement (in order not to further delay the signature and application of the deal). The EU Commission agreed to present CETA as a 'mixed' agreement in response to many Member States, including the UK's, view that CETA consists of 'both EU and Member State competence'.

Question 3

Article 216 TFEU loosely codifies the 'ERTA doctrine' on the Union's general competence to conclude international agreements. While recognising the express treaty making competences of the Union conferred elsewhere by the Treaties, the Article 216 TFEU grants the Union a residual competence to conclude international agreements in three instances.

The first alternative mentioned in Article 216(1) TFEU confers a Treaty power to the Union '*where the conclusion of an agreement is necessary in order achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*'. This formulation mirrors the Union's general competence in Article 352 TFEU. If the

[13] Opinion 1/94, *loc. cit.* n. 10, para. 95.

[14] *loc. cit.* n. 4, at para.18.

Court decided to confirm the parallelism the Union will have a residual competence to conclude international agreements that cuts across the jurisdictional scope of the entire TFEU.

Regardless of what the CJEU will make of this alternative, Article 216 TFEU lists two additional situations. The Union will also be entitled to conclude international agreements, where this '*is provided for in a legally binding act or is likely to affect common rules or alter their scope*'. Both alternatives make the existence of external competence dependant on the existence of internal Union law, although it is (theoretically) difficult to accept that the Union can expand its competences without Treaty amendment through the simple adoption of internal Union acts.

Question 4

It is not currently known whether there exists a link between Article 216 TFEU and Article 3(2) TFEU.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

Pursuant to Article 218(4) TFEU, the Council has the power to address directives to the negotiator, and to designate a special committee in consultation with which the negotiations must be conducted. This is usually the Council's Trade Policy Committee (TPC).

From an international trade perspective, Malta's overall experience on the interaction between negotiator/negotiating team and special committee was satisfactory. One possible issue that might be looked into is that larger Member States are more likely to be connected to the negotiating arm of the Commission than smaller Member States, like Malta.

Moreover, Malta's perception of the institutions is respectable, although knowledgeable that at times negotiations could grind to a halt and progress might take too long to be realised due to political influences within the same institutions.

Question 6

In the area of international trade, the CJEU's recent Opinion 2/15 on the Free Trade Agreement between the EU and Singapore[15] assessed the competences

[15] Opinion of 16 May 2017, ECLI:EU:C:2017:376; see also Opinion of AG Sharpston delivered on 21 December 2016 on the Opinion 2/15, ECLI:EU:C:2016:992.

in the EU-Singapore Free Trade Agreement (FTA). This Opinion, alongside the opinion of the Advocate General Sharpston, provides some guidance on what is EU competence and what is EU – Member States' mixed competence. However, given that FTA disciplines are evolving beyond what was typically the remit of trade, the inclusion of novel areas in trade policy creates a further dilemma on what is only EU or mixed competence.

From a trade perspective, the European Parliament is also involved in giving its consent through a vote.

Question 7

In trade policy, provisional application typically applies to those elements that are Union competence only (or as decided by the Council). In this process, the Member States are directly involved and hence, no issues of competence are foreseen there as provisional application is processed through Qualified Majority Voting. However, mixed competence areas are typically excluded by the Council decision (exclusion from provisional application until national ratification). In this regard, any decision on what to exclude from provisional application has to be taken in the Council Decision. The renegotiation of agreements by the Union with third countries to exclude areas of competences of the Member States could be a way forward.

Question 8

Pursuant to Article 218(6) (a) TFEU the Council adopts a decision concluding and international agreement after obtaining the Parliament's consent. Under the provisions of Article 218(6) (a) TFEU such Parliamentary consent is required in five cases, including: (iii) *agreements establishing a specific institutional framework by organising cooperation procedures*, and (iv) *agreements with important budgetary implications for the European Union*. It is currently unknown what interpretation should be given to the above provisions, in particular, which budgetary implications could be seen as 'important'.

Question 9

According to Article 2018(9) TFEU, the cases of suspension of the application of international agreements shall be decided by the Council of the Union on a proposal from the European Commission or the High Representative. Currently, there is no general assessment made by Malta of the application of this provision of the TFEU and currently there are no specific remarks to be made in relation to the recent suspension cases.

Question 10
Article 218(7) TFEU provides for the procedure to be followed for establishing the positions to be adopted on behalf of the European Union in a body set up by an international agreement. At present, there had been no examples of decisions challenged and/or discussed in Malta that have not been challenged before the Court of Justice.

Question 11
Pursuant to Article 218(10) TFEU, the European Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion procedure regarding international agreements. Such information shall be provided to the Parliament in sufficient time for it to be able to express its point of view if appropriate and for the Commission to be able to take the Parliament's views as far as possible into account. This information shall, as a general rule, be provided to the Parliament through the responsible Parliamentary Committee and where appropriate in a plenary sitting. In duly justified cases, it shall be provided to more than one Parliamentary Committee. Since transparency has become an ever more important aspect of EU policy in general and hence this is supported.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12
There are no known national cases on the application and/or interpretation of international agreements concluded solely by the European Union or of mixed agreements, which were not source of references for a preliminary ruling. There is no national case law concerning the challenge of international agreements concluded solely by the European Union or of mixed agreements, without there being any references for a preliminary ruling on the interpretation of validity.

Question 13
The opinion of the CJEU Opinion 2/15 on the Free Trade Agreement between the EU and Singapore[16] was clearly in favour of the agreement being mixed on basic investment protection provisions and on portfolio investments. However, it is not yet clear if this will settle the matters between Member States and the Commission on EU competence in FTAs and it is still not clear what the way forward could be to address this situation.

[16] *loc. cit.* n. 15.

Question 14
Currently there are no actions for failure to fulfil obligations brought by the European Commission against Malta for failure to comply with the international commitments that are binding on the European Union.

Question 15
As regards to control measures that are taken by Malta in view of ensuring compliance with the international agreements that are binding on the European Union, it should be remarked that enforceability is subject to ratification and adoption of the international agreement as an Act of Maltese Parliament. In such case, the international agreement becomes part of the Laws of Malta and hence enforceable in Maltese Courts.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16
The scope of commercial policy since the entry into force of the Treaty of Lisbon should include trade policy in general and EU investment policy. A nuanced approach to dealing with some areas that have a direct impact on trade, but in which Member States have retained competence, is required.

Foreign Direct Investment promotion is a competence of Member State and should remain so. On Foreign Direct Investment protection, the Union has taken some of the competences to reflect the direct competence and impact that the Union's treaties / laws have on the Foreign Direct Investment. Notwithstanding, the increased relevance of the Union in the area of investment, Member States have their own responsibilities at the local level.

Member States retain competence in the area of portfolio investment. Following the opinion of the CJEU on the EU-Singapore agreement[17], the aspects of trade in transport and in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIP agreements) could be considered more a remit of the Common Commercial Policy. However, one would need to look into the legal detail provided.

Question 17
The Bilateral Investment Treaties (BITs) of Member States and the EU agreements should be complementary. One should build on the other in view of the important developments made in this area in recent years. However, given that Member States have specific country or regional interests that do not exactly

[17] *loc. cit.* n. 15.

match the EU interests, co-existence of the two types of agreements is necessary, while also respecting the need to replace Member States' BITs once IP agreements are finalised by the EU (in line with the Grandfathering Regulation on this topic). BITs with countries that do not have an investment agreement with the EU are important to ensure secure investment environment with target destination countries. BITs could also be viewed as important by foreign companies wanting to investment in a particular Member State.

Question 18

As regards the dispute settlement mechanism regarding investment protection in the new generation of free trade agreements envisaged with the Union's partners (such as CETA and TTIP) Malta supports the EU's new generation dispute settlement mechanism as it improves significantly some aspects of concern with older style dispute settlement mechanisms in BITs. However, a major issue is when and why this should be triggered and excluding dispute settlement when there is public interest involved. Moreover, the inclusion of transparency and the reduction of conflict of interest of the judges is something that is important for a well-functioning system. It should also be noted that in recent years the increase in international investment cases has increased making the establishment of a fixed system a more feasible.

Question 19

An agreement was reached on a Financial Responsibility Regulation[18] in case of dispute settlement a few years back in which both respondent and liability would be apportioned in cases of dispute settlement. Malta agrees to the principles reflected in that Regulation by which responsibility is apportioned according to the origin of the measure/s to which a breach of an agreement can be traced to, nothing that joint Union-MS responsibilities were envisaged as possible situation in future cases.

Question 20

In accordance with the last sentence of Article 207(1) TFEU, the common commercial policy shall be carried out within the framework of the principles and objectives of the external action of the European Union. There are currently no expressed views on the relationship of this provision with Article 21 TEU.

[18] Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257/121.

Question 21

As regards the perspective of the Member States on the procedure for negotiating and concluding international agreements regarding common commercial policy, it should be specifically commented that a simple procedure that also takes into account the legal concerns related to competence should be adopted. This is necessary to make EU trade policy more efficient and timely during the processing of decision.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

Since entry into force of Amsterdam Treaty in 1997, there has been a significant competence shift from the Member States to the Union in the areas of migration and asylum: a number of relevant EU laws, enacted in accordance with the Treaties and their relevant Protocols, now cover asylum, family migration and the right of migrants who are long-term residents and also irregular migration.[19] The Treaty of Lisbon emphasised that one of the core aims of the Union is to build an area of freedom, security and justice without internal frontiers, and with full respect for fundamental rights.[20] The core aims of the AFSJ project are encapsulated in Title V of the Treaty and the fairness towards third country nationals is one of them.[21]

Protocol (No 23) on the external relations of the Member States with regard to the crossing of external borders, refers to the fact that the agreements concerned are to be concluded as long as Union law is respected, whereby the Union shall have competence. Any agreement with a third country regarding the exemption from the visa requirement of its nationals should be so conducted. The exemption from such visa requirement may be allowed to nationals of the third country only if that exemption is provided for in Union legislation, in this case Regulation 539/2001.[22] It is also worth mentioning that paragraph 2 of article 20 of the Convention implementing the Schengen Agreement also deals with bilateral agreements, albeit the reference is to agreements signed prior to the coming into

[19] Such as e.g. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003; Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[20] Article 3(2) TFEU.

[21] Article 67(2) TFEU.

[22] Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81/1.

force of the Convention. When the Schengen Acquis became part of the Treaty, such agreements are in accordance with Protocol 23 as they form part of EU law.

Malta has a number of bilateral agreements which are in line with the exemptions provided for in Article 4 of Regulation 539/2001.

Question 23

[Under the combined provisions of Articles 33 (2) (c) and 38 of Directive 2013/32/EU of 26.6.2013 on common procedures for granting and withdrawing international protection, a Member State may apply the safe third country concept in order to declare an application for international protection submitted by a third-country national from that country inadmissible and to return the applicant to the territory of that third country – even if the State Member at stake admitted that it was responsible for examining that application pursuant to Regulation No 604/2013 of 26.6.2013 (see judgment of the Court of Justice of 17.2.2016, Mirza, C-695/15, paragraphs 42 and 46). At this stage of development of the Common European Asylum System (Article 78 (2) TFEU), it is for the Member States to draw up the list of safe third countries, subject to the conditions provided for in Article 38.]

There is currently no national case law on the interpretation and application of the safe third country concept. Currently, Malta only has a list of safe third countries of origin. The safe third country concept has never been applied by the Office of the Refugee Commissioner.

Question 24

Third country nationals explore different legal routes into the EU – as migrant workers, asylum-seekers and refugees. In the follow-up to the revolutions in the Arab world Malta, together with Italy, has been sharing a significant burden in migrants' influx. The small Mediterranean islands of Lampedusa and Maltese Archipelago have become main entry points for migrants on the Mediterranean sea routes. Back then, here have been constant and desperate calls for the EU and other Member States to assist in migrants' redistribution and share the burden of dealing with asylum-seekers. Clearly today, irregular migration and uncontrolled movement of people has become a common problem for all Member States and is one of the core priorities for the EU as a whole. A truly sustainable solution lies in the increasing co-operation between Member States on the one hand, and the intensifying EU dialogue and cooperation with countries of origin and transit in order to manage migration flows more effectively.

The Global Approach to Migration and Mobility (GAMM) was the first comprehensive attempt to prioritize a number of important aspects of migration, linking related policy areas for greater coherence (e.g. migration and development).

In the follow up to the 2011 revolutions in the Arab world, the GAMM has been renewed with the mobility of third country nationals at its core and with a focus on making partnerships more sustained and forward looking. The GAMM has set the long-term vision of addressing root causes of migration, as well as promoted circular migration as a mutual benefit for countries of origin and destination.

The GAMM has been an important mechanism for the EU to prioritize dialogue and cooperation with third countries, however, it is important that the EU strengthens these further, whilst fully addressing its concerns and aspirations towards migration management.

One area which has seen little progress is that of returns and readmission. Despite the prioritization of returns and readmission, the GAMM failed to provide the necessary incentives for the finalization of return agreements with partner countries. On the other hand, many third countries prefer negotiating return agreements with individual EU Member States rather than with the EU as a whole. The GAMM helped to strengthen political relations with countries in the European Neighborhood, contributing to legislative reforms and capacity building in partner countries by means of Mobility Partnerships. Nevertheless, it is important to enhance the migration dialogues undertaken through other EU frameworks, for example by making migration a regular agenda item in Political Dialogues taking place within the framework of Article 8 of the Cotonou Partnership Agreement.

The Partnership Framework complements the Global Approach to Migration and Mobility by elaborating the EU's comprehensive approach further and providing a tailor-made approach in addressing the needs of countries of origin and transit. This Framework further builds on the outcome of the Valletta Summit on Migration, tackling the five pillars outlined in the Action Plan, as well as putting additional focus on addressing the root causes of irregular migration. The Commission's Communication has initiated the process culminating in the European External Investment Plan (EIP) launched by the Council and the European Parliament in June 2016. This new tool will help to create job opportunities and facilitate investment in Africa and the European Neighborhood. The deployment of European Migration Liaison Officers in EU Delegations in targeted third countries has also helped in having people with the right knowledge and experience on the ground.

In respect to the maintenance of special relations with third countries, it should be stressed that as a Commonwealth member, Malta has good relations with a number of Commonwealth countries. Malta's leverage and political dialogue on migration issues with specific third countries (including from the Commonwealth Group of Nations) is however felt to be stronger through the EU dialogue than merely bilaterally. This is mainly as a result of the EU's large

number of tools at its disposal that can be used to enhance cooperation on migration matters, such as trade and development assistance.

Malta has three bilateral agreements on migration matters with Burkina Faso (2013), The Gambia (2014) and Nigeria (2014). The agreements specify the points of contact, the authorities involved, the repatriation procedure to be followed as well as sectors for technical cooperation.

Question 25

As regards to the question on whether the practice of concluding readmission agreements with third countries by the Member States is correct under Article 79 (3) or Article 3 (2) TFEU, it should be noted that in Malta there is a consideration that Member States may, in accordance with EU law, conclude bilateral readmission agreements with third countries.

As regards to the question on relationship between readmission agreements concluded between the EU and a third country, on the one hand, and readmission agreements concluded between a Member State and the same third country on the other hand, it is considered that wherever there is a previously existing bilateral readmission agreement between a Member State and a third country, special provision could be made in the EU agreement that readmission operations between the Member State in question and the third country shall continue to be governed by the bilateral agreement, provided that this agreement does not in any way contravene the provisions of EU or international law, including the principle of non-refoulement.

Following bilateral negotiations with a number of countries of origin in order to strengthen cooperation in the field of return, Malta has signed three MoUs on Migration matters with the following:

Burkina Faso – signed on the 27th February 2013;
Nigeria – signed on the 3rd April 2014;
The Gambia – signed on the 23rd September 2014.

Such MoUs cover various areas related to readmission, such as the establishment of contact points, the authorities involved, the repatriation procedure as well as areas of technical cooperation between both Parties.

The European Border and Coast Guard cannot be bound by any specific provision that is found to contravene Union or international law as applicable to the Member State in question.

POLAND

Magdalena Słok-Wódkowska*

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

There are no doubts that post-Lisbon developments in the EU law resulted in boosting legislation in many areas, partly due to a shift of competences. It resulted also in an increased activity of a new institution of European External Action Service and number of agreements related to general issues and political cooperation such as the EU and Afghanistan Cooperation Agreement on Partnership and Development or the EU and Cuba Political Dialogue and Cooperation Agreement.

Despite the significance of general political agreements, in my view, the most important area of these new competences is the area of freedom, security and justice, where we can also observe an increase of cooperation with third states. An increase of legislation concerning cooperation in civil and criminal matters as well as cooperation in internal matters is followed by a growing need for international cooperation. Therefore, the EU recently acceded some conventions such as *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (prepared by Hague Conference on Private International Law HCCH) or *Council of Europe Convention on preventing and combating violence against women and domestic violence* or *Council of Europe Convention and Additional Protocol on the prevention of terrorism*. The biggest problem

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I can notice within this area, is that many fundamental conventions, especially prepared by HCCH in 1960s or 1970s are open for accession for states only and do not allow international organization to be a party. It requires the EU to obligate its member states to accede for the benefit of the EU in order to comply with ERTA principle.

Other areas where the EU has been particularly active is international trade and investments as well as data protection (or data exchange).

Poland rarely raises any issues during conclusion of international instruments laying within the EU exclusive competences, although there are some exceptions. One of the most recent is *Council of Europe Convention on preventing and combating violence against women and domestic violence*, mainly due to political reasons, although the issue of lack of the EU competences to conclude the conventions has also been raised[1]. In case of *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* there were some doubts about division of competences raised as well, as according to the Commission's initial motion the EU was exclusively competent to sign the Protocol. Poland did not support such a division of competences, claiming that the Protocol lays within shared competences (as claimed other Member States, too). As a result of doubts raised by the Council, initial motion[2] has been changed to indicate in the recital 5 of the preamble that the Protocol "should therefore be signed on behalf of the European Union as regards matters falling within the competence of the Union in so far as the Additional Protocol may affect those common rules or alter their scope. The Member States retain their competence in so far as the Protocol does not affect common rules or alter the scope thereof "[3].

Questions 2 – 4

All three questions are closely linked; therefore, I will answer on them together. It is mainly due to the similarity of wording of the Articles 3 (2) and 216 (1). There

[1] See for example: Opinion of the Foreign and European Union Affairs Committee of the Senate of the Republic of Poland on the proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence COM(2016)109, and the proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe convention on preventing and combating violence against women and domestic violence COM(2016)111 adopted at the meeting on 29 November 2016, http://www.ipex.eu/IPEXL-WEB/scrutiny/NLE20160063/plsen.do, access: 20.08.2017.

[2] Proposal for a COUNCIL DECISION on the signing, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) (COM(2015)291).

[3] Council Decision (EU) 2015/1914 of 18 September 2015 on the signing, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No 196).

are only minor differences between these two provisions. It is difficult to assess whether they have any practical impact[4].

Although there are three possible cases when, according to the Article 3 (2), the EU has an extended exclusive competence, two of them are much less controversial and unclear than the third one. Conclusion of an agreement is very rarely provided for in a legislative act of the Union. Also, a case, when conclusion of an agreement is necessary to enable the Union to exercise its internal competence refers to a very limited number of agreements. On the other hand, though, a case when conclusion of an agreement "may affect common rules or alter their scope" is vague.

There is no official position of Polish government concerning Articles 3 (2) and 216 (1), although from views presented during ECJ proceedings[5] we can assume, that it supports rather narrow interpretation of the last case. In the proceedings related to *The Hague Convention on the civil aspects of international child abduction*, Poland presented the view, that because scope and application of the Convention and the *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000* are not the same, the EU has no competence at all in this area. Similar opinion was presented during proceedings concerning *Free Trade Agreement between the European Union and the Republic of Singapore*. Such an opinion was presented by the majority of states, but the Court did not share these opinions.

On the contrary, in my opinion, the Article 3 (2) should be interpreted rather broadly. It means, that whenever there is UE legislation on a given issue, the EU has an exclusive competence to conclude international agreements on that issue. Such an interpretation was recently confirmed in ECJ Advisory Opinions 1/13[6] or 3/15[7]. The Court clearly stated that whenever common rules introduced in the EU legislation may be affected by an international agreement, it is the EU, who is exclusively competent to conclude such an agreement.

General competence to conclude international agreements by the EU has not been discussed recently, neither in Poland's official documents nor in a recent case-law. The similarity of wording between these two provisions must be interpreted as an indication, that there is a link between what is a competence and exclusive competence of the EU to conclude international agreements. Article 216 (1) combined with the Article 3 (2) may be also seen as a way to alter a little

[4] See for example P. Koutrakos, *EU international relations law*, Bloomsbury, 2015, p. 128.

[5] Mainly in proceedings for issuing opinions 1/13 (Opinion 1/13 of the Court of 14 October 2014, ECLI:EU:C:2014:2303) and 2/15 (Opinion 2/15 of the Court of 16 May 2017, ECLI:EU:C:2017:376).

[6] Opinion 1/13 of the Court of 14 October 2014, ECLI:EU:C:2014:2303.

[7] Opinion 3/15 of the Court of 14 February 2017, ECLI:EU:C:2017:114.

bit ERTA principle. In the ERTA judgment, the ECJ stated that Member states cannot conclude agreement, when there is a secondary legislation on a given issue, but did not overrule the possibility that an agreement can be concluded, when there is no existing EU legislation. Current wording must be understood as an identity of the EU competence to conclude an agreements and the EU exclusive competence. Therefore, if the EU can conclude an agreement, it cannot be concluded by Member States and, on the other hand, if a competence is broader than exclusive competence, the EU cannot conclude such an agreement on its own. Such a situation would require a mixed agreement. This interpretation was also confirmed in latest judgments, for example in an opinion 2/15.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFUE)

Question 5

The question refers to a special committee of the Article 218(4), which is often designated during negotiations. First of all, we have to be aware of the fact, that there is no one special committee, but rather many of them, designated for negotiations of agreements with various fields. Therefore, it is impossible to make a general comment on a position of Member States, as it may differ in different committees. My general impression is that Member States has a very mediocre role in the EU negotiations, as the Commission's negotiating teams mainly inform committees on their achievement rather than seek some prior advices, although there might be committees where common position is prepared by a committee in advance, before every session of negotiation.

Question 6

Poland seems to be rather reluctant to the idea of provisional application, although it is a common practice during lengthy procedure of conclusion of mixed agreements. Provisional application is also rarely used in Poland's practice (in relation to agreements that are not mixed with the EU), only in exceptional cases. In the EU agreements, it is acceptable in case of mixed bilateral agreements mainly because of the fact, that it usually takes years to fully ratify an agreement by all Member States. Poland's position here is quite clear – provisional application can only be limited to issues, where the EU has exclusive competences. It is also in line with position of other Member States.

The most important issue related to provisional application is a division of competence between the EU and its Member States. Therefore, the Council is the most suitable institution to decide on it. Despite getting some additional

powers in Lisbon Treaty, European Parliament has very limited scope of action in relation to conclusion of international agreements of the EU. It is concentrated mainly around ensuring its legislative powers rather than proper division of competences. As a result, it cannot influence wording of a decisions on signing, provisional application and conclusion of an agreements. In my view, it is not possible under current treaty framework to ensure European Parliaments' participation in making a decision on provisional application.

Question 7

Problem of provisional application is not distinctive for EU law only. It can be a source of many doubts also, when an agreement is concluded by a state in case, when provisional application last too long. The main problem seems to be determining a moment, when provisional application should be ceased.

It is also the main problem in case of the EU's mixed agreements. It usually takes a few years to ratify an agreement by all Member States and enter fully into force. Member States should be given enough time to finish its lengthy internal procedures. Provisional application might be though a problem in case when one or few Member States declare that it (they) are not willing to ratify an agreement. On one hand, it should be obvious that in such case provisional application should be terminated, as there would no longer be a chance for an agreement to enter into force. On the other hand though, it is a political problem when one out of twenty eight Member States is not willing to ratify a treaty. A good example of such a situation is a case of EU-Ukraine Association Agreement. After citizens of the Netherland voted "no" in the referendum in 2016, there was a threat that the Netherland (as the only Member State) would not ratify the Association Agreement. The problem, mainly political, has been solved by a special declaration[8] and the Netherland were eventually convinced to ratify the Agreement in June 2017. This case proves, that problem of provisional application and possibility of non-ratification by a Member State is more political than legal and solution would be also rather political.

Therefore, it is not possible to give one universal answer to a question whether the EU should renegotiate and conclude an agreement alone, as there is no one universal solution. It depends on a kind of agreement, an issue covered by the agreement, a reason why a Member State would not ratify it. All of these factors should be taken into consideration while seeking for a solution for a problem of non-ratification.

[8] European Council conclusions on Ukraine, 15 December 2016, Brussels, 15 December 2016, file:///C:/Users/MSW/AppData/Local/Temp/15-euco-conclusions-ukraine.pdf.

Question 8

When we consider a set of criteria for mandatory approval of an agreement by the European Parliament, it is obvious that the most import and frequently used is the Article 218 (6) (a) (v) *agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required*. Points (iii) and (iv), despite being mentioned before this provision would be rarely used, mainly to complement Article 218 (6) (a) (v). In my opinion, the main objective of consent of the European Parliament is to secure the European Parliament's competences in the EU decision-making procedures. Therefore, primarily it is to ensure, that no international agreement would introduce obligations that would require the EP consent without it. Majority of the EU agreements, including these establishing a specific institutional framework by organising cooperation procedures and with important budgetary implications for the Union are concluded within fields where legislative procedure require participation or consent of the European Parliament. The (v) point is also the most concrete one, with least elasticity and possibility of interpretation. Therefore, points (iii) and (iv) can be used only in these rare cases, when an agreement covers fields, that do not require consent or participation of the European Parliament. The most important of such fields seems to be Title V of the TEU, but agreements concluded based solely on the Article 37 of TEU are usually rather general. More precise agreements would have mixed character, which does not exclude consent of the European Parliament.

In my opinion, the interpretation of points (iii) and (iv) should be broad. The provisions are safeguards to ensure democratic control pursued in the EU by the European Parliament. When there are any doubts whether the EP should take part in conclusion of the agreement, it is safer to engage this institution, as the only one in the EU, which is elected democratically. In times of ever present calls for greater democratic legitimization of both European and international law, participation of elected institutions should be as broad as possible.

Question 9

Suspension of application of a treaty is an extraordinary procedure, used mainly in case of a severe violation of human rights by a party of an agreement. Despite the fact, that such a possibility has been included in many agreements concluded by the EU as so called "human rights" clauses it is in fact treated as a measure of last resort. Suspension is rarely used[9], therefore it is not discussed vividly in Poland.

[9] It was in fact used only once in case of the Cooperation Agreement with Yugoslavia, more on the issue: G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration Without Membership*, Brill, 2016, p. 70.

Question 10

There were no discussions concerning any of positions to be adopted on behalf of the European Union in an international body that I know of and none of them have been challenged nor in front of national courts neither in the ECJ. Because of complexity of procedure here, positions of the EU are usually subjects only of internal discussion within the administration. Even if the government has some doubts or remarks it is nothing unusual or drawing an attention of broader public.

Question 11

Providing democratic control and legitimacy ensured mainly by bodies elected in general elections is one of the biggest challenges of contemporary international law. It is of special importance in a legal system that is created by states as a supranational legal order. Therefore, assuring as much participation of the European Parliament in a process of conclusion of an agreement is such important. Practice shows, that it is also convenient in a situation, when the European Parliament gives its consent at the end of the process, as it allows the EP to influence negotiator. If we look for example at a negotiations process of agreements concerning passenger name records with the United States or Canada[10], we can see how important involvement of the EP might be, when there are some controversies concerning an agreement. The role of the European Parliament in negotiations does not seem to be controversial in Poland.

Although involvement of democratically elected bodies in negotiations and conclusion of an international agreement is very important with twenty-eight national parliaments (some bicameral, some with strong regional parliaments) it becomes a challenge to engage them all. There are of course interparliamentary bodies, that can be used to ensure participation of national parliaments, although the only case, when they were actually used is a case of Transatlantic Trade an Investment Partnership (TTIP). TTIP was discussed during meetings of Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) in 2014 and 2016[11]. COSAC called for a greater participation of national parliaments and a dialogue between them and the European Commission. But TTIP and trade negotiations should be treated rather as an exception then a common practice in negotiations. National parliaments have extremely limited competences in the field of external relations of the EU. Decisions concerning signing and conclusion of international agreements are not legislative acts, therefore national parliaments cannot question its

[10] See for example a history of negotiations and the EP role at Personal data protection Fact Sheet, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.12.8.html.

[11] See Contribution of the LIII COSAC Riga, 31 May-2 June 2015, OJ C 342, 16.10.2015, p. 1–7; Contribution of the LVI COSAC, 13-15 November 2016, Bratislava, OJ C 486, 28.12.2016, p. 1–4.

compliance with subsidiarity principle and what is more, there is no obligation to even inform them, that such decisions are prepared.

Despite such a narrow competence, European Commission usually sends drafts of decisions on signing and conclusion of an international agreement to national parliaments. Therefore, they are able to scrutinize these decisions in a regular procedure, established by each parliament. In Poland, the procedure is based on the Act of 8 October 2010 (the Cooperation Act)[12]. According to the procedure in case of non-legislative acts both the Sejm and the Senat may ask the government to present its position concerning a given act, for example a decision on signing an international agreement. Both the Sejm and the Senat may give its opinion on a draft to the government or even sent it the EU institutions. But it must be underlined, that it is a final stage of the EU procedure, when the agreement is already negotiated and such an opinion of one national parliament has very limited political and legal significance.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

There are no such cases that I know of. Although national courts and tribunals are more and more often accustomated to referring to the EU law, it concerns rather secondary law. Complexity of an issue of international agreements concluded by the EU seems to preclude national courts from any referring to them in their case-law. There were no preliminary questions concerning international agreements ever asked by polish courts or tribunals, too.

Question 13

There was no specific discussion at national level concerning direct effects of international agreements concluded by the EU. There is no special position taken by Poland on direct effect of international agreement. Moreover, the literature on that issue is rather scarce in Poland.

Question 14

There is no action of infringement taken by the European Commission relating to compliance of Poland with an international agreement concluded by the EU.

Question 15

There is no specific procedure to control compliance with international agreements binding in the EU. There are only general measures undertaken to ensure,

[12] Act on the cooperation of the Council of Ministers with the Sejm and the Senate in Matters Relating to the Republic of Poland's Membership of the European, O.J. of 2010, No. 213, item 1395.

that new legislation in Poland is in line with the EU law, which include also international agreements. Any new draft of an act need to be evaluated by a division of Ministry of Foreign Affairs responsible for European Law as well as by a special office in the Chancellery of the Sejm.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENT

Question 16

Changes of the scope of common commercial policy made in the Lisbon Treaty do not leave much space for further discussions, especially in the light of newest ECJ judgments. There are no doubts that all of the WTO-related issues are covered by the Article 207 (1). Beside the fact, that commercial policy related to trade in goods as well as, increasingly, to trade in services has been perceived for many years as fully comprised by exclusive competence, it was confirmed also in relation to intellectual property rights in a *Daiichi Sankyo*[13] judgment. Foreign direct investments are also covered *expressis verbis* by the Article 207 (1), while *a contrario* portfolio investments are excluded from its scope. Such an interpretation was confirmed explicitly by the ECJ in its advisory opinion 2/15 concerning free trade agreement (FTA) with Singapore[14]. In the same opinion, the ECJ made it clear that transport issues, that are usually regulated in trade agreements, are fully comprised by the exclusive competence of the EU, despite the fact, that they are not covered by the Article 207 itself. It was derived by the Court from a number of the EU regulations concerning transportation.

Clarifications made by the ECJ made previous discussions irrelevant. Although covering all of the WTO-related issues by the exclusive competences was not controversial in Poland, there were some doubts concerning other issues. As it was envisaged by the Polish position presented in case of the EU-Singapore FTA, according to Poland (and a number of other Member States) many issues such as transport services, sustainable development, provisions designed to combat anti-competitive activity should not be treated as the EU exclusive competence and should require consent of Member States. Beside this position, no official position has been presented. During discussions about Comprehensive Economic and Trade Agreement (CETA) with Canada, the only issue addressed was investment protection, without special attention paid to portfolio investments, although it was quite obvious that Poland tried to narrow down the scope of the EU exclusive competence concerning investment.

[13] Daiichi Sankyo & Sanofi-Aventis Deutschland, C-414/11, Judgment of 18 July 2013, ECLI:EU:C:2013:520.
[14] Opinion 2/15, op. cit.

Question 17

Poland has concluded nearly forty bilateral agreements with third states, so it can be seen as a very active within this field. Vast majority of these agreements was concluded in the first half of nineteen nineties and none of them was ever amended or renegotiated. Therefore, almost all Polish BIT are obsolete and can be seen as not providing for sufficient level of protection of interests of states vis-à-vis companies. They for instance do not exclude dispute settlement from the scope of mist-favour nation clause or provide for detailed rules applied in dispute settlement mechanisms. As a result, Poland seems to be rather in favour of conclusion investment treaties by the EU, as a way to get much more modern agreements with better defined rights and obligations of states and companies.

Moreover, many doubts were clarified by the *Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party*, according to which the EU may be a responder in case of a dispute pursued based on an EU-wide agreement.

Relationship between current BITs concluded by Poland with newly negotiated EU-wide BITs was not really discussed publicly in Poland. From the current practice, after negotiating some investment chapters of the FTAs it became clear, that these agreements simply supersede bilateral agreements which are going to be terminated.

Question 18

Although it might be surprising Poland was much more in favour of an "old" dispute settlement mechanism (arbitrage) then it is of an investment court system. The most important obstacle seen by the Polish government in the ICS is lack of guarantees, that a judge appointed by Poland will be chosen to the Investment Court. Poland was even pushing for the panel of judges in CETA to be expanded to include a judge from each of the EU's current 28 nations, despite its previous consent for signing CETA. Official position on CETA is that the EU should guarantee to Poland an influence on composition of the investment court. The same position is expected to be presented in relation to other ICS in other agreements as well as to the multilateral court.

Question 19

Problem of liability of the Union and of the Member States was not widely discussed in Poland. At the moment, this problem seems to be closed by the Regulation 912/2014. Division of liability established in the Regulation has not been questioned.

Question 20

Despite the invocation of principles and objectives of the external actions of the EU directly in the Article 207, I do not see articles 21 TEU and 207(1) as closely interlinked. In my opinion, it is rather a general obligation to pursue trade policy in a manner not contrary to the general EU external policy.

In practice, almost all of the EU trade agreements are supplemented by general political agreement. As majority of the EU FTAs concluded so far was a part of a broader association agreement, political cooperation was important and obligatory part of every agreement. The new-type FTAs concluded with developed states cover only economic issues. Therefore, parallel to the FTAs there were negotiated general political agreements complementary to FTAs. The EU concluded Framework Agreement between the European Union and the Republic of Korea in 2010 (entered into force in 2014), initialled the text of the Partnership and Cooperation Agreement between the EU and Singapore in 2013, concluded a Strategic Partnership Agreement with Canada in 2016 and still negotiates A Strategic Partnership Agreement with Japan. The aim of these agreements is to ensure political cooperation and dialog with its economic partners. It seems to be the best way to ensure compliance with the general requirement of the last sentence of the Article 207(1).

Question 21

Despite constant calls for greater openness and transparency of commercial negotiations within the EU formulated mostly by civil society also in Poland, there is no official position of the authorities on that issue.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

Bilateral agreements between a Member State and a third country can be concluded in every issue, which is not covered or affected by the EU law. Therefore, it is rather obvious, that Member States can conclude agreements which scope is outside the EU regulation and which at the same time supplement the EU law. On the other hand, wording of the Protocol (No 23) is very general and does not refer to short-term visas only. In my opinion, it is only a clarification, that such agreements, concluded by Member States only are possibly and that the Protocol itself does not confer any new rights to them.

Poland has concluded three bilateral agreements concerning crossing border and visas, all with its non-EU neighbours – Russia[15], Belarus[16] and Ukraine[17]. All of them were concluded before entering into force of the Protocol, moreover agreements with Russia and Ukraine were concluded before Poland's accession to the EU. Both agreements – with Russia and with Ukraine remained in force despite the fact, that the EU has concluded separate agreement on visas. Both agreements were amended after Poland's accession to the Schengen zone and relevant provisions of the EU agreements replaced provisions of bilateral agreement. The agreement with Belarus was concluded shortly after Poland's accession to the Schengen zone in 2007 in order to bring bilateral relations in line with requirement of Schengen zone membership.

Question 23

Despite being an important factor in a political debate in Poland, practice on asylum law in Poland is rather scarce compared to other European states, as is usually less than 5000 applications for around 12000 persons. The concept of the safe third state is present in Polish law, but only as a general provision. There is no list of safe third countries. In the Polish act on granting foreigners' international protection[18] there is a definition of safe third state which is in line with the Articles 38 and 39 of the Directive 2013/32/EU. The only hint of a definition of safe third country can be found in the Article 18 of an Act on granting foreigners' international protection on the territory of Republic of Poland, which states, that when a part of a state is safe, the whole state can be considered safe state. It is one of the most important interpretations, as vast majority of those who apply for asylum in Poland comes from Chechnya, which is a part of Russia.

[15] Umowa między Rządem Rzeczypospolitej Polskiej a Rządem Federacji Rosyjskiej o warunkach podróży obywateli Rzeczypospolitej Polskiej i obywateli Federacji Rosyjskiej (An Agreement between the Government of Republic of Poland and the Government of Russian Federation on conditions of travelling of Citizens of Republic of Poland and Citzens of Russian Federation), http://www.msz.gov.pl/resource/f7751f68-2eee-4e10-9e5b-d60896e199ac:JCR.

[16] Agreement between the Government of Republic of Poland and the Government of Republic of Belarus on natural persons' travels, www.msz.gov.pl/resource/43bc7c0d-9721-48ed-ba57-c34b8535e051:JCR.

[17] Umowa między Rządem Rzeczypospolitej Polskiej a Gabinetem Ministrów Ukrainy o zasadach ruchu osobowego (Agreement between the Government of Republic of Poland and the Cabinet of Republic of Ukraine on principles of natural persons' travels), www.msz.gov.pl/resource/d98ebe7a-08ed-4380-b983-ebb9190fec91:JCR; Protocol to the Agreement, www.msz.gov.pl/resource/831e2409-c332-4d0a-bdf6-f678a5719b32:JCR.

[18] Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej, O.J. 2016, pos. 1836.

Question 24

Poland, as a country situated at the eastern border of the EU is much more affected by different kinds of crises in the east, mainly Russia, Belarus or Ukraine. It has also much closer ties with these countries than with African states. Although there are some motions for international protections from citizens of these eastern countries, they are much less in numbers than from African states. Poland does not have any pacts with African states concerning migrations including priority countries mentioned in the Communication COM(2016)385.

Question 25

Establishing international relations on a certain issue between the EU and a third country does not exclude a possibility of establishing similar relations between a Member State and another third country. Therefore, in my opinion there is nothing contradictory in concluding readmission agreements both by the EU and by Member States provided that they are different third states.

It is a little bit different when such agreements concern the same third state. In such case, although it is possible, they have to be compatible. Member State's agreement cannot contradict an agreement of the EU, but it can be complementary. Otherwise bilateral agreement of one Member State needs to be changed and adjusted to the EU-wide agreement.

It is known situation where there are two parallel systems of bilateral agreements. Although I cannot see a real threat of overlapping scopes of readmission agreements at the moment, there are examples of how such a problem can be resolved in the EU law. We can observe it in aviation after *open skies*[19] judgement and investment law. In aviation, there have been traditionally bilateral agreements, but majority of them have been amended by number of horizontal agreements concluded solely by the EU[20]. In investment law, there was a shift of competence in Lisbon Treaty. Despite the fact, that according to the Article 207 the EU has exclusive competence in foreign direct investments, Member States have concluded over 1300 agreements with third countries on that issue. It is not possible to terminate them all, therefore according to the *Regulation (EU) No 1219/2012 of the European Parliament and the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries* they can be maintained in force. Similar solution could be used also in case of readmission agreement if needed.

[19] Judgments: Commission v. United Kingdom, C-466/98, EU:C:2002:624; Commission v. Sweden, C-468/98, EU:C:2002:626; Commission v. Finland, C-469/98, EU:C:2002:627; Commission v. Belgium, C-471/98, EU:C:2002:628; Commission v. Luxemburg, C-472/98, EU:C:2002:629; Commission v. Austria, C-475/98, EU:C:2002:630 and Commission v. Germany, C-476/98, EU:C:2002:631.

[20] More in: B. Havel, Beyond Open Skies: A New Regime for International Aviation, Kluwer Law International, 2009, pp. 485-486.

Poland in 2016 concluded an agreement on readmission with Kazakhstan[21], which entered into force in August 2017. It is very similar to agreements usually concluded by the EU. Poland has also concluded implementing protocols to agreements on readmission signed by the EU with Russia, Ukraine and Moldova[22].

[21] Umowa między Rządem RP a Rządem Republiki Kazachstanu o readmisji osób, O.J. 2017, pos. 1623.
[22] English translation accessible at: https://traktaty.msz.gov.pl/bap.php

PORTUGAL

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CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES[1]

Question 1

The recent case law of the Court of Justice makes a fundamental contribution to clarify the exclusive competence of the Union to conclude an international agreement. After considering, in *Pringle*[2], that the European Stability Mechanism (ESM) Treaty does not affect the common rules on economic and monetary policy, in *Broadcasters* judgement[3], in *Opinion 1/13*[4] and in *Green Network* case[5], the Court extends the ERTA effect to protection of neighboring rights of broadcasting organizations, to civil aspects of international child abduction (the Hague convention of 25 October 1980) and to promotion of the electricity produced from renewable energy sources in the internal electricity market, respectively.

In *Broadcasters* judgement, the Court, contrary to the narrow view of the area of the EU law taken by the Council and some Member States, opted for considering the different aspects of protection of the rights of the broadcasting

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[2] Case C-370/12, *Pringle*, judgement of 27 November 2012, EU:C:2012:756, para 101.
[3] Case C-114/12, *Commission v. Council*, judgement of 4 September 2014, EU:C:2014:224.
[4] Opinion 1/13 of 14 October 2014, EU:C:2014:2303.
[5] Case C-66/13, *Green Network*, judgement of 26 November 2014, EU:C:2014:2399

organizations (the right-holder, the subject-matter and the form of exploitation). At the end of the day, the Court concluded that the definition of the right holder may be affected if there is a discussion at the international level about the definition of the right holder, if the subject-matter of protection is extended and if the right granted is extended to cover other forms of protection, the EU law is affected. To sum up, the Court annuls the Decision of the Council and the Representatives of the Governments of the Member States meeting within the Council on the participation of the European Union and its Member States in negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organizations, of 19 December 2011.

In *opinion 1/13* on Hague the Convention on the civil aspects of international child abduction, the Commission, after the rejection by the Council of eight proposals for decisions of the Council of the European Union concerning the declarations of acceptance by the Member States, in the interest of the EU, of the accession of eight third States to the above mentioned Hague Convention, submitted the request for an opinion to the Court pursuant to Article 218(11) TFEU

The Commission takes the view that the question of the international abduction of children fell within the exclusive external competence of the EU, while the Council and most of the representatives of the Member States considered the Council to be under no legal obligation to adopt those proposals, since the EU did not, in their view, have exclusive competence in the area concerned.

The Court finds that the provisions of Regulation No 2201/2003 cover to a large extent the two procedures governed by the 1980 Hague Convention, namely the procedure concerning the return of children who have been wrongfully removed and the procedure for securing the exercise of access rights. Thus, the whole of the Convention must be regarded as covered by the EU rules.

If the Member States, rather than the EU, had competence to decide whether or not to accept the accession of a new third State to the 1980 Hague Convention, there would be a risk of undermining the uniform and consistent application of Regulation No 2201/2003 and, in particular, the rules concerning cooperation between the authorities of the Member States, whenever a situation involving international child abduction involved a third State and two Member States, one of which had accepted the accession of that third State to the Convention whilst the other had not.

For the Court, the exclusive competence of the EU encompasses the acceptance of the accession of a third State to the 1980 Hague Convention.

The *Green Network* case concerns a request for a preliminary ruling on the interpretation of Articles 3(2) TFEU and 216 TFEU, read in conjunction with Article 5 of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable

energy sources in the internal electricity market (OJ 2001 L 283, p. 33), and the Agreement between the European Economic Community and the Swiss Confederation (OJ, English Special Edition 1972 (I), p. 191), as adapted by Decision No 1/2000 of the EC-Switzerland Joint Committee of 25 October 2000 (OJ 2001 L 51, p. 1) ('the Free Trade Agreement').

The Court ruled that having regarded the provisions of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, the European Community enjoys exclusive external competence precluding a provision of national law, such as that at issue in the main proceedings, which provides for the grant of exemption from the obligation to purchase green certificates owing to the introduction, onto the national consumer market, of electricity imported from a third State, by means of the prior conclusion, between the Member State and third State concerned, of an agreement under which the electricity thus imported is guaranteed as having been produced from renewable energy sources, according to arrangements identical to those set out in Article 5 of that directive.

When a provision such as that referred to in paragraph 1 of the operative part of this judgment has not been applied by a national court because it is incompatible with EU law, it is contrary to EU law for that court to apply, by way of substitution, an earlier provision of national law in substance similar to that non applied, which provides for the grant of exemption from the obligation to purchase green certificates owing to the introduction, onto the national consumer market, of electricity imported from a third State, by means of the prior conclusion, between the national grid manager and an equivalent local authority of that third State, of an agreement determining the verification arrangements necessary for the purpose of certifying that the electricity thus imported is electricity produced from renewable energy sources.

Summing up, in comparison to the most Member States and the Council, the Court of Justice has a broader view of the external exclusive competence of the EU.

In *Broadcasters* judgement, the Council was supported by the Czech Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Poland and the United Kingdom. According to these Member States, the future Convention of the Council of Europe falls within an area of shared competences between the European Union and its Member States, namely that of the internal market, which encompasses protection of intellectual property. Consequently, both the European Union and the Member States should be involved in the forthcoming negotiations by cooperating closely in all stages of the process in order to ensure the unity of the external representation of the European Union.

The Portuguese Republic did not intervene in this case.

In *Opinion 1/13*, apart from Italy, which supported the Commission and the Parliament, the Belgian, Czech, German and Estonian Governments, Ireland, the Greek, Spanish, French, Cypriot, Latvian, Lithuanian, Austrian, Polish, Portuguese, Romanian, Slovak, Finnish, Swedish and United Kingdom Governments and the Council all maintain that the EU does not have exclusive external competence in this regard. In addition, the Greek, French and Polish Governments sustain that the EU has no competence at all in this area.

In the first place, the Member States, except Italy, argued that the declaration of acceptance of accession is not capable of undermining the uniform and consistent application of Regulation No 2201/2003 because the objective of the declaration is different, the declaration relating to cooperation with the central authorities of third States, whilst the regulation governs only cooperation between the central authorities of the Member States

In the second place, the Member States, except Italy, sustained that an exclusive external competence cannot arise merely because the area in which the Convention applies is covered to a large extent by equivalent rules of EU law. First of all, that criterion is irrelevant since it was not included in Article 3(2) TFEU, which codified the Court's case-law concerning the circumstances in which the EU has exclusive competence to conclude an international agreement. Next, it is argued that there is only a partial overlap between the scope of the Convention and that of Regulation No 2201/2003, both with regard to the nature of the relations governed and in relation to the persons to whom those instruments are applicable. Finally, it is claimed that the overlaps which do exist between the Convention and Regulation No 2201/2003 are not such as to establish exclusive competence on the part of the EU since they are abstract and do not demonstrate that the Convention has any effect on the regulation.

In the third place, even though the fact that certain Member States accept the accession of an acceding State whilst others do not may produce unwelcome situations and mean that the enforceability of the 1980 Hague Convention as against the States that accede to it varies from one Member State to another, that is inherent in the very nature of the Convention and is not an obstacle to the proper application of Regulation No 2201/2003.

This is to underline that e Portuguese Government intervened, supporting the Council.

In the recent Opinion 3/15 of 14 February 2017 on Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, mentioned in the next section, the Czech, French, Italian, Lithuanian, Romanian, Finnish and United Kingdom Governments take the view that the European Union does not have exclusive competence under

Article 3(2) TFEU to conclude that Treaty inasmuch as the latter is not capable of affecting common EU rules or of altering their scope.

They argue in that regard that it follows from the Court's case-law that any conclusion concerning competence must be based on a specific analysis of the relationship between the international agreement envisaged and the EU law in force, account being taken of, inter alia, the nature and content of the rules in question.

The Portuguese Government did not intervene.

One of the most recent examples is given by the Opinion 3/15 of 14 February 2017 on Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled above mentioned.

In this Opinion, the Court of Justice reaffirmed its former case law related to the interpretation of the last limb Article 3(2) TFEU, maintaining that "there is a risk that common EU rules may be adversely affected by international commitments undertaken by the Member States, or that the scope of those rules may be altered, which is such as to justify an exclusive external competence of the European Union, where those commitments fall within the scope of those rules (Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 71, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 29). A finding that there is such a risk does not presuppose that the area covered by the international commitments and that of the EU rules coincide fully (Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 72, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 30). In particular, such international commitments may affect EU rules or alter their scope when the commitments fall within an area which is already covered to a large extent by such rules (see, to that effect, Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 73, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 31)."

Having said that, the Court continued: "since the EU is vested only with conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the EU law in force. That analysis must take into account the areas covered, respectively, by the rules of EU law and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish (Opinion 1/13 (Accession

of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 74, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 33)."

After proceeding to that analysis, the Court held that the conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled falls within the exclusive competence of the European Union.

As far as the author of this lines knows, there has been no problems raised at the national level.

Question 2

Article 3 (2) TFEU consolidates earlier case-law of the Court of Justice concerning the implied exclusive external competences of the EU.

Recently, in 5 December 2017[6], the Court, recalling Opinion 1/03 (New Lugano Convention) of 7 February 2006 (EU:C:2006:81, paragraph 114), said:

> "the competence of the European Union to conclude international agreements may arise not only from an express conferment by the Treaties, but may equally flow implicitly from other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the EU institutions. In particular, whenever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the Union has the competence to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect."

According to Article 3 (2) TFEU the Union is exclusively competent to conclude an international agreement in three situations: i) "when its conclusion is provided for in a legislative act of the Union"; ii) when its conclusion "is necessary to enable the Union to exercise its internal competence"; and iii) in so far as its conclusion may affect common rules or alter their scope".

First option – the conclusion of an international treaty is provided for by a legislative act.

A narrower interpretation of the provision would demand that the legislative act says that the external competence is exclusive or that the exclusivity of the external competence depends on the exclusivity of the internal competence. However, nothing in the wording of Article 3 (2) TFEU so states. Therefore, the provision should interpreted in a broader way. That means where the conclusion of an international treaty is provided for in an legislative act, the Union will

[6] Case C-600/14, *Federal Republic Germany v. Council* (OTIF)

have exclusive external competence in this area, with the consequence that the Member States are pre-empted from concluding such agreement independently, from legislating or adopting any legally binding act. The same reasoning seems to be applicable where a Treaty article accords the Union the power to conclude an international treaty, unless the Treaty says the contrary.[7]

Second option – the conclusion of an international agreement "is necessary to enable the Union to exercise its internal competence"

Following the case law of the Court of Justice[8], Article 3 (2) confers external exclusive competence to the EU where it is necessary to enable the Union to exercise an internal competence. The provision does not distinguish between a shared internal competence or an internal competence that only allowed supporting action, provided that the international agreement is confined within the boundaries of this competence.

Third option – the conclusion of an international agreement may affect common rules or alter their scope.

According to the case law of the Court of Justice, the affectation of common rules or alteration of their scope does not depend on the exercise of the internal competence[9].

The notion of "common rules" does not only refer the current stage of EU Law in the area in question, but also refers to the rules in making. In other words, it does not only refer to legally binding rules, such as the Treaties themselves, legislative or individual acts, but also to its future development, insofar as that would be foreseeable at the time of analysis.

Most Member States have a rather restrictive view of Article 3 (2) TFEU. The evidence of this statement can be given by the observations of some Member States within the scope of the case law of the Court of Justice.

Giving one more example: In *Opinion 3/15*[10] concerning the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, the various governments that have submitted observations to the Court take the view that the European Union does not have exclusive competence under Article 3(2) TFEU to conclude the Marrakesh Treaty inasmuch as the latter is not capable of affecting common EU rules or of altering their scope.

[7] Paul Craig, *The Lisbon Treaty* , p. 166

[8] On this case law, see Friedrich Erlbacher, "Recent Case-Law on the External Competence of the European Union: How Member States can Embrace their own Treaty?", EPIN Paper, No. 43 / January 2017, p. 9 ff.

[9] See opinion 1/03, para. 126; Opinion 1/13, para77, Green Network, para 33; Broadcasting Organizations, para 72

[10] *Opinion 3/15* of 14 February 2017, ECLI:EU:C:2017:114.

They argue that it follows from the Court's case-law that any conclusion concerning competence must be based on a specific analysis of the relationship between the international agreement envisaged and the EU law in force, account being taken of, inter alia, the nature and content of the rules in question. They argue that Directive 2001/29 brought about only minimum harmonization of certain aspects of copyright and related rights. In particular, the directive did not harmonize the exceptions and limitations to those rights (...) The Member States thus retain their competence, both internally and externally, to render such an exception or limitation mandatory."

Portugal did not intervene in this case.

Question 3

Article 216 (1) TFEU deals with the question whether the EU has external competence to conclude international agreements.

According to the Court of Justice "It follows from the very wording of that provision, in which no distinction is made according to whether the European Union's external competence is exclusive or shared, that the Union possesses such a competence in four situations. Contrary to the arguments put forward by the Federal Republic of Germany, the scenario in which the conclusion of an agreement is liable to affect common rules or to alter their scope, a scenario where the Union competence is, under Article 3(2) TFEU, exclusive, constitutes only one of those situations.

Since the entry into force of the Lisbon Treaty, Member States and the Council have been repeatedly contesting the scope of the external competences of the EU.

Member States seek to restrict the scope of the EU external relations' competence.

Question 4

Article 216 TFEU concerns the general European Union's external competence to conclude international agreements. For this provision it does not matter if the competence is exclusive or shared. That means the provision does not proceed to any categorization.

By contrast, Article 3 (2) TFEU solely concerns situations where the Union has exclusive external competence.

According to the Court, "the European Union may have an external competence that falls outside the situations laid down in Article 3(2) TFEU."[11]

[11] Case C-600/14, para 51.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)[12]

Question 5

For an answer to this question, we will take as an example the procedure for the European Union (EU) to conclude international trade and investment agreements under the common commercial policy (CCP), as they have been on the top of the EU external relations agenda, since the Lisbon Treaty. The procedure is laid down in Articles 207 and 218 on the Treaty on the Functioning of the European Union (TFEU) and according to the official entities of Portugal[13] that follow this matter in the Trade Policy Committee (TPC), the existing regime and mechanisms are considered to be satisfactory. Member States (MS) presence in the TPC allows for the participation in the elaboration of the negotiating mandate. Later on it allows for the assessment of the European Commission's compliance with this mandate, as well as for the monitoring of how MS´s interests are adequately covered by the European negotiating proposals.

The European Commission's duty of information to the MS on the progress of negotiations on trade agreements[14] is pursued through regular meetings in different formats (national experts, States' representatives or high-level policymakers, depending on the decision and the momentum), as well as reporting. The presence of the European Commission at these meetings (namely of the policy officers participating in the negotiations), the clarifications provided by the Council's Legal Service, and the compromise solutions presented by the Presidency, all contribute to the negotiating momentum.

However, the procedure for negotiating and concluding international trade and investments agreements is not without criticism and it could be improved at various levels.

Firstly, it would be important to reduce the length of the negotiating period and of the approval of the agreements (for a critical balance see, Question 17). By providing strict deadlines for the completion of several internal stages, such as public consultations, the European Parliament ´s (EP) opinion, translation,

[12] Chapters 2, 3 and 4 were written by Maria João Palma. The author thanks the contributes of Pedro Camacho, Master of Arts in Political Science and International Relations, Nova University of Lisbon; Paula Redondo Pereira, lawyer, LL. M. Georgetown University; Master on European Studies Católica-Lisbon University; Law Degree Nova University of Lisbon; Fernando Bilé, José Salgado and Tânia de Castro Parreira experts on International Trade Policy from the Portuguese Ministry of Economy and Ana Luísa Figueira expert on Common Commercial Policy from the Portuguese Ministry of Foreign Affairs.

[13] Ministry of Foreign Affairs and the Ministry of Economy.

[14] This duty of information is laid down in Article 207 (3) of the TFEU, third paragraph, and includes not only the TPC but also the EP.

or national ratification procedures, the overall duration of the procedure for the conclusion of international trade and investment agreements could be significantly shortened.

Secondly, the division of competences between the EU and the MS demands the conclusion of "mixed agreements"[15] – concluded jointly by the EU and the MS. The procedural complexity of these trade and investment agreements is greater than in the so-called "EU-only" agreements (trade agreements), which also hampers speed. In fact, "mixed agreements" require: i) a double mandate given by the Council of the EU and the MS to the European Commission, ii) a stronger reporting obligation from the EU to the MS, iii) consensus in decision-making and, iv) the intervention of the national parliaments (with the possibility of a veto)[16].

According to the official entities of Portugal that are responsible for these areas (*supra*), a potential improvement in favour of the effectiveness of the CCP could be based on replacing the current *modus operandi* – the conclusion of a mixed agreement, which includes investment protection rules – by the negotiation and conclusion of two separate agreements, an "EU-only", containing the matters of exclusive competence, and a mixed agreement containing matters of shared competence – namely, investment protection, a sensitive matter for MS and where there is not always a consensus with negotiating partners.

However, in our view and although the recent Court of Justice of the European Union´s (CJEU) ruling clarifies the allocation of competences (Opinion 2/2015) to a certain point, taking into consideration the broadening and variability of the scope of the agreements, as well as the phenomenon of pre-emption (Question 6), it will always be possible to equate new boundaries and, therefore, new issues for the delimitation of competences between the EU and the MS, which determines that "*mixity*" will be a recurrent issue, making it preferable to work on the efficiency of this procedure.

Thirdly, according to the Portuguese official entities responsible for these areas, the EU's variable geometry would recommend strengthening the current impact assessment model of the agreements, in order to integrate deeper analysis which should be both differentiated (by regions) and individualized (by MS).

Lastly, and particularly as regards the interaction between national experts and EU negotiating teams, the Portuguese officials entities are concerned about the increasing lack of substance in written reports, and the favouring of a face-to-face *debriefing* at TPC meetings. This trend significantly hampers the analysis and subsequent national decision making, as well as impoverishing contributions

[15] CJEU Opinion 2/2015 of May 2017 (Question 16).
[16] See Question 7.

and debate at the technical level. Thus, in order to safeguard the transparency of the CCP without affecting the measures deemed necessary to ensure the confidential nature of the information and the negotiations, it is suggested to split the report of the negotiating rounds into two separate documents: an institutional communication, for civil society and other stakeholders, and a detailed technical report for experts monitoring the negotiations. In addition, the late circulation of documents, in particular those constituting a consolidation of the EU position in the negotiations, together with the increasing lack of awareness of the partners' proposals/offers, often make it impossible for MS to act. That situation can damage the construction of a common policy of vital importance, the development of which has attracted growing interest from European citizens.

A final word on the declassification of the negotiating directives with a view to their publication often suggested by the European Commission and defended by some MS. According to the Portuguese official entities responsible for these areas, and referring to the CJEU's settled case-law, there should be no disclosure of the negotiating directives if it can "prejudice the protection of the public interest as regards the international relations of the Union or its Member States" (C-266/2005[17], inter alia). The Portuguese official entities consider that, as a matter of principle, publication should not take place before the conclusion of the negotiation phase. Premature publication of the mandate may weaken the EU's negotiating power vis-à-vis the partner (if the mandate is too detailed) or affect the balance of powers between the Council of the EU and the European Commission (if it is too generic or ambiguous). However, there is recognition of the need for increased transparency allowing for the scrutiny of civil society leading to the publication of the mandates.

Question 6

Article 218 (5) of the TFUE regulates the provisional application of international agreements: "*The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, <u>its</u> provisional application before entry into force.*" – emphasis added.

The provisional application has been used to anticipate the entry into force of the matters of exclusive competence of the EU in mixed agreements leaving the decision concerning shared competences between the EU and MS, or reserved to the latter, to a later stage. This decision depends on a ratification process by all national parliaments and will ultimately lead to the entry into force of the agreement in its entirety.

[17] C-266/05, *Sison v. Council*, ECLI: EU: C: 2007, p. 75.

The application of different provisions of the agreements based on competence raises the problem of the admissibility of *the partial provisional application* of the agreements.

The TFEU is silent regarding this possibility. According to the principle of good faith that governs the interpretation of international Treaties, it is admissible to conceive of two interpretations[18]: firstly, to adopt the maxim *a maiore ad minus* (he who can do more can do less) admitting the provisional entry of a part of the agreement. Following this broad interpretation, the EU, in the exercise of *ius tractum* and in accordance with Article 25 of the Vienna Convention on the Law of Treaties[19], opts, upon agreement with the third party, for the partial or total provisional application of the agreement. Another possible interpretation is to consider that the fragmentation of an agreement, as regards its application, has not been sought by the drafters of the Treaties that govern the EU legal order (Rome and the revision Treaties that follow it), who would have conceived the agreements solely as a whole. In light of this interpretation, they have established their own rules, deviating from the opening contained in Article 25 of the Vienna Convention.

In view of the recent trend of provisional application of EU international trade agreements (see EU/South Korea; EU/Colombia; EU/Peru and EU/Ukraine), where the selection criterion for the provisions of the agreement to be provisionally applied has been the competence frontier (i.e., EU exclusive competences *versus* shared or reserved competences of the MS) and, taking into account the controversies that this frontier poses[20] it would be advisable, *de iure condendo*, to introduce in the Treaties the criteria that would regulate such choice[21].

To begin with, the TFUE should clarify that the provisional application of the agreements is justified regarding matters of exclusive competence of the EU, leaving the application of the provisions which depends on a ratification procedure by the MS to a later stage.

For this to be done, there are, however, additional difficulties. One of them is the identification of matters of national competence. This is due to the omission of a list identifying exclusive national competences in the body of the Treaties.

[18] The two possible interpretations are equated *in* Maria João Palma – "A Política Comercial Comum no pós-Lisboa – a Competência para a Celebração de Acordos Internacionais de Comércio da União Europeia" – [*The Common Commercial Policy after Lisbon – the competence for the conclusion of EU international trade agreements*]
http://www.apeeuropeus.com/uploads/6/6/3/7/66379879/palma_maria_joão_2017.pdf

[19] Vienna Convention on the Law of Treaties, of 23 May 1969 (Vienna Convention).

[20] As example of the difficulty of distinguishing between different competences, it is worth to mention the request for an opinion from the European Commission to the CJEU, to assess the competences of the EU/Singapore agreement, Opinion 2/2015, of 16 May 2017.

[21] Maria João Palma, *op. cit.*, p. 171.

The Treaty of Lisbon introduced an exhaustive list of matters of exclusive EU competence in Article 3 of the TFEU and an illustrative list of matters of shared competence in Article 4 of the TFEU. We find an exercise equating the inclusion of an illustrative list of national competences to be useful, provided that the principle of conferral[22] is respected – i.e. ensuring that the EU only has the competences explicitly or implicitly attributed to it[23].

Still within the same exercise, the Treaties should also be updated regarding the list of exclusive competences to take into account CJEU decisions based on the mutation of shared into exclusive competences due to the pre-emption effect[24].

Finally, Article 218 of the TFEU should mention the EP favourable opinion on the provisional application of international agreements. The institutional practice reveals that there is a tendency to obtain a *favourable opinion* from the EP on the provisional application of trade agreements, a precedent initiated under the EU/South Korea Agreement (1 July 2011, in force since 2015). This practice should be welcomed in a future revision of the Treaties, as the provisions deemed "*suitable*" to enter into force take full effect, in practical terms – making the EP's position just as important[25].

Question 7

The entry into force of mixed agreements (e.g. the CETA)[26] depends on the ratification of all national and regional parliaments in all MS (approximately 38 parliaments), which means that each of these parliaments has a *veto power* over the entire agreement.

Besides defending that non-ratification by a MS overturn the agreement in its entirety, Advocate General Sharpston has pointed out, in the comments on the EU/Singapore Opinion (*above*), that the national and regional parliaments must base their disagreement on grounds of national or shared competences[27].

[22] See Article 5 (2) TUE: "*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*".

[23] Maria João Palma, *op. cit.*, p. 171.

[24] For a definition, see Advocate General Ruiz-Jarabo Colomber, Case C-478/07 (*Budweiser*), 2009 ECR I-07721, para 93, referring the pre-emption as "*the situation in which the concurrent competences of the member States in a particular filed may have been displaced by the activity of the Community legislature*". We tend to find that the pre-emption effect is reversible due to the fact that the competences on which it is based are of a shared nature. However, we see an advantage in the exercise of clarification of the new status of a certain competence by the revisers of the Treaties whenever they see the metamorphoses that occurred in a given matter as definitive.

[25] Maria João Palma, *op. cit.*, p. 171.

[26] Comprehensive and Trade Agreement between the EU and Canada.

[27] See paragraph 568 of the Advocate General's comments: "*The Court has held that, when an agreement requiring the participation of both the European Union and its constituent Member States is negotiated and concluded,*

In this respect, however, we advocate *a mitigated position*, in which the non-ratification of the agreement by a MS would only overturn it if the agreement is considered to have been negotiated upon a *single undertaking* logic. Should the prevailing view be that the logic behind the negotiation of the agreement was not that of a *single undertaking*, a possible non-ratification by a MS should not deter the conversion of the provisional application of the agreement into a definitive entry into force[28]. In this case, the revalidation of the matters of EU exclusive competence which the MS endorsed as members of the Council of the EU, should again take place through a new decision of the Council of the EU, and a new agreement with the other party (e.g., Canada in the case of the CETA), with no need to reopen the negotiations. According to the TFEU, such a decision will only be possible after obtaining a *favourable opinion* by the EP. Under Article 207 TFEU, the Council of the EU decides on a qualified majority. The practice however has dictated consensus to be the rule for the approval of trade agreements in the Council of the EU[29].

In view of its importance, this conversion (i.e. the possibility of transforming the provisional application of an agreement into a definitive one with no need to reopen the negotiations) should be explicitly referred to and regulated in the body of Article 218 TFEU – in order to safeguard and stabilize the negotiation consensus reached in the part of the agreement concerning matters falling under the exclusive competence of the EU.

Questions 8 – 10
No data available.

Question 11
Since the Lisbon Treaty, the EP has become more active concerning the negotiation and conclusion of international agreements, in particular trade agree-

both the European Union and the Member States must act within the framework of the competences which they have while respecting the competences of any other contracting party. It is true that, in principle, each party (including the Member States) must— as matters stand— choose between either consenting to or rejecting the entire agreement. However, that choice must be made in accordance with the Treaty rules on the allocation of competences. Were a Member State to refuse to conclude an international agreement for reasons relating to aspects of that agreement for which the European Union enjoys exclusive external competence that Member State would be acting in breach of those Treaty rules" (emphasis added).
The CJEU has not ruled on this aspect in Opinion 2/2015, as, in our view, it would overstep the scope of the European Commission's request.

[28] Maria João Palma, *op. cit.*, p. 168. In the event of a disagreement on the admissibility of conversion, we believe that the CJEU should rule on it, under Article 218 (11) TFEU, as it is a question of competences.

[29] Maria João Palma, *idem.*

ments, with significant contributions to their design[30/31]. The performance of this task by the EP has been very appreciated by the Portuguese government so far, which considers that the EP has played a determinant role, while contributing to increase transparency and democratic debate of the matters covered by the international agreements of the EU.

However, there is an imbalance between the EP's participation when compared with that of the national parliaments, in particular with regard to agreements involving both the competences of the EU and the MS. In our view, this imbalance seems to be due to the reduced prominence of national parliaments when approving international agreements involving shared competences (mixed agreements), when compared to the process of approving secondary legislation, according to the Treaties and its annexed protocols.

As stated, the Protocol on the Role of National Parliaments in the European Union (Protocol No. 1) and the Protocol on the Application of the Principles of Subsidiarity and Proportionality (Protocol No. 2), annexed to the Treaty of Lisbon, enable the management of the exercise of shared competences between the EU and the MS, calling for the good offices of national parliaments from whom the role of "*arbitrators*" in approving EU secondary law of a shared nature is required by supervising the correct implementation of the principle of subsidiarity.

However, both Protocols are silent on the participation of national parliaments in the process of concluding international agreements which involve shared competences (mixed agreements)[32].

It should be emphasized that the principle of subsidiarity applies only in respect of secondary law, where the exercise of competences is dictated by an *exclusion game*, i.e. competence will only be exercised at the EU level "(...) *if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*" (Article 5 (3) TEU).

However, in the case of the exercise of external competence – i.e. in relation to the conclusion of international agreements – we are not dealing with an

[30] This more active role played by the EP is due to the fact that with the Lisbon Treaty it gained a power similar to a veto with the imposition of obtaining a favorable opinion from it concerning trade agreements (Article 218 (6), v) TFUE and 207 (2) TFUE).

[31] Pedro Silva Pereira – "Acordo CETA: O Parlamento Europeu fez a diferença" [*CETA: The European Parliament makes the difference*], *in Revista Análise Europeia*, nº 3, (2017) pp. 183-197: *http://www.apeeuropeus.com/uploads/6/6/3/7/66379879/silva_pereira_pedro_2017.pdf.*
The author emphasizes the role of the EP in the establishment of an International Investment Court, replacing the original proposal of an arbitration system, for the investor-state disputes resolution on foreign investment in the CETA.

[32] Maria João Palma, *op. cit.*, p. 173.

exclusion game, but an *accumulation game*[33] – in that both the MS and the EU must be involved in the exercise of the competence, from the moment when they both grant the negotiating mandate to the European Commission (*double mandate*), until the conclusion of the international agreement. However, the definition of a mixed agreement and its respective procedure do not result from the Treaties[34], but from the CJEU jurisprudence (*maxime*, Opinion 1/94[35]) and the institutional practice which has fostered it.

This lack of regulation of mixed agreements in the body of the Treaties has been reflected in the mentioned Protocols, which deal only with the management of mixed competences at the internal level.

While the absence of a reference to mixed agreements appears to make sense regarding the Protocol on the Application of the Principles of Subsidiarity and Proportionality – which deals only with secondary law[36] – the same cannot be said in relation to the Protocol on the Role of National Parliaments in the European Union. The role of national parliaments is important both regarding EU secondary law, and the conclusion of EU international agreements involving mixed competences – which they have to ratify and over which they wield an effective veto power (see Question 11).

Such a fundamental power determines, in our view, that the involvement of national parliaments during the negotiating process of mixed international agreements should be reviewed to better reflect the current needs of these new trends of mixed agreements.

The Protocol on the Role of National Parliaments in the European Union refers *ad abundantiam* to the monitoring that national parliaments are expected to perform regarding *"draft legislative acts"* – which shall be sent directly to national parliaments by the proposers. In parallel, the Treaties should demand that national parliaments carry out a similar function as regards international agreements where mixed competences are involved, while highlighting that

[33] *Idem*, p. 174.

[34] The only time the Treaties made a reference to mixed agreement was in Article 133 (6) 2 para. of the Treaty on the European Community (Treaty of Nice) ex-207 TFEU. No definition was given but there was a reference to shared competences for international trade agreements as well as the definition of the procedure: "(...) *agreements relating to trade in cultural and audio-visual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States*" (emphasis added).

[35] Opinion 1/94, 15 November 1994 ECLI: EU: C: 384.

[36] In this respect, it would be important for Article 5 TEU to be amended, in order to explain that the principle of subsidiarity is not a principle governing external competences. MARIA JOÃO PALMA, *op. cit.*, p. 174.

this should necessarily be done in accordance with the constitutional traditions of each MS[37].

The unbalance situation that we find within the EU legal order can equally be found within the Portuguese legal framework. The Law on monitoring, assessment and pronouncement by the Portuguese Parliament, *Assembleia da República* (AR)[38], bearing in mind the European Union Construction Process[39], emphasizes the role of the AR in the verification of the application of the subsidiarity principle by national parliaments as regards to secondary law, with only a mere reference to the Government's obligation to inform the AR about draft agreements or treaties to be concluded by the EU or among the MS in the context of the EU[40]. Also, it does not to emphasize the role of mixed agreements[41], while it mentions the transposition of directives as an example of a more impactful act for Portugal[42].

In view of the importance and implications of the national competences involved in mixed agreements[43], it would seem appropriate to introduce an explicit reference to them in Article 4 of the aforementioned national Law[44], explicitly stating a proactive role for the AR in this proceeding[45] [46] More than a right to be informed (Article 5), the national Law must clearly and unequivocally provide a right to monitor and assess the negotiation and conclusion of mixed agreements by the AR (Article 4)[47].

[37] Only one reference to "*other issues*" appears in the Preamble of the Protocol on the Role of National Parliaments in the European Union. That being said, it should be emphasized that the Protocol does not apply only to secondary law, *vide* Article 1, in relation to consultation documents. Title II on parliamentary cooperation is also silent on international agreements.

[38] This is the official designation of the Portuguese National Parliament.

[39] Law no. 43/2006, of 25 August, as amended by Law 21/2012, of 17 May.

[40] See Article 5 (1) (a) of the aforementioned Law.

[41] Article 5 (4): "*The Government shall submit to the Portuguese National Parliament, in the first quarter of each year, a summary report to monitor Portugal's participation in the process of construction of the European Union, which should inform, namely, on the deliberations with greater impact for Portugal taken the previous year by the European institutions and the measures put in place by the Government as a result of these deliberations, with particular emphasis on the transposition of directives*" (emphasis added).

[42] Maria João Palma, *op. cit.*, p. 175.

[43] For instance, the creation of an Investment Court or *portfolio* provisions, according to the CJEU in Opinion 2/2015, of 16 may 2017.

[44] Article 4 regulates the means of accomplishment and appreciation.

[45] MARIA JOÃO PALMA, *op. cit.*, p. 175.

[46] This without prejudice to the reservation or confidentiality rules in force for the negotiation process.

[47] It is true that this right could result from paragraph 4, of Article 4, which states: "*The Assembly of the Republic or the Government may still (...) raise the debate on all the subjects and positions under discussion in the European institutions that concern matters within its competence*." However, because of its importance, we believe that the reference to draft agreements involving national competences should be explicit and not only result from the framing of a residual provision. Maria João Palma, *op. cit.*, p. 176.

In conclusion, we consider that the role of the national parliaments must be emphasized both at the EU and at the national level, especially in what refers to the procedure of mixed agreements. In particular in what refers to trade and investment agreements this improvement is needed. Although the competences that were referred as of a shared nature in Article 133 TEC (Treaty of Nice) were, with the Treaty of Lisbon, moved into the exclusive competence of the EU (sensitives services)[48], the figure of mixed agreement remains relevant to matters not covered by Article 207 TFEU, but relevant in terms of trade and investment agreements (*e.g. portfolio investment, dispute settlement between investors and the State).* This exercise of clarification and reinforcement of the role of the national parliaments is determinant, as the consequences of a "veto" of a mixed agreement are too severe for their participation and involvement in the negotiating process not to be explicitly clarified[49].

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

No data available.

Question 13

The possibility given to individuals to invoke rights arising from international agreements directly before the national courts has been referred to as *direct effect.*

Direct effect differs from *direct applicability,* another characteristic of international agreements. Article 8 of the Portuguese Constitution set forth the direct applicability of international agreements provided that their ratification or approval, and publication at the national level had occurred[50].

The full acceptance or direct applicability of international agreements in the Portuguese legal system determines that these do not need to be "transformed" into national law to be applicable in the internal order[51]. However, this does not

[48] These are now under the shield of the unanimity rule. See, Article 207 (4) a) and b). *"The Council shall also act unanimously for the negotiation and conclusion of agreements:*
(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them."

[49] Maria João Palma, *op. cit.,* p. 176.

[50] Article 8 (2) of the Constitution of the Portuguese Republic states: "*The norms contained in international conventions regularly ratified or approved shall be in force on the internal order after their official publication and as long as they bind the Portuguese State internationally*". Official publication takes place in the Portuguese Official Gazette (*Diário da República*).

[51] The Portuguese legal system is a monistic one, opposed to the dual system where incorporation of international law into national law is required.

determine *per se* that interested parties may invoke the rights contained in the agreements before the national courts. *Direct applicability* is a characteristic of the act while *direct effect* is a feature of the provisions the act may contain that make them apt to be invoked in national courts[52].

Within the EU legal framework, there is significant jurisprudence of the CJEU on this issue.

In the 1963 *Van Gend en Loos* judgment[53], the CJEU ruled for the first time that the provisions of the EC Treaty could confer rights on EU citizens. According to the CJEU, affirming such an effect depends on the concrete verification of the provisions' characteristics, which should "*clearly and unconditionally*" confer rights on individuals[54].

This relatively stabilized and recurrent jurisprudence on the enshrinement of the direct effect of international agreements[55] would, however, be different in respect of multilateral agreements, taking into account their specificity.

In the 1972 *International Fruit Company* judgment[56], the CJEU considered that the rules of the General agreement on tariffs and trade (GATT) could not have direct effect, as the agreement was characterized by a relative flexibility of its provisions once they could be derogated or suspended (retaliations)[57]. This flexibility would preclude the possibility of their invocation in the national courts.

In the 1999 *Portugal v. Council* judgment[58], the CJEU first clarified that the EU institutions, which have the power to negotiate and conclude international agreements, are free to agree on the effects that the provisions of the agreement will produce in the internal order of the contracting Parties. Only if this issue

[52] It is possible to analyse direct effect of international law (agreements, treaties or conventions) or internal law of the EU such as directives or regulations. See Maria João Palma – *A invocação das normas das directivas comunitárias perante as jurisdições nacionais dos Estados-Membros,* tese de Mestrado policopiada, Faculdade de Direito de Lisboa, [Direct effect – the case of Directives in the European Legal Order, LL.M. thesis, University of Lisbon, Faculty of Law], 1998.

[53] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 1963, ECLI 1.

[54] In *Van Gend & Loos*, the CJUE affirmed: "*To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions*". Once considering that article 12 of the ECT contained "*a clear und unconditional obligation*" the CJUE considered it "*ideally adapted to produce direct effects in the legal relationship between member states and their subjects*".

[55] The CJEU would consider not only EC Treaty provisions but also rules of international agreements concluded by the EU, such as association agreements.

[56] Joined Cases 21-24/72, *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit,* 1972, ECR 1219.

[57] *Idem*, Recital 21: "*This agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements' is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties*" (emphasis added).

[58] Case C-149/96, *Portuguese Republic v. Council of the European Union*, 1999, ECR I-08395.

is not dealt with within the agreement, are the courts, in particular the CJEU, eligible to examine it[59].

In this judgement, the CJEU reiterates its arguments with regards to the GATT in order to deny the direct effect of the rules contained in the WTO agreements: the flexibility of its provisions including the possibility of suspension of concessions (or retaliations).

We support the CJEU's understanding, i.e., a provision that can have its application suspended does not qualify as a rule of unconditional application. It will be controversial to admit that an individual could invoke a provision at a national court against the defaulting State while the State was under retaliation or negotiating for compensation due to the non-compliance of the same rule.

In addition, in the aforementioned 1999 *Portugal v. Council,* the CJEU emphasizes the lack of reciprocity *vis a vis* direct effect on the part of the (at that time) Community's trading partners, in relation to the WTO agreements[60]. The Court considers that the lack of reciprocity in the application of the agreement could lead to a non-uniform application of WTO rules, thus validating the last recital of the Preamble to Decision 94/800, where the Council stated that "*by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts*"[61].

This case law has been recurrently repeated, for example, with regards to the TRIPS Agreement (e.g. in the 1998 *Hèrmes* judgment[62] and the 2000 *Parfums Dior* judgment[63]) and with regards to the GATT 1994 (e.g. in the 2005 *Parys*[64] and the 2007 *Ikea*[65] judgments).

Recently, the direct effect of international agreements has gained importance around the EU's international trade and investment agreements – e.g. CETA and TTIP[66].

[59] *Idem*, Recital 34.

[60] Recital 45: "*However, the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on 'reciprocal and mutually advantageous arrangements' and which must ipso facto be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules*".

[61] Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

[62] Case C-53/96, *Hèrmes International/FHT Marketing*, 1998, ECR I – 3637.

[63] Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA v. Tuk Consultancy BV and others*, 2000, ECR I – 11307.

[64] Case C-377/02, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)*, 2005, ECR I– 01465.

[65] Case C-351704, *Ikea Wholesale Ltd v. Commissioners of Customs & Excise*, 2007, ECR – I-07723.

[66] Transatlantic Trade and Investment Partnership between the EU and the United States.

Taking into account the asymmetry concerning the admission of direct effect between the EU and others trading partners such as Canada or the US[67], the agreements negotiated or under negotiation by the EU do not enshrine direct effect of their provisions. Apparently, it has been understood that this would have entailed a non-reciprocal treatment between individuals of both Parties. The admission of direct effect in the EU order would represent an advantageous treatment for companies or individuals of other Parties operating in the EU, where they could invoke the direct effect of said agreements, but the reverse would not be possible. Thus, the express denial of direct effect was the solution found for the current EU international trade agreements[68], in line with the jurisprudence of the CJEU that analysed previous trade agreements.

If we examine the denial of direct effect contained in the international trade EU agreements recently negotiated or under negotiation, in the light of the CJEU case law, we can verify that the same argumentation developed for the GATT (47), and subsequently for the WTO agreements, remains valid and applicable to the present agreements.

Accordingly, a study requested by the Committee on the Environment, Public Health and Food Safety of the EP to the Department for Economic and Scientific Policy concludes that, "*While the above decisions have mostly been taken on WTO law, i.e. multilateral trade law, there is no reason to assume that the ECJ's position on a comprehensive bilateral trade and investment agreement would be any different*"[69].

Direct effect of the EU's international trade and investment agreements was subject to discussion by the Portuguese authorities, who took into consideration the above case law and the reasons set forth by the CJEU. Although there is no final conclusion concerning this complex topic, ultimately being a subject for the CJEU to deal with, the consistence of the jurisprudence on this issue seems

[67] Ronald A. Brand – "Direct Effect of International Economic Law in the United States and the European Union", *Northwestern Journal of International Law & Business*, vol. 17, issue 1, 1997, pp. 556 to 608, http://scholarlycommons.law.northwestern.edu/njilb/vol17/iss1/17.

[68] See Article 30.6 of CETA: *"1. Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties. 2. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement"*.

[69] European Parliament, Department for Economic and Scientific Policy, "*Legal Implications of TTIP for the Acquis Communautaire in ENVI Relevant Sectors*" (2013), http://www.google.pt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwik9v2Du7bVAhVIOxoKHdqEBZgQFggsMAA&url=http%3A%2F%2Fwww.europarl.europa.eu%2FRegData%2Fetudes%2Fetudes%2Fjoin%2F2013%2F507492%2FIPOL-ENVI_ET(2013)507492_EN.pdf&usg=AFQjCNFxZ76R5-DkXpg56ava6imPqG03Tw, p. 15.

to have been a factor in the Portuguese authorities assenting to explicitly setting aside the possibility of direct effect, namely, within the CETA and TTIP[70].

However, in our view, a distinction should be made between the different matters the trade and investment agreements are dealing with, and the correspondent systems of litigation.

If the system of litigation allows for compensation or retaliation (e.g. trade issues), then there is an evident parallel with the cases the CJEU has dealt with. However, where there is no place for that flexibility – which seems to be the case with the investment chapter of said agreements – only the argument of lack of reciprocity can prevail. Thus, although the reasons are different, the result is necessarily the same – no direct effect for the rules contained in international trade agreements with those characteristics.

As the direct effect of the *new generation* trade and investment agreements is set aside, individuals cannot invoke rights derived therefrom in the national courts or the CJEU. It is, therefore, necessary to enact legislation to expedite the implementation of the agreements by the Parties, subject to a possible liability action against them for non-implementation of the agreements.

In particular, with regards to investors and their investments, most of these recent trade and investment agreements ensure that rights can be invoked either before an arbitration system of litigation or an International Investment Court. Both will apply the rights derived from these Treaties to the investors and investments of both Parties, which determines that the problem of non-reciprocity of direct effect will be a non-issue. As a matter of fact, we see this possibility as a voluntary *sui generis* recognition of direct effect *rationne materia*.

Questions 14 and 15

No data available.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16

With the entry into force of the Treaty of Lisbon in 2009[71], Article 207 (1) of TFUE conferred a new competence to the EU regarding Foreign Direct Investment (FDI), namely for the conclusion of international investment agreements (IIA). This new competence has an exclusive nature (Article 3 (1) (e) of the TFUE), meaning that only the EU is entitled to proceed with it; MS are therefore

[70] According to information provided by the Portuguese official entities (Ministry of Economy and Ministry of Foreign Affairs).

[71] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed 13 December 2007, Official Journal (OJ) C 306/01 of 17 December 2007.

prevented from concluding new international agreements on this issue, unless authorized by the EU under Article 2 of the TFEU (see Question 17)[72].

In order to understand the scope of the CCP on this matter, it is important to distinguish between FDI and portfolio investment, taking into account the case law of the CJEU, *maxime* the recent Opinion 2/2015[73].

In recital 80 the CJUE recalls that: *"it is settled case-law that direct investment consists in investments of any kind made by natural or legal persons 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 in order to carry out an economic activity. Acquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable him to participate effectively in the management of that company or in its control (see, inter alia, judgments of 12 December 2006, Test Claimants in the FII Group Litigation, C-446/04; EU: C:2006:774, paragraphs 181 and 182; of March 2009, Commission v. Italy, C-326/07, EU: C:2009:193, paragraph 35; and of 24 November 2016, SECIL, C-464/14, EU: C:2016:896, paragraphs 75 and 76)."*

In Recital 227 of the above mentioned Opinion, the CJEU recalls that: "*non-direct foreign investment may, inter alia, take place in the form of the acquisition of company securities with the intention of making a financial investment without any intention to influence the management and control of the undertaking ('portfolio' investments), and that such investments constitute movements of capital for the purposes of Article 63 TFEU (see, inter alia, judgments of 28 September 2006, Commission v Netherlands, C-282/04 and C-283/04, EU:C:2006:208, paragraph 19; of 21 October 2010, Idryma Typou, C-81/09, EU:C:2010:622, paragraph 48; and of 10 November 2011, Commission v Portugal, C-212/09, EU:C:2011:717, paragraph 47).*"

Bearing in mind the Opinion, it should be assumed that the expression "direct investment" in Article 207 of the TFUE only includes investments with the characteristics identified above. Therefore, appropriate conclusions should be drawn in terms of the EU's competence, i.e. the EU will be exclusively competent to approve either secondary law to implement the CCP, the subject of which is FDI (Article 207 (2) of the TFEU), or to conclude international agreements with the same subject (Article 207 (1) of the TFEU)[74].

[72] Article 2 (1) of the TFEU provides that, *"When 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"* (emphasis added).

[73] Opinion 2/2015, 16 May 2017, not yet published.

[74] See, Maria João Palma – "A nova Política Europeia de Investimento Estrangeiro decorrente do Tratado de Lisboa: o Regulamento *Grandfathering* e a articulação entre a competência da União Europeia e as competências remanescentes dos Estados-Membros", [The new European Policy on Foreing Investment after the Treaty of Lisbon: The Grandfathering Regulation and the articulation between

To this extent, indirect investment (e.g. *portfolio* investment) should be classified as shared competence, which determines that:

1. In the case of secondary law (regulations, directives) concerning indirect investment, the EU must comply with the principle of subsidiarity[75] (Article 5 (3) of the TEU, articulated with Article 4 (2) (a) of the TFEU on the internal market – *in casu*, free movement of capital, Article 63 et seq. of the TFEU).
2. When the act regards both FDI and *portfolio*, it requires a dual legal basis, namely, Article 64 (2) and Article 207 (2) of the TFEU[76] [77].
3. The celebration of international agreements involving both direct investment and indirect investment should follow the procedure of mixed agreements, i.e. the mandate to the European Commission to carry out the negotiations should be granted jointly by the Council of the EU on behalf of the EU and by the MS and the conclusion of the agreement should be done by both of them (see Opinion 2/2015).

It should also be noted that, in our view, the mixed nature of IIA derives not only from the fact that both exclusive and shared competences of the EU are involved, but also from the fact that those agreements (e.g. CETA)[78] involve competences reserved for the MS, *inter alia*, expropriation, compensation for damages,

the competences of the EU and the competences of Member States] *in Revista Internacional de Arbitragem e Conciliação*, Almedina, Vol. VIII, 2015, p. 92.

[75] Shared competences require the subsidiarity test for the EU to regulate *in lieu* of the MS. To that extent, Article 5 (3) of the TEU provides that *"under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level"* (emphasis added). It also states that "*the institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol*." It should be emphasized that, since the Treaty of Lisbon, the role of national parliaments was strengthened concerning the assessment of the principle of subsidiarity through preventive control (*early warning mechanism*), in accordance with the provisions of the Protocol (No. 2) on the application of the Principles of Subsidiarity and Proportionality referred to in Article 5 (4) TEU. Maria João Palma, *op. cit.*, p. 92.

[76] For that reason, we have questioned the legality of the Grandfathering Regulation, based only on Article 207 of the TFEU. Maria João Palma, *op. cit.*, p. 102 et seq.

[77] In the case the act pursues more than one objective, or has several components and one of them is not identifiable as the main one, it must be based on several legal bases provided that the procedures for which the legal bases refer are not incompatible. See, Judgment C-130/10, *European Parliament v. Council* 2012, Recitals 42-45. In the case *sub judice*, we see no procedural incompatibility since both Articles 64 and 207 (2) of the TFEU refer to the ordinary legislative procedure.

[78] The EU and Canada agreed on 21 September 2017 as the date to start the provisional application of the CETA: http://europa.eu/rapid/press-release_STATEMENT-17-1959_en.htm.

dispute resolution system[79] or provisions on restrictions on capital movements which are set forth and are subject to a specific procedure under Article 65 (1) of the TFEU, as well as measures to restore public order or public security[80].

However, in Opinion 2/2015 the CJEU did not identify any competences reserved for the MS. The *mixity of competences* the CJEU affirmed is based only in a dichotomy of competences: exclusive of the EU and shared between the EU and the MS. No identification of national exclusive competences was done by the Court. This, in our view, is contrary to the *principle of conferral*[81]. For that reason, some parts of the Opinion may be unconstitutional.

If we compare the list of matters which the Council of the EU considered as shared competences in the CETA provisional application Decision[82] and those identified by the German Constitutional Court decision that looked at CETA's provisional application, with the enumeration of the CJEU in Opinion 2/2015, we see no coincidence between them, the list of the first two being much longer[83].

Because of this divergence of understandings, reactions can be expected from the Constitutional Courts of the MS or the national parliaments, in the *post-Opinion 2/2015* period.

However, in practical terms, the impact of those divergences can be diminished as the procedure to celebrate mixed agreements is the same independently of the inclusion within the agreements of competences of a shared nature or competences of national reserve nature, both of them imposing the unanimous ratification by MS. For that reason, the need of identification of reserved competences risks being relegated to second rank status in this discussion, as

[79] At least those connected with the competences of the MS. In Opinion 2/2015, the CJEU considered the dispute resolution system as a matter of share competence. However, in our view, the CJEU should have established a parallelism of competences when analyzing the dispute system competence, noting a trilogy of competences evolved: exclusive of the EU (FDI matters); shared competences (portfolio) and reserved to MS (e.g., expropriation, compensation for damages).

[80] Maria João Palma, *op. cit.*, p. 95.

[81] See Article 5 (2) of the TUE: "*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*" (emphasis added).

[82] Council Decision (10974/16), 5 October 2016, listing the articles to be provisionally applied http://data.consilium.europa.eu/doc/document/ST-10974-2016-INIT/pt/pdf.

[83] Maria Joao Palma – "A Política Comercial Comum no pós-Lisboa – a Competência para a Celebração de Acordos Internacionais de Comércio da União Europeia" [The Common Commercial Policy after Lisbon – the competence of the EU to celebrate international trade agreements] – *Revista Análise Europeia*, nº 3, maio de 2017, p. 171 http://www.apeeuropeus.com/analiseeuropeia-2-3.html, p. 169. When analysing the CETA, the German Constitutional Court listed as matters not apt for definitive application chapters 8 and 13 (investment protection including the system of litigation and portfolio); chapter 11 (mutual recognition of professional qualifications); chapter 14 (maritime transportation); and chapter 23 (labour). The CJEU only classifies portfolio and the system of litigation concerning investment as shared competences.

the procedure imposed by shared competences is the same as that for reserved competences of MS, making it possible to refer to a *free riding effect* of the consensus for the national competences through the procedure of celebration for mixed agreements.

Obviously, the Treaties will have to deal with these unclear boundaries concerning competences – see Question 6 about the need for clarification on competences as a *de iure condendo* exercise.

Question 17

In order to implement the FDI competence, the EU adopted the Regulation (EU) No 1219/2012 of the European Parliament and of the Council, of 12 December 2012[84], which established transitional arrangements for bilateral investment agreements between MS and third countries (Grandfathering Regulation)[85].

The Grandfathering Regulation ensures the validity of Bilateral Investment Treaties (BITs) of the MS until they are replaced by the IIA concluded by the EU (see Article 3 of the Regulation). The application of Article 351 of the TFEU was thereby excluded[86], which would result in the obligation by MS to terminate their BITs in light of the transfer of competence to the EU concerning FDI. This Regulation safeguarded a large number of BITs signed by the MS (41 in the case of Portugal, from a total of 1,392 for all of the MS)[87]. The maintenance of such protection net can be referred as a positive aspect of the Regulation, inasmuch as it ensured a continuous line of protection of investors and their investments under national BITs, until the entry into force of the EU's IIAs with a certain Party.

The Grandfathering Regulation thus resulted in a *peaceful coexistence* between the provisions for the protection of foreign investment in the BITs of the MS and the IIA of the EU[88].

This coexistence is based on a *trilogy*, in which the old BITs of the MS coexist with the EU's IIAs as long as the Parties are not identical, and the new BITs concluded by MS authorized by the EU on the basis of *empowerment* under Article 2

[84] Published in the OJEU, L 351/40, 20.12.2012.

[85] Maria João Palma, *op. cit.*, (2015), pp. 83 to 110.

[86] Article 351 of the TFEU provides that: "*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.* To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. *Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude (...)*" – (emphasis added). The expression "*... all appropriate steps...*" includes the termination or withdrawal of the agreement.

[87] The list of agreements referred to in Article 4 of the Regulation can be found in OJ C 131, of 8 May 2013, p. 2 et seq.

[88] Maria João Palma, *op. cit.*, (2015), p. 106.

of the TFEU, provided that the EU has no interest in the Parties chosen by the MS[89].

The possibility of empowerment granted by the EU to the MS (see Article 7 of the Regulation) is seen as the second positive aspect of the scheme outlined in the Regulation, as it allows for a *catching up* exercise by MS whose BIT network is less dense than other MS[90].

However, when reviewing the first years of implementation of the CCP (2009/2017), including of the Grandfathering Regulation (2013/2017), some concerns have to be outlined: as of September 2017 there is no agreement concluded by the EU with investment provisions in force to refer to. We can only indicate the conclusion of the negotiations of the UE/Vietnam agreement in December 2015, pending signature and ratification, expected to enter into force in early 2018; or the foreseeable provisional entry into force of CETA (21 September 2017)[91], which is limited to matters within the exclusive competence of the EU, leaving out the regime of investment protection which will depend on the ratification of all MS (see Question 7).

If, on the one hand, one must emphasise the ambitious agenda of negotiations the UE has assumed taking into account the whole set of agreements being negotiated (inter alia, EU/Japan, EU/China, EU/Myanmar, EU/India, EU/Singapore)[92], on the other hand, it has to be noted that the EU has not made much progress since the European investment policy began to be implemented[93].

While we highlight a less visible result from the EU side, we also find national investment protection networks still to be unbalanced, e.g. when comparing the number of BITs from Germany, the United Kingdom or the Netherlands with

[89] Maria João Palma – "A Proteção do Investimento Estrangeiro – uma Nova Política Europeia", [Foreign investment protection – a new European Union Policy?] *in Revista Análise Europeia*, (1) nº 1, 2016, http://www.apeeuropeus.com/uploads/6/6/3/7/66379879/palma_maria_joao__2016_.pdf.

[90] The Grandfathering Regulation entered into force in January 2013. In June 2013, Germany had 136 signed BITs, of which 127 were in force; whereas Portugal had 55 signed BITs and 41 in force (see http://investmentpolicyhub.unctad.org/IIA). In May 2017, figures indicate that Portugal had 55 signed BITs and 45 in force http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (accessed May 2017).

The fact that Portugal maintains the same number of BITs signed in both periods reveals the complexity of the authorization process and the period of deadlock that occurred in a phase after the Grandfathering Regulation entered into force.

[91] http://europa.eu/rapid/press-release_STATEMENT-17-1959_en.htm.

[92] The TTIP negotiations were suspended after the election of President Trump.

[93] See the Communication on the European international investment policy (COM (2010) 343), of 7 July 2010, where the European Commission listed those whom it considered to be value added partners – Canada, India, Singapore, Mercosur, in the short term; China and Russia, in the medium term. For the state of the current negotiations, see: http://ec.europa.eu/trade/.

countries like Portugal[94]. The expected result – to harmonize protection networks under the umbrella of the IIA EU agreements – is not being achieved in the short/medium term.

The starting point gave an advantage to certain MS and this becomes increasingly more relevant due to the impasse of the negotiations carried out by the EU.

This is partly due to what is established on Article 9 (1) (b) of the Grandfathering Regulation, where it is considered sufficient for the EU to signal a negotiating interest in a Party to prevent an authorization for a MS to negotiate a BIT[95].

In practical terms, however, it has been understood that only the presentation of negotiating directives by the European Commission to the Council acts as a deterrent to negotiations by the MS. Otherwise, and according to the Regulation, the mere reference to a particular partner in a Communication by the European Commission could have that implication. In our view, the Regulation should be amended, at least concerning this aspect.

But we find the problem to be even more acute: the *stand-still* obligation imposed on MS while the EU is negotiating the IIAs did not favour harmonization of the level of protection of the various MS, instead contributing to the increase of the gap between them. As the negotiations of IIAs have spanned several years, during this period investors and investments of MS enjoying the protection afforded by BITs compete side by side with those who do not – and cannot – enjoy this protection, leading to an uneven playing field.

Such a scenario leads us to propose the complete deletion of (1) (b) of Article 9 of the Grandfathering Regulation, given the negotiating history and the delays in the negotiations[96]. In our opinion, it should be possible for MS to submit applications for authorization to negotiate new BITs until the EU has concluded an agreement containing investment protection provisions with the same Party[97].

This suggestion has, however, no support within Portugal's official entities (Ministry of Economy and Ministry of Foreign Affairs), which are responsible

[94] Analysing data of May 2017, Portugal has about half the total number of BITs in force vis-à-vis the countries with the largest BIT networks in the EU. France has 104 signed BITs, 96 in force; Germany has 135 signed BITs, 131 in force; the Netherlands has 94 signed BITs, 90 in force; Italy has 84 signed BITs, 73 in force; Spain has 80 signed BITs, 73 in force; the United Kingdom has 106 signed BITs, 95 in force. Portugal has 55 signed BITs, 45 in force. See http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu.

[95] According to Article 9 of the Regulation, one of the cases in which the EU does not grant empowerment is when this is considered to "*be superfluous, because the Commission has submitted or has decided to submit a recommendation to open negotiations with the third country concerned pursuant to Article 218(3) TFEU*" (emphasis added).

[96] For instance, the negotiations of the CETA stated in 2009. From this moment on, those with no BIT with Canada where blocked from having one.

[97] The relevant moment must be the definitive entry into force of the agreement.

for the national negotiation process for BITs and for monitoring the negotiation process of investment agreements by the EU, insofar as they consider that parallel negotiations by the MS may block the negotiation procedure at the EU level.

However, in our view, Article 9 (1) (d) would be sufficient to deal with this possibility as the European Commission could avoid giving the authorization concerning a certain request, should it consider that the prospective negotiation would present a "*serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the Union*."

It should also be noted that, since the European Commission suggested that MS amend their national Model BITs in accordance with the provisions contained in CETA's investment chapter (similar to the one suggested for TTIP), it is not clear that the permission for MS to negotiate BITs, in parallel with the EU, would collide with the harmonization of the level of protection that is intended to achieve within the EU.

To finalize, we also suggest that the possibility of parallel negotiations should be done according to the authorization procedure by the European Commission, to whom it competes to maintain the level playing field as it has to be done when authorising BITs with partners where the European Commission has no interest. In both cases, the EU IIA would substitute the BIT assuring a continuous line of protection from the national level to the EU level.

Question 18

Although the EU has not approved a Model for an IIA, it is nonetheless possible to verify that the provisions in different EU IIA are very similar, to the point of it being possible to consider the existence of an '*invisible model*'[98] for EU IIAs and, inclusively, for the BITs of the MS *post-Grandfathering.*

The shaping of this invisible model had two stages. Firstly, the EU IIAs were inspired by the provisions of the BITs of the MS. Secondly, the recent BITs of the MS absorbed the novelties contained within the EU IIAs: on the one hand, the enshrinement of the MS' *right to regulate* on behalf of the public interest (*policy space*) and, on the other hand, a demand for judicialisation of the dispute settlement[99].

This has resulted in two frequent features common to all *new age* IIAs and BITs of the MS – the right to regulate and the judicialisation of the dispute settlement system. It must be emphasized that these two aspects are interlinked, as they

[98] The expression is found in Bungenberg and A. Reinisch – "The Anatomy of the (Invisible) EU Model BIT", *The Journal of World Investment and Trade* (2014) 15. It should be highlighted that, not only are the investment provisions contained in the different EU IIA similar, but they also share similarities with the clauses of the MS' BITs. See, Maria João Palma, *op. cit.*, (2016), p. 131.

[99] Maria João Palma, *op. cit.*, (2016), *idem.*

both contribute to ensure a better balance between the rights of investors and the rights and obligations of MS hosting investors and investments and, therefore, are both seen as positive aspects of the EU IIAs.

Firstly, the fact that *policy space* is enshrined within investment agreements is considered to be a positive aspect, allowing for the possibility of justifying the exercise of the right to legislate in accordance with the public interest, without any obligation imposed on States or the EU to compensate investors who may have been harmed[100].

CETA sets public health, safety and the environment as public interest objectives (Annex 8A: Expropriation). In a broader formulation, the TTIP agreement[101] mentions public health, safety, environment, public morals, social or consumer protection and the promotion and protection of cultural diversity (Annex I. Expropriation).

Portugal still does not have a BIT signed under a procedure of empowerment *post-Grandfathering*, although it has received several authorizations by the European Commission to start negotiations procedures[102]. However, according to information provided by the official entities responsible for the negotiation of BITs in Portugal (Ministry of Economy and Ministry of Foreign Affairs), the Portuguese Model BIT to be used includes a *policy space* clause, similar to that contained within the TTIP agreement.

Concerning the *reform of the arbitration system* and its transition towards a judicial system[103], Portugal is sensitive to the arguments traditionally made against international arbitration in respect of investments[104]:

[100] Damages deriving from legislative measures depreciating the value of investments are referred to, in international investment law, as "*indirect expropriations*".

[101] See http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230.

[102] Namely, Nigeria, Saudi Arabia, Azerbaijan, Moldova, Georgia, Ivory Coast, Ghana, Bahrain, Iran and Ethiopia.

[103] On the investor-State dispute settlement system in the EU IIA, see August Reinisch and Lukas Stifter – "What about ISDS in EU Investment Agreements", *in Revista Internacional de Arbitragem e Conciliação*, Almedina, Vol. VIII, 2015, pp. 7-34. In the national doctrine, Dário Moura Vicente: "Os mecanismos de resolução de litígios entre Estados e investidores na perspetiva europeia: desenvolvimentos recentes" [Investor-State dispute settlement in an European perspective: recent developments"], *in Liber Amicorum Fausto de Quadros,* Vol. 1, Coordenação de Marcelo Rebelo de Sousa e Eduardo Vera-Cruz Pinto, Almedina, Coimbra, 2016, p. 695; Luís de Lima Pinheiro: "Mecanismos de resolução de litígios com os investidores nos Acordos CETA e TTIP" [Investor-State dispute settlement in CETA and TTIP] *in União Europeia, Reforma ou Declínio,* Coordenação de Eduardo Paz Ferreira, ed. Veja, Lisboa, 2016, pp. 259 to 375.

[104] In the national doctrine, a review of these arguments can be found in Ricardo do Nascimento Ferreira "A judicialização do Sistema de ISDS no TTIP", *in Revista Internacional de Arbitragem e Conciliação*, Almedina, Vol. VIII, 2015, p. 114.

- on the one hand, the tendency by arbitrators to decide in favour of investors, possibly in view of their interest in future appointments;
- on the other, the fact that arbitration tribunals for investment are private in nature and that there is no public control of their establishment or decisions;
- and lastly, the fact that arbitration undermines the State's right to public regulation, which could potentially lead to an abuse of a right of action against measures taken in the public interest by States[105/106].

Taking into account the arguments against investment arbitration, the evolution of the traditional arbitration system towards the creation of an *International Investment Court,* enshrined in the CETA was well received by Portugal's official entities.

This development follows a public consultation held in 2014 by the European Commission on the TTIP agreement[107] and the criticisms directed at the possibility of recourse to international arbitration on investment. In response, the European Commission introduced proposals for improving the system in May 2015[108], including the possible creation of an *investment court of a judicial, permanent and multilateral nature*.

Along the same lines, the EP adopted a Resolution on 8 of July 2015, recommending that the European Commission adopts a new system for settling disputes between investors and States, subject to democratic principles and control, public prosecution and in accordance with transparency rules, with recourse to professional and independent judges, appointed by a public authority, including the possibility of appeal in order to ensure the consistency of the decisions, which, taken as a whole, would allegedly contribute to preventing private interests from jeopardizing the pursuit of the public interest[109/110]. On 16 of Septem-

[105] *Idem*.

[106] For instance, the *Abaclat* case (ICSID arbitrations initiated by foreign investors against measures to restructure public debt by Argentina to deal with the economic and financial crisis) or the *Vattenfall* case (initiated against Germany, also in ICSID, by virtue of its decision in phasing-out nuclear energy), referred to in Maria João Palma, *op. cit.*, (2016), p. 132.
For a critical analysis of these cases, *vide*, Maude Barlow and Raoul Marc Jennar – "Le fléau de l´arbitrage international", Le Monde diplomatique, 01.02.2016. http://www.monde-diplomatique.fr/2016/02/BARLOW/54744.

[107] The European Commission's report on the outcome of the public consultation, of 13 January 2015, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf.

[108] Concept Paper, of May 2015 http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

[109] See www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML.

[110] An assessment of the EP's performance in this area can be found in Pedro Silva Pereira – "Acordo CETA: o Parlamento Europeu fez a diferença", [CETA: the European Parliament has made the

ber 2015, the European Commission published the proposed TTIP chapter on investment for discussion, including provisions on a *permanent judicial system for the settlement of investment disputes*, simultaneously affirming its commitment to the creation of an *International Investment Court* to replace all the dispute settlement systems provided for in IIAs[111].

In the course of the legal scrubbing exercise of CETA[112], a new dispute settlement system between investors and States was introduced in the Agreement: the Investment Court System (ICS), imported from the exercise performed for the TTIP.

It should be emphasized that all of these steps merited Portugal's agreement.

In short, the two-pronged EU exercise – enshrinement of the *policy space* and evolution from a private arbitration system to an *International Investment Court* – are considered, at the national level, to be very positive (Ministry of Economy and Ministry of Foreign Affairs), to the extent that they promote a fair balance of positions between investors and States or the EU within a dispute.

Question 19

No data available.

Question 20

In this respect, it should be noted that, since the Treaty of Lisbon, the CCP has come under the umbrella of the general provisions on "European Union's External Action" including Article 21 TEU, which states that the Union should promote "*in the wider world: democracy, the rule of law (...) respect for human dignity (...)" (no. 1),* but also *"work for a high degree of cooperation in all fields of international relations" (no. 2),* in order to, *inter alia, "(...) (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development (...)".*

The verification of compliance with these requirements should prevail through the negotiation process of international trade agreements, with emphasis on the *favourable opinion* by the EP, whether in respect of the entire agreement

difference] *in* Revista Análise Europeia, 3 (2), May 2017, pp. 183-197. http://www.apeeuropeus.com/uploads/6/6/3/7/66379879/silva_pereira_pedro_2017.pdf.

[111] See http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf and http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm.

[112] The legal scrubbing of the CETA Agreement ended on 29 February 2016.

or in exceptional situations of "*partial*" provisional application including in case of the conversion from provisional to definitive application (see Question 6)[113].

We also believe that this monitoring is a matter for national parliaments, especially during the ratification stage, which justifies their greater participation and involvement during the negotiating stage of the agreements[114].

In a globalized world, trade cannot be treated separately from other issues – trade liberalization interacts with other areas such as labour, social and environmental policy, the *good neighbourliness* of which must be scrutinized by both the European and national parliaments.

Article 21 TEU was designed to determine the necessary accommodation of EU external action, including the CCP, to socially and environmentally sustainable economic development and global poverty eradication[115]. In short, it assigns an important role to be played by national parliaments also in what refers to the areas of exclusive competences of trade agreements, as trade cannot be disconnected from others issues of national competence.

Question 21

This question was answered above (see Question 5).

[113] The partial provisional application should put into perspective the possibility of making the whole agreement evolve to fulfil the obligations contained in Article 21 TEU. On the other hand, in case of conversion, it will be necessary that the dropped "*parties or provisions of the agreement*" are not considered essential to the fulfilment of the dictates of article 21 TEU. See, Maria João Palma, *op. cit*, (2017), p. 172.

[114] *Idem*.

[115] In the national doctrine, see Teresa Moreira, Comentário ao artigo 206º do TFUE, [Comments on Article 206 TFUE], *in Tratado de Lisboa, Anotado e Comentado*, Coordenação de Manuel Lopes Porto e Gonçalo Anastácio, Almedina, Coimbra, 2012, p. 808.

ROMANIA

Ion M. Anghel*

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

In what regards the ERTA principle, we would like to mention the Broadcasting Rights case[1]. The Court, following the Commission's reasoning according to which on the basis of the ERTA principle the EU is exclusively competent to negotiate the Convention on the neighboring rights of broadcasting organizations, decided that the EU has an implied exclusive competence in the field of neighboring and related rights, because the content of the negotiations for the Convention falls within an area covered to a large extent by Union rules and because the negotiations may affect the EU rules or alter their scope.

Question 2

All EU action is bound by the principle of conferral according to which the Union can only act within the limits of the competences attributed to it by the Member States through the Treaties.

If article 3(1) TFEU expressly foresees the exclusive competence of the EU with regards to the CCP, article 3(2) TFEU also foresees an implicit exclusive

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[1] C-114/12, European Commission v. Council.

competence for the EU in regard to concluding an international agreement 'when its conclusion is provided for in a legislative act of the Union, when this is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope'. Art. 3(2) TFEU represents a codification of pre-Lisbon case-law which enables the EU to exclude Member States participation in its external policy in two main situations:

a) EU exclusivity is triggered when the internal and external aspects of a particular policy area can only be exercised effectively together. This is called the complementarity principle and applies even in the absence of prior EU internal legislation.
b) the EU will have the power to act alone when the intended international agreement concerns an area 'covered to a large extent' by Union rules, because the agreement could 'affect the Union rules' or 'alter their scope'. This is called the "ERTA principle" and requires parallelism between the internal and external field because its application depends upon a degree of prior secondary legislation.

Art. 3(2) TFEU contains some implicit constraints on the implied excusive competence. These constraints refer more exactly to the question of fulfilling the criteria mentioned by art. 3(2) TFEU (the conclusion of an international agreement is provided in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence or in so far as its conclusion may affect common rules or alter their scope). These criteria rule out EU exclusivity when the external measure does not concern an area covered 'to a large extent by EU rules' or does not 'affect common EU rules or alter their scope'.

The application of the ERTA principle does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully, but that the international commitments fall within an area which is already largely covered by EU rules. In assessing whether this is the case, the CJEU must not only take into account the scope of the rules in question but also their nature and content as well as their future development, insofar as that is foreseeable at the time of analysis. In this respect, it is established case-law that when both the Union rules and the international agreement lay down minimum standards, implied exclusivity cannot arise, even if the Union rules and the provisions of the agreement cover the same area.[2]

In order to fulfill the criteria 'to affect common EU rules' or 'to alter their scope', a certain degree of internal harmonisation is required. However, the precise degree of harmonisation that is required to trigger the ERTA effect is not

[2] CJEU Opinion 1/03, para. 127.

clear and can vary. However, according to this established case-law, EU exclusivity cannot arise when both the internal EU legislation and the intended international agreement lay down minimum requirements, allowing the Member States to adopt more stringent measures.

Question 3

Article 216 para. 1 TFEU: *The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.*

Article 216 TFEU is the substance core for the conclusion of international agreements because it stipulates the general rules according to which the European Union may conclude international agreements with one or several third countries. This article represents an expression of EU's legal personality, conferred through primary law. According to article 216 para. 1 TFEU, the Union can do so "[...] where the Treaties so provide [first reason] or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties [second reason], or is provided for in a legally binding Union act [third reason], or is likely to affect common rules or alter their scope [fourth reason]". Article 216 para. 2 TFEU indicated that such agreements are binding for the institutions of the Union and for its member states. Article 216 TFEU (which comprises the detailed dispositions regulating the situations when the European Union "may conclude an agreement with one or more third countries or international organizations") also reflects and codifies the Court's jurisprudence on the existence of the external competence of the Union and is directly related to the assignment of competences performed through articles 2-4 TFEU. Article 216, paragraph 1 TFEU establishes the *existence* of the Union's external competence, but not its character (shared or **exclusive),** the latter being established in article 3, para. 1 and 2 TFEU.

Question 4

The connection between the two dispositions can be expressed as follows: article 216 establishes EU's general competence to conclude agreements, while article 3 para. 2 TFEU establishes EU's implicit external competence. According to the conclusions of AG Sharpston in Opinion 2/15: *Article 216 TFEU (which comprises the detailed dispositions regulating the situations when the European Union "may conclude an agreement with one or more third countries or international organizations") also reflects and codifies the Court's jurisprudence on the existence of the external competence of the Union and is directly related to the assignment of competences performed through*

articles 2-4 TFEU. Article 216 paragraph (1) TFEU establishes the existence of the Union's external competence, but not its exclusive character – the latter is established in article 3, paragraphs 1 and 2 TFEU.[3] Unlike article 3 para. 2 TFEU, which does not expressly refer to the *external* competence, article 3 para. 2 TFEU establishes the circumstances when "the Union shall also have exclusive competence for the conclusion of an international agreement".

If we are in the situation of one of the reasons established in article 3 para. 2 TFEU and the European Union benefits of external competence, on the grounds of the dispositions of article 216 para. 1 TFEU which confers the competence to conclude international agreements, this external competence is *exclusive*.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

Article 218 para. 4 TFEU constitutes the main reference regulations establishing the outline of the duties conferred to the Council and, respectively, to the special committee, as well as to the Commission in all stages of concluding international agreements. Given that the aim is to establish an interinstitutional balance, the respective disposition establishes, in particular, that the agreements between the Union and one or several third countries are negotiated by the Commission or by the High Representative of the Union for Foreign Affairs and Security Policy, with the observance of the negotiation directives adopted by the Council, and are subsequently concluded by the Council, either after the approval or after the consultation of the Parliament. The weight center in the stages of concluding the agreements is placed at the level of the Council, under the reserve of the competences recognized to the Commission in this field[4]. The interpretation offered by the CJEU was in this sense: *Article 218(4) TFEU must be interpreted as empowering the Council to set out, in the negotiating directives, procedural arrangements governing the process for the provision of information, for communication and for consultation between the special committee and the Commission, as such rules meet the objective of ensuring proper cooperation at the internal level.*[5]

We can speak of a multi-level game in EU context, where the institutions habilitated to negotiate agreements must ensure that the international agreements satisfy, on the one hand, the contracting third party, and, at the same time,

[3] Para.64 from AG Conclusions.

[4] Decision of the Court of Justice of the European Union of 16 July 2015, C-425/13, COM v. CONS (ETS).

[5] Para. 78 of the Decision quoted.

the EU member states and institutions, on the other hand. Until now, the attempt of the institutions to satisfy all interests involved was not perfect. In case of third parties, the situation may become frustrating due to the complicated inter-institutional architecture. In case of the EU-Canada free trade agreement, the 2014 version of the text of the treaty had to be revised, such as to include the new system of the Investment Court and negotiations were extended for seven years. In addition, certain member states had doubts regarding the compatibility of the mechanism for solving the conflicts with EU legislation. In case of the negotiations for a free-trade agreement with Singapore, it took two years for Approval 2/15 to be given. The member states desire more convergence, suppleness of the inter-institutional act, but, at the same time, the satisfying of the political interests at the internal level, as proven by the negotiations for comprehensive agreements, where consensus is very difficult to achieve.

Question 6

The possibility to temporarily apply an EU international treaty is established in article 218 para. 5 of the TFEU. The selection of the dispositions which will make the object of the temporary application is one of the most difficult exercises because, on the one hand, it must confer clarity to the third country (public international law relations) and, on the other hand, it may not impact the division of competences at internal level (EU law relations), only the regulations falling in the competence of the Union (exclusive or shared) being able to make the object of the temporary application. The exercise is performed from case to case, depending on the specific of the agreements.

From the procedural point of view, the decision regarding the temporary application may be made at the same time with the signing, meaning, before the treaty is concluded at EU level, with the proper involvement of the European Parliament. Of course, the postponement of the temporary application until the moment when the EP gave its consent or approval is not mandatory. Still, a practice is developed (since the conclusion of the Free-trade agreement with South Korea) where temporary application is only decided after the hearing of the EP's position on the agreement or even only after the EP gave its consent for the conclusion. We consider that this practice regarding the postponement of the temporary application until the moment when the EP gave its consent or approval should be the interinstitutional behavior rule, answering the logic of art. 218 TFEU, the democratic control of the external action underlined by the CJEU[6] and predictability, a component of loyal cooperation.

[6] Jurisprudence explained and strengthened the right of the EP to be informed throughout the entire procedure applicable to the conclusion of international agreements, first of all, in order to be able to

The EP is invested with an important role, in the sense that a signed agreement cannot produce effects – with final nature – without the approval or, as the case may be, the consent of the European Parliament. Symmetrically, the EP's role should also be respected when the producing of effect with temporary nature is foreseen, since in the hypothesis of a negative decision of the EP the legal relations within the Union would already be affected by the temporary application.

Question 7

The non-participation to a *multilateral mixed agreement* by one (or several) member states is not, in itself, always problematic, because most agreements can enter into effect as soon as a certain number of signatory states have ratified the agreement.

The situation is different in what concerns the bilateral mixed agreements. In their case, it is necessary that both the Eu and the member states sign the treaty. The signature indicates the intention to conclude the agreement, does not actually conclude it as such. The refusal to sign the agreement by a member state may have as effect the blocking of the temporary application because at the level of the "European" side, the procedure (regarding signing) is not fulfilled.

Through the refusal to sign the agreement, a member state may, de facto, create the right to veto on the temporary application on the parties to the agreement falling under the incidence of the Union's competences, because this can only occur after the signing by the parties. This scenario almost took place when the Belgian federal government was, for the first time, in impossibility to sign CETA, as a consequence of the refusal expressed by Wallonia (in Belgium, the national procedure indicating that Belgium cannot offer its agreement before receiving the approval of all regional Belgian parliaments).

In what concerns the effects of the rejection of an agreement during the ratification procedure at national level, it must be noted that for entering into effect, it is necessary that both the EU and all member states express their consent. Through rejection by one member state, it is certain that the treaty cannot enter into effect as being final. Under these circumstances, the temporary application cannot be extended sine die, situation which requires, first of all at political level, a consultation of all parties involved (the respective member state, the other member states, the third country), in order to find the best solution for coming out of blockage. The renegotiation of the agreement cannot be

exercise an effective democratic control on the Union's external action. Thus, the Information must be as complete as possible, such as the efficient democratic control to be possible throughout the term of the negotiations, according to the decision of the CJEU in Decision (Great Chamber) of 14 June 2016 in case C-263/14 European Parliament against the Council of the European Union ("Tanzania"), which stated that the extent of the obligation to inform the EP applies to all procedural stages necessary for the conclusion of an agreement.

excluded in such situation, depending on the nature of the objections invoked by the member states which decided to reject it.

Question 8

The Parliament's involvement in the treaty elaboration process *"is an expression of the democratic principles on which the European Union is founded. In particular, the Court has already stated that the Parliament's involvement in the decision-making process is the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly"* (Mauritius Decision[7], para. 81). The Parliament must be immediately and fully informed, throughout the conclusion of treaties, in order to enforce the disposition of art. 218, para. 10 TFEU. The EP must be involved during all stages occurring in the negotiation of international agreements; see the previous explanation (question 6), even more so in the context of situations requiring an extended cooperation framework or in case of budgetary issues, where the representative dimension of this institution must be reflected (the decision to assign funds refers, at the same time, to the EU as entity and to the national circumscriptions).

Question 9

Article 218 para. 9 TFEU sets the core of the matter of suspending international agreements. This disposition is in line with the principles established by the Vienna Convention, observing the symmetry of legal regulations. The EU inserts in the international agreements essential clauses whose breach would lead to the suspension of the agreement. For example, in the free-trade agreement with Singapore, it was decided that, due to the specific of the *connection presented by the dispositions of chapter 13 of the agreement envisaged with the commercial exchange between the Union and the Republic of Singapore it also derived from the fact that a breach of the dispositions in the matter of the social protection of workers and environmental protection, stipulated in this chapter, authorizes, according to the international law tradition codified in article 60 paragraph (1) of the Convention on treaty law, signed in Vienna on 23rd of May 1969 (Recueil des traités des Nations unies, vol. 1155, p. 331, hereinafter called the "Vienna Convention"), which applies to the relationship between the Union and third parties (see, on the applicability regarding the external relations of the Union of traditional regulations codified in the Vienna Convention, decision of 25 February 2010, Brita, C-386/08, EU:C:2010:91, points 41 and 42, as well as Decision of 21 December 2016, Council/Front Polisario, C-104/16 P, EU:C:2016:973, points 100, 107, 110 and 113), the other party to terminate or suspend the liberalization of these exchanges, established in the other dispositions of the above-mentioned agreement.*[8]

[7] Decision of the CJEU of 24 June 2014, C-658/11, PE c. CONS.

[8] Para. 161 of the Decision quoted.

Question 10

An international treaty must be interpreted not only depending on the terms in which it is written, but also in the light of its objectives. Article 31 of the Vienna Convention on treaty law of May 23rd, 1969, establishes, in this regard, that a treaty must be interpreted in good faith, according to the usual sense which is going to be assigned to the terms of the treaty in their context and in the lights of its object and purpose. The EU association agreements often stipulate the creation of institutions; the CJEU decided that the decisions with legal effect originating from these organizations have the same status as the agreement itself[9].

We do not have examples at the national level regarding decisions disputed or debated in a special manner.

Question 11

CJEU stated the importance of the interinstitutional balance provided by efficient and transparent communication, including the role of the EP, since CJEU underlined EP's responsibility to exercise an effective democratic control over the Union's external action. Therefore, the presentation of information, access to data throughout the entire process, facilitation of the control in due time, would avoid litigations between the Union's institutions. The CJEU **"***Tanzania***"**[10] defines the extent of the obligation to inform the EP: it applies to all procedural stages in the conclusion of a treaty. In the European decisional process in the matter of concluding treaties, the EP is invested with an important role, in the sense that a signed agreement cannot produce effects – with final nature – without the approval or, as the case may be, the consent of the European Parliament. The national Parliaments are highlighted in the stage of agreement ratification – since mixed agreements require the consent expressed at national level.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

We have no information regarding such national jurisprudence.

Question 13

Regarding the issue of possible direct effect of international agreements, we would like to first of all state that according to art. 216 (2) TFEU, EU's international agreements bind EU institutions and its Member States.

[9] CJUE Decision on the Montreal Convention for the Unification of Certain Rules for International Carriage by Air: ECJ, Case C-63/09, Decision of 6 May 2010, Axel Walz v CLickair SA, para 20; CJUE Decision C-192/89, Sevince v Staatssecretaris van Justitie.

[10] CJUE Decision, C-586/14 of 9 June 2016.

The obligation of the EU to comply with international law is transmitted into the internal legal orders of the Member States. It is only as a consequence of the status of the EU as a contracting party to an international agreement that the latter enjoys supremacy over Member States' law.

In verifying the possible direct effect of an international agreement, the CJEU has applied a two-step test: first, it verified the spirit, structure and nature of the agreement in order to establish whether the agreement is intended to create individual rights and, second of all, the existence of a provision that is sufficiently clear, precise and unconditional in conferring rights upon individuals.

The majority of the CJEU case-law on direct effect refers to international agreements creating close links – association, pre-accession, cooperation, cooperation for development. The provisions of these agreements were invoked by private parties to claim the enforcement of a specific subjective right provided for by the agreement (case C-162/00, regarding the association agreement concluded with Poland before it was a Member State).

In case C-416/96, the Court ruled that a provision of the EEC-Morocco Cooperation Agreement precluding a host member state from refusing to extend the residence permit of a Moroccan national under certain conditions had direct effect.

Case C-265/03 dealt with the possible direct effect of a provision of the Communities-Russia Partnership Agreement from 1997, which prohibits employment discrimination on grounds of nationality against Russian workers. The Court again found that individuals to whom that provision applies are entitled to rely on it before the courts of the member states.

The issue in case C-162/96 concerned an action against a Council regulation in the light of its inconsistency with the Cooperation Agreement between EEC and Yugoslavia. Although the Court did not find any grounds for invalidity of the EU measures, it nevertheless accepted the possibility for an individual to challenge its legality on grounds of the rights derived from the international agreement.

Another example is the Lome Convention on international taxation, which in case C-469/93 was admitted as being capable to confer rights on individuals which they may invoke before national courts in order to challenge the application of conflicting national provisions.

All the judgments mentioned above were delivered within the preliminary ruling procedure before the ECJ and illustrate a continuous line of acceptance of the direct effect of international agreements.

Nevertheless, the Court took a different approach in relation to the WTO Agreements where it rejected the direct effect[11].

[11] C-21-24/72, International Fruit Company and C-280/93, Germany v Commission.

Question 14
Romania does not have such actions pending.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 15
The international agreements to which the EU is a party are integrated in the EU legal order, having as source of law a position superior to derived law. In Romania, the assurance of the observance of EU law at national level does not distinguish depending on the different EU law sources. Hence, the observance of these commitment is subjected to the fundamental EU law principles, including enforcement priority and loyal cooperation.

Question 16
The Lisbon Treaty constitutes an important step in the development of EU external exclusivity. Article 207(1) Treaty on the Functioning of the European Union (TFEU) not only introduced an exclusive competence for the EU over trade in services and foreign direct investment, but also over the 'commercial aspects of IP'. Article 207(1) TFEU states: 'The common commercial policy (CCP) shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'.

Article 3(1) TFEU expressly foresees the exclusive competence of the EU with regards to the CCP. Hence, when negotiating and concluding international agreements in the domains of the CCP, Member State involvement is not required.

As regards the CCP, constant case-law of the CJEU (including its latest decision in Opinion 2/15 regarding the Agreement between the EU and Singapore), this term refers to a policy that shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. It follows from that provision, in particular from

its second sentence, according to which the CCP belongs within the context of the Union's external action that this policy relates to trade with third States[12].

We would like to stress the following: According to settled case-law, the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the CCP. On the other hand, an EU act falls within that policy if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it[13].

Referring to the interpretations given by the Court to the CCP post-Lisbon, we would like to mention the Daiichi Sankyo Case (C-414/11). It concerned a preliminary question on whether Article 27 of the TRIPs Agreement, setting out the framework for patent protection, falls within the Member States' area of competence or within the EU's sphere of competence. In this context, the Court examined the scope of the CCP competence.

Emphasizing the novelty of article 207 TFEU, the CJEU decided that only provisions principally aiming to promote, facilitate or govern trade and having a direct and immediate effect on trade, fall within the scope of the CCP. According to the Court, all TRIPs provisions have this specific link with international trade because they are part of the WTO-system.

By making the EU's competences parallel to the fields covered by the WTO Agreements, the Daiichi Sankyo judgment satisfies the EU Commission's demand for wider competencies on the basis of more efficiency and consistency within the EU's trade policy.

Art.207 TFEU refers specifically to *foreign direct investments*, as falling within the ambit of the CCP. According to settled case-law, direct investment consists in investments of any kind made by natural or legal persons 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 in order to carry out an economic activity. Acquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable him to participate effectively in the management of that company or in its control[14].

[12] Judgments of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, paragraph 50 and of 22 October 2013, *Commission* v *Council*, C-137/12, paragraph 56.

[13] judgments of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C 414/11, paragraph 51 and of 22 October 2013, Commission v Council, C-137/12, paragraph 57 and Opinion 3/15 (Marrakesh Treaty on access to published works) of 14 February 2017, paragraph 61.

[14] Judgments of 12 December 2006, Test Claimants in the FII Group Litigation, C-446/04, paragraphs 181 and 182; of 26 March 2009, Commission v Italy, C-326/07, paragraph 35; and of 24 November 2016, SECIL, C-464/14, paragraphs 75 and 76.

Nevertheless, there is no uniform definition of the term "foreign direct investments" at treaty level. We would like to stress at this point the fact that an investment treaty covers besides issues of foreign direct investments, the indirect foreign investments (the so-called "portfolio investments"), as well as a provisions referring to expropriation or/and right of property (subjects which according to art.345 TFEU fall within the competence of Member States).

Question 17

In what concerns bilateral trade agreements, they are usually concluded between states in order to facilitate trade and investments in their commercial relationships by eliminating tariffs, quotas, export restraints and other trade barriers, harmonising the regulatory standards and more generally speaking, by liberalising the trade. The features of this type of agreement show similarities to the WTO agreements in regard to their high level of integration, the broad scope that includes the most important aspects of trade: custom duties, goods, services, technical requirements et cetera, and the investor-state dispute settlement procedures which complement the application of the treaty. On the other hand, the nature of bilateral trade agreements closely resembles more traditional international cooperation or association agreements, since they are concluded between two parties and also cover subjects that are not directly linked to trade, such as sustainable development or public safety.

Referring to the question of the ambit of bilateral investment agreements concluded by Member States, we would like to distinguish between investment agreements concluded between Member States (intra-EU BITs) and those concluded by Member States with third countries (extra-EU BITs). Considering the definition of the CCP, we consider that only extra-EU BITs fall within the exclusive competence of the EU, thus prohibiting Member States from concluding other agreements with third countries. In support of this interpretation, we would like to note the adoption of the EU Regulation No. 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

Question 18

In Romania's opinion, the establishment of Investment Courts within the free-trade agreements concluded by the EU represents an important step for the reform of the mechanism for settling the state-investors disputes. In this context, a mechanism with two jurisdiction degrees, a substance and appeal mechanism would present the following advantages:

– It will be a permanent *institution* composed of judges elected by the party states from the persons highly qualified in the field of private international

law and of investment law, held to observe strict ethical and moral standards. This would ease the opposition of public opinion to the current system, generally considered as being unequitable and corrupt, serving exclusively the interests of the multinational corporations. At the same time, it could facilitate the removal of the obstacles on the path of adopting and implementing the Free-trade agreements concluded by the EU with third countries.

- the existence of a challenge manner will improve coherence and consistence of the primary arbitrary decisions; Considering the multitude of investment treaties in effect (more than 3000), the practice of the arbitrary tribunals on the interpretation of their provisions is currently inconsistent; in view of ensuring the efficiency of the future mechanism, we believe that the actions regarding the establishment of a multilateral institution should be doubled by efforts to conclude a multilateral treaty, containing standard rules regarding the protection and promotion of foreign investments.
- the appeal institution will be granted the competence to rule both on material law and procedural law elements, action which is currently not possible; The manifest errors of substance, form or procedure can thus be corrected;
- it will lead to the improvement of transparency in the decision-making process; the procedure rules on the basis of which the Court will operate will be the result of the negotiation process between the party states.

Question 19

In what concerns the shared financial liability – Union and member states, when state-investors disputes occur, as a result of a breach of the free-trade agreements concluded by the EU, Romania considers that the provisions of EU Regulation no. 912/2012 of the European Parliament and of the Council[15] are equitable, not infringing on the sovereignty and the economic-financial interests of the member states, if their application will be done according to the generally accepted principle of individual liability. However, Romania reserves the right to reconsider its position, depending on the jurisprudential evolutions subsequent to the entering into effect of the respective treaties.

Question 20

According to article 21 of the Treaty on the European Union (TUE) and to article 207 of the Treaty on the Functioning of the European Union (TFEU), Romania

[15] EU Regulation no. 912/2012 established a shared liability, between the EU and the member states, depending on the fault incurred in the breaching of the free-trade agreement dispositions.

supports an integrated approach targeting the observance of human rights in the context of the common commercial policy, including the free-trade agreements[16]. The objective is to make sure that any preferential EU commercial relation with a third country is based on a certain type of commitment to the observance of human rights and the democratic principles. For instance, article 1 of the Association and partnership agreement between the EU and Vietnam (APC UE-Vietnam) contains references to the observance of human rights, an essential element of the agreement, which, in case of a substantial breach, may lead to the suspension of its application. As in the case of other agreements (SPA and CETA), the Free-trade agreement establishes a connection, binding from the legal viewpoint, with the Partnership and cooperation agreement, placing the commitments regarding the observance of the common principles and values at the basis of the bilateral relations between a third country and the European Union.

Question 21

Romania considers that the negotiation process and the decision to sign, in case of the Free-trade agreements, must occur on the basis of the European principle of loyal cooperation and for the purpose of observing the fundamental interests and the sovereignty of each separate member state. The Romanian side considers that the current voting system, which stipulates the unanimous adoption, at the level of the Council, of the decisions regarding the trade agreements, ensures the balanced representation of each member state, regardless of its size or economic power.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

The interpretation of Protocol 23 in conjunction with art.77 (2) point b) should be the following: Agreements concluded with third countries cannot exceed or include the limits imposed by the EU legislation and in the meantime have to comply with or align with the provisions of the EU legislation adopted in the field of border checks. However, there are situations where EU law sets out general action lines for Member States and their implementation requires adaptation to the specifics of our neighboring relations with third countries. For example, we

[16] For a unitary approach at the EU level, see "COMMISSION STAFF WORKING DOCUMENT, Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement", available at: http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154189.pdf

would like to note the implementation of the provisions of EU Regulation no. 1931/2006 on small border traffic which authorizes Member States to conclude agreements regarding small trafficking, but details as those related to the border area in which the regime is applicable could not be established at European level because they have to take into account the local characteristics.

Question 23

At this point, RO does not have a national list of safe third countries or safe countries of origin. Each situation is analyzed on a case-by-case basis. The list of safe countries of origin is adopted by order of the Minister of Internal Affairs upon the proposal of the General Inspectorate for Immigration according to the criteria laid down in national legislation. According to RO, the use of the concept of safe third countries must take into account the respect of international law, standards of fundamental rights and non-discrimination.

Question 24

Romania has always emphasized the need for stronger involvement and support of the countries of origin in addressing the causes of migration. We hope that the new partnership framework proposed by the COM will add value to the efforts that have been quite limited in this direction so far. Progress in this area is essential because only by working with the countries of origin, we will be able to stop uncontrolled flows to the EU and, at the same time, we will be able to provide a development perspective for these countries.

We consider a geographically balanced approach in tailor-made cooperation with third countries is necessary. We must pay due attention to all regions with migratory potential and this attention should be translated into future concrete projects to strengthen practical cooperation on return and readmission. We emphasize in this context the importance of maximizing the potential of the EU Mobility Partnerships with Jordan, Lebanon and Belarus, both in terms of direct benefits for better management of migration and of their added value for the socio-economic development of these countries. Romania has signed the Mobility Partnerships with the Republic of Moldova, Armenia, Georgia and Jordan. Romania's involvement in the projects is appreciated and it is hoped to continue the collaboration in the future.

Question 25

As a prerequisite for the accession to the EU, Romania has concluded all the relevant readmission agreements. Ever since the entry into force of the Treaty of Amsterdam, Bucharest has concluded readmission agreements with: Republic of Moldova, Republic of Serbia, Russian Federation, and Bosnia and Herzegovina.

As of the date of entry into force of the Readmission Agreement between the EU and Turkey (1 October 2014), Romania has ceased to apply its bilateral readmission agreement with Ankara with a view to fully observe the loyalty principle towards the EU.

SLOVENIA

Maja Peternel*
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Introduction

The law on EU external relations is rightly seen as one of the most interesting and complex areas of EU activities, mainly due to its constant interplay between the competences of the EU and its institutions on the one hand, and the interests of the Member States on the other hand. As a result of developments in investment protection law and even more following the migration crisis in 2015, UK's withdrawal from the EU and considering the broader circumstances of today's world, the EU and its Member States have recently been facing new challenges in this area of law, some of unprecedented scope. Although some indications of the impact of these developments on the EU's external relations law and its application in national legal systems of Member States can be already traced, it is difficult to predict the final outcome at this stage.

An examination based on the prepared questionnaire by the FIDE suggests that Slovenia, as one of the smallest EU Member States, has recently *not taken strong positions* on the legal aspects of issues discussed under this topic and does *not have particularly detailed, elaborated positions developed at the horizontal level.* This being said, there are individual dossiers, such as those related to justice and trade, in which some of the issues discussed were considered; however, they have not been developed in great detail.

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In the process of research, we contacted numerous representatives and officials of the Slovenian administration, particularly at the competent ministries – of the interior, foreign affairs and economy; we examined the national legislation and case law related to the external relations law, and analysed Slovenia's official positions on the topic.

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Questions 1 and 2

In accordance with the ERTA judgment, the EU has exclusive competence to conclude an international agreement if that agreement affects or is likely to affect internal rules of the Union. The problems of the AETR effect and the interpretation and use of Article 3(2) TFEU have been detected in, for instance, the justice and justice-related provisions of the acts under discussion in the EU Council. In the discussions at the working group level on the Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), the Council of Europe Convention against Manipulation of Sports Results, the Istanbul Convention, the Hague Convention on the Civil Aspects of International Child Abduction, and most recently the enforcement of settlement agreements resulting from international commercial conciliation/mediation in UNCITRAL, Slovenia was or is among the Member States *seeking greater clarity on the distribution of competences* in discussions within the Council. The reasons for this seem to be legal, seeking greater clarity (and transparency), since the nature of the field requires greater precision, particularly the field of criminal justice. Slovenia's concern is also related to the fact that only minimum rules of harmonisation had been adopted at the EU level. In the Declaration on the Activities of the Republic of Slovenia in the institutions of the European Union in the Period January 2016 – June 2017, it was clarified that "Slovenia supports efforts to make the EU more effective, but not with the aim of transferring to capitals the powers of its institutions and reducing their importance. According to Slovenia, such tendencies lead to the EU's dilution and an increase in the role of larger Member States at the expense of smaller ones. Slovenia supports the community method and strong EU institutions." [1]

When it comes to the question of competence in the field of justice, it is worth noting that in one particular case in Slovenia an interesting aspect prevailed while waiting for the final outcome of the discussions on competence within the

[1] Declaration on the Activities of the Republic of Slovenia in the Institutions of the European Union in the Period January 2016 – June 2017, Official Gazette RS, No. 19/2016.

EU. It was the decision of the Ministry of Justice to take into account the best interests of a child in a concrete case and to decide to support the accession of a third state (Russian Federation) to the 1980 Hague Convention on the Civil Aspects of International Child Abduction[2] in order to protect that child. Also, in our opinion, when prolonged discussions on the internal division of competence prevents the EU from taking a position, it is difficult not to take into account the principle of the best interests of the child, as well as possibly other fundamental rights in the Charter of Fundamental Rights that relate to particularly vulnerable persons. It is our view that in such circumstances the rights of the child should not be affected and should be protected. In the meantime, the competence issue on the question of the accession of third states to the Hague Convention was resolved by the Court in its Opinion 1/13[3], confirming that the acceptance of the accession of a third country to the Hague Convention on the Civil Aspects of International Child Abduction falls within the EU's exclusive competence. However, if a similar situation occurred and a question relating to the protection of fundamental rights arose with regard to another convention or an agreement, it could be rather challenging for Member States to decide on their action before a final EU position on competence is adopted or found. In this case, it seems that EU institutions and Member States *must act as quickly as possible to find a solution,* as well as to consider the specific circumstances in this period of uncertainty in which the activities of Member States ought to be taking place.[4]

Following is another example of Slovenia's positions on the division of competences. In line with the arguments of other Member States and the Council, Slovenia has expressed positions in favour of the mixity of the Singapore Free Trade Agreement, CETA and other agreements that the EU has been concluding.

[2] https://www.hcch.net/en/instruments/conventions/full-text/?cid=24.

[3] Opinion 1/13 of the Court (Grand Chamber), 14 October 2014.

[4] While admittedly not dealing with the question of the competence of the Union versus the competence of Member States, it is nonetheless important to note in this regard the Court of Justice's approach in case C-648/11 in relation to the Dublin Regulation and the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. The Court stated twice in the judgement that, since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong for more than is strictly necessary/unnecessary the procedure for determining the Member State responsible. With the best interests of the minor mentioned only in the first paragraph, the Court nonetheless found that "the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003." The best interests of the child should therefore be of primary consideration whenever either Member States or EU institutions act within the scope of Article 51 of the Charter. See paragraphs 55, 59 and 61 of the judgement in Case C-648/11 MA and Others vs. Secretary of State for the Home Department, 6 June 2013.

While in Opinion 2/15[5] the Court clarified that much of the Singapore Free Trade Agreement falls under exclusive Union competence, it will take some time before all the consequences of the Court's new approach are seen and analysed.

Questions 3 and 4

Although the Court's interpretation in Opinion 2/15 of various notions of mixity seems to point out a new aspect of shared competence, it is still up to the Court to declare itself more clearly on the relation or link – which we believe exists – between Article 216 of TFEU and Article 3(2) of TFEU[6]. In our view, Article 3(2) TFEU is general and stipulates the exclusive nature of the competence, according to the system of the division of competences in Chapter I of Title I of the TEU. Article 216 of the TFEU seems broader, and its *substance also depends on the context of the Chapter in which it is included in the TFEU*. By including a separate chapter on international agreements in the treaty, the treaty makes international agreements a key instrument of foreign policy. This is important, as Member States could indeed be required to step in on behalf of the EU, if the EU is not able exercise its external competence on its own because the rules of an international organisation do not allow it.[7] Although international organisations are recognised as important subjects of international law, their legal personality is not equal to that of states, and is limited to their competences, as provided in their constituent statutes. The United Nations is an example – other subjects of international law than states cannot be members, which is why the EU has the status of enhanced observer. Article 216 TFEU thus defines with whom the EU is allowed to conclude international agreements: states and international organisations.

Similarly, AG Szpunar stated: "Therefore, as regards the relationship between Article 216(1) and Article 3(2) TFEU, it should be noted that the first provision concerns the existence of external competence, whereas the second resolves the issue of whether or not such external competence (which exists pursuant to Article 216 TFEU) is exclusive."[8] That being said, it is our view that the text of Article 216 TFEU cannot be interpreted differently, in its overlapping aspects, from the competence as per Article 3(2) of the TFEU, as the substance and tool go hand in hand. While the context might be slightly different, and one article relates to the existence of the competence and the other to the issue of the nature of the competence, the following "where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework

[5] Opinion 2/15 of the Court (Full Court), 16 May 2017. See also *infra*.

[6] Case C-600/14.

[7] See paragraph 52 of Judgement in Case C-399/12 Germany v Council ("OIV"), 7 October 2014.

[8] Paragraph 80 of AG Szpunar opinion in C-600/14 Germany v Council. See also paragraph 64 of AG Sharpston opinion in procedure 2/15, 21 December 2016.

of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope" should be interpreted on the one hand independently, and on the other as bearing in mind that the interpretation of Article 216 would also be built on, among other provisions, the existence of the exclusivity of competence as determined in the Article 3(2) of TEU (and not vice versa). However, it has to be added that, whereas we concur with the AG Szpunar opinion in paragraph 81 of the opinion, that the scope of Article 216(1) TFEU is more extensive than that of Article 3(2), it needs to be observed that Member States might be required to act on behalf of the Union in cases when the EU is not allowed to conclude an agreement based on the competences stemming from Chapter I of Title I of the TEU and that there could be Member States competences other than those falling under "proper shared competences" which might require, for being closely related to the EU competences, conclusion of a mixed agreement.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)
and
CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Questions 5 and 21

According to various discussions, the general experience in Slovenia on the interaction between the negotiator/negotiating team and the special committee under Article 218(4) TFEU *has been positive*. However, this perception is somewhat dependent on policy and in particular on the type of competence (mixed versus exclusive agreements). It seems that when mixed agreements are being negotiated, the mixity allows for greater interaction and leaves state officials feeling that the opinions of committee members are better taken into account by the negotiator. Deeper and more open dialogue would therefore be welcomed in negotiating EU trade agreements. *Transparency is also important for citizens of Member States*; thus "in negotiations on free trade agreements, Slovenia stresses in particular the importance of the transparency of negotiations between EU institutions, as well as in relation to stakeholders and citizens."[9] However, comments have been made that, despite adopting a transparent approach, the committee should not be used as a simple reporting platform. It seems that in future,

[9] Declaration on the activities of the Republic of Slovenia in the institutions of the European Union in the period July 2017 – December 2018, to be published.

more focus and attention should be given to this aspect by the team negotiating international agreements for the EU.

With the Court clarifying the competences in the field of trade in Opinion 2/15, and consequently several of the competences that had been considered mixed now falling under the EU's competence, we feel it is important to note that the substance of the work and responsibilities that the governments of Member States had towards their citizens cannot cease when it comes to new generation of trade agreements. It is our view that EU institutions should be aware that with *the expansion of EU's responsibilities and tasks externally, their tasks and responsibilities should probably expand also internally*. For instance, one could check whether (and how) the European Parliament trade committee takes into account the interests of the citizens of all EU Member States if its members do not come from all Member States. However, the European Parliament is not the only institution to take over certain additional tasks; actually it may not be the most suitable of the institutions to do so as it plays a specific role in the inter-institutional setting defined by the Treaties. In this context, the role of the Commission would be more important since it has to take over some aspects of competences formerly understood as belonging to the governments of Member States (such as in the field of transport services, intellectual property rights, provisions on expropriation and sustainable development).

Questions 6, 7 and 11

Regarding the provisional application of international agreements, *Slovenian law in principle excludes the provisional application of agreements*.[10] Thus, as a starting point in Slovenia, only those provisions that fall under the Union's competence can be provisionally applied.[11] According to one Slovenian official, provisional application should be well justified and non-precedential in relation to other agreements. According to another high official's opinion, since provisional application is limited to EU exclusive competence, non-ratification in one Member State should not be an unsurmountable obstacle to the application of a mixed agreement that

[10] The Act on Foreign Affairs in Article 72 allows for the provisional application of only those agreements ratified by the Government of the Republic of Slovenia. Since the agreements in question are to be ratified by Parliament, this particular provision is not relevant.

[11] "On the basis of the allocation of competences between the European Union and its Member States under the Treaties, the Decision of the Council that authorises the provisional application of the CETA between the European Union and its Member States, on the one part, and Canada, on the other part, shall not affect the autonomy of the Republic of Slovenia to decide to be bound by it with regard to issues falling within its national competence. This implies that reference in the said Agreement to internal requirements and procedures necessary for its provisional application is to be understood in the case of the Republic of Slovenia as referring to the completion of ratification procedures." From the Statement by Slovenia (on the bilateral investment court system and various other issues). OJ L 11, 14.1.2017, p. 9–22.

in part falls within the exclusive competence of the EU.[12] He pointed out that in such cases, it might be sensible to reconsider the conclusion or the renegotiation of the agreement, while at the same time taking into account the broader political context. Taking into account the principle of sincere cooperation it will in our view be nonetheless crucial to evaluate the circumstances and interests as well as competences before drawing legal conclusions on the unfortunate need to renegotiate any international agreement.

Regarding the question of the participation of the European Parliament in deciding on the provisional application of international agreements, it seems that its formal involvement might not be necessary. *Close cooperation with the European Parliament would nevertheless be expected* by Slovenia, considering its statement underlining "the spirit of enhanced inter-institutional cooperation and institutional unity in achieving common goals."[13] It seems that the involvement of the European Parliament in Slovenian view is also necessary for reasons of transparency.

For Slovenia, having *national parliaments involved in EU matters is of the utmost importance*. This is reflected in the Declaration on the Activities of the Republic of Slovenia in the Institutions of the European Union in the Period July 2017–December 2018: "We are also defending the role of national parliaments in addressing EU affairs, including in the macroeconomic area (European Semester). National parliaments are the watchdogs of the principle of subsidiarity and ensure greater enforcement of the principle of democratic accountability and legitimacy. When drafting legislative initiatives, their inclusion at an early stage can contribute to improved acceptance and simpler transposition and application of adopted rules." [14] Slovenia keeps its Parliament at least informed, if not formally involved, at every stage in the process of negotiating and concluding international agreements, in accordance with Article 3a of the Constitution of the Republic of Slovenia[15] and the Act on Cooperation between the National

[12] Such examples would probably not concern Slovenia's position on ratifying any of the mixed agreements. However, it is worth noting with regard to the CETA agreement, for example, that Slovenia has also not yet ratified the agreement. While its provisions which fall under EU competence already apply, the ECJ's clarifications on the compliance of ICS provisions with the Treaties will be an important factor in concluding the ratification process at the national level, considering the position of Slovenia with regard to ICS (see *infra*).

[13] "The joint declaration on the 2017 legislative priorities confirmed the joint commitments on the involvement of the three institutions in addressing the key challenges of the EU. Slovenia believes that work should continue in the spirit of enhanced interinstitutional cooperation and institutional unity in achieving common goals." Declaration on the activities of the Republic of Slovenia in institutions of the European Union in the period July 2017 – December 2018, to be published.

[14] Ibidem.

[15] Paragraph 4 of Article 3a of Slovenia's Constitution states": "In procedures for the adoption of legal acts and decisions in international organisations to which Slovenia has transferred the exercise of part of its sovereign rights, the Government shall promptly inform the National Assembly of proposals for

Assembly and the Government in EU Affairs[16]. The Slovenian Parliament can even define a national position for the government to follow in negotiations.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Questions 16 and 17

Regarding the scope of the common trade policy since the entry into force of the Treaty of Lisbon, Slovenia had taken the view that the substance of the international agreements that had been negotiated by the EU was such that the *agreements were of a mixed nature*. For instance, in the case of the Free Trade Agreement with Singapore, Slovenia did not concur with the Commission's view on the exclusive nature of the agreement and considered that the dynamic and broad interpretation of Article 207 of the Treaty of Lisbon was no longer necessary, because the provision was sufficiently developed by the inclusion of new policies. In this context, Slovenia was specifically pointing out investments (portfolio investments) and the mechanism for settling investment disputes, intellectual property, and sustainable development concerning trade in timber and timber products, as well as trade in fishery products. Slovenia's position also touched on some other areas such as expropriation, which was considered a national competence. Also, Article 61 of TRIPS was not considered to fall under Union's competence.

Regarding transport, Slovenian officials believe that further clarifications would be needed following the Court's Opinion 2/15. The same applies to the relationship between bilateral investment agreements (BITs) concluded by individual Member States with third countries and agreements concluded by the EU with third countries in the field of investment protection. That could be relevant also for the EU pilot which the Commission opened on Slovenia's BIT with Russia. While the opinion clarifies competence concerning the termination of BITs stating that a clause terminating the BITs of Member States could be part of free trade agreements (FTAs), Slovenian officials dealing with trade believe that many issues on how to deal with the *consequence of the mixed nature of BITs were not resolved by the Opinion 2/15* (in paragraphs 246 to 256 of the opinion). Indeed, BITs would also normally cover portfolio investments, and practical issues arise as to how to deal with the mixed nature of agreements and non-Union competences.

such acts and decisions as well as of its own activities. The National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities. The relationship between the National Assembly and the Government arising from this paragraph shall be regulated in detail by a law adopted by a two-thirds majority vote of deputies present." Official Gazette RS Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

[16] Cooperation between the National Assembly and the Government in EU Affairs Act, Official Gazette RS, Nos. 34/04, 43/10, 107/10 and 30/15.

Question 20

As already stated, Slovenian officials in general believe that while the scope of investment and the legal nature of FTAs has been successfully clarified by the Court, many of the issues remain open or pose further questions. It will be interesting to observe what impact, if any, the opinion of the Court will have on the policies listed in Article 21 TFEU and on their interaction with the trade policy. The perception in Slovenia is that the Common Foreign and Security Policy, being in a separate Chapter 2 of TEU, remains untouched. While Chapter 2 under Title V of the TEU contains specific provisions on the common foreign and security policy, it might be worth noting that Article 23 of TEU nonetheless connects Chapter 2 with the general provisions on the Union's external action from Chapter 1. Furthermore, as the wider consequences are most likely going to affect the structure of future investment agreements, one could pose a question how the new approach to competences and a potential EU only agreement would be relevant in relation to certain sensitive policies, such as GMO or drinking water supply.[17] In any event, in our view, the *scope of the ratified pre-Lisbon FTAs should in principle not be directly affected*, since the Court's explanation in Opinion 2/15 is based on the post-Lisbon acquis.

Question 18

The Court also has not had a chance to rule on the compatibility of the investment dispute settlement mechanism in FTAs with the Treaties, and it is felt that the Court's clarifications with regard to the CETA will be a welcome and necessary one since this has been one of the Slovenia's major concerns. Until then, the Achmea case[18] will address certain questions on the compatibility of the dispute settlement clauses in BITs of Member States with the Treaties. The question of legal means to address investment disputes has also been receiving considerable attention from various NGOs as well as the academic world, with conferences and dissertations addressing the topic. *Slovenia's position has been consistently sceptical about the compatibility of the dispute settlement clauses in the EU FTAs with the Treaties* and is ready to work on improving the system.[19] According to the Declaration

[17] Statement by Slovenia (on the bilateral investment court system and various other issues). OJ L 11, 14.1.2017, p. 9–22.

[18] C-284/16.

[19] "The Republic of Slovenia, while recalling the highly sensitive nature of the investment chapter, considers that the agreement to sign the CETA does not prejudice the principal position of the Republic of Slovenia on the bilateral investment court system. Considering the various concerns expressed during the negotiations on the investment court system provisions, the Republic of Slovenia expects that the investment court system continually develops in line with the Joint Interpretative Declaration and the law of the European Union, and that the relevant provisions of CETA are adapted in order to introduce the improvements already before the multilateral investment tribunal and appellate mechanism for

on the Activities of the Republic of Slovenia in the Institutions of the European Union in the Period July 2017 – December 2018: "In the field of investments, Slovenia is committed to an effective system of investment protection and the resolution of investment disputes in accordance with EU treaties and international investment law. Slovenia also advocates reform of the Investment Court System (ICS) prior to its inclusion in trade agreements, and also expresses its concerns about the multilateral investment court (MIC)." [20]

Issues of compliance of the ICS mechanism can be questioned from the point of view of respect for the fundamental rights and principles of EU law; for instance, the most frequently raised are dilemmas concerning the autonomy of the EU acquis, the principle of non-discrimination, equality before the law – as domestic investors cannot use the ICS institute – the right to a fair trial and effective legal protection, the exclusive jurisdiction of the EU Court to interpret EU law and the jurisdiction of national courts in adjudicating in disputes in accordance with national constitutions. Further important concerns relate to the institutional structure of the ICS: the ICS structure and appeal body, the system of appointing arbitrators the provisions of which would not guarantee that a dispute concerning Slovenia would be assessed by an arbiter from Slovenia and chosen by Slovenia, reimbursement of the costs of arbitrators, etc.[21]

While it is envisaged that the investment court system to be established by CETA would be considered in the ratification processes of Member States[22], it appears to us that removing justice from its Member State context with a possible absence of arbiters that possess the requisite amount of knowledge about a Member State, could indeed *pose concerns of legitimacy* and raise questions about the acceptability of the decisions of such bodies by the wider public, especially when the bodies decide on liability questions and financial damages may be awarded.

the resolution of investment disputes is established." From the Statement by Slovenia (on the bilateral investment court system and various other issues). OJ L 11, 14.1.2017, p. 9–22.

[20] Declaration on the activities of the Republic of Slovenia in the institutions of the European Union in the Period July 2017 – December 2018, to be published.

[21] For instance, during the CETA negotiations, with regard to ICS, Slovenia explicitly required and was able to negotiate the inclusion of a reference to national courts in the Joint Statement, and a partial reform of ICS in the part concerning the Code of arbiters was planned prior to enforcement. From a press release from the Slovenian government: Slovenian Government supports CETA, 13.10.16 http://www.vlada.si/en/media_room/government_press_releases/press_release/article/slovenian_government_supports_ceta_58770/.

[22] Statement by the Commission and the Council on investment protection and the Investment Court System (ICS). Statements to be entered in the Council minutes, OJ L 11, 14.1.2017, p. 9–22.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Questions 22 and 24

On migration, many of the points raised in the FIDE questionnaire concern a wider geographical area and, considering the size and capacities of Slovenia, might at the first glance be rather far-reaching. However, as migratory routes cross Slovenia from both east and south, addressing the root causes of illegal migration is of paramount importance, and the questions raised are quite relevant. Wider questions of migratory flows are therefore of greater concern, in the light of Slovenia's geographical location, and in the light of the recent unprecedented experience of massive migration through Slovenia in 2015 and 2016. The migration crisis in 2015 posed many problems, not only humanitarian and logistical, but also legal and political, as well as concerns relating to national safety, public order and stability.[23] All of these resulted in the amendments to the Aliens Act[24] passed by the Slovenian Parliament that addressed a possible similar extraordinary situation (influx of migrants) in the future. The amendments to the Act (welcomed by some, and heavily criticised by others) were vigorously discussed in the Slovenian political arena, in professional legal circles and by NGO's and the general public.[25] The amendment also attracted the attention of the Council of Europe.[26]

However, focusing on the external dimension of activities in the field of migration, Slovenia has *not concluded agreements with third countries* which would fall within the scope of Article 77(2) TFEU. Slovenia has been concluding agreements 'only' on short-stay visa waivers for holders of diplomatic passports.[27]

[23] The Court of Justice provided a crucial clarification in its judgement in cases C-490/16 (A.S. v. Republic of Slovenia) and C-646/16 Khadija Jafari and Zainab Jafari, namely that Croatia was responsible for examining applications for international protection by persons who crossed its border en masse during the 2015-2016 migration crisis, finding that the term 'irregular crossing of a border' also covers a situation in which a Member State admits to its territory non-EU nationals on humanitarian grounds by way of derogating from the entry conditions generally imposed on non-EU nationals.

[24] Act Amending the Aliens Act, Official Gazette RS, No. 5/17.

[25] See for example: http://www.mirovni-institut.si/en/ten-reasons-why-the-draft-amendments-to-the-aliens-act-violate-slovenian-constitution-and-international-law, http://www.vlada.si/en/media_room/government_press_releases/press_release/article/slovenia_the_government_adopts_amendments_to_the_aliens_act_44138, http://eumigrationlawblog.eu/slovenia-amendments-to-the-aliens-act-enable-the-state-to-activate-closure-of-the-border-for-asylum-seekers.

[26] See: https://www.euractiv.com/section/justice-home-affairs/news/council-of-europe-calls-on-slovenia-to-amend-new-migrant-law.

[27] EU agreements on short-stay visas normally contain a provision stating that the agreement shall take precedence over any bilateral agreements or arrangements concluded between individual Member States and the third state, in so far as they cover issues falling within the scope of the agreement.

With regard to questions on the relationship between the new Partnership Framework with third countries in the context of the European Agenda for Migration and the Global Approach to Migration and Mobility, it is considered that the new Partnership Framework with third countries and the Global Approach to Migration and Mobility are complementary, and that the Partnership Framework displaces the global approach. As we expected, we have not been informed about any special relations within the sense of the Commission's communication (COM(2016)385final, p.9) or about a pact concluded by Slovenia with an African country. Pacts concluded by the EU with key countries would therefore be most welcome.

Question 23

The *safe third country concept was touched upon in a few court cases in Slovenia*. The Constitutional Court of the Republic of Slovenia had already previously pronounced on the matter in case No. U-I-155/11[28], and annulled Article 60 of the International Protection Act[29] (provision on the national concept of a safe third country) and Article 62(1) of the International Protection Act (provision on the concept of a European safe third country) and ruled that Article 61 of the International Protection Act (containing criteria for determining a safe third country) was not inconsistent with the Constitution. The Constitutional Court further found that Article 63(1) (provision on procedure) was inconsistent with the Constitution.

The provision on the national concept of a safe country referred to in the second paragraph of Article 27 (2) of the Procedural Directive was included in Article 62 of the Act, determining that an applicant may be handed over to a safe third country if the applicant was in that country prior to arrival in the Republic of Slovenia, and that country is therefore competent to substantively examine the application. The same conditions were included for determining a European safe third country.

The Constitutional Court assessed the allegations regarding the incompatibility of the afore- mentioned articles of the International Protection Act relating to the concept of a safe third country with the first paragraph of Article 33 of the Geneva Convention and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in terms of compliance with Article 18 of the Slovenian Constitution. This is a constitutional provision which refers to the principle of non-refoulement in a country where an applicant for international protection would be subject to a violation of the right to the prohibition of torture.

[28] Official Gazette RS, No. 114/2013, http://odlocitve.us-rs.si/en/odlocitev/AN03720?q=U-I-155%2F11.
[29] Official Gazette RS, No. 11/2011.

The Court declared the following: "The principle of non-refoulement ensures applicants the right to enter and stay in a country in which they applied for protection and the right of access to a fair and effective procedure in which the competent authority assesses whether the applicant's removal, expulsion, or extradition could possibly entail an infringement of this principle. States may only exceptionally expel, remove, or extradite applicants to another country without substantively considering the application if they are convinced that the third country is safe (the safe third country concept). A third country is safe if it offers the applicant effective protection from a violation of the principle of non-refoulement. The concept of a safe third country, which is based on the rebuttable presumption of interstate trust, is in conformity with the principle of non-refoulement if the third state is obliged to fulfil comparable international obligations.

If we take into consideration that the extradition of an applicant for international protection to a third country may have irreparable consequences for the applicant if inhuman treatment were to occur following extradition to the third country, the requirement of clear and precise norms in the regulation that determines the conditions for extraditing an applicant for international protection to a third country is of special importance. Therefore, a regulation that does not ensure applicants for international protection a clear legal position in relation to the state with regard to the questions that refer to the conditions for extradition to a third country is inconsistent with the principle of the clarity and precision of regulations determined by Article 2 of the Constitution.

Due to the special importance of the human right determined by Article 18 of the Constitution and the irreparable consequences that would occur if the applicant were to be subjected to torture or inhuman treatment, a statutory regulation that does not determine that the legal remedy against an order rejecting an application for international protection has, due to the application of the safe third country concept, suspensory effect, is inconsistent with the right to effective judicial protection determined by the first paragraph of Article 23 of the Constitution and the right to an effective legal remedy determined by Article 25 of the Constitution."[30]

The earlier Slovenian case law relates to Croatia being defined as a safe third country when it was a candidate country for EU membership. After Croatia's accession to the Union until the migration crisis in 2015, the concept seemed to be less relevant, since, considering the geographical location, any neighbouring state in Slovenia's case would now always be a Member State. Thus it was not until the migration crisis and the (relocation) mechanisms adopted at the EU

[30] From the abstract, Official Gazette RS, No. 114/2013, http://odlocitve.us-rs.si/en/odlocitev/AN03720?q=U-I-155%2F11.

level to tackle the number of migrants reaching Europe that triggered the need to determine new safe third countries in order to aid decision-making procedures. No new judicial domestic cases have been noted since the entry into force of the government ordinance determining the list of safe third countries on 20 February 2016.[31]

As the EU is deciding on the list of European safe third countries, the ordinance declared the following countries as safe third countries: Albania, Algeria, Bangladesh, Bosnia and Herzegovina, Montenegro, Egypt, Kosovo, Macedonia, Morocco, Serbia, Tunisia and Turkey. While it has been alleged that a list of safe third countries may contradict the internationally recognised right to asylum, it has to be underlined that the presumption can be rebutted, and an individual filing the claim is allowed to describe the subjective circumstances in a particular safe third country that substantiate a claim to asylum. The presumption of safety being rebuttable was also relevant to deciding whether to return a person to a Member State, taking into account all the relevant circumstances also in terms of the principle of non-refoulement, including the applicant's personal situation in the country in question and their health.[32]

Question 25

Regarding *readmission agreements with third countries, Slovenia has not concluded many* – with Albania, Bosnia and Herzegovina, Montenegro, Macedonia, Canada, Kosovo, Moldova, Russia, Serbia, Switzerland – and more than half of them are candidate countries anyway. The collision clause in EU readmission agreements prevents any duplication of provisions applicable at the EU level. It is considered in Slovenia that the agreements do not contain problematic clauses. The human rights obligations stemming from international law are taken into account by the administration and, as already presented, the national legislation is affected by the national courts' jurisprudence adhering to the highest human rights standards.

Conclusion

This update on the standpoints and interests of Slovenia relating to the EU's external relations law was based on a helpful questionnaire by the FIDE. It is clear that Slovenia is not taking an active role and strong position on all the relevant legal issues; however, and as pointed out in the introduction, there are areas (such as the question of mixity and the compatibility of ISDS/ICS provisions with Treaties in trade policy and recently also various pressing issues concerning migration)

[31] Ordinance determining the list of safe countries of origin, Official Gazette RS, No. 13/16.

[32] See Decision of the Supreme Court of Slovenia UP-613/16-16, also judgement in cases C-411/10 and C-493/10, 21 December 2011.

where its positions are developed, clearly stated and consistent. In our research, we also noticed that in Slovenia there is a lack of analysis by legal experts which would thoroughly examine the practical implications of developments in EU external relations policy in the context of both the EU and its Member States.

As one of the smallest EU Member States and due to its limited resources and capacities, Slovenia should focus on specific legal issues which are of particular national concern. It seems that the decision of the Arbitral Tribunal in 2017 which fixed the border between Slovenia and Croatia and is raising some interesting questions also in relation to EU law, will occupy politicians and international as well as EU lawyers in Slovenia in the coming period.

SPAIN

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CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

Over the last few years, EU legislation has extended in many domains in a rather intense manner, particularly -but not only- regarding the area of freedom, security and justice. As a result of the AETR doctrine, this development in the Union's scope of action has narrowed the respective scope for external action of Member States in such material domains. Thus, unsurprisingly, Member States are noticing a progressive limitation in their external competences concerning matters that had traditionally fallen within their scope of powers, which is not always easily accepted. Under these circumstances, Member States can refuse to plainly accept this approach advocated by the Union, thereby challenging it before the ECJ. This legal issue could be brought to the Court of Justice simply because there is interest in clarifying a competence-related matter. Whereas this seems to be the most appropriate foundation, we can neither exclude nor deem inappropriate any other political grounds that may lead a Member State to challenge, at any given time, the implementation of the AETR doctrine by the EU.

In this regard, it is worth noting that the ECJ is taking a "broad" interpretation of the AETR doctrine, as can be inferred from an in-depth analysis of Opinion

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1/13.[1] In the ECJ's view, the areas covered by international agreement and those covered by the EU rules need not coincide fully. In fact, the ECJ considers that in order for the EU to have exclusive competence to conclude an agreement, it suffices that the scope of the agreement be covered "to a large extent" by EU provisions. Furthermore, according to the ECJ, EU rules may be "affected" by international agreements even if there is no contradiction between the agreement and EU rules.

In broad terms, Spain fully accepts this Union's "competence drift" through the ECJ, as could not be otherwise, given the legal commitments entered into by Spain as an EU Member State. Nevertheless, accepting this Union's quest for extended competences does not prevent Spain from being somewhat reluctant, from a legal standpoint, to this *vis expansiva* related; indeed, Spain has challenged the Court of Justice's interpretation through comments submitted to the ECJ. This is clearly evidenced, for instance, by the observations submitted regarding the Opinion on whether the exclusive competence of the European Union encompasses the acceptance of the accession of a non-Union country to the 1980 Hague Convention. While the Commission argued that the Union had exclusive competences as a result of the inclusion of the 1980 Hague Convention provisions in Council Regulation 2201/2003, of 27 November 2003 (the so-called Brussels II bis Regulation),[2] Spain argued in favour of Member State competence in this field. In fact, Spain considers that the adoption of the said Regulation has no impact on the matter, since the power to decide on the accession of third States to the Convention was not affected by the substance of the Regulation. Furthermore, the Kingdom of Spain contended that the issue of the acceptance of the accession of non-Union countries to the 1980 Hague Convention was neither provided in an EU legislative act, nor was necessary for the Union to exercise its external competences. Hence, the idea that this was not an exclusive Union competence, since it was not necessary for the EU to exercise its external powers, was reiterated. Similarly, Spain requested the ECJ to construe the Union's competence in international child abduction as a shared competence. However, the Court of Justice did not take this approach and, as is well known, proclaim the exclusive competence of the EU.[3]

There was a similar situation regarding the Opinion on the EU-Singapore Agreement.[4] In this case, the observations submitted by Spain to the ECJ focused

[1] ECJ Opinion 1/13, of 14 October 2014, ECLI: EU: C: 2014:2303.

[2] See sections 4, 32 and 54 of the Request for the opinion.

[3] ECJ Opinion 1/13, of 14 October 2014, ECLI: EU: C: 2014:2303.

[4] ECJ Opinion 2/15, of 16 May 2017, ECLI: EU: C: 2017:376. On this Opinion, within the Spanish scholarly doctrine, see J. Díez-Hochleitner, "La nueva política comercial de la Unión Europea desborda el marco de sus competencias. Comentarios preliminares al Dictamen 2/15 del TJUE", *Revista Española*

on underlining the fact that several matters covered by the Agreement fell outside the exclusive competence of the EU.[5] In particular, Spain challenged the Commission's arguments[6] on the applicability of Article 3(2) TFEU to Chapter 8 of the Agreement on Services (including transport services), Establishment and Electronic Commerce. Along these lines, let's recall that the ECJ ultimately failed to uphold Spain's position, and it considered that the competence in the field of transport (including maritime, rail, road and internal waterways transport) is an exclusive EU competence.[7] The Kingdom of Spain also challenged the competence of the Union in Chapter 9, related to Investment protection, as well as in Chapter 13, under the heading Trade and Sustainable Development.

Similarly, in the recent case on the Lisbon Agreement on Appellations of Origin and Geographical Indications, although the Court of Justice decided on the first disputed matter (i.e. that the contested decision failed to take into account the exclusive competence vested on the Union by Article 3(1) TFEU in the field of common commercial policy) and declared the exclusive competence of the Union on that legal basis,[8] alternatively, there was also discussion about a potential AETR effect or the application of Article 3(2) TFEU. Yet again, the focus was on clarifying and specifying how to construe the case law in Opinion 1/13. In this case, the Kingdom of Spain questioned the Commission's interpretation on the scope of application of the CCP for the purposes of determining the "risk that common rules may be affected."[9] Spain challenged the interpretation under which the scope of application of the Lisbon Agreement had already been provided by EU law. Hence, although the Kingdom of Spain acknowledged the exclusive competence of the Union in that specific area to negotiate the

de Derecho Europeo, no 57, 2017, pp. 403-429; and, A. Segura Serrano, "Renovación y crisis de la política comercial común de la Unión Europea: el Dictamen 2/15", *Revista General de Derecho Europeo*, nno 43, 2017, pp. 100-151.

[5] It is worth examining, for background, Chapter 17 of the EU-Singapore Agreement on the 'Institutional, General and Final Provisions' and particularly Article 17(9), on Restrictions to Safeguard the Balance-of-Payments, or Article 17(18), related to 'Future Accessions to the Union'. According to Spain, all of these aspects are simple examples of provisions affecting Member State competences, and therefore the Union's exclusive competence should be excluded.

[6] See sections 116 to 125 of the Request for the opinion.

[7] *Ibid*., sections 168 to 218.

[8] In Spain's view, inasmuch as the purpose of the Agreement is to set a legal framework for the protection of appellations of origin and geographical indications, both agricultural and non-agricultural, there is no room to think that it must fall within the scope of the CCP, since the Agreement does not govern commercial aspects of intellectual property. Indeed, even if it could seem like an industrial/intellectual property issue, Spain was more concerned about its impact on agricultural and artisanal interests.

[9] Regarding the notion of "field", see paragraphs 51 and 52 of the action brought by the Commission; and regarding the interpretation of the "risk that common rules may be affected", see paragraphs 53 to 57 of the action brought by the Commission.

Agreement, it considered that the Lisbon Agreement (since it refers to any good or commodity) affected areas that go beyond those expressly provided in existing EU provisions, such as those related to agricultural or food products, wine, or spirits that may be protected by an appellation of origin. Spain further advocated this interpretation by highlighting that the Union's external competence only becomes exclusive insofar as common rules have been laid down at an internal level. Particularly, in the case at stake, Spain asserted that there is a significant amount of goods or commodities on which there is no EU legislation.[10]

Finally, it is worth noting, among other examples, the case of the Weddell Sea.[11] It is still to be decided if, as contended by the Commission, the Council Decision following the proposals submitted to the Commission for the Conservation of Antarctic Marine Living Resources, aimed at designating marine protected areas (in the Weddell Sea, in the Ross Sea and Eastern Antarctica) as well as a set of special areas for scientific study, falls within the Union's exclusive competence in the field of conservation of marine biological resources (Art. 3(1)(d) TFEU). In the Commission's view, when the Council adopted the said Decision on behalf of the Union and its Member States, it did not take into account the legal context of the measure to which the contested act refers, neither within the framework of the Convention on the Conservation of Antarctic Marine Living Resources, nor within the framework of the EU. Alternatively, the Commission considers that, although this measure should be deemed to be outside the scope of Article 3(1)(d) TFEU, the Council encroached upon the exclusive competence of the Union in any case, insofar as the latter has external competence in this field because the measure can affect EU rules (Regulations 600/2004 and 601/2004[12]) or alter the scope thereof (Framework position of the European Union of June 2014), within the meaning of Article 3(2) TFEU. However, the Kingdom of Spain contends that there are competences in the area of research and development, which are taken into account regarding the Convention on the Conservation of Antarctic Marine Living Resources. Instead of focusing on whether this matter is related to the environment or if it falls within the field of research and development (which are both areas of shared competence), Spain challenges the applicability to this specific case of the ECJ's analysis put forward

[10] ECJ Judgment of 25 October 2017, *Commission v. Council*, C-389/2015, ECLI: EU: C: 2017: 798.

[11] ECJ cases C-626/2015 and C-659/2016, pending judgment.

[12] Regulation 600/2004, of 22 March 2004, laying down certain technical measures applicable to fishing activities in the area covered by the Convention on the conservation of Antarctic marine living resources (OJ L97, 1.4.2004, pp. 1-15); and, Regulation 601/2004, of 22 March 2004, laying down certain control measures applicable to fishing activities in the area covered by the Convention on the conservation of Antarctic marine living resources and repealing Regulations (EEC) No 3943/90, (EC) No 66/98 and (EC) No 1721/1999 (*ibid*., pp. 16-29).

in Opinion 1/13; it puts into question that the area of environment has been subject to internal regulation by the EU. There is certainly an underlying legal issue, but the political dimension of the problem must not be overlooked.

Question 2

In line with the previous response, the general perception in Spain of Article 3(2) TFEU is that its effects might be too undetermined and, above all, that there is a growing *vis expansiva* related thereto. It seems like not only Spain believes this. Several Member States have restated their critical position before the ECJ regarding the Commission's extensive interpretation of this primary law provision. This has been evidenced in issues related to the International Organization of Vine and Wine or the Railway Organization. There is no doubt that Spain is reluctant to accept the external representation and the negotiation system in certain international organizations sought by the Commission.

Although it does not involve the conclusion of an international agreement by the EU, it is worth noting the interesting dispute between the Commission and the Council regarding the Commission's (exclusive) competence to present written statements before the International Tribunal for the Law of the Sea (ITLOS) in the context of Advisory opinion No 21 on the responsibility of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States,[13] even lacking prior approval from the Council. In this dispute, the Council (supported by the Kingdom of Spain, among others) filed an application before the ECJ seeking the annulment of the decision of the European Commission of 29 November 2013 to submit the "Written statement by the European Commission on behalf of the European Union" to the ITLOS. The Council alleged infringement of the principle of conferral of powers and of the principle of loyalty, and it also claimed that its prerogatives under Article 218(9) TFEU had been undermined by the Commission. The Court of Justice dismissed the action, on the grounds that the Commission had not infringed any provisions whatsoever.[14] As has been confirmed by the authors of this report, the Court's stance has been far from welcomed within the Spanish Administration; yet again, it evidences a "competence drift" regarding the Union's external competence.

[13] ITLOS, Advisory Opinion of 2 April 2015, Case No 21, Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC). See, within the Spanish doctrine, a critical approach to the excessively broad construction by ITLOS of its jurisdiction in its advisory function: J. Martín y Pérez de Nanclares, "The Advisory Function of the International Tribunal of the Law of the See as a Full Court and the Excessive Expansion of its Jurisdiction", in P.A. Fernández Sánchez (ed.), *New Approaches to the Law of the Sea – In honor of Ambassador José Antonio de Yturriaga-Barberá*, Nova, New York, 2017, pp. 73-84.

[14] ECJ Judgment of 6 October 2015 , *Council v. Commission*, C-73/14, ECLI: EU: C:2015:663, para. 76.

Question 3

Following the entry into force of the Lisbon Treaty, Article 216(1) TFEU -as opposed to ex Article 300(1)- expressly refers to the cases where an external Union competence to conclude international agreements with other international organizations or third States can be inferred. There are five cases: (i) where the Treaties so provide; (ii) where the conclusion of an agreement is necessary in order to achieve one of the objectives referred to in the Treaties; (iii) where provided for in a legally binding Union act; (iv) where it may affect common rules, or (v) where it is likely to alter the scope of the said common rules.

In light of this provision's wording, the most prominent scholars harbor no doubts that Article 216(1) TFEU clearly evidences that the Treaties have embraced the ECJ's AETR case law doctrine.[15] In this regard, paragraph 1 of Article 216 TFEU provides, on the one hand, for the principle of conferral, regarding the conclusion of international agreements, generally laid down in Article 5(1) and 5(2) TEU, and specifically enshrined in various Treaty provisions.[16] However, on the other hand, it clearly asserts that the Union has an implied competence to conclude international agreements with third States or international organizations in any of the abovementioned cases listed in Article 216 TFEU.

Therefore, Article 216 TFEU substantially acknowledges the existence of such (external) competence of the Union. Nevertheless, it does not comment, at least expressly, on the scope of this competence. That is why it is essential to inquire about the connection between this provision and Article 3(2) TFEU, as put forward by the General rapporteurs in their questions.

[15] See, for instance, R. Geiger, "Art. 216 TFEU", in R. Geiger *et al.* (eds.), *European Union Treaties*, Beck, Munich, 2015, in pp. 780-784, in p. 782; Hummer, "Art. 216", in Ch. Vedder and W. Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, Nomos, Baden-Baden, 2011, pp. 806-811, in p. 808; Lachmayer/von Föster, "Art. 216 AEUV", in von den Groeben *et al.* (eds.), *Europäisches Unionsrecht*, Nomos, Baden-Baden, 2015, vol. 4, pp. 458-466, in p. 459; Terhechtye, "Art. 216 AEUV", in J. Schwarze (ed.), *EU-Kommentar*, Nomos, Baden-Baden, 3 ed., 2012, pp. 1991-1997, in p. 1993; Vöncky/Beylage-Haamann, "Art. 216 AEUV", in Grabitz, Hilf, Nettesheim, *Das Recht der Europäischen Union*, Verlag CH Beck-Hart, Munich, 2011, vol. 2, pp. 1-18, in p. 3.

[16] See Articles 6(2) TEU (EU accession to the ECHR), 37 TEU (agreements in the area of the CFSP), 165(3) TFEU (international agreements in the field of education and sport, in particular with the Council of Europe), 167(3) TFEU (agreements in the field of culture, in particular with the Council of Europe), 168(3) TFEU (international agreements in the field of public health), 207 TFEU (agreements in the field of common commercial policy), 211 TFEU (development cooperation agreements), 212(3) TFEU (international agreements regarding economic, financial and technical cooperation with third countries), 214(4) TFEU (agreements on humanitarian aid), 217 TFEU (agreements establishing an association) and 219(3) TFEU (agreements concerning monetary or foreign exchange regime matters).

Question 4

It is definitely appropriate to consider whether there is a link between Articles 216(1) and 3(2) TFEU. In our view, there is. As stated above, Article 216(1) TFEU simply acknowledges a Union competence regarding the conclusion of international agreements. However, as to determine if it is a shared or an exclusive competence, and thus to clarify if Member States are still entitled to conclude international agreements in that same sphere, we need to resort to Articles 3(2) and 4 TFEU.

In our view, out of the four cases of implied EU competences to conclude international agreements set out in Article 216(1) TFEU, there are two that exactly match the cases of implied exclusive competence provided in Article 3(2) TFEU, and where the EU competence will thus be exclusive. These are the cases where the conclusion of the agreement is likely to affect common rules or alter their scope. Although the wording of this provision could be deemed inappropriate,[17] we agree on the fact that, having regard to the ECJ case law in this domain,[18] the Union has exclusive competence in these cases.[19] Let's recall that, in the Opinion regarding the Lugano Convention, the Court of Justice referred to "the principle that, where common rules have been adopted, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with non-member countries which affect those rules," and clearly stated that "[i]n such a case the [Union] also has the exclusive competence to conclude international agreements."[20] The foregoing does not prevent the stance of several States from being worthy of consideration to say the least; these States contend that the notion of "altering the scope of common rules" must be narrowly construed.[21]

As for the case where the conclusion of an agreement is necessary in order to achieve one of the objectives referred to in the Treaties (Art. 216(1) TFEU), the ECJ has already differentiated this scenario from the case where concluding an agreement is necessary to enable the Union to exercise its internal competence (Art. 3(2) TFEU). This distinction is clearly shown in Opinion 2/15.[22]

Strictly speaking, the cases where the conclusion of the agreement is provided in a legally binding Union act (Art. 216(1) TFEU) and where it is laid down in a

[17] A significant sector of scholars has considered this wording as "unfortunate" and "unglücklich formuliert." See, for instance, Geiger, "Art. 216", *op. cit.*, p. 783, section 12; Lachmayer/von Försten, "Art. 216", *op. cit.*, p. 461, section 11.

[18] ECJ Opinion 2/91, of 19 March 1993, paras. 25 and 26, ECLI: EU: C:: 1993: 106; held to this day.

[19] Vöncky/Beylage-Haarmann, "Art. 216", *op. cit.*, p. 8, section 20.

[20] ECJ Opinion 1/03, of 7.2.2006, *Lugano Convention*, para. 116, ECLI: EU: C:2006: 81 (emphasis added).

[21] See, along these lines, among others, Nettesheim, "Art. 3 TEU", in Grabitz, Hil and Nettesheim, *Das Recht..., op. cit.*, particularly section 24.

[22] Paras. 239-244.

legislative act of the Union (Art. 3(2) TFEU) are neither a perfect match. There is no doubt that a legislative act will always be binding, but the opposite will not always be true. Certain binding acts not stemming from a legislative process cannot be considered legislative acts. Under the TFEU's wording, if such measures provided for the future conclusion of an agreement by the EU, the Union will have the powers to conclude such agreement, but it will not be an exclusive competence (except under the other cases listed in Article 3(2) TFEU).[23]

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

Generally speaking, the Spanish administration has a good impression regarding the *interaction between the negotiator/negotiating team and the special committee of Article 218(4) TFEU*. However, there have been some controversies. For instance, the Free Trade Agreement between the EU and Singapore triggered a dispute: whilst the negotiating directives provided for the negotiation of a mixed agreement, the Commission negotiated the agreement as an agreement between the EU and Singapore alone. This was reported to COREPER by the Trade Policy Committee (appointed by the Council under Article 207(3) TFEU), which requested this Permanent Representatives Committee to confirm the procedure for signing and concluding the agreement. COREPER was also asked to request the Commission, as a negotiator on behalf of the EU and the Member States, to adapt the text to the mixed nature of that type of agreement.

The two-tier configuration of the special committee, where the first level is made up of members of REPER, and thus residents of Brussels, who meet on a weekly basis ('Brussels based'); and where the second level is made up of senior officials from capital cities meeting on a monthly basis ('Capitals'), seems to work well. In both cases, the presence of the Commission is essential.

Regarding the *position of EU institutions* within the framework of Article 218 TFEU, Spain has a positive perception. It particularly appreciates the Commission's role, since Spain considers that in the fields of exclusive competence, it might have gained greater knowledge than Member States.

Although there has been a great deal of inter-institutional tension related to the procedure for the conclusion of international agreements, many of these

[23] On the notion of legislative act and the legal consequences attached thereto (including the one at stake in this case), see, within the Spanish doctrine, C. Martínez Capdevila, "A vueltas con la noción de 'acto legislativo' y sus consecuencias jurídicas en el Derecho de la Unión Europea", *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz*, 2013, pp. 97-159, pp. 147-152.

conflicts are now trully horizontal (as opposed to what happened prior to the entry into force of the Lisbon Treaty).[24] These disagreements have concerned some of the following issues: the negotiating directives, the appointment of the negotiator, the scope of the obligation to have the European Parliament fully informed at all stages of the procedure, or the legal basis of the various decisions that can be made under Article 218 TFEU.[25]

Question 6

The *provisional application* of international agreements fulfils the need to anticipate the effectiveness of international agreement provisions (all or some of them) before the agreement entries into force. Therefore, the underlying reason is urgency. This criterion should guide the decision as to which provisions are worth applying prior to the entry into force of the relevant international agreement: those that need to be applied before carrying out the internal proceedings required for the final conclusion of the agreement. Compliance with the internal procedure laid down by the Treaties for the conclusion of an international agreement by the EU, particularly the European Parliament prerogatives, should lead to a narrow use of the provisional application, which should be limited to cases justifiable on grounds of urgency.[26]

There are mixed agreements providing for the provisional application of provisions only regarding the EU and the third State, thereby excluding Member States.[27] In that case, in addition to urgency, there should be a second criterion to determine which provisions shall be applied provisionally: whether or not these provisions fall within the scope of EU competence. The set of articles to be applied on a provisional basis by the EU is determined "only to the extent

[24] This is the view of the Spanish scholarly literature; see L.N. González Alonso, "La Unión Europea en su laberinto: definiendo el nuevo equilibro institucional en materia de acción exterior", in C. Martínez Capdevila and E. Martínez Pérez (eds.), *Retos para la acción exterior de la Unión Europea*, Tirant lo Blanch, Valencia, 2017, pp. 199-224, pp. 200-201.

[25] On this issue, amongst other Spanish authors, see R. Gosalbo Bono, "Insuficiencias jurídicas e institucionales de la acción exterior de la Unión Europea", *Revista de Derecho Comunitario Europeo*, no. 50, 2015, pp. 231-320, pp. 253-259; and, L.N. González Alonso, "La Unión Europea en su laberinto...", *op. cit.*, pp. 202-216.

[26] To examine EU practice regarding the provisional application of international agreements, see P. Andrés Sáenz de Santa María, "La Unión Europea y el Derecho de los tratados: una relación compleja", *Revista Española de Derecho Internacional*, no. 68, 2016, pp. 51-102, pp. 64-74.

[27] For instance, see the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part (Art. 30) (OJ L329, 3.12.2006); Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part (Art. 86.3) (OJ L337, 13.12.2016); or, Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part (Art. 59) (OJ L67, 14.3.2017).

that they cover matters falling within the Union's competence."[28] Nevertheless, it is clear that the provisions included in the list of articles that will be applied provisionally are those that cover matters that *prima facie* fall within the scope of powers of the EU.

Given its *raison d'être*, the *procedure to decide on the provisional application* must be a fast-track procedure, as the one laid down in Article 218(5) TFEU. The European Parliament's involvement in the decision regarding the provisional application would slow the procedure down. In Spain, it is for the Council of Ministers to authorize the provisional application of a treaty;[29] there is no intervention from the national Parliament, at least concerning the decision on the provisional application.

In our view as scholars, the duty to keep the European Parliament immediately and fully informed (Art. 218(10) TFEU) requires to notify to it, as soon as possible, the Council's decision to apply an agreement on a provisional basis. In order to preserve the European Parliament's role within the procedure for the conclusion of the agreement, other measures could be inserted in Article 218 TFEU, such as:

(i) a provision establishing that whenever the European Parliament denies its consent for the conclusion of the agreement as required by Article 218(6)(a) TFEU, the Council shall immediately notify the other contracting parties of its intention not to become party thereto; according to the rule codified by Article 25(2) of the Vienna Convention on the Law of Treaties (1969), provisional application of that agreement with respect to the EU shall thus be terminated;

(ii) a provision excluding provisional application of those agreements whose conclusion must be consented by the European Parliament when provisional application can lead to irreversible situations. A paradigmatic example of this would be the EU accession to the European Convention of Human Rights.

[28] Concerning the agreements mentioned in the previous note, Decision 2016/2118 (Art. 3) (OJ L329, 3.12.2006); Decision 2016/2232 (Art. 3) (OJ L337, 13.12.2016); and, Decision 2017/434 (Art. 3) (OJ L67, 14.3.2017).

[29] Article 15 of the Act 25/2014, of 27 November 2014, on Treaties and other International Agreements. See a commentary on this provision in P. Andrés Sáenz de Santa María, "Art. 15. Aplicación provisional", in P. Andrés Sáenz de Santa María, J. Díez-Hochleitner and J. Martín y Pérez de Nanclares (dirs.), *Comentarios a la Ley de tratados internacionales y otros acuerdos internacionales. Ley 25/2014, de 27 de noviembre*, Civitas-Thomson Reuters, Cizur Menor, 2015, pp. 307-327.

Question 7

Provisional application is a transitional situation, prior to the entry into force of the relevant international agreement. This explains the provision of the Vienna Convention on the Law of Treaties (1969), according to which provisional application should be terminated for a State once it notifies to the other countries its intention not to become a party to that treaty.[30] Maintaining provisional application even after it is known that the agreement will not enter into force –because one or more Member States have decided not to conclude it– would imply an unlawful circumvention of the law. Therefore, provisional application should be terminated both for the Member States and for the EU when a Member State notifies that it will not conclude a mixed agreement. This should be true even regarding mixed agreements providing for the provisional application only for the EU and the third State; indeed, under all mixed agreements, the entry into force is made dependent on the conclusion of the agreement by the EU and its Member States.

Theoretically, *transforming a mixed agreement into an EU-only agreement* would be a perfect solution in the event of non-ratification by a Member State, as the EU would get rid of the "disturbing" Member State(s). However, in practice, this solution will not be easy to implement, particularly in the case of multilateral agreements, where the chances for the EU of limiting their subject matter to the EU's existing powers would diminish. Furthermore, ECJ case law on mixity has extended this concept to such extent that, in order to turn a mixed agreement into an EU-only agreement, the former would not only have to be stripped of any provisions related to exclusive competences of Member States, but also of those related to areas of shared competence between the Union and Member States. The agreement would thus be strictly limited to the areas where, according to Article 3(1) TFEU, the Union has exclusive competence or where, according to Article 3(2) TFEU, the Union has exclusive competence for the conclusion of an international agreement. The "strip" would have to be a major one. We would have to see if the third State would accept it.

Question 8

The inclusion of *agreements establishing a specific institutional framework by organising cooperation procedures* in the list of agreements to be approved by the European Parliament stems from the Maastricht Treaty (1992). In spite of the time that has elapsed, there is no definition of this category of agreements in the ECJ case law.

Considering the wording and the context, which are elements of the general rule of interpretation of treaties, codified by Article 31 of the Vienna Convention on the Law of Treaties (1969), we believe that these agreements could have three defining features:

[30] Article 25(2).

(i) their purpose is cooperation with third parties;
(ii) they provide for a distinct institutional framework, which should not be limited to setting up a committee that monitors the application of the agreement, but rather there must be a more sophisticated structure;
(iii) finally, their legal basis is not Article 217 TFEU, since the agreements concluded under this provision are association agreements, listed elsewhere in Article 218(6)(a) TFEU.

Development cooperation agreements (Art. 209(2) TFEU), as well as agreements on economic, financial and technical cooperation with third countries (Art. 212(3) TFEU) meet requirements (i) and (iii); although one must have regard to their actual content, they will most likely meet requirement (ii). Humanitarian aid agreements (Art. 214(4) TFEU) fulfil condition (iii), and it could be understood that they also comply with requirement (i); nonetheless, it will be difficult for these agreements to create an institutional framework, given that humanitarian aid does not require one.

In any event, we have to keep in mind that in all the above mentioned fields, the ordinary legislative procedure applies (Arts. 209(1), 212(2) and 214(3) TFEU). Thus, without getting into the debate on whether the aforesaid conditions are met, the need for the European Parliament's consent will undeniably, and at all events, stem from Article 218(6)(a)(i) TFEU.

Regarding the *agreements with important budgetary implications for the Union*, their inclusion in the list of agreements requiring the European Parliament's approval comes from the Maastricht Treaty. Yet again, we are dealing with a rather undetermined category (what are "budgetary implications"? and when are these "important"?).

In this case, the Court of Justice has actually provided a definition,[31] where the significance of an agreement's budgetary implications is not assessed according to the overall budget, but exclusively "in the context of the budgetary outlay approved by the Community for its external policy." Additionally, where a sectoral agreement is involved, this analysis may be complemented by "a comparison between the expenditure entailed by the agreement and the whole of the budgetary appropriations for the sector in question, taking the internal and external aspects together." Although strict,[32] the judgment seems convincing. It is also realistic regarding the appropriations allocated to external action with

[31] Judgment of 8 July 1999, *Parliament v. Council*, C-189/97.

[32] See, in this regard, within the Spanish scholarly literature, G. Garzón Clariana, "The Shifting Powers of the European Parliament. Democratic Legitimacy and the Competences of the European Union", in S. Garben and I. Govaere (eds.), *The Division of Competences between the EU and the Member States*, Hart Publishing, Oxford, 2017, pp. 276-283, p. 281.

respect to the overall budget.[33] True, the ECJ fails to quantify "important" in the wording "important budgetary implications." Instead, it uses a synonym, such as "significant" ("a significant share of the appropriations designed to finance the Community's external operations"). However, a different solution would be plainly and simply illusory (or even concerning, since Law is not an exact science).

Question 9

The decision-making procedure contained in Article 218(9) TFEU and applicable to the *suspension by the EU of an international agreement* raises three issues: a) the allocation of the power of initiative between the European Commission and the High Representative; b) the voting rule within the EU Council; and c) the exclusion of the European Parliament.

As for a), Spain considers that the allocation of the power of initiative between the European Commission and the High Representative is subject to the same criterion as the one applicable to the opening of the negotiations. So the Commission will have the general initiative, while the High Representative will have the initiative where the agreement relates exclusively or principally to the CFSP.

As for b), Spain believes that the provision of Article 218(8) TFEU, regarding the voting rule in the Council "throughout the procedure," is also applied in the context of Article 218(9) TFEU. Therefore, there is a parallel as to how the Council decided to conclude an agreement and how it may adopt a decision suspending the application thereof. The alternative would be to consider that Article 218(8) TFEU is only applicable to the procedure for the conclusion of agreements (outside of which is the suspension), and that, in the absence of an indication of a voting rule in Article 218(9) TFEU, the Council should act by a qualified majority by default.[34]

Lastly, regarding c), the Spanish Administration does not consider that excluding the European Parliament from the EU's decision to suspend the application of an international agreement is an undesirable situation to be solved.

As Spanish scholars, the absence of the European Parliament in that procedure is noteworthy. In our domestic system, although the Council of Ministers may decide to suspend the application of a treaty, if its conclusion was approved by our national Parliament, the Government shall request forthwith ratification by Parliament. In case of parliamentary denial, the Government shall revoke the

[33] J. Laso Pérez, "Acuerdos con implicaciones financieras importantes: problemas de calificación (Comentario a la Sentencia del TJCE de 8 de julio de 1999, as. Parlamento Europeo c. Consejo, as. C-189/97)", *Revista de Derecho Comunitario Europeo*, no. 7, 2000, pp. 209-230, p. 221.

[34] Article 16(3) TEU.

resolution to suspend the application of the treaty.[35] Within the EU, in our view, the European Parliament's role would in any case be limited to being immediately and fully informed of the Council's decision to suspend the application of an international agreement (Art. 218(10) TFEU).

We are not aware of any *recent suspension cases* on the part of the EU. Actually, to our knowledge, this provision enshrined in Article 219(9) TFEU has only been implemented twice (in 2011 and 2012), with regards to the same agreement: the Cooperation Agreement between the EU and Syria. In 2011, the EU Council consented to partially suspend the application of the Agreement until the Syrian authorities put an end to the systematic violations of human rights and could again be considered as being in compliance with general international law and the principles which form the basis of the Cooperation Agreement. That partial suspension affected crude oil and petroleum products.[36] In 2012, the EU Council extended the suspension to gold, precious metals and diamonds.[37]

Question 10

The *procedure to be followed for establishing the position to be adopted on behalf of the EU in a body set up by an international agreement* is the same as that applicable to the suspension of an agreement. Article 218(9) TFEU deals with both aspects in the same way.

We can thus refer to the answer to question 9 regarding the power of initiative and the voting rule within the Council. We believe that the European Parliament's non-involvement could be justified in this case. The main argument for this is not that due to the frequency with which the EU's positions in the bodies set up by international agreements may be called for, parliamentary involvement would impair effective EU participation in these bodies.[38] Instead, we believe there is room for arguing that, upon approving the conclusion of the agreement and granting decision-making powers to a body provided in the agreement, the European Parliament would have given its consent in advance to its decisions

[35] Article 37 of Act 25/2014, cited. See a commentary on this provision: J.A. González Vega, "Artículo 37. Denuncia y suspensión", in P. Andrés Sáenz de Santa María, J. Díez-Hochleitner and J. Martín y Pérez de Nanclares (dirs.), *Comentarios a la Ley..., op. cit.*, pp. 763-788.

[36] Decision 2011/523 (OJ L228, 3.9.2011).

[37] Decision 2012/123 (OJ L54, 28.2.2012).

[38] A. Dashwood, "External Relations Provisions of the Amsterdam Treaty", in D. O´Keeffe and P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty*, Hart Publishing, 1999, p. 207. It does not seem to us that there is such a high frequency. For instance, if we examine the amount of decisions made by one of the most consolidated bodies set up by international agreements, such as the EU-Morocco Association Council (provided in the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, signed in 1996), we notice that it only adopts one or two decisions every year.

and to the EU's position taken within such body. This is the stance of the Spanish Administration. In our view, Article 218(10) TFEU requires to inform the European Parliament.

The Spanish Administration paid special attention to this provision when the EU Council had to adopt the Decision establishing the position to be taken on behalf of the EU within the Stabilisation and Association Council established by the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part, concerning a Decision of the Stabilisation and Association Council adopting its rules of procedure.[39] The Stabilisation and Association Agreement with Kosovo* establishes a Stabilisation and Association Council, called to supervise the application and implementation of the Agreement.[40] The first decision taken by the Council were its Rules of procedure. The Commission's proposal mentioned Article 217 TFEU in conjunction with Article 218(9) TFEU as a legal basis.[41] The Council added Article 37 TEU in conjunction with Article 31(1) TEU, thus confirming that the decision regarding the conclusion of an agreement and the decision establishing the EU's position within a body created by such agreement must be the same, as we already stated in the answer to question 9. Accordingly, the voting rule applicable within the Council for the approval of one decision and the other will be identical.[42]

Question 11

As is well known, in accordance with ECJ case-law, the obligation imposed by Article 218(10) TFEU, under which the *Parliament is to be* "*immediately and fully informed at all stages of the procedure*," applies to any procedure concluding an international agreement, including agreements exclusively related to the CFSP.[43] With respect to the scope of the information obligation, the Court has stated that it

[39] Decision 2016/1232 (OJ L202, 28.7.2016).

[40] The Stabilisation and Association Agreement with Kosovo*, signed on 27 October 2015, entered into force on 1 April 2016 (OJ L71, 16.3.2016).

[41] COM(2016) 280 final, 23.5.2016.

[42] Council Decision 2016/342 on the conclusion, on behalf of the Union, of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo *, of the other part, was based on all these TEU and TFEU articles (OJ L71, 16.3.2016).

[43] Judgment of 24 June 2014, *Parliament v. Council*, C-658/11, para. 85; and, Judgment of 14 June 2016, *Parliament v. Council*, C-263/14, para. 68. These judgments have been examined by the Spanish scholarly literature; see A. Delgado Casteleiro, "Los últimos restos del Dodo. La elección de bases jurídicas y su influencia en el papel del Parlamento Europeo en la nueva PESC a la luz del asunto acuerdo sobre piratería con Mauricio (C-658/11)", *Revista Española de Derecho Europeo*, no. 53, 2015, pp. 175-199; and, P. García Andrade, "La base jurídica de la celebración de acuerdos internacionales por parte de la UE: entre la PESC y la dimensión exterior del Espacio de Libertad, Seguridad y Justicia. Comentario a la sentencia

includes the stages in the procedure for negotiating and concluding agreements laid down in Article 218 TFEU (*inter alia*, the authorization to open negotiations, the definition of the negotiating directives, the nomination of the EU negotiator, the designation of a special committee, the completion of negotiations, the authorization to sign the agreement, the decision on the provisional application and the conclusion of the agreement), and also the intermediate results reached by the negotiations.[44]

The Spanish Administration does not seem to have any issue with this information requirement, which must be complied with by the Commission or the High Representative.

Expressing our own personal view as scholars, we believe that, although it may not technically belong to the "negotiation and conclusion procedure," the information obligation also covers the decisions concerning the provisional application, the suspension of the agreement and the establishment of the EU position in a body set up by an agreement. Before the Lisbon Treaty, Article 300(3) Treaty EC imposed the obligation to inform the European Parliament immediately and fully of any decision regarding any of these three circumstances. In fact, the information obligation was limited solely to those three decisions. Taking into account that the Lisbon Treaty sought to strengthen the role of the European Parliament, it is not conceivable that it put an end to the previous state of affairs. Conversely, it has completed the previous regulation (which therefore remains in place) through additional provisions.

As for the *role of national and/or regional parliaments*, in the *Front Polisario* case, the General Court stated (very surprisingly) that a decision concluding an international agreement with the consent of the European Parliament was a legislative act.[45] The Commission apparently disagrees, since it is not forwarding to national Parliaments any of its drafts for the adoption by the Council of these decisions, under the early warning system established by Protocol (No. 2) on the application of the principles of subsidiarity and proportionality.[46]

del Tribunal de Justicia de 14 de junio de 2016, asunto C-263/14, Parlamento c. Consejo", *Revista General de Derecho Europeo*, no. 41, 2017, pp. 128-160.

[44] Judgment of 14 June 2016, *Parliament v. Council*, cit., paras. 76-77.

[45] Judgment of 10 December 2015, T-512/12, para. 71. This conclusion was not upheld (rightly so) by the Court in its judgment on the appeal action brought by the Council (Judgment of 21 December 2016, C-104/16 P).

[46] As has been contended herein, in our view, the decisions related to the conclusion of an international agreement cannot be considered as legislative measures, since they do not stem from a legislative procedure in the terms of Article 218 TFEU (C. Martínez Capdevila, "A vueltas con la noción de 'acto legislativo'...", *op. cit.*). The ECJ agrees with this consideration (Judgment of 6 September 2017, *Slovakia and Hungary v. Council*, C-643/15 and C-647/15, paras. 58-67).

Therefore, the role played by the Spanish national Parliament is the one resulting from our domestic legal order. Act 8/1994, of 19 May, on the Joint Committee for the European Union does not provide for the Parliament's involvement in the procedure for the conclusion of international agreements by the EU. It does not even provide for its indirect involvement by the establishment of the position to be taken by Spain within the EU Council in the context of Article 218 TFEU.

As for mixed agreements, the involvement of national Parliaments will be as provided by the relevant Member State's legislation governing the conclusion of international treaties. The Spanish Constitution requires prior parliamentary approval for the final conclusion of the treaties listed in Articles 93 and 94(1). In practice, due to the broad interpretation performed by the Council of State of several cases listed in Article 94(1), the vast majority of treaties are covered by this provision.[47] The parliamentary approval for the conclusion of treaties under Article 94(1) is subject to a specific procedure, other than the legislative process, where both chambers of Parliament are on a more equal footing.[48]

The differing roles played by national Parliaments regarding EU-only agreements and mixed agreements (well exemplified by the Spanish system) should mitigate the European Commission's temptation to claim that the agreements it negotiates qualify as EU-only agreements.[49] It should be extremely cautious at all times, but all the more so concerning particularly significant treaties, such as, for instance, new generation trade agreements.

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

We are not aware of any national case law in that regard.

[47] In the most recent Spanish literature, see: P. Pérez Tremps, "Artículo 93. La integración en la Unión Europea", in E. Casas Baamonde and M. Rodríguez-Piñero y Bravo-Ferrer (coords.), *Comentarios a la Constitución española. XXX aniversario*, Woulters Kluwer, Madrid, pp. 1562-1575; M. Amores Conradi, "Artículo 93. Otras organizaciones o instituciones internacionales", *ibid.*, pp. 1576-1583; J. Díez-Hochleitner, "Artículo 94", *ibid.*, pp. 1584-1595; and, C. Izquierdo Sans, "Artículo 17. Trámites internos previos a la manifestación del consentimiento en obligarse por un tratado internacional", in P. Andrés Sáenz de Santa María, J. Díez-Hochleitner and J. Martín y Pérez de Nanclares (dirs.), *Comentarios a la Ley..., op. cit.*, pp. 339-359.

[48] On the specificities of the procedure set forth in Article 74(2) of the Constitution, applicable to the approval of international treaties under Article 94(1), see Spanish Constitutional Court Judgment no. 155/2005, of 9 June. See a commentary in: M. Urrea Corres, "La autorización parlamentaria en la celebración de tratados internacionales: una reserva orgánica y de procedimiento. Comentario a la STC 155/2005, de 9 de junio", *Revista General de Derecho Europeo*, no. 10, 2006.

[49] P. Andrés Saénz de Santa María has rated the Commission's actions as "expansive" ("La Unión Europea y el Derecho...", *op. cit.*, p. 61).

Question 13

Indeed, the direct effect of international agreements is a classic issue traditionally dealt with by international law scholars. Self-evidently, given the broad scope of Union competences (both express and implied) to conclude international agreements, this aspect has also been put forward within the EU. The most recent ECJ case law has not really focused on the direct effect of the agreements concluded by the EU, but rather on the possibility that individuals may plead such direct effect in order to assess the validity of secondary law in the light of the rules of international law relied upon. This was the case, in the most significant recent examples, in *Intertanko*[50] or *IATA*[51]. In this regard, the Court of Justice has laid down a set of requirements that must be met in order for the Court to accept the possibility of invoking both treaty and customary international law provisions. As for treaty international law provisions, the ECJ provides for the following three mandatory requirements: (i) the Union must be bound by them; (ii) their content must be unconditional and sufficiently precise; (iii) the nature and the broad logic of the treaty provisions must not preclude review by the Court of the disputed act of European Union law.[52] Furthermore, the possibility to invoke customary international law provisions is subject to the following conditions: (i) these must be capable of calling into question the competence of the European Union to adopt the disputed act, and (ii) the act in question must be liable to affect rights which the individual derives from European Union law or to create obligations under European Union law.[53]

More recently, this possible application of international agreements to assess the validity of EU law has been examined following a request for a preliminary ruling and not a direct appeal, for instance: the case regarding the Partnership Agreement between the European Community and the Kingdom of Morocco in the fisheries sector.[54] Amongst the questions referred to the Court of Justice, we just focus on the issue of the individual's legal standing to challenge the validity of EU acts on the grounds that the EU breached international law provisions.[55]

[50] ECJ Judgment of 3 June 2008, *Intertanko et al. v. Secretary of State for Transport*, C-308/06, ECLI:EU:C:2008:312.

[51] ECJ Judgment of 21 December 2011, *IATA*, C-366/10, ECLI:EU:C:2011:864.

[52] *Ibid.*, paras. 51 to 55.

[53] *Ibid.*, paras. 101 to 103 and 107.

[54] Request for a preliminary ruling, case C-266/16 (OJ, *C* 260, 18.7.2016, pp. 31-32).

[55] The full request for a preliminary ruling includes the following two aspects: (i) the appellant has legal standing under domestic law to challenge the validity of EU acts, although he does not invoke any rights under EU law; and/or, (ii) the principle put forward by the International Court of Justice [ICJ Judgment of 15 June 1954, the *Monetary Gold Removed from Rome in 1943 Case*] under which it may not issue judgments censoring a given conduct or affecting the rights of a State that is not a party to the Court and which has not consented to be bound by the Court decisions.

The Kingdom of Spain, which was a party to this case, opposes to the fact that the individual in question may invoke those International law provisions particularly relying on breaches of requirements applicable to treaty law [criteria (i), (ii) and (iii)] and customary law [criterion (ii)] established by recent case law of the Court of Justice.[56]

The case is still pending ruling by the Court. However, Advocate General Wathelet believes that the case brings along certain new legal approaches, insofar as "the present case raises the separate issue of the validity of an international agreement concluded by the Union by means of the act approving its conclusion (treaty secondary law)," and all of that through a request for a preliminary ruling on validity.[57] From this approach, the Advocate General deems inappropriate to transpose as such the principles mentioned by the Court in the abovementioned case law, given that this would preclude effective judicial review of the Union's external action.[58] Thus, he concludes that "[i]n the context of the judicial review of international agreements concluded by the European Union and the European Union acts approving or implementing such agreements, the possibility of relying on the rules of international law is subject to the following conditions, independently of whether those rules belong to one or to several sources of international law: the Union must be bound by the rule relied on, its content must be unconditional and sufficiently precise and, last, its nature and its broad logic must not preclude judicial review of the contested act."[59] Nevertheless, it remains to be seen the approach to be taken by the ECJ in its judgment.

Similarly, this issue might also appear in the ongoing opinion on the validity of the EU-Canada CETA under EU law. Regarding this treaty, the issue becomes particularly relevant, since there is a clause expressly denying the direct effect of the said treaty provisions.[60]

Question 14

There are no *pending infringement proceedings against Spain for failure to comply with the international agreements concluded by the EU.*

Question 15

In Spain there are no *internal mechanisms for ensuring compliance with the international agreements concluded by the EU.*

[56] *Ibid.*, para. 77.

[57] This can be inferred from the Opinion by Advocate General Wathelet submitted on 10 January 2018, C- 266/16, para. 80, ECLI:EU:C:2018:1.

[58] *Ibid.*, paras. 87-97.

[59] *Ibid.*, para. 296.

[60] ECJ Opinion 1/17, still pending (OJ, *C* 369, 30.10. 2017, in p. 2).

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENT

Question 16

The EU has exclusive competence in the area of common commercial policy (CCP) (Art. 3(1)(e) TFEU). As regards the *scope* of this policy, according to the ECJ, an EU act falls within the CCP if two conditions are met: if it relates specifically to trade with one or more third States; and has direct and immediate effects on it.[61] Within the Spanish doctrine, Professor J. Díez-Hochleitner has contended that the broad margin of appreciation (or, maybe, scope for discretion) granted to the ECJ by these criteria should entail the obligation to further justify its decisions.[62]

Regardless of its scope, the fact that the core content of an international agreement falls within the CCP does not imply that such agreement should be concluded solely by the EU on the basis of its exclusive competence. This idea is expressed by Article 207(6) TFEU: "[t]he exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation." Therefore, if the agreement affected areas of exclusive competence of Member States or related to areas of shared competence between the Union and Member States (alongside its specific connection with trade), with no justification for EU intervention under Articles 216(1) and 3(2) TFEU, such agreement shall be concluded as a mixed agreement by the EU and Member States.

Since the entry into force of the Lisbon Treaty on 1 December 2009, the CCP includes *foreign direct investment* (Art. 207(1) TFEU). According to settled ECJ case law, direct investment means "investments of any kind made by natural or legal persons 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 in order to carry out an economic activity. Acquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable him to participate effectively in the management of that company or in its control."[63] Amongst other Spanish scholars, Professor L. Hinojosa Martínez has shown that the notion of "foreign direct investment" is defined to some extent in EU law,

[61] Ultimately, Opinion 2/15, para. 36. On the existence of these requirements in ECJ case law within the Spanish literature, see A. Segura Serrano, "Renovación y crisis...", *op. cit.*, pp. 108-109.

[62] "La nueva política comercial...", *op. cit.*, p. 409.

[63] This case law has been recently put forward by the ECJ in Opinion 2/15 (para. 80).

and that it is basically in line with the definitions provided in the most significant international legal texts.[64]

The specific link with trade between the EU and the relevant third State of an agreement solely regulating investment protection without addressing the admission of such foreign investment (mainly through provisions ensuring national treatment, fair and equitable treatment, compensation for expropriation, or free transfer of dividends), enables the inclusion of the agreement within the CCP. In this regard, the Court of Justice has emphasized that Article 207(1) TFEU generally refers to EU acts concerning foreign direct investment, "without drawing a distinction according to whether the acts concern the admission or the protection of such investments."[65] In the procedure before the ECJ leading to Opinion 2/15, Spain had advocated a narrow construction of "foreign direct investment," which did not encompass investment protection; the main argument was that investment policy has its own substance. National scholars have expressed different opinions.[66]

Portfolio investments[67] are not direct investments. Therefore, they are not covered by the CCP, as has been conceded by the Commission.[68] The competence of the EU to conclude international agreements related to this kind of investments is implied, i.e., it will stem from the second to fourth cases listed in Article 216(1) TFEU. Provided that it exists, such *treaty-making power* conferred on the EU shall be exclusive of the Union under the circumstances provided in Article 3(2) TFEU; otherwise, it will be a shared power with Member States under the presumption in favour of shared competences (*pro concurrentia*) laid down in Article 4(1) TFEU. As is well known, regarding the Agreement with Singapore, the ECJ ruled that the commitments contained in this legal instrument related to investments other than direct investments fall within a competence shared between the European Union and the Member States.[69]

[64] "El alcance de la competencia exterior europea en materia de inversiones", *Revista de Derecho Comunitario Europeo*, no. 52, 2015, pp. 871-907, pp. 875-882.

[65] Opinion 2/15, para. 87.

[66] In this vein, see J. Díez-Hochleitner, "El incierto futuro de los acuerdos bilaterales sobre protección de inversiones celebrados por los Estados miembros de la Unión Europea", *Revista Española de Derecho Europeo*, no. 33, 2010, pp. 5-43, pp. 12 *et seq.*; *id.*, "La nueva política comercial...", *op. cit.*, pp. 420-422; and, L. Hinojosa Martínez, "El alcance de la competencia...", *op. cit.*, pp. 889-892.

[67] On the implied treaty-making power of the EU regarding portfolio investments stemming from Article 64(2) TFEU, see, in particular, J. Díez-Hochleitner, "El incierto futuro...", *op. cit.*, pp. 26-28 and p. 33; and, L. Hinojosa Martínez, "El alcance de la competencia...", *op. cit.*, pp. 895-903.

[68] L. Hinojosa Martínez has noted the complexity attached to differentiating between direct investments and portfolio investments in certain financial transactions ("El alcance de la competencia...", *op. cit.*, p. 880).

[69] Opinion 2/15, paras. 239-244.

As for international agreements in the field of *transport*, Article 207(5) TFEU provides that the conclusion of international agreements in this field shall be subject to the specific title on transport provided in the TFEU (Arts. 90-100) as well as to Article 218 TFEU. The supply of services in the field of transport is thus excluded from the CCP, as has been confirmed by the ECJ.[70] Furthermore, in Opinion 2/15, the Court has recalled that the notion of services "in the field of transport" covers not only actual transport services, but also other services inherently linked to a physical act of moving persons or goods from one place to another by a means of transport.[71] Those services which are not linked in this way with transport services are covered by Article 207(1) TFEU, and thus fall within the CCP. According to the ECJ, this was the case for aircraft repair and maintenance services, the selling and marketing of air transport services, and computer reservation system services.[72] Spain took a different stance regarding the selling and marketing of air transport services: Spain considered that such selling and marketing activities fell within the transport policy and not the CCP, since marketing a service is inherent to the service itself, and thus the regime applicable to such marketing activities cannot be different from that applied to the actual service. Spain neither believed that computer reservation system services were covered by the CCP, but it did acknowledge the exclusive competence of the EU under Article 3(2) TFEU. On a general basis, Spain had advocated a broad interpretation of Article 207(5) TFEU, contrary to the narrow construction embraced by the Commission in its request for an opinion.

Regarding *TRIPs*, it is worth noting that, as stated by the ECJ in Opinion 1/94, "the primary objective of TRIPs is to strengthen and harmonize the protection of intellectual property on a world-wide scale."[73] Although since the entry into force of the Lisbon Treaty the commercial aspects of intellectual and industrial property fall within the CCP (Art. 207(1) TFEU), we consider that this should not affect the assessment of the purpose pursued by the TRIPs, which seeks to protect intellectual property in itself, beyond commercial aspects. In this connection, as opposed to the ECJ (*Daiichi Sankyo* Judgment), we do not believe that, following the entry into force of the Lisbon Treaty, the TRIPs Agreement as a whole has become covered by the CCP.[74] We therefore side with those Member States that submitted observations in this case, as well as with Advocate

[70] Opinion 1/08, of 30 November 2009, para. 162; and, Opinion 2/15, para. 57.

[71] Para. 61. The ECJ thereby extended to EU's external action the notion of "services in the field of transport" coined in the context of the internal market (Judgment of 15 October 2015, *Grupo Itevelesa*, C-168/14, paras. 45 and 46; more recently, Judgment of 20 December 2017, *Uber*, C-434/15, para. 41).

[72] Para. 68.

[73] Opinion 1/94, of 15 November 1994, para. 58.

[74] Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, para. 53.

General D. Pedro Cruz Villalón. The Spanish doctrine has also been critical of *Daiichi* along these lines.[75] It is worth noting that the Spanish Administration has not issued an opinion on whether the entire TRIPs agreement is covered by the CCP. However, it has contended that the protection of intellectual property has its own substance, aside from the CCP.[76]

Question 17

As is well known, the *relationship between bilateral investment treaties (BITs) of the Member States with third countries and the agreements concluded by the EU in this area* is governed by Regulation 1219/2012, of 12 December 2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries.[77] This Regulation provides that any BITs between Member States and third countries signed before 1 December 2009 shall remain in force until a bilateral investment agreement between the Union and the same third country enters into force (Arts. 2-6);[78] without prejudice to "other obligations of the Member States under Union law" (Art. 3). In our view, these obligations include those stemming from Article 351(2) TFEU, as can be inferred from the judgments delivered by the ECJ regarding certain BITs involving Austria, Finland and Sweden.[79]

[75] See J. Díez-Hochleitner, "La nueva política comercial...", *op. cit.*, p. 413. A. Segura Serrano does not criticize the *Daiichi* judgment, but the absence of a sufficient explanation by the ECJ in this ruling and in Opinion 2/15 of the determination of the main purpose of the relevant international agreement ("Renovación y crisis...", *op. cit.*, pp. 123-126).

[76] This was Spain's claim in *Commission v. EU Council (Lisbon Agreement on Appellations of Origin and Geographical Indications)*, C-389/15, where it supported the EU Council. This case was settled by Judgment of 25 October 2017.

[77] OJ L351, 20.12.2012. For an analysis by Spanish authors on the proposal from the Commission leading to this Regulation, as well as of the amendments suggested by the European Parliament, see F.J. Pascual Vives, "Los acuerdos sobre promoción y protección recíproca de las inversiones extranjeras y el Derecho de la Unión Europea", *Revista Española de Derecho Europeo*, no. 40, 2011, pp. 441-489.

[78] For instance, the EU-Singapore Agreement provides that any existing BIT between Member States and Singapore shall cease to have effect, and shall be replaced and superseded by this new EU Agreement from the date of entry into force thereof (Art. 9.10(1)). The same provision is set forth in the Comprehensive Economic and Trade Agreement (CETA) concluded with Canada (Art. 30.8). J. Díez-Hochleitner has rightly described as "untenable" the conclusion reached by the ECJ in Opinion 2/15; according to the ECJ, the EU has "succeeded" Member States in their prior investment agreements with Singapore ("La nueva política comercial...", *op. cit.*, p. 407, further explained in pp. 427-428); in this vein, see F. Pascual Vives, "El futuro del arbitraje de inversión en los acuerdos internacionales celebrados por la Unión Europea", *Revista Electrónica de Estudios Internacionales*, no. 33, 2017, p. 35, pp. 29-30 ; and, A. Segura Serrano, "Renovación y crisis...", *op. cit.*, pp. 142-143.

[79] Judgments of 3 March 2009, *Commission v. Austria* (C-205/06) and *Commission v. Sweden* (C-249/06); and Judgment of 19 November 2009, *Commission v. Finland* (C-188/07). For a critical assessment within the Spanish literature, see J. Díez-Hochleitner, "El incierto futuro...", *op. cit.*; these judgments are also examined in F.J. Pascual Vives, "El subsistema regional comunitario ante el régimen internacional de

Furthermore, under the Regulation, Member States are authorized to amend existing BITs as well as to conclude new bilateral investment agreements with third countries, insofar as the EU has not concluded its own agreement with third countries in the same regard (Arts. 7-11). To that end, Regulation 1219/2012 lays down a procedure under which Member States must: notify the Commission in writing to request its authorization to enter into negotiations with the third country (the Commission shall authorize these negotiations unless certain specified circumstances occur); keep the Commission informed of the progress and outcome of the negotiations; and request the Commission's authorization to sign and conclude the agreement. Presumably, any amendment intended to adapt to EU law the BITs concluded by Member States, as in the abovementioned 2009 judgments (i.e., providing a clause allowing the relevant Member State to comply with their obligations under EU law), will be authorized by the Commission right away.

As a third scenario, the Regulation refers to BITs signed by Member States between 1 December 2009 (when the Lisbon Treaty entered into force) and 9 January 2013 (when the Regulation entered into force) (Art. 12). These agreements must be notified to the Commission, which may authorise their maintenance or entry into force. Unless this authorization has been obtained, the relevant Member State shall not take any further steps towards the conclusion of the agreement, and must withdraw or reverse those steps which have been taken.

Under Chapter II of the Regulation, on the maintenance in force of existing BITs, Spain notified to the Commission 64 bilateral investment treaties. The Spain-Croatia BIT, of 21 July 1997, was included in the list, since by the date on which Spain had to notify the Commission, Croatia had not yet joined the Union. The list also included the BITs concluded with Angola, Saudi Arabia, Bahrain, Congo, Ethiopia, Gambia, Ghana, Mauritania and Yemen, which had been signed, but still had not been processed internally. The following subsequent changes have been notified to the Commission by Spain, in compliance with the obligation laid down in Article 2: (i) the entry into force of the BITs concluded with Saudi Arabia, Bahrain and Mauritania; and (ii) the denunciation of the BITs concluded with Bolivia, Indonesia, South Africa and India.[80]

protección de las inversiones extranjeras", *Revista de Derecho Comunitario Europeo*, no. 36, 2010, pp. 467-495, pp. 485-491.

[80] The first and last list of BITs notified by Spain under Regulation 1219/2012 can be found at: OJ C131, 8.5.2013 and OJ C147, 11.5.2017. On Spain's practice regarding the implementation of Regulation 1219/2012, see A. Pastor Palomar, "La aplicación práctica del Reglamento (UE) nº 1219/2012 sobre los acuerdos bilaterales de inversión entre Estados miembros y terceros países", *Revista General de Derecho Europeo*, no. 31, 2013, 21 pp.

Pursuant to Chapter III of the Regulation, on the authorization to amend or conclude BITs, Spain has requested authorization to amend the transfer clause in accordance with EU law in 22 BITs.

Finally, in compliance with Article 12, Spain notified the Commission of its BITs with Haiti, which had been signed *ad referendum* on 17 November 2012, and Mozambique, whose signature was authorized by the Council of Ministers on 15 October 2010. Upon examining the Spain-Haiti BIT, the Commission concluded that the agreement was not compatible with TFEU provisions on free movement of capital between Member States and third countries. Additionally, the Commission stated the need to include in Article 7 of the BIT, on transfers, a clause covering compliance by the parties with the obligations stemming from their participation in a free trade area, a customs union, a common market, an economic and monetary union, or any other form of cooperation or regional integration. This was also the case for the Spain-Mozambique BIT. In fact, Spain is currently negotiating with this country the inclusion of the clause required by the Commission.

Question 18

As for the *dispute settlement mechanism regarding investment protection in the new generation of free trade agreements envisaged withe the Union's partners (CETA, TTIP, etc.)*, Spain supports the Investment Court System proposed by the EU (ICS), as an alternative to the traditional investor-State dispute system (ISDS), seeking to achieve a more transparent, efficient, predictable system, which could also provide further guarantees to the parties in dispute.

The traditional ISDS is characterized by its *ad hoc* nature, with arbitrators designated on a case-by-case basis whose decisions are not subject to appeal. The ICS follows a different approach: for each agreement, there is a permanent pool of arbitrators, out of which, randomly, three arbitrators will hear the case; additionally, it is set up as a two-instance system, composed of a Tribunal of First Instance and an Appeal Tribunal, which makes it a sounder system whilst preventing inconsistencies in the Tribunal of First Instance decisions.

Regarding arbitrators, Spain welcomes that their appointment is on the parties to the agreement (whereas under the ISDS the parties in dispute -the investor and the State- may appoint an arbitrator of their choice). Spain also takes a positive view of the fact that practitioners who actively represent parties before arbitral tribunals are prevented from serving as arbitrators in other cases ("double hat"); everyone is aware of the potential conflicts of interest in this context. Finally, Spain embraces the fact that arbitrators should be experts in international law. According to Spain, all of these factors will lead to more impartial and independent arbitration tribunals.

As for the relationship between the ICS and domestic courts, the Commission has opted for the "no-u-turn" approach, as opposed to the "fork-in-the-road" rule, another common model in BITs. Under the first approach, investors will have to withdraw from any domestic proceedings they have started before submitting a claim to the ICS, and they will not be allowed to go back to a domestic court after losing the ICS case. The "fork-in-the-road" model implies that the choice of an investor to submit disputes either to a domestic court or international arbitration is deemed to be final to the exclusion of the other. Both mechanisms are aimed at avoiding double compensation.

The Spanish doctrine has advocated the compatibility of the ICS with EU law autonomy.[81]

Last but not least, Spain positively assesses Opinion 2/15 when it establishes that the Investor-State dispute settlement provisions of the EU-Singapore Agreement fall within a competence shared between the European Union and the Member States.[82] Within the national doctrine, there has been some criticism of the ECJ's legal reasoning for being too simple. Remarkably, J. Díez-Hochleitner regrets that the Court of Justice overlooked the key fact that a Singapore investor could bring a claim against Member States within this dispute settlement mechanism (and such claim would be based on measures foreign or barely linked to EU law) as the main argument to claim the mixity of the Agreement in this regard.[83]

Question 19

Concerning *liability of the EU and of the Member States resulting from a breach of the said agreements*, we must differentiate between international responsibility and internal responsibility.

International responsibility must be determined according to international law. In the case of an EU-only agreement, international responsibility would necessarily lie with the EU, as only the EU has assumed an international obligation. In the case of a mixed agreement, we would need to establish if the third party is aware of the division of powers between the EU and the Member States (through a declaration of competences or some other way) and therefore knows who (the EU or Member States) is its counterpart in respect of every provision of the agreement. Where no declaration of competences has been made and the

[81] J. Díez-Hochleitner, "La protección de las inversiones en el TTIP: claves del debate", *Revista General de Derecho Europeo*, no. 37, 2015, pp. 1-13, pp. 6-7; *id.*, "The European Union Facing Investment Arbitration", in P. Eeckhout and M. López Escudero (eds.), *The European Union's External Action in Times of Crisis*, Hart Publishing, Oxford, 2016, pp. 460-463. This same author assess the advantages and drawbacks of the ICS model ("La protección de las inversiones...", *op. cit.*, pp. 9-13).

[82] Paras. 285-293.

[83] J. Díez-Hochleitner, "La nueva política comercial...", *op. cit.*, pp. 424-426.

agreement contains no indication of which obligations were entered into by which party (the EU or Member States), international law sides with joint responsibility. This is apparent from Article 17 of the Draft articles on responsibility of international organisations, adopted by the International Law Commission in 2011. Amongst the Spanish scholars, J. Díez-Hochleitner has argued that not even from an EU law perspective it is possible to contend that international responsibility for a breach of investment agreements should rest upon the EU at all events.[84]

A different issue from international liability is the apportionment of responsibility between the EU and its Member States vis-à-vis a third party. This allocation of responsibility can be governed by EU law; in fact, it is. The reference legal instrument is Regulation 912/2014, of 23 July 2014, establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party.[85] Article 3 establishes the criteria according to which financial responsibility shall be apportioned between the EU and the Member States. On a general basis, the criteria are based on who has afforded the treatment at issue to the investor, unless the treatment afforded to the investor by the Member State concerned was required by Union law, in which case the EU shall be financially responsible. Regulation 912/2014 confers to the European Commission the power to adopt a decision in order to determine the financial responsibility of a Member States where the EU acts as respondent and the Commission considers that the award or settlement of costs arising from the arbitration in question should be paid by the Member State concerned, on the basis of the criteria established in Article 3 (Arts. 3(2) and 19). It also provides that the Member State shall bear financial responsibility where the EU is the respondent and the State accepts potential responsibility during the proceedings (Art. 3(3)).

Question 20

Although the Lisbon Treaty failed to unify the EU's external action framework (the CFSP maintained many of its specificities), it did bring together its various elements. This was facilitated by the establishment of a set of common principles and objectives for EU's external action as a whole. These principles and objectives were laid down in Article 21(1) and (2) TEU. In case their placement under the "General Provisions on the Union's External Actions" (Arts. 21 and 22 TEU) was not explicit enough, the Treaties underpin this idea when they provide that the Union shall respect these principles and pursue these objectives "in the development and implementation of the different areas of the Union's

[84] "The European Union Facing...", *op. cit.*, pp. 474-475.
[85] OJ L257, 28.8.2014.

external action covered by this Title [encompassing the CFSP] and by Part Five of the Treaty on the Functioning of the European Union [on the Union's external action], and of the external aspects of its other policies" (Art. 21(3) TEU). This idea is persistently reiterated. It can be found at the beginning of the TEU Chapter on the CFSP (Art. 23 TEU), as well as at the beginning of Part Five of the TFEU, under the "General Provisions on the Union's External Action" (Art. 205), and in four specific fields of this "Community" external action: commercial policy (Art. 207(1) *in fine* TFEU); development cooperation (Art. 208(1) TFEU), economic, financial and technical cooperation with third countries (Art. 212(1) TFEU) and humanitarian aid (Art. 214(1) TFEU).

In Opinion 2/15, which addresses the CCP, the ECJ highlights the rule enshrined in Article 21(3) TEU, in Article 205 TFEU, and in the second indent of Article 207(1) TFEU, in order to contend that sustainable development (mentioned in Article 21(2)(f) TEU as an objective of EU's external action in the international sphere) forms an integral part of the abovementioned CCP.[86] According to the ECJ itself, this does not mean that the exclusive competence of the Union in the area of CCP can be exercised to specifically regulate the levels of environmental protection,[87] but it allows to govern trade between the EU and the third State, by making liberalisation of that trade subject to the condition that the Parties comply with their international obligations concerning environmental protection.[88]

At a theoretical level, Spain agrees with these considerations. A different issue altogether would be that, regarding its application specifically to the Agreement with Singapore, our country contended before the ECJ that several Chapter 13 provisions do not fall within the competence of the EU in the area of CCP.

Question 21

Up to this point, the EU's approach by default was to negotiate free trade agreements in full, including a chapter on investments with three main elements: liberalisation, protection and dispute settlement. Opinion 2/15 issued by the ECJ has given rise to a debate on how to conclude trade agreements. The trade part of the agreements and the investment part could be separated. This would allow to negotiate "EU-only" agreements (which would include liberalisation of investments) and, on the other hand, investment agreements (investment protection and dispute settlement), which could be negotiated by themselves ("stand-alone") as mixed agreements. There are precedents with Myanmar (an

[86] Para. 147.
[87] Para. 164.
[88] Para. 166.

agreement solely on investment protection and ICS) and China.[89] In any event, this issue is being discussed with the European Commission within the Council. Spain favours a flexible approach, which shall be assessed on a case-by-case basis depending on the third State at issue.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

The European Union has never had express external competence in the field of migration, which has not prevented it from addressing certain related issues through association or partnership and cooperation agreements.[90] Following the Treaty of Amsterdam and pursuant to the principle of parallelism between internal and external powers, the EU somehow developed an external action in the area of readmission and visa policy (legal admission of third-country nationals as legal residents). The Treaty of Lisbon, in turn, has limited the scope of the EU's external action in the field of legal immigration by granting Member States the competence to determine the volumes of admission of migrants for employment purposes. At the same time, it confers on the EU an express competence regarding readmission, as we will see when addressing the issues raised by question 25.[91]

Taking the legal framework established by the Treaty of Lisbon as reference, let us focus on Article 77(1)(b) TFEU, according to which the Union shall develop a policy with a view to carrying out checks on persons and efficient monitoring of the crossing of external borders.

For that purpose, Article 77(2) provides that the EU institutions shall adopt measures concerning "the checks to which persons crossing external borders are subject," without prejudice to Member States' competence to "negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements." (Protocol No 23 on external relations of the Member States with regard to the crossing of external borders). It follows from the above that the Treaty sought to place a limitation on the poten-

[89] The Spanish literature supports this solution; see J. Díez-Hochleitner, "La nueva política comercial...", *op. cit.*, p. 429.

[90] These agreements have incorporated certain elements related to the legal status of nationals of the parties: equal treatment as regards working conditions, access to for legal residents, and certain aspects concerning social security. See, for further details, P. García Andrade, *La acción exterior de la Unión Europea en materia migratoria. Un problema de reparto de competencias*, Tirant lo Blanch, Valencia, 2015, pp. 463-475.

[91] See J. Martín y Pérez de Nanclares, "The External Dimension of the Area of Freedom, Security and Justice: An Essential Part of the European Union's External Action", in P. Eeckhout and M. López Escudero (eds.), *The European Union's External Action..., op. cit.*

tial expansive effects of an external competence of the EU in the field of legal immigration. Such limitation on powers explains the EU's recourse to mobility partnerships in the area of its external action. These legal instruments are less solid,[92] but they respect the Member States' competences.[93]

Consequently, the external action on legal immigration is an area where there is certain interplay between Member States' and EU's powers: "different preferences motivated by economic, cultural and foreign policy objectives intertwine, leading to segmentation of the legal status and admission preferences depending on the nationality of the individuals concerned."[94]

Spain entered into a number of agreements with third States as a result of a policy action (*Plan Africa 2006*) seeking to promote cooperation on migratory flows with priority third countries. As a result, the Agreements with Guinea-Bissau,[95] Niger[96], Mali[97], Cape Verde[98], Guinea Conakry[99] and Gambia[100] -concluded after the Treaty of Amsterdam- are currently in force.

Question 23

The concept of "safe third country"[101] in Directive 2013/32 refers to non-entrée policies, according to which several instruments are adopted to discourage the

[92] The European Commission refers to these instruments as "political statements" or "declarations of intention."

[93] N. Reslow, "Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships", *Journal of European Integration*, 2011.

[94] See S. Iglesias Sánchez, "¿Hay un lugar para la acción exterior de la Unión Europea en materia de inmigración legal? Acuerdos internacionales, asociaciones de movilidad e intereses estatales", in J. Martín y Pérez de Nanclares (coord.), *La dimensión exterior del Espacio de Libertad, Seguridad y Justicia de la Unión Europea*, Iustel, Madrid, 2012, pp. 255-283, at pp. 173-194 (own translation).

[95] Agreement between the Kingdom of Spain and the Republic of Guinea-Bissau on immigration, done ad referendum in Bissau on 27 January 2008. There is an exchange of letters dated 11 July and 29 September 2008 introducing amendments (BOE no 134, 3 June 2008).

[96] Framework Cooperation Agreement on immigration between the Kingdom of Spain and the Republic of Niger, of 10 May 2008 (BOE no 160, 3 June 2008).

[97] Framework Cooperation Agreement on immigration between the Kingdom of Spain and the Republic of Mali, of 23 January 2007 (BOE no 135, 4 June 2008).

[98] Framework Cooperation Agreement on immigration between the Kingdom of Spain and the Republic of Cape Verde, of 20 March 2007 (BOE no 39, 14 February 2008).

[99] Cooperation Agreement on immigration between the Kingdom of Spain and the Republic of Guinea, done ad referendum in Conakry on 9 October 2006 (BOE no 26, 30 January 2008).

[100] Framework Cooperation Agreement on immigration between the Kingdom of Spain and the Republic of Gambia, done ad referendum in Banjul on 9 October 2006 (BOE no 310, 28 December 2006).

[101] See, *inter alia*, M. Hunt, "The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future", *IJRL*, vol. 26, 2014, p. 503 *et seq*. V. Moreno-Lax, "The Legality of the 'Save Third Country' Notion Contested: Insights from the Law of Treaties", in G.S. Goodwin-Gill and Ph. Weckel (eds.), *Protection des migrants et des réfugiées au XXIe siècle. Aspects de droit international. Migration and Refugee Protection in the 21st Century, International Legal Aspects*, Martinus Nijhoff, The Hague, 2015, p. 668.

arrival of refugees. This is done either by preventing access to the territory or by preventing applications for international protection.[102] This asylum policy is largely influenced by a security-centred approach which raises concerns as to its compatibility with well-settled principles of international law, such as the principle of non-refoulement, and the requirement that applications for international protection be assessed on an individual basis.[103] The consideration of a State as a "safe third country" under Article 37(1) of the Directive is a matter for Member States, and it operates as a rebuttable presumption. While the Directive sets out in Annex I several elements to be considered by Member States in order to determine which countries may be eligible as safe countries, the situation across Member States is far from homogeneous.[104]

There is some case law in Spain interpreting the concept of "safe third country" and its application to specific cases. Two decisions by the Spanish High Court (*Audiencia Nacional*) are relevant in this regard.[105] In both judgments, the Court dismisses the appeals brought by two Syrian nationals against the decision of the Spanish administration in charge of assessing their asylum applications. The Court interprets and applies the notion of "safe third country" in relation to Morocco. As these decisions point out, the definition of such concept is open to debate, since there is no "irrebuttable presumption [qualifying a State as a safe third country] that does not admit evidence to the contrary."[106] Based on this approach, Spanish courts rely on the ECJ[107] to conclude that the condition of safe third country may only be granted to those States that "have ratified the Geneva Convention and... observe its provisions," noting however that "the mere ratification does not entail an irrebuttable presumption that such State observes these conventions." The Spanish case law also refers to the "safe third country concept to reject asylum applications."[108]

We are not aware, however, of any decisions of Spanish courts that extend to the delimitation of this concept in relation to the concept of European safe third country ("super-safe third country") in accordance with Article 39 of the Directive. Nevertheless, in our opinion, both the concept of safe third country and the European safe third country ("super-safe third country") are enabling

[102] J.C. Hathaway, *The rights of refugees under international law*, Cambridge University Press, Cambridge, 2005, p. 291.

[103] See V. Moreno-Lax, "The Legality...", *op. cit.*.

[104] In this regard, see the Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

[105] Judgment of the Spanish High Court (*Audiencia Nacional*) of 16 October 2016 and 16 November 2016.

[106] *Ibid*., para. 6.

[107] ECJ, Judgment of 21 December 2011, C-411/10 and C-493/10.

[108] Judgments of the Spanish High Court (*Audiencia Nacional*) of 21 December 2011 and 18 February 2004.

EU Member States to shirk their responsibility with regard to potential asylum applications for which they are in principle responsible. As a result, asylum seekers may end up roaming across Member States in search for a consideration of their country of origin as a non-safe country. Also, this system may lead to a concentration of asylum applications in peripheral countries of the European Union. There is already ample evidence of this situation.

On another level, extraterritorial processing of asylum claims seeks to regulate the submission of asylum applications outside the territory of the Members States.[109] This was hardly a European invention. The United States already resorted to this practice at Guantanamo naval base when dealing with asylum applications from Haitians. Similarly, the Australian government transfers asylum seekers to South Pacific countries, where their applications are processed.[110] In this context, we cannot fail to mention the controversial Agreement concluded by the European Union and Turkey,[111] on the readmission of illegal residents, which was the subject of an application for annulment finally dismissed as inadmissible by the General Court of the European Union on the grounds that it was not an act of the EU.[112]

Question 24

The debate between those who consider that the new Migration Partnership Framework has superseded the Global Approach and those who don't is not very enriching, whichever the prevailing interpretation. Therefore, it may not be advisable to devote much effort to answer this question in utmost detail – something impossible, in any case. Indeed, even if only for the weight the Global Approach has been given in the European agenda, it seems unlikely that an

[109] On the problems derived from externalizing asylum applications, see, in the Spanish literature, S. Morgades Gil, "Hacia la externalización del asilo en la Unión Europea", in M. Aparicio, M. Illamola, D. Moya and S. Rodera (Coords.), *Las fronteras de la ciudadanía en España y en la Unión Europea. Actas del II y III Encuentro de jóvenes investigadores en derecho de inmigración y asilo*, Gerona, 2006, pp. 311-330; and, J. Abrisketa Uriarte, "La dimensión externa del Derecho de la Unión Europea en materia de refugio y asilo: un examen desde la perspectiva del non-refoulement", *Revista de Derecho Comunitario Europeo*, no 56, 2017, pp. 119-158.

[110] As described by E. Salamanca Aguado, "La dimensión exterior de la política común de asilo: ¿solidaridad internacional o elusión de responsabilidades?", in J. Martín y Pérez de Nanclares (coord.), *La dimensión exterior..., op. cit.*, pp. 255-283, at pp. 275-278.

[111] EU-Turkey Statement, of 18 March 2016. A first assessment of this Agreement may be read in Document COM(2016) 0231 final. It describes how, by letter of 12 April 2016, Turkey provided assurances that all returned Syrians would be granted temporary protection.

[112] Order of the General Court of 28 February 2017, ECLI:EU:T:2017:128. There are some interesting comments on this decision. See, *inter alia*, E. Uría Gavilán, "El Tribunal General se declara incompetente para conocer de los recursos de anulación contra la Declaración de la Unión Europea y Turquía de 18 de marzo de 2016", *La Ley Unión Europea*, no 49, 2017.

express repeal will take place. However, we cannot rule out that the prevailing interpretation will be that this is a further stage in the progressive evolution of this EU policy, where the instruments developed so far may coexist.

In this regard, it is fair to say that the new Partnership Framework is ultimately a more consistent tool than the Global Approach, as it incorporates action instruments that make it possible to address, on a horizontal basis, the priority objective in the fight against illegal immigration. With the new Partnership Framework, the EU intends to use *all* policies –not just immigration-specific ones– to achieve its goals in that field. This approach certainly fosters EU's "conditionality" as an important instrument in its relations with third countries.

To our knowledge, neither the EU nor Spain has concluded any international agreement under this New Approach.

As already noted in Question 22, Spain has entered into a number of so-called "new generation" international agreements with Guinea-Bissau, Niger, Mali, Cape Verde, Guinea Conakry and Gambia. All these agreements have the same structure based on the following elements: (i) admission of workers; (ii) voluntary return of persons; (iii) integration of residents; (iv) migration and development; (v) cooperation in the fight against illegal immigration and human trafficking; and (vi) readmission of persons.[113] These agreements address in a comprehensive manner the different aspects related to migration, so their content could serve as a reference for the European Union.

Question 25

Readmission procedures are a useful instrument mainly for two purposes: safeguarding the security of external borders and curbing migratory flows that cannot be managed by the Member States. Before the entry into force of the Treaty of Lisbon, readmission was a suitable area for the application of the AETR doctrine. However, the provision incorporated by Article 79(3) TFEU expressly grants to the Union the competence to conclude readmission agreements with third countries of origin and transit.[114] From this perspective, the exercise of this power by the Union will only be subject to the requirements of the subsidiarity principle.[115]

[113] Among the agreements referred to above, the Framework Agreement with Mali stands out, being the only one without a specific section on readmission of persons.

[114] Prior to the said competence provision of the TFEU, the EU included in its association and cooperation agreements a first version of the "standard readmission clause" (1995). This was gradually reformulated after the entry into force of the Treaty of Amsterdam (1999) and the European Council of Seville (2002) in order to better adapt the wording to the specific needs of each third country.

[115] Although no reference is made to the subsidiarity check, such monitoring stems from the criteria used by the EU to select the countries parties to the relevant agreement. See, in this regard, P. García Andrade, *La acción exterior..., op. cit.*, p. 335.

Therefore, and consistently with the new attribution of competence to the Union, Member States should restrain from entering into this type of agreements with third countries when the Union has already done so, except if expressly authorized or on matters regarding the implementation of the agreement.[116] However, it is interesting to determine the relationship between Readmission Agreements concluded so far by the European Union and agreements concluded (or to be concluded) by Member States with those same third countries. In this regard, it should be borne in mind that such Readmission Agreements concluded by the EU (sometimes as mixed agreements) include a clause allowing these Agreements with third countries to coexist with others concluded by Member States, provided that the latter are compatible with the former. However, the Member States must not enter into new agreements once the Union has concluded its own.[117]

Spain has concluded several international agreements on the readmission of illegal immigrants with third countries, especially European and African States. They were all, however, concluded before the entry into force of Article 79(3) TFEU. Among them stand out those concluded with African countries such as Algeria,[118] Mauritania,[119] Guinea-Bissau[120] and Morocco.[121]

The agreement concluded with Morocco in 1992 is particularly interesting. It regulates, among other aspects, cross-border movement of persons and transit between both countries.[122] As stated in its preamble, such agreement was concluded in the framework of the cooperation established between both States

[116] See J. Martín y Pérez de Nanclares, "La dimensión exterior del Espacio de Libertad, Seguridad y Justicia: en busca de una acción de la Unión eficaz, coherente y coordinada", in *La dimensión exterior...*, *op. cit.*, pp. 23-48, at p. 35.

[117] It should be taken into account that EU readmission agreements are, in the words of T. Fajardo del Castillo, "elements of a security belt deployed around Europe's external border, and the states parties act as buffer states to contain illegal migration flows in their region" ("Los acuerdos de readmisión de los inmigrantes en situación irregular celebrados por España", in F. Aldecoa Luzárraga and J.M. Sobrino Heredia, coords., *Migraciones y desarrollo: IIª Jornadas Iberoamericanas de Estudios Internacionales*, Marcial Pons, Madrid, pp. 87-102, at p. 95).

[118] Protocol between the Government of Spain and the People's Democratic Republic of Algeria on persons' circulation, signed ad referendum in Algiers on 31 July 2002 (BOE no 37, 12 February 2001).

[119] Agreement between the Kingdom of Spain and the Islamic Republic of Mauritania on immigration, signed in Madrid on 1 July 2003 (BOE no 185, 4 August 2003).

[120] Agreement on immigration, signed in Madrid on 7 February 2003 (BOE no 74, 27 March 2003).

[121] Agreement between the Kingdom of Spain and the Kingdom of Morocco on the movement of people, the transit and the readmission of foreigners who have entered illegally, signed in Madrid on 13 February 1992 (BOE no 100, 25 April 1992; correction of errors published in BOE, 25 April 1992, and BOE no 130, 30 May 1992).

[122] Agreement between the Kingdom of Spain and the Kingdom of Morocco on the movement of people, the transit and the readmission of foreigners who have entered illegally, signed in Madrid on 13 February 1992 (BOE no 100, 25 April 1992).

and the historical ties linking the two peoples, in order to "address the common concern of coordinating efforts to stop the illegal migration flow of foreigners between Spain and Morocco." This agreement does not include any specific provision addressing what has come to be called "hot returns." These are joint controls at the border with Ceuta and Melilla (Spanish cities located in the north of Africa) for the immediate expulsion of foreigners trying to (or who have just managed to) cross the border. The agreement only establishes that "readmission will be effected if it is proven, by any means, that the foreigners whose readmission is requested actually come from the territory of the requested State."[123]

From this perspective, several NGOs have repeatedly denounced that, in practice, this agreement allegedly covers such "hot returns." In response to criticism, Spain amended the Foreign Nationals Act (*Ley de extranjería*) through the First Final Provision of the Organic Act on the Protection of Public Safety,[124] Thus, introducing the so-called "border rejection."[125] Under this provision, foreigners detected at the boundary line of Ceuta or Melilla while attempting to cross the border illegally may be rejected in order to prevent their illegal entry into Spain. This regulation established, however, that border rejections must comply with international human rights law and international protection standards binding for Spain.[126] Besides this express statement included in the law, the ECtHR ruled against Spain on 3 October 2017, considering that the immediate return to Morocco of sub-Saharan immigrants amounted to a collective expulsion of foreign nationals in breach of the European Convention on Human Rights (Art. 4 of Protocol No 4), also violating the right to an effective remedy (Art. 13 of the Convention).[127]

To close, it is perhaps useful to recall that the existence of bilateral readmission agreements between Morocco and immigration-receiving Member States (among which, Spain) has not facilitated the negotiation of the EU Readmission Agreement with Morocco. In this regard, we believe that the gap between the negotiating positions of the parties has been compounded by the lack of a legal void that could have provided an incentive for concluding this Agreement.[128]

[123] Article 2(1), paragraph (2), provides that "[t]he application for readmission shall be submitted within ten days after the illegal entry into the territory of the requested State. It shall contain all available data relating to the identity, the personal documents that the foreigner may possess and the conditions of his/her illegal entry into the territory of the requesting State, as well as any other information available."

[124] Organic Act 4/2015, of 30 March (BOE no 77, 31 March 2015).

[125] Tenth Additional Provision of Organic Act 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (as amended by Organic Act 8/2000, Organic Act 2/2009, Organic Act 10/2011 and Royal Decree-Law 16/2012), which establishes a special regime for Ceuta and Melilla.

[126] Tenth Additional Provision, paragraph (2).

[127] Judgment of the ECtHR, of 3 October 2017, *N.D. and N.T. (Malian and Ivorian nationals) v. Spain*.

[128] L. Jaidi and I. Martín, *Commet faire avancer le Statu avancé UE-Maroc?*, IEMed, 2010, p. 77.

SWEDEN

Pär Hallström*

CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

The ERTA judgement was given at a time, in 1971, when the union was still an economic community whose legislation, with some exceptions in the social field, was directed towards economy and trade. Since then the further creative activity of the ECJ/EUCJ, legislative work by the institutions, and confirmation of those developments together with adaptation to new European political realities and aspirations by successive treaty changes have resulted in the present European Union. A Union with wide aims and objects and whose legislative activity covers most fields including a new focus on rights of the individual. In order not to intrude excessively on national decision making EU institutions shall apply the principles of subsidiarity and proportionality. However, legislation is directed towards internal EU circumstances and their ERTA effects on national foreign affairs are seldom, if ever, reckoned with by EU institutions or by the member states when they decide about EU legislation. A way to better reconcile national foreign policy interests with EU domestic interests of legislating would consequently consist in taking better notice of the external effects of legislating and evaluate whether the principles of subsidiarity and proportionality should be applied in consideration also of those effects.

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In the most recent practice of the EUCJ, opinion 2/15 EUSFTA, the Court makes precisions about the scope of common commercial policy, including into it certain parts of the transport policy and direct investment and offers guidance as concerns other parts of the transport policy and of foreign portfolio investments.

Question 2

Article 3(1) TFEU enumerates areas where the Union shall have exclusive competence and in Article 3(2) it is stated that the Union shall also have exclusive competence [1] when its conclusion is provided for in a legislative act of the Union or [2] is necessary to enable the Union to exercise its internal competence, or [3] in so far as its conclusion may affect common rules or alter their scope.

While Article 3(1) expresses what areas are of EU exclusive competence already with the entering into force of the union treaties, Article 3(2) aims at other fields that occasionally are under EU exclusive external competence. The first option refers to the situation when a legislative act, a regulation or a directive, provides that the Union may conclude an international agreement. From its wording it is obvious that the Union has already materialised its internal competence of the matter, but that, from foreign policy reasons, it expects that an international agreement will be negotiated and concluded concerning that matter in a future. This matter will consequently not be one of common commercial policy nature, as such ones are included in Article 3(1), but it may still be questioned whether the prohibition expressed in Article 207(6), on the requirement that commercial agreements with third states shall not affect the delimitation of competences between the Union and the Member States, does not have a general application.

The second option writes down the opinion of the court 1/76 on the Draft Agreement establishing a European laying-up fund for inland waterway vessels: whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into international commitments necessary for the attainment of that objective, even in the absence of an express provision in that connection. The conditions for applying this option are very strict, however. The Union shall have internal competence of the matter, but it must be impossible for it to effectively exercise that power in the absence of an international agreement with a third state. Those strict conditions have almost prevented the use of this second option.

The third option has been frequently applied, on the contrary. It is the ERTA case written down in Article 3(2), and the EUCJ refers in detail to that case in order to interpret the third option of the article[1]. The European Union must first

[1] E.g. Opinion 2/15 para. 232, Opinion 1/13, ECLI:EU:C:2014:2303, para 74.

have issued secondary law, and when the European Union has exercised this internal competence, it must, in parallel, have exclusive external competence in order to prevent the member states from entering into international commitment that could affect those common rules or alter their scope. In order to find out whether the Union has external exclusive competence in a field it is consequently necessary to make a comprehensive and detailed analysis of the EU law in force in that field in quite a detail, and to estimate their foreseeable future development. For the EU to have exclusive competence it is sufficient that the field is covered by EU legislation to a large extent. The requirement in this third option is still vague despite the case law of the Court, and it is continuously the object of discussion between the member states and the EU institutions.

A general remark concerning the application of Article 3(2) is that the conclusion of an international treaty by the Union, due to the fact that it is difficult to change its contents without the consent of the third party, will have consequences not only on the present EU legislation and the division of competences between the member states and the Union but also on the possibilities and eventual need of the EU to legislate in the field in the future.

Questions 3 and 4

In spite of some similarities of the wording of Articles 3(2) and 216 they have different objects and meaning. While Article 3(2) TFEU deals with the cases where the European Union has exclusive external competence, hence it more directly deals with the division of competences between the Member states and the Union, Article 216(1) sets down the competence where the Union may conclude an agreement with third countries or international organisations alone or together with the member states within the framework of a mixed agreement. Consequently, Article 3(2) deals with the coming of existence and existence of Union exclusive external competence, while Article 216 deals with the exercise of Union external competence. In that way Article 216 puts limits to Union competence in relation to the Member states. Article 216 is applicable both for cases concerning conclusion of agreements by the Union basing itself on its exclusive competence and for cases of shared competence[2] and for cases where other competences accorded by the TFEU serve as a base. Furthermore it is relevant for the exercise of TEU powers.

The Union has had external powers in the fields of the EC since the Rome treaty, but the Lisbon TEU Article 37 clarifies that the Union may also conclude agreements in areas of common foreign and security policy, and this fact is taken account of in Article 216. It states, as a first option of competence, that the Union

[2] Case C-425/13 Commission/Council, ECLI:EU:C:2015:483 para.66.

may conclude an agreement with one or more countries or international organisations where the Treaties (in plural) so provide. It refers both to the provisions in the TEU and to provisions in the TFEU expressly granting the EU powers to conclude international agreements such as e.g. Articles 206 and 207 (commercial policy, an area of exclusive Union competence), 191(4) (environment, an area of shared competence) and 209(2) (development policy, an area of parallel competence).

The second option of competence is where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties. It may appear that this option concerns cases where Union shares competence with the member states (cfr. Opinion 2/15 point 242), or concerns an agreement based on the CFSP, and that the necessity requirement expresses the principle of subsidiarity protecting the member states from excessive Union action. Without a subsidiarity limit, the second requirement, "to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties", would grant the Union very wide powers. From the wording of Article 216 second option it is clear that it is related to Article 3(2) second option, but Article 216 omits the reference to necessity for exercising *internal* competence. This lack is needed in order to include CFSP agreements, but it also makes that the obligation of the member states to refrain from action is less evident.

The third option is that the conclusion of an agreement is provided for in a legally binding Union act. It is a natural consequence of the external competence of the Union stated in Article 3 (2) first option.

The fourth option of Article 216 is where the conclusion is likely to affect common rules or alter their scope. This option is related to the exclusive competence of the union, both internally and externally, when the Union has pre-empted member states competence stated in Article 3(2) third option. The competence of the Union to conclude an agreement is a natural consequence of its exclusive competence confirmed in Article 3(2).

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

The relations between the institutions of the Union shall be exercised with respect of the principles of institutional balance and mutual sincere cooperation (Article 13(2) TEU). Article 218 constitutes, as regards the negotiation and conclusion of agreements, the principal provision to be referred to for the purpose of

demarcation of the powers conferred respectively on the Council and the eventual special committee and on the Commission. The balance of the institutions consists, according to Article 218, in negotiating power by the Commission, in compliance with the negotiating directives drawn up by the Council, and then concluded by the Council, either after obtaining the consent of the European Parliament or after consulting it. The power to conclude international agreements is conferred on the Council subject to the exceptional powers of the Commission in this field. Article 218(4) provides that, when the Council has designated a special committee, the negotiations must be conducted in consultation with that committee. The Council shall act by a qualified majority throughout the procedure except for the cases when the agreement covers a field for which unanimity is required for adopting a Union act as well as for association agreements and accession agreements with candidate countries and accession to the ECHR, Article 218(8). The general interest of the member states is to be taken care of by the Commission while they can emphasise their individual interests in the Council and the special committee.

The Commission must provide the special committee with all the information necessary for it to monitor the progress of the negotiations, such as, in particular, the general aims announced and the positions taken by the other parties throughout the negotiations.[3] The Commission can be required to provide that information to the Council as well.[4] The Council, for its part, is empowered to set out, in the negotiating directives, procedural arrangements governing the process for the provision of information, for communication and for consultation between the special committee and the Commission. However, Article 218(4) does not invest the Council with the power to impose detailed negotiation positions on the Commission, or permit that such detailed binding positions be established within the special committee.[5] Such acts would upset the institutional balance where the negotiator shall enjoy a necessary room of manoeuvre.

The interinstitutional agreement on better law-making provides in its Article 40[6] that the three institutions commit to meet in order to negotiate improved practical arrangements for cooperation and information-sharing within the framework of the Treaties, as interpreted by the CJEU. The institutions are at present negotiating these future practical arrangements. The Court has on two occasions[7] ruled on the right of the European Parliament to be informed

[3] Ibid. para. 66.

[4] Ibid. Para 67.

[5] Ibid. Para 90 and 85.

[6] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.123.01.0001.ENG

[7] Case C-22/15, *Commission/Portugal*, ECLI:EU:C:2016:453; C-263/14, Case C-263/14, *Parliament v. Council* ECLI:EU:C:2016:435

during the negotiation of EU international agreements. Despite the rulings being clear on certain issues of the need to respect the prerogatives of the European Parliament, the exact extent of its rights to be involved in the negotiation and conclusion of EU international agreements[8] is still to be debatable.

Of relevance for understanding the interinstitutional relations as concerns the negotiation and conclusion of EU international agreements are also the Commission recent practice on publishing negotiation mandates as well as the role that national parliaments might play when member states ratify mixed agreements.

Question 6

Questions of provisional application of EU international agreements can only be raised concerning mixed agreements, as its purpose is appliance pending ratification or eventually signing by all the member states. The entry into force of mixed agreements with a third state requires that both the EU and the member states and the third state concerned have ratified it. Regularly the Union awaits the ratification of such agreements until after all the members states have ratified. The decision of provisional application is taken by the Council in accordance with the procedure stated in Article 218 (5), mostly in connection with signing the treaty.

Since the provisional application only concerns the parts of the agreement where EU has exclusive competence, member states do not act upon the provisional application. Recent case law has made it clear that EU treaties do not provide for a legal basis for national ratification procedures of the member states. In case member states would like to express their willingness to apply an international EU agreement on a provisional basis, it ought to be expressed in an act separate from that of the Council[9]. Being an international agreement, international law is applied to all the three categories of parties, and after the parties have signed the mixed agreement they are bound by the rule "to refrain from acts which would defeat the object and purpose of the agreement".[10] Each member state retains its identity as a sovereign state obliged to respect its international obligations, but as member of the European Union it is at the same time bound by the Union principles of sincere cooperation (Article 4(3) TEU) and of unity in the international representation of the Union.

An international treaty is the outcome of a negotiation where the parties have agreed about reciprocal rights and duties that they consider advantageous to them. When it comes to mixed agreements the expected reciprocal balance

[8] Case C-22/15 ibid. para.84.

[9] This requirement was made clear by the CJEU in Case 28/12, *Commission v. Council*, ECLI:EU:C:2015:282.

[10] Article 18, Vienna Convention of the Law of Treaties.

bears upon the whole treaty including matters that are under Union competence and under member state competence. If the Union decides to apply the treaty provisionally or, as may happen, agrees about an interim agreement, it only covers matters that are under Union exclusive competence. As long as the member states have not ratified the mixed agreement it could be argued whether a reciprocal balance is prevailing. However, after the Union has decided about provisional application of the mixed agreement it is binding not only for the Union, but also for its member states as part of Union law. Therefore, in practice, the third state has seldom reason to worry about the exact scope of member state or Union competence. In fact it may be hard to tell even for experts, as the reason to have recourse to a mixed agreement solution may be politically motivated or the extent of Union exclusive competence may expand because of pre-emption in fields of shared competence.

Given this difficulty it may seem paradoxical that member states have accepted provisional application of mixed agreements, as this requires that those parts of such agreements that are under EU exclusive competence are evident. Member states only accept provisional application of those parts and no national ratification process can take place on those specific parts of the agreement.

The question of how to determine which provisions should be applied provisionally is thus intimately tied to three factors: the requirement of reaching a reciprocal balance as understood by the Union and by the third state; determination of what matters of the envisaged mixed treaty belonging to the Union competence that could be object of a decision by the Council on provisory application and what provisions would need a decision by the member states; a political evaluation of a reasonable time span before all member states have ratified the treaty, a factor that has to do with the (des)interest of some member states of certain provisions and the constitutional complexity of certain states.

Historically the role of the European Parliament has been very modest when it comes to the conclusion of commercial treaties, and the provisory application of treaties has mostly concerned their trade parts. The question of giving the Parliament a more prominent role can be justified because of the breadths of newer treaties, the extension of the notion of commercial policy, and of the fact that their provisory application is decided by the Council by majority. A stronger role of the Parliament would therefore seem reasonable from democratic viewpoint. However, it is involved in the negotiation process via its right to be informed at all stages, and it may informally express its opinions. In this way the Commission and the Council can take account of the positions of the Parliament, and prepare a result that would be acceptable by it at the ratification stage.

Question 7

Mixed agreements between the Union and the member states and a third state have an entry into force clause stating that they can only enter into force after all parties have deposited their respective instrument of ratification or approval. Therefore a member state may block the entry into force of the whole agreement, and not only the parts under member state competence, by its refusal to ratify. In this way the state may make the main majority rule in the Council out of play (Article 218(8)). A way of avoiding the result of such an act would be to conclude an EU/third state agreement comprising the areas of Union exclusive or shared competence. The result of the latter case is that the Council expresses its willingness to let the Union exercise its shared external competence, while it at the same time the consequence of the international agreement should not lead to internal competence being transferred into exclusive EU competence. Such a decision would of course need an evaluation of the full political context.

Question 8

Given that the general rule says that the Council acts by a qualified majority in the process of negotiation and conclusion of international agreements the democratic principle demands that the Parliament shall have a decisional role in order to compensate the diminished power of the member states and their parliaments. This demand is called for when decisions are to be taken that may affect parliamentary powers in particularly the legislative or financial and taxation fields. Major agreements aiming at cooperation where decisions are to be taken concerning behind the border measures and setting up a specific institutional framework for that purpose affect parliamentary interest to such an extent that consent by the European Parliament is needed and so are agreements that may bind future decisions on Union financial resources.

Question 9

Article 218(9) takes into consideration the variety of agreements entered into by the Union and the need of political room of manoeuvre of the Commission for TFEU agreements as well as of the High Representative for TEU agreements and of a final political control by the Council.

As to those new agreements in the commercial field, that set up an arbitral dispute settlement system, the political evaluation is replaced by a legal one for re-establishing economic disequilibria caused by the failure by one of the parties to live up to its obligations.

Question 10

When a body set up by an agreement (mixed committee) has been granted power to adopt legally binding acts, the Council shall decide on the positions to be taken by Union. The Commission or the High Representative have the power to make propositions to the Council (Article 218(9)). However, such acts supplementing or amending the institutional framework of the agreement constitute exceptions.

This article has been used on a more regular basis since the entry into force of the Lisbon Treaty. It has enforced the role of the principle of sincere cooperation and the need for the Union to speak with one voice at international level. One of the consequences of the enhanced use of this article is that cases have been brought to the CJEU concerning its interpretation.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16

The Opinion 2/15 (EU-Singapore Free Trade Agreement) of 16.5. 2017, concerning the first one of the 'new generation' of EU free trade agreements, gives an account of what the CJEU considers is included in the concept of common commercial policy. Those agreements contain, apart from traditional trade matters, also such ones as sustainable development, labour standards, the protection of intellectual property rights, and the more controversial one of investment protection. In order to determine the scope of the common commercial policy the CJEU departs from the wording of Article 207(1), and it continues by setting down a criterion saying that for an EU act to belong to the common commercial policy it is not enough that it is liable to have implications for trade with one or more third states, it must essentially intend to promote, facilitate or govern such trade and have direct and immediate effects on it.

Applying that criterion the Court investigates the commitments of the EUSFTA relating to (i) market access, (ii) investment protection, (iii) intellectual property protection, (iv) competition and (v) sustainable development. When it comes to issues touching upon legislation in fields such as financial services, non-tariff barriers to trade and investment in renewable energy generation, government procurement, investment protection, social protection of workers, and environmental protection the Court verifies that the agreement only contains obligations about national treatment or eventually encourages the mutual recognition of standards or that the parties are members of international conventions laying down basic rules. The Court reaffirms that commercial agreements must not harmonise national legislation. They shall not affect the delimitation of competences between the Union and the Member States (para. 164 referring to Article 207(6)). On those basis the Court finds that portfolio investments are

not included in the common commercial policy, and that therefore the regulation of those kinds of investments are not part of EU exclusive competence.

Question 18

International law on protection of investments has been developed via ICSID case law, including a rudimentary principle of good governance. It is a positive feature of the dispute settlement mechanism of the 'new generation' of free trade agreements that it has ties with ICSID contributing to a common global investment law.

Certain of the clauses on settlement of disputes between companies and states within the framework of BITS have been criticised for not being clear enough. Given the inclusion of protection clauses in the 'new generation' of EU free trade agreements it is of interest to have the question of their compatibility with the EU legal order tried, and the CJEU may have an opportunity to do so in its Opinion 1/17 lodged by Belgium in September 2017.

A reasonable way forward in order to unite the need of opening up for multilateralism of future trade and investment and the complexity of EU and member state interests and competences in the investment field is to lift out investments from the EU free trade agreements, permitting the EU to conclude special investment protection agreements with third states, a proposal presented by the Commission.[11]

Question 19

According to Article 8.21(1) CETA the investor delivers to the European Union a notice requesting a determination of the respondent. The investor shall identify the measures in respect of which the investor intends to submit a claim (2). The European Union determines whether the EU or a Member State shall be the respondent (3). If the measures identified in the notice are exclusively measures of a Member State, the Member State shall be the respondent, but if the measures identified include measures of the EU, the EU shall be respondent (4). If the European Union or a Member State is the respondent, neither the EU nor the Member State may assert the inadmissibility of the claim (6).

The distribution of liability of those new generation agreements follows the practice developed by the EU within the framework WTO dispute settlement in spite of the fact that the dispute settlement of the WTO is of intergovernmental nature.

[11] http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy/

Question 20

Already before the Lisbon Treaty the EU included the objectives of the development policy, such as sustainable development and good governance, into the common commercial policy when it decided on unilateral measures, e.g. regulations on generalised preferences. Before the Lisbon Treaty the EU also included the objectives of the common foreign and security policy, such as to develop and consolidate democracy and respect for human rights and fundamental freedoms, into many of the mixed trade agreements between the EU and its Member States on the one part and a third state on the other part.

The Lisbon Treaty brought together and added to the principles and objectives expressed in earlier versions of the Union Treaties for various policies, such as foreign policy, commercial or environmental policy, into an introductory Article 21 TEU, on general provisions on the Union's external action. They are to be respected and carried out by the Union when it implements its external action in different areas (Article 21(3) TEU).

Article 207(1) TFEU reminds about this obligation stating that "the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action", and Article 205 TFEU makes clear that those principles and objectives are those formulated in Article 21. The EUCJ has drawn the conclusion from this state of things in its opinion 2/15, and it found that TFEU Treaty differs appreciably from the EC Treaty previously in force, in that it includes new aspects of contemporary international trade in that policy (para.141), and that one of the features of that development is the obligation of the EU to integrate those objectives and principles into the conduct of its common commercial policy (para.143). The CJEU does not only limit itself to Article 21, however, it means that the objectives enumerated in that article are added by account taken of the objectives of Articles 9 to 11 TFEU, having general application. It is on those bases that the CJEU finds that the provisions on social protection of workers and on protection of the environment of the EUSFTA are included in the common commercial policy (para. 146). That relevant chapter of the EUSFTA has furthermore direct and immediate effects on the trade between the parties as it firstly encourages the parties not to reduce the level of social and environmental protection below the standards laid down by international conventions or apply them in a protectionist manner and secondly it reduces the risks of major disparities between the costs of production in the parties (para.157-159). The CJEU underlines that the parties do not have the intention to harmonise the labour or environment standards but to regulate trade (para.165, 166).

THE NETHERLANDS

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CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

As a general first remark, it is important to note that the Netherlands[1] aims to be an 'EU-law abiding citizen'. The so-called 'Guidelines for external action by the Union and its Member States',[2] of the Ministry for Foreign Affairs are meant to guide the decisions related to the division of competences, the position in international fora and the conclusions of international agreements. The very first sentence in that document is that the EU Treaties are leading in all cases. While the Netherlands, nevertheless, frequently participates in debates on the actual interpretation of the treaty provisions, it is important to keep this starting point in mind.

Recently, the AETR/ERTA doctrine played a role again in two opinions by the CJEU: Opinion 2/15 and Opinion 3/15.[3] Opinion 2/15 concerned the draft Free

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[1] In this report, 'the Netherlands' is used to refer to 'the government of the Netherlands', unless otherwise indicated.

[2] 'Vuistregels voor extern optreden van de EU en haar lidstaten', Ministry for Foreign Affairs, 2013; http://www.minbuza.nl/binaries/content/assets/ecer/ecer/import/icer/handleidingen/2013/vuistregels-voor-extern-optreden-van-de-eu-en-haar-lidstaten-gbvb-icer-versie.

[3] Opinion 2/15, Singapore ECLI:EU:C:2017:375; Opinion 3/15, Marrakesh Treaty, ECLI:EU:C:2017:114.

Trade Agreement between the EU and the Republic of Singapore (EUSFTA). The CJEU held that commitments concerning services in the field of transport; maritime transport; rail transport; road transport; internal waterways transport and commitments concerning public procurement within the field of transport all fall within the exclusive competence pursuant to Article 3(2) TFEU as a codification of the ERTA doctrine[4]. Opinion 3/15 addressed the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled. The CJEU held that its conclusion may affect or alter the scope of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (within the meaning of Article 3(2) TFEU) and therefore falls within the exclusive competence of the European Union.

The ERTA effect is not only relevant with regard to the competence of the Union to conclude an international agreement, but also with regard to positions to be adopted within international organisations (within the meaning of Article 218(9) TFEU) (for example Council Decision (EU) 2017/449 of 7 March 2017 on the position to be adopted, on behalf of the European Union, in the 60th session of the Commission on Narcotic Drugs on the scheduling of substances under the Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol, and the Convention on Psychotropic Substances of 1971[5]).

[4] The Court has made it clear in case C-114/12 Commission v Council (Negotiation of a CoE Convention), paras 65-67 and in Opinion 1/13 (Hague Convention on Child Abduction) that Art. 3(2) and ERTA form a continuum, since 3(2) tries to give a summary codification of ERTA. From this, the Court draws the conclusion that it should go on to interpret Art. 3(2) in the light of its ERTA doctrine. In recent case law (also Opinion 2/15) it is striking that the all-encompassing summary of the different ERTA cases given in Opinion 1/03 (new Lugano Convention) is invoked repeatedly.

[5] The Commission on Narcotic Drugs (CND) regularly amends the lists of substances that are annexed to the United Nations (UN) Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol (the 1961 UN Convention) and to the UN Convention on Psychotropic Substances of 1971 (the 1971 UN Convention) on the basis of recommendations of the World Health Organisation (WHO). All EU Member States are signatories of the 1961 UN Convention and to the 1971 UN Convention. The Union is not a signatory of the conventions. 12 Member States are currently members of the CND with the right to vote. The Union has an observer status in the CND. Until recently no positions to be adopted on behalf of the European Union in the CND were established. However, this year, the European Commission rightfully proposed (see COM(2017) 72 final) a Council Decision on the basis of article 218(9) TFEU on the position to be taken on behalf of the EU in the CND, because changes to the schedules of the 1961 and 1971 UN Conventions have direct repercussions for the scope of application of Union law in the area of drug control for all Member States. Article 1 of Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking states that, for the purposes of the Framework Decision, "drugs" shall mean any of the substances covered by either the 1961 UN Convention or by the 1971 UN Convention. Framework Decision 2004/757/JHA therefore applies to substances listed in the Schedules

Question 2

Article 3(1) TFEU provides in which areas the EU has "a priori" exclusive internal competence. On the basis of Article 3(2) TFEU the Union has an "implied" exclusive competence for the conclusion of an international agreement when 1) its conclusion is provided for in a legislative act of the Union; or 2) it is necessary to enable the Union to exercise its internal competence; or 3) in so far as its conclusion may affect common rules or alter their scope.

In recent cases the Netherlands – in line with the Council's position –argued in favour of a more restrictive reading of Article 3(2) TFEU. In particular the application of the last ground of Article 3(2) TFEU (the ERTA doctrine) gives rise to many discussions among the Union institutions. It follows, however, from the case-law of the CJEU that the Union has exclusive competence if there is a risk that common Union rules might be affected by international commitments undertaken by the Member States, or that the scope of those rules might be altered, when the scope of the international commitments fall within the scope of Union rules[6]. Hence, to assess whether the Union has exclusive competence to conclude an international agreement "*a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the EU law in force*" has to be delivered. That analysis must take into account the areas covered, respectively, by the rules of the EU law and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish.[7] The CJEU applies Article 3(2) TFEU widely: 1) a finding that there is a risk that common rules might be affected/altered in scope does not presuppose that the area covered by the international commitments and that of the EU *coincide fully*, it is sufficient if the commitments fall within an area which is already covered *to a large extent* by such rules;[8] 2) It is also necessary to take into account *not only the current state of EU law* in the area of question, *but also its future development* insofar as that it is foreseeable at the time of the ERTA-analysis;[9] 3) EU rules may be affected by international commitments *even if there is no possible contradiction* between those commitments

to the 1961 UN Convention and the 1971 UN Convention. Thus, any change to the schedules annexed to these conventions directly affects common EU rules and alters their scope, within the meaning of Article 3(2) TFEU.

[6] See Cases C-22/70 (ERTA-AETR), paras 22 and 30 and Case C-114/12, para. 68.

[7] See Opinion 3/15, para. 108; Opinion 1/13, para. 74 and Case C-66/13, para. 33

[8] See Opinion 1/13, paras. 72-73 and Case C-66/13 paras 30-31.

[9] See Opinion 1/03, para. 126 and Opinion 2/91, para. 25.

and the EU rules;[10] 4) the fact that an international agreement contains *minimum requirements* does not necessarily mean that it cannot lead to exclusive external Union competence.[11]

The position of the Netherlands is that the third option of Article 3(2) cannot give rise to a Union exclusive external competence, if the Union has not exercised its competence internally. This follows from the case law of the Court[12] and has recently been reaffirmed by the CJEU in Opinion 2/15.[13] In its reasoning on transport services, the Court found that the EU, by adopting internal legislation, had adopted common rules that were likely to be affected by the Singapore FTA. The legislation for maritime transport consists of one (three-page) Regulation,[14] which deals with a few aspects of maritime transport only. On this – decidedly slender – basis the Court found that the *entirety* of the maritime obligations in the agreement succumb to the effect of Article 3(2). The Court followed a similar logic for the rail and road transport provisions of the agreement.

Interestingly enough perhaps, the Netherlands supports the view that *supporting or supplementing competences* covered under Article 6 TFEU can lead to an exclusive competence under the second option "necessary to enable the Union exercise its internal competence" and third option "may affect common rules or alter their scope".[15] However, the room of application under the second and third option for such supporting competences is limited. That an internal competence may only effectively exercised at the same time as the external competence is a rather rare option and requires that the international agreement is necessary to attain objectives which cannot be attained by establishing autonomous rules.[16] And the latter option would require that the international agreement affects common rules established through supporting competences, which is also rather unlikely.

[10] See Opinion 1/13, para. 86; Opinion 2/91, paras. 25 and 26.

[11] The CJEU has clarified in Case C-114/12 (*Commission* v. *Council*) that the exception with regard to minimum requirements referred to in Opinion 2/91 concerned a situation in which both the EU common rules and the international lay down minimum requirements. See also Opinion 1/13, para. 120 and further.

[12] See Opinion 2/92, para. 36.

[13] See para. 229-235.

[14] Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ L378 of 31 December 1986, p. 1.

[15] See the 'Vuistregels voor extern optreden van EU en haar lidstaten', *op.cit.* n.2.

[16] For instance, Case *Commission v. Germany* (Open Skies), ECLI:EU:C:2002:631, paras.86-89 but this inextricable link is not mentioned in the Lugano Convention Opinion 1/03, ECLI:EU:C:2006:81 or has been addressed in post-Lisbon case law.

The AETR-ERTA doctrine cannot be applied to a situation where the EU rule referred to a provision of primary law, as clarified by the Singapore Opinion and when it is not a rule of secondary law in the exercise of an internal competence that has been conferred upon the EU by the Treaties. The CJEU has clarified that, in the light of the primacy of the EU Treaties over acts adopted on their basis, those acts, including agreements concluded by the European Union with third States, derive their legitimacy from those Treaties and cannot have an impact on the meaning or scope of the Treaties' provisions.

The Netherland's government holds that in certain situations competences remain exclusively in the hands of the Member States, with example that such matters are not covered by internal rules (non-agricultural appellations and indications, and fees in regard to the Lisbon agreement on appellations of origin and geographical indications),[17] or include rules on diplomatic protection (Article 9.28 of the EUSFTA in the 'Investor-State Dispute Settlement' ('ISDS')). In the Singapore Opinion, the Court rebutted the Dutch argument supported by Germany and Austria on property protection,[18] while the diplomatic protection rules were not addressed at all by the Court. In contrast to the Court, AG Sharpston did raise it in her opinion and agreed with the Member States that the EU has no competence on diplomatic protection (despite its legal personality and diplomatic activities through for instance the Union Delegations).[19]

Overall it remains difficult to compare existing legislation with the norms covered by the respective international agreement, assessing the extent of coverage, the risk to be affected and future developments. This infuses legal uncertainty in an area aimed to achieve legal certainty by codification of EU external relations case law.

Question 3

The CJEU has applied the second ground "where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties" in Opinion 2/15. It held that Section A of Chapter 9 of the draft FTA with Singapore, in so far as it does not concern foreign direct investments, falls within the competence relating to the internal market *that is shared* between the Union and the Member States pursuant to Article 4(2)(a) TFEU. Subsequently, the Court held that "*The competence conferred on the Union by Article 216(1) TFEU in respect of the conclusion of an agreement which is "necessary in order to achieve, within the framework of the Union's policies,*

[17] Case C-389/15 *Commission* v. *Counci*l, currently pending, the Netherlands has intervened on the side of the Council.

[18] Opinion 2/15 para.107.

[19] Opinion of AG Sharpston, para. 537.

one of the objectives referred to in the Treaties' is also shared, since Article 4(1) TFEU provides that the European Union 'shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6', which is the case here. (emphasis added)".

It follows that the second ground of Article 216(1) TFEU does not fully coincide with the second ground of Article 3(2) TFEU (conclusion an international agreement necessary to enable the Union to exercise its internal competence): the EU may conclude an international agreement with one or more third countries when this is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, without being necessary to enable the Union to exercise its internal competence.

With regard to the restriction to the treaty-making powers explicitly mentioned in both Treaties, the Netherlands holds that this provision is somewhat unclear in the light of the treaty-making practice that the Union has followed hitherto. It aims to continues to follow the classic ERTA doctrine. This entails that the Union is equipped with international personality according to the Treaty (presently Article 47 TEU) and, since this was a general provision, this meant "that in its external relations the Community [now the Union] enjoys the capacity to establish contractual links with third countries over the whole field of [its] objectives...." There is reason to assume that ERTA in this respect is still good law, since Article 47 is identical to and has a comparable place in the system of the Treaties as the old article on personality of the EEC. Seen in that light, the following statement from the Court retains its full authority: "The Court has concluded *inter alia* that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion." Therefore, the seemingly exhaustive reference to treaty-making powers to "when the Treaties so provide" in Article 216 in the end may remain merely illustrative.[20]

Question 4

In points 171-172 of the Opinion in Case 2/15 the Court mentions Article 216 TFEU in the context of the *ERTA* case law noting that,

> *"171. In line with that case-law, Article 216 TFEU grants to the EU competence to conclude, inter alia, any international agreement which 'is likely to affect common rules or alter their scope'.*

[20] The whole paragraph is largely based on P.J. Kuijper in F. Amtenbrink et al. (eds.), Kapteyn/VerLoren van Themaat, *Law of the European Union*, Kluwer Law, 2017, forthcoming.

172. Under Article 3(2) TFEU, the competence of the European Union to conclude such an agreement is exclusive".

Indeed, the language of Articles 3(2) and 216(1) TFEU seems to suggest that there is a natural link between the two. Article 3(2) provides that:

"*[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is* provided for in a legislative act of the Union *or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may* affect common rules or alter their scope".

Article 216(1) states that:

"*[t]he Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope*".

We would, however, point out the following. Apart from the underlined options featuring in both provisions, Article 3(2) gives external competence to the Union when the conclusion of the agreement "*is necessary to enable the Union to exercise its internal competence*". In contrast, Article 216(1) does not provide for this option, but allows for the conclusion of an international agreement when this is "*necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*".

While Article 216(1) can be interpreted in the light of the principle of conferral (see reply under Question 3), it cannot be a (nearly open-ended) extension of Union competence; a link with an existing internal competence remains necessary. There is a link because Article 216(1) TFEU sets out when the EU has *external competence* to conclude an international agreement with one or more third countries and Article 3(2) TFEU sets out when the Union has an *exclusive* external competence for the conclusion of an international agreement. For example: If a legally binding Union act provides for the conclusion of an international agreement (third ground of Article 216(1)TFEU) the EU will have exclusive external competence pursuant to the first ground of Article 3(2) if that legally binding act is a "legislative" act.[21] The fourth ground of Article 216(1) TFEU appears to correspond with the third ground of Article 3(2) TFEU: if the conclusion of an international agreement is likely to affect common rules or alter their scope (fourth ground of article 216 TFEU), then the Union has exclusive

[21] See also the opinion of AG Sharpston in Opinion procedure 2/15, para. 68.

external competence according to the third ground of Article 3(2) TFEU.[22] As stated above, the second ground of Article 216(1) TFEU does not fully coincide with the second ground of Article 3(2) TFEU.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

The system installed by Article 218(4) provides the Commission with a considerable scope to negotiate, but subject to oversight by the Members of the Council. This can lead to tensions between the negotiating teams and the special committees of the Council. While this could be regarded as natural and linked to the different positions of each actor, it is striking that Member States' representatives on such committees can be upset about relatively minor instances, e.g. believing that the Commission is constantly scheming to withhold information. From a more objective perspective, it may very well be that the chief negotiator was simply too busy and forgot about certain information.

Nevertheless, the Netherlands considers the guidance given by the CJEU in Case C-425/13 (*Gas Emissions*)[23] important. In that case the CJEU clarified that the Commission must provide the special committee all the information necessary for it to monitor the progress of the negotiations. The Commission can be required to provide that information to the Council as well.[24] Furthermore, the CJEU has held that article 218(4) TFEU must be interpreted as empowering the Council to set out, in the negotiating directives, procedural arrangements governing the process for the provision of information for communication and for consultation between the special committee and the Commission.[25] However, the special committee/Council cannot establish detailed negotiating positions of the Union.[26] Thereby, the Court essentially sought to maintain the balance between the Institutions. On the one hand, the Commission is granted considerable latitude in establishing negotiating positions while, on the other hand, the Members of the Council may impose procedural restraints, but not dictate the substance of the negotiating positions. In practice, this leaves the Commission with some leeway in determining its tactics, whilst being aware of the red lines drawn by Member States.

[22] See also Opinion 2/15, para. 171-172.
[23] Case C-425/13, *Commission v. Council (Gas emissions)* (Grand Chamber), EU:C:2015:483, points 66-90.
[24] Paras. 66-67.
[25] Para. 78.
[26] Paras 85-93.

In practice, both the Member States and the Commission tend to stick to the guidance of *Gas Emissions*. There are some perceptible differences between different policy areas. For example, in trade matters DG TRADE has a relatively strong position *vis-à-vis* the Member States. In development policy, the Commission tends to be somewhat more reverent.

The Netherlands further stresses the importance of earlier discussions on the mandate before the actual negotiations start (cf. Case C-687/15). These discussions include for instance the nature of the agreement (EU-only or mixed), but the Commission usually leaves out a proposal for a substantive legal basis. With the Council, the Netherlands agrees that a proposal on a substantive legal basis is required from the outset as it largely defines the subsequent decisions. Finally, with regard to trade agreements, the Netherlands is largely satisfied with the sharing of information during the negotiations.

Question 6

Provisional application was originally conceived to prevent having to wait for sometimes time consuming national ratification procedures in relation to provisions for which the Union enjoys an exclusive competence anyway. This used to be the case in particular for fisheries agreements with yearly quota negotiations and comparable agricultural agreements. Other reasons are that existing agreements need to be bridged (e.g. fishery rights), or there may be budgetary reasons. The provisional application is restricted to the Union competences in a mixed agreement, as some/many Member States have no procedure for provisional application of treaties in their laws on treaty-making. It is therefore standard practice that only the EU may provisionally apply and agreement. In that respect it is necessary to determine which provisions of a mixed agreement are within the EU's competence, although the nature of the Union competence (exclusive, shared, parallel, supportive, CFSP) is not decisive.[27] The Netherlands has followed this practice, although more recently (during the procedure to approve and ratify the Association Agreement with Ukraine in particular) the question came up to what extent Parliament has a say in those parts of an agreement that are exclusively in the hands of the Union (see further below).

The scope of the provisional application of bilateral mixed agreements broadened over the years, often going beyond trade-related elements into areas ranging from economic cooperation, political dialogue to even CFSP.[28] In order to accom-

[27] See also the response of the Dutch Government to a similar question from the Dutch Parliament: https://www.rijksoverheid.nl/documenten/kamerstukken/2016/03/25/beantwoording-vragen-over-de-voorlopige-toepassing-van-het-associatieverdrag-tussen-de-eu-en-oekraine

[28] See for example the provisional application of the EU-Ukraine AA (combined reading of the Council Decision 2014/295/EU and Council Decision 2014/668/EU) (on this issue, see the comments of G. Van

modate the concerns of several Member States that the scope of the provisional application would also touch upon Member State competences, the Council decisions on signature and provisional application now state that the listed provisions shall only provisionally apply "to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy".[29] Several Council decisions even explicitly state that "the provisional application of parts of the Agreement does not prejudge the allocation of competences between the Union and its Member States in accordance with the Treaties."[30] It is thus clear that the scope of the provisional application of mixed agreements provides little insight into the division of competences between the EU and its Member States.[31]

However, the fact that a provision falls under Union competence and *can* be provisionally applied does not imply that it *has to be* provisionally applied – there is an element of political choice here, to be made by the Council on a case-by-case basis and which may vary per international agreement.

As to the second sub-question, the institutional role of the European Parliament within the field of external relations consists of two separate functions. The Parliament has a role in providing its consent (or, in some cases, its opinion) under Article 218(6) TFEU. At the same time, the Parliament has a general right of oversight (the somewhat wrong English translation of Article 13 TEU speaks of "*control*"). The Parliament's right to be "*immediately and fully informed at all stages of the procedure*" (Article 218(10)) is a reflection of this right of oversight. This right must be interpreted liberally.[32] This being said, the institutional balance

der Loo, *Ibid*). For other examples, see the scope of the provisional application of the EU-New Zealand Partnership Agreement on Relations and Cooperation (Council Decision 2016/1970/EU, OJ, 2016, L 304/1) and the Enhanced Partnership and Cooperation Agreement with Kazakhstan (Council Decision 2016/123/EU, OJ, 2016, 29/1).

[29] See for example the Council decisions mentioned in the previous note.

[30] See for example Council Decision 2016/2232/EU on the signing on the EU-Cuba Political Dialogue and Cooperation Agreement (OJ, 2016, L 337/1). A similar formulation can also be found in Council Decision 2017/38 on the provisional application of CETA (OJ, 2017, L 11/1080). The Council and Member States also adopted numerous Statements and Declarations to the Council minutes in which they emphasise that the provisional application of the agreement in several areas such as transport and moral rights does not prejudge the allocation of competences between the EU and the Member States. On the various statements, see G. Van der Loo, "CETA's signature: 38 statements, a joint interpretative instrument and an uncertain future", *CEPS Commentary*, 31 October 2016.

[31] Adopted from G. Van der Loo and R.A. Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Options', *Common Market Law Review*, 2017, No. 3, pp. 735–770.

[32] See Cases C-658/11, *Parliament v. Council (Mauritius)*, EU:C:2014:2025, points 77-81 and 86 and C-263/14, *Parliament v. Council (Tanzania Agreement)*, EU:C:2016:435, point 68. Currently (June 2017) negotiations are underway between the Council, the EP, the Commission and the High Representative to negotiate arrangements to give effect to Article 218(10) (see the Interinstitutional Agreement on Better Law-Making, OJ L 123 of 12 May 2016, p. 1, par. 40).

provided for by the Treaties foresees no role for the Parliament in the adoption of the Decisions of signature and provisional application. In the light of the constitutional experience of other jurisdictions this is not exceptional: for example, in the United States the president may conclude international agreements "*by and with the Advice and Consent of the Senate*"[33] – the House of Representatives plays no constitutional role in the procedure. Nevertheless, in practice, there may be instances where the actual provisional application is postponed until the European Parliament has given its consent. See in this regard, for example the Council Conclusions on CETA:

> *"The Council adopted the Decisions authorising the signature and provisional application of CETA between the European Union and its Member States and Canada and agreed to forward the agreement to the European Parliament for its consent.*
>
> *The Council agreed that, pursuant to Article 1.2 of the Council Decision on provisional application, the date by which the notification referred to in Article 30.7(3) of the Agreement is to be sent to Canada shall be 17 February 2017, provided that the European Parliament has given its consent to the Agreement."*[34]

Although this is not a standard practice, it might be useful in politically sensitive cases/cases where it is unclear whether the European Parliament will give its consent to an international agreement.[35] In the case of the CETA, the Netherlands has supported the proposal of Commissioner Malmström to postpone the provisional application until after the European Parliament had given its consent.

Question 7

The question of non-ratification of mixed agreements by one or more Member States has recently been analysed extensively by one of the Dutch rapporteurs.[36] If a Member State does not ratify an agreement between the Union and its Member States on the one hand, and a third state on the other (mixed agreement), then

[33] Article II:2 of the U.S. Constitution.

[34] NB: The Council decided to postpone the date of notification of provisional application, until after the consent of the European Parliament. However, it should be noted that the Council had already adopted its decision on provisional application pursuant to article 218(5) TFEU.

[35] See for example Council decision 2012/15/EU of 20 December 2011 repealing Council Decision 2011/491/EU on the signing, on the signing, on behalf of the European Union, and the provisional application of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco. The Council repeal its decision on the signature and provisional application of the agreement with Morocco, after the European Parliament refused to give its consent.

[36] G. Van der Loo and R.A. Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Options', *Common Market Law Review*, 2017, No. 3, pp. 735–770.

that mixed agreement cannot enter into force; as at least in the case of bilateral mixed agreements the ratification by all is usually required. [37] In principle, the non-ratification by a Member State does not directly affect the provisional application of parts of a mixed agreement between the Union and the third state in question. However, if a political event gives rise to the situation that an agreement runs aground due to the lack of ratification by a Member State, consultation should take place, preferably, at the level of the European Council in order to seek to find a solution.[38] This includes, first, an analysis of the reasons for this step (non-ratification) and of the degree of finality of it. The Dutch referendum on the Association Agreement with Ukraine provides an example: the (factually correct or not) concerns of part of the electorate ('agreement will lead to Ukraine's accession'/'it will lead to military co-operation', etc.) eventually have been solved through an additional declaration to the agreement. While the position of the Netherlands is that the solution found is legally sound, the rapporteurs also see reasons to be more critical.[39]

Only if it is evident that a Member State cannot and will not ratify the agreement because of imperative reasons one should draw the conclusion that the ratification procedure has failed. Even then, the Council will be loath to draw that conclusion unless the government of the Member State concerned has notified it of the existence of such imperative reasons.[40]

One can claim that, as long as not all the parties have ratified the agreement, the provisional application can continue indefinitely.[41] The clauses on

[37] See for the response of the NL Government to similar questions https://www.rijksoverheid.nl/documenten/kamerstukken/2016/10/11/beantwoording-kamervragen-over-de-voorlopige-toepassing-en-ratificatie-van-het-vrijhandelsverdrag-tussen-de-eu-en-canada. ; https://zoek.officielebekendmakingen.nl/ah-tk-20152016-1401.html; and
https://zoek.officielebekendmakingen.nl/dossier/21501-02/kst-21501-02-1572?resultIndex=6&sorttype=1&sortorder=4

[38] See for example the "Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine of the other part" (http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-euco-conclusions-ukraine/) which was adopted after the outcome of the Dutch Referendum on 6 April 2016 on the bill approving the EU-Ukraine Association agreement.

[39] These reasons are spelled-out in R.A. Wessel, 'The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement', *European Papers, European Forum*, 22 December 2016, pp. 1-5.

[40] See, in this regard, Statement from the Council (no. 20) regarding the termination of provisional application of CETA: "*If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or <u>following</u> the completion of other constitutional processes <u>and formal notification by the government of the concerned state</u>, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures*" (emphasis added).

[41] This section and the following one are partly based on Van der Loo and Wessel, *op.cit.* n.31.

provisional application in mixed agreements or the respective Council decisions do not impose a 'deadline' on the provisional application. However, the provisional application of (parts of) an agreement provides less legal certainty compared to the full entry into force of the agreement, especially for the third country, because the provisional application can in several cases be terminated immediately, contrary to the termination clauses of (mixed) agreements which require a notice of six months or more. However, several mixed agreements do include a specific procedure for the termination of the provisional application, including a notice comparable to the one foreseen in the respective termination clause.

The situation would change if a Member State would deposit a notification that it will not ratify the agreement. As argued above, considering the 'entry into force clauses' of (bilateral) mixed agreements (which require the ratification of "all" the contracting parties), this would imply that the ratification procedure of the agreement has failed and that the agreement cannot be concluded. Although mixed agreements or their respective Council decision do not set a time-limit on the provisional application, they often state that the provisional application can only take place "pending its entry into force" or "pending the completion of the procedures for its conclusion".[42] Therefore, the failure of the ratification procedure would require the termination of the provisional application.[43]

The Netherlands takes the view that the provisional application should not go on indefinitely if it becomes clear that one of the parties does not intend to ratify any longer.[44] A situation which could arise in the event of non-ratification by a Member State is still unprecedented. However, should such a situation occur, the Council needs to take a decision on the provisional application of an agreement, taking into account that a continuation of the provisional application would not be consistent with the fact that the agreement will never enter into force. [45] After all, an agreement is provisionally applied pending the entry to force of an agreement. See in this regard, Statement no. 20 of the Council regarding the termination of provisional application of CETA: "*If the ratification of CETA fails*

[42] See for instance the Council decisions mentioned in note 106 with regard the EU-New Zealand Partnership Agreement on Relations and Cooperation and the EU-Kazakhstan Enhanced PCA.

[43] Although not a mixed agreement, this was what happened with the so-called SWIFT agreement banking data transfers to the USA when it became clear that ratification was not possible due to a negative vote in the European Parliament. See also J. Santos Vara, 'Transatlantic counterterrorism cooperation agreements on the transfer of personal data: a test for democratic accountability in the EU', in E. Fahey and D. Curtin (eds.), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders*, Cambridge University Press, 2014, pp 256-288 at 271.

[44] This also follows from the VCLT. Moreover, a provisionally applied treaty is a weak treaty, as any party can withdraw from it instantaneously (also VCLT).

[45] See: https://zoek.officielebekendmakingen.nl/ah-tk-20152016-1401.html

permanently and definitively because of a ruling of constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures"[46].

The provisional application of an agreement can only be terminated by a notification from the EU to the third party concerned, after a decision has been taken by the Council. The European Parliament should be informed immediately. The Netherlands has a nuanced position on this.

Question 8

These alternatives were included in the wording of the treaty-making provisions pre-Lisbon. For agreements establishing a 'specific institutional framework' already pre-Lisbon the question arose how to differentiate this category from association agreements. One view interprets this as covering agreements on the Union's participation in international organisations, which establish complex institutional structures but are not association agreements.[47] A broader reading was advocated by the European Parliament but has not yet been confirmed by a judicial interpretation.[48] And on the basis of the condition "important budgetary consequences" in subparagraph iv) the Court has established that it is established with respect to the size of the budget as a whole and not just a chapter of it and whether the expenditure is spread over one or several years and a comparison can be made for a sectoral agreement between the expenditure entailed by the agreement and the whole of the budgetary appropriations for the sector in question, taking the internal and external aspects together.[49]

[46] See: http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf

[47] I. MacLeod, I.D: Henry and S. Hyett, *The External relations of the European Communities*, Clarendon Press, Oxford, 1996, p.102. K. Lenaerts and P.Van Nuffel, European Union Law, Sweet and Maxwell, 3rd edn.2011, para.26-012. The WTO Agreements provide an example.

[48] In Case-566/08, the European Parliament challenged the adoption of the Council Decision 2008/70/EC of 29 September 2009 on the conclusion of the Southern Indian Ocean Fisheries Agreement on the basis of the argument that this agreement belongs to the category of agreements establishing a specific institutional framework. The case was, however, removed from the register on 25 February 2010 because post-Lisbon the EP's powers had increased.

[49] In Case C-189/97, *Parliament v. Council*, concerning the EC-Mauretania Fisheries Agreement, the Court ruled that a sum representing 1% of the whole of the payment appropriations allocated for external operations of the Community does not have important implications for the Community budget. The Court rejected a comparison with the overall Community budget as a basis for "important implications" The consequence is that this limit will not easily lead to a requirement of consent, as the threshold will be high. See on this further: P. J. Kuijper in F. Amtenbrink et al.(eds.), Kapteyn/VerLoren, *Law of the European Union*, Kluwer Law, 2017, forthcoming.

Question 9

Since the entry into force of the Treaty of Lisbon, the Council has taken decisions partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic until the Syrian authorities put an end to the systematic violations of human rights and can again be considered as being in compliance with general international law and the principles which form the basis of the Cooperation Agreement (see Council Decision 2011/523/EU and Council Decision 2012/123/CFSP). As far as we are aware, these have been the only suspension cases since the entry into force of the Treaty of Lisbon. Prior to the entry into force of the Treaty of Lisbon, there have also been very few suspension cases but these concerned the application of Article 96 mechanism in form of appropriate measures under the Cotonou Agreement.[50] It appears that the EU is very reluctant/cautious in suspending an international agreement due to its obligations under international law (and even though this 'only' requires a QMV decision in the Council).

Question 10

In the past (2010) there have been discussions on the draft Decisions on the position that the Union should take in the respective Stabilisation and Association Councils between the EU and Israel, the Former Yugoslav Republic of Macedonia, Algeria and Tunisia. The Decisions concerned the adoption of provisions on the coordination of social security systems. The draft decisions were problematic for the Netherlands because the export of benefits could no longer be stopped unilaterally by the Netherlands, but would require the consent of other Member States. In the end, wording was found which was acceptable for the Netherlands.

[50] See examples of appropriate measures: Council Decision 2013/112/EC of 18 February 2003 extending the period of application of the measures in Decision 2002/148/EC concluding consultations with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement; Council Decision 2004/157/EC of 19 February 2004 extending the period of application of the measures in Decision 2002/148/EC concluding consultations with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement; Council Decision 2005/139/EC of 17 February 2005 extending the period of application of the measures provided for by Decision 2002/148/EC concluding consultations held with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement; Council Decision 2003/631/EC of 25 August 2003 adopting measures concerning Liberia under Article 96 of the ACP-EC Partnership Agreement in a case of special urgency; Council Decision 2004/289/EC of 22 March 2004 concerning the partial release of the conditional amount of EUR 1 billion under the ninth European Development Fund for cooperation with African, Caribbean and Pacific countries in order to establish a water facility; Council Decision 2006/114/EC of 14 February 2006 extending the period of application of the measures in Decision 2002/148/EC concluding consultations with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement; Council Decision 2006/450/EC of 27 June 2006 amending Decision 2003/631/EC adopting measures concerning Liberia under Article 96 of the ACP-EC Partnership Agreement in a case of special urgency.

Question 11

As has been explained in the answer to question 6, the European Parliament has, first, a role to provide its consent (or, in some cases, of being consulted) under Article 218(6) TFEU. Secondly, it has the right to be informed "*immediately and fully informed at all stages of the procedure*" under Article 218(10), which is an expression of the Parliament's right of oversight. These provisions exclude a right to 'co-decide' in the procedure for the adoption of international agreements, although in practice they may come close to it.

In the *Mauritius*[51] and *Tanzania*[52] cases the Court concluded that the obligation under Article 218(10) implies that the Council inform the Parliament promptly of any decisions taken in the procedure and that this is an essential procedural requirement.[53] Indeed, the flow of information includes:

> "*the intermediate results reached by the negotiations. In that regard, as argued by the Parliament, that information requirement made it necessary that the Council should communicate to it the text of the draft agreement and the text of the draft decision approved by the Council's Foreign Relations Counsellors who are responsible for the negotiations*".[54]

It is, with respect, submitted that the Foreign Relations Counsellors (known as the RELEX working party) are not, themselves, "*responsible*" for any negotiations in the sense that they negotiate. At most, that working party acts as an Article 218(4) committee that itself must be debriefed by the negotiators.

The Court held also that:

> "*Since Article 218(2) TFEU provides that it is for the Council to authorize the opening of negotiations, to adopt negotiating directives, and to authorize the signing and conclusion of the agreements, it follows that it is also incumbent on the Council, not least in the context of agreements exclusively concerning the CFSP, to ensure that the obligation laid down by Article 218(10) TFEU is fulfilled*".[55]

It is respectfully submitted that this conclusion is not quite logical, since the Council does not itself negotiate international agreements and is thus itself dependent on the flow of information coming from the Commission or the High Representative (as the case may be).

[51] Case C-658/11, *Parliament v. Council (Mauritius)*, EU:C:2014:2025, paras. 77-81 and 86.
[52] Case C-263/14, *Parliament v. Council (Tanzania Agreement)*, EU:C:2016:435, para.68.
[53] *Mauritius* case, paras. 78 and 80.
[54] *Tanzania* case, para. 77.
[55] Ibid., point 73.

In addition, the Interinstitutional Agreement on Better Law-Making[56] provides for the Council, the Parliament, the Commission and the High Representative to meet in order to negotiate improved "practical arrangements for co-operation and information sharing" in relation to international agreements (paragraph 40).[57] The Netherlands is supportive of this exercise as it would clarify the extent to which the European Parliament should be informed "*immediately and fully*" pursuant to article 218(10 TFEU) and avoid *ad hoc* interpretations on the right to information of the European Parliament. Nevertheless, the limits of Article 218(10) TFEU including the CJEU's case-law, as well as the institutional balance of Article 13 (2) TEU, should be respected.

Furthermore, the Netherlands considers the provision of information to national/regional parliament equally important. There are, however, good arguments against giving Member States' parliaments actual rights on the conclusion of Union agreements or the Union part of mixed agreements.[58]

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

Specific cases in which Dutch courts unjustifiably refrained from a reference for a preliminary ruling could not be found.[59] In various cases, arguments relating to such agreements are raised by one of the parties but rejected after close examination. In such cases it is concluded that a preliminary ruling is not necessary. Sometimes a request for a preliminary ruling is made, but then withdrawn. This happened in case C-470/15,[60] which concerned the interpretation of the Open Skies Agreement between the EU and the US.[61]

[56] Interinstitutional Agreement on Better Law-Making, OJ L123 of 12 May 2016, p. 1, para. 40.

[57] See for the work undertaken by the Maltese Presidency: http://data.consilium.europa.eu/doc/document/ST-10006-2017-INIT/en/pdf).

[58] See P.J. Kuijper arguing that the "pastis" approach to mixity should be ended at https://acelg.blogactiv.eu/2016/10/28/post-ceta-how-we-got-there-and-how-to-go-on-by-pieter-jan-kuijper/. But see Van der Loo and Wessel, *op.cit.* n.31 on alternative suggestions.

[59] In a recent case (April 2017) against the provisional application of the EU-Ukraine Association Agreement (which took longer due to an allegedly too slow reaction by the Dutch government after the referendum) the Court in the Hague ruled that there was no legal obligation for the Dutch government to act in a more speedy manner. Yet, no preliminary references was needed as the case concerned an interpretation of Dutch law.

[60] The case came from the Raad van State, ECLI:NL:RVS:2015:2773.

[61] It is unclear why the request was withdrawn two months later: C-470/15 *Lufthansa Cargo AG* v. *Staatssecretaris van Infrastructuur en Milieu*, request for preliminary ruling withdrawn from register on 15. 12.2015. The Advocate General had apparently been heard, so the assumption would be that it had been communicated to the Raad van State that there was no actual need for a preliminary ruling. Another

Conclusions can indirectly be drawn from those cases that *were* in fact subject to preliminary rulings, or that concern the application/interpretation of agreements in general. Such preliminary references mainly involved three areas of law: environmental law, migration law and IP law and the respective multilateral or bilateral agreements. Many judgments can be found that address the interpretation and direct effect of the Association Agreement with Turkey, its Additional Protocol and Association Agreements.[62] In other rulings, international IP rights agreements in the form of WIPO and TRIPS[63] play a role and the question asked how far EU law has to be interpreted in conformity with these international treaty obligations.[64] For example, IP-related preliminary references from 2016 with a Dutch origin were Case C-174/15[65] or Case C-169/15[66], and both concerned mainly the interpretation of European legislation in light of these international agreements.

Question 13

Due to the effects that international agreements in general may have within the monist Netherlands' legal order in view of Articles 93 and 94 of the Constitution of the Netherlands,[67] discussions on this issue are perhaps more limited than in some other Member States and practice confirms that even provisions of the Constitution itself have to be interpreted and applied in conformity with

possibility for a withdrawal of a reference would be that a similar case had been decided in the meantime or that for practical reasons there was no need to decide on the case at all any longer.

[62] See only ECLI:NL:RBDHA:2016:3336.

[63] ECLI:NL:PHR:2009:BH7602. Occasionally, other international treaties, exclusive or mixed agreements are applied in cases before the national courts. An interesting example is a dispute before the Rotterdam district court relating to a governmental license for a company to build and exploit an offshore windmillpark. The license was contested by several interested parties. One of the arguments was that the location of the windmillpark was not compatible with articles 56 and 60 of the 1972 UN Sea Treaty (UNCLOS III). The District Court referred to the Court of Justice's judgment in the *Intertanko* case (Case C-308/06, ECLI:EU:C:2008:312) and concluded that no infringement of an international obligation had taken place (ECLI: NL:RBROT: 2011:BQ6678)

[64] C-428/08, *Monsanto Technology LLC*, ECLI:EU:C:2010:402.The Dutch court asked whether the interpretation of Article 9 of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions has to take the TRIPs Agreement into account.

[65] *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*, ECLI:EU:C:2016:856. 'This concerned the interpretation of Art." (1)(a) Directive 2006/115 in light of the WIPO Treaty.

[66] C-428/08, *Montis Design BV v. Goossens Meubelen BV*, ECLI:EU:C:2016:790. This addressed the interpretation of Directive 93/98 in accordance with the TRIPs Agreement and the Berne Convention.

[67] Article 93: Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published; Article 94: Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

self-executing provisions of treaties and decisions of international organisations.[68] Some discussions have taken place in relation to cases before the Council of State (*Raad van State*), the highest administrative court. Thus, the Aarhus Convention has played a role in a domestic setting (albeit that in that case the Council of State could rely on the implementing Directive),[69] and a preliminary question was raised (but later withdrawn) in relation to the direct effect of the EU-US airline convention. According to the Council of State, this convention contained provisions that were intended to be directly effective.[70] In many cases, the issue of direct effect is not explicitly decided. In a very practical way, the court deals with the argument by interpretation of the provision(s) of the international agreement which is invoked. A good example is the dispute against certain exemptions on a new Netherlands prohibition of smoking in cafés and restaurants. These exemptions were challenged on the basis of the UN Framework Convention on Tobacco Control. The Supreme Court accepted the judgments of the lower courts and held that the provisions of the Convention were sufficiently detailed and clear and, consequently, could have direct effect with the result that the exemptions had to be deleted.[71]

Question 14

The most recent case, where the Commission successfully took the Netherlands to court over the failure to comply with EU law due international commitments of EU and EU Member States, was case C-92/07. This case, decided in 2010, concerned the situation that higher charges on the issue of residence permits for Turkish nationals were imposed by the Netherlands than for nationals of the EU Member States, EEA nationals and Swiss nationals. This was considered a breach of Articles 9 of the Ankara Agreement, 41 (1) of the Additional Protocol and Articles 10 (1) and 13 of Decision 1/80.[72] In addition, a currently pending infringement procedure addresses the bilateral investment agreement between the Netherlands and Slovakia from 1991 and the Commission argues that it breaches EU internal market rules. In September 2016, the Commission sent reasoned opinions to the Netherlands (and Austria, Romania, Slovakia and Sweden) requesting

[68] P. van Dijk, Constitutional Review in the Netherlands, http://www.venice.coe.int/WCCJ/Papers/NED_vanDijk_E.pdf and M. van Empel and M. de Jong, Constitution, International Treaties, Contracts and Torts, Netherlands Comparative Law Association, https://www.ejcl.org/64/art64-17.html#_ftn2.

[69] Case 01409190/1/R6, 27 May 2015, ECLI:NL:RVS:2015:1702.

[70] See Case 201309168/1/A3, 2 September 2015, ECLI:NL:RVS:2015:2773; as well as the CJEU Case C-470/15, *Lufthansa Cargo*, ECLI:EU:C:2015:838. Thanks to Prof. Johan van de Gronden for pointing us to these cases.

[71] ECLI:NL:GHDHA: 2013:BZ4871 and ECLI:NL:HR:2014:2928.

[72] Case C-92/07 *European Commission* v. *The Netherlands*, ECLI:EU:C:2010:228.

these countries to terminate their intra-EU bilateral investment treaties.[73] And on 10 July 2014 the Commission issued a letter of formal notice against the Netherlands for its intervention before the ITLOS in the field of EU exclusive competences but the case was not further pursued in the infringement procedure. At stake was ITLOS case no. 21 on a request for an advisory opinion by the Subregional Fisheries Commission (SRFC) to the International Tribunal for the Law of the Sea (ITLOS). In the written proceedings the Netherlands provided a written statement, next to the European Union and other Member States (UK, Portugal, Germany, France and Spain). The written statement of the Union which was delivered by the European Commission on behalf of the Union resulted in Case C-73/14 Council v. Commission (ITLOS) in which the Council unsuccessfully challenged the mandate of the Commission under Article 335 TFEU to act on behalf of the Union in international disputes and before international courts.[74]

Question 15

No specific control measures are taken in view of ensuring compliance with international agreements that are binding on the EU. However, the Department of International Trade Policy and Economic Governance of the Ministry of Foreign Affairs does have contact with entrepreneurs to verify whether third countries comply with their commitments under trade agreements. They can notify this via handelsbelemmeringen@minbuza.nl .

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16

These questions have all been answered in Opinion 2/15, *Singapore FTA*.[75] In this Grand Chamber Opinion, the Court confirmed the *Daiichi*[76] standard to determine the scope of the Common Commercial Policy, as follows:

> *"It is settled case-law that the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy if it relates specifically to such trade in that*

[73] European Commission, September infringements 'package: key decisions, 29 September 2016.
[74] C-73/14, *Council* v. *Commission* (ITLOS), ECLI:EU:C:2015:663.
[75] Opinion 2/15, *Singapore FTA*, EU:C:2017:376.
[76] As developed in Case C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para. 51-52. See also Case C-137/12, *Commission v. Council*, EU:C:2013:675, para. 57, and Opinion 3/15, *Marrakesh Treaty on access to published works*, EU:C:2017:114, para. 61. Also relevant in this respect is Case C-249/06, *Commission v. Sweden*, ECLI:EU:C:2009:119, on agreements originating from the pre-accession period. Here the link is not just made with the free movement of goods, but the free movement of capital.

it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it ...

... It follows that only the components of the envisaged agreement that display a specific link, in the above sense, with trade between the European Union and the Republic of Singapore fall within the field of the common commercial policy".[77]

The Court applies this test liberally and concludes that, for example, provisions on sustainable development and competition law fall within the scope of the Council Commercial Policy. The Court's *Daiichi* standard is subjected to only two limitations. To begin with, provisions laying down environmental standards would not fall within the scope of the CCP.[78] Secondly, provisions in the Singapore FTA concerning fall within the scope of Article 207 since they "*in no way [fall] within the scope of harmonisation of the laws of the Member States of the European Union, but [are] intended to govern the liberalisation of trade*".[79] However, provisions that merely refer to international agreements in these respective fields do not lay down such standards. These are merely intended, the Court finds:

"*to ensure that trade between [the EU and Singapore] takes place in compliance with the obligations that stem from the international agreements concerning social protection of workers and environmental protection to which they are party*".[80]

The effects on trade:

"*result, first, from the commitment of the Parties, stemming from Article 13.1.3 of the envisaged agreement, on the one hand, not to encourage trade by reducing the levels of social and environmental protection in their respective territories* below the standards laid down by international commitments *and, on the other, not to apply* those standards *in a protectionist manner*".[81]

The Court concludes that:

"*the provisions of Chapter 13 of the envisaged agreement are intended not to regulate the levels of social and environmental protection in the Parties' respective territory but to govern trade between the European Union and the Republic of Singapore ...* "[82]

[77] Opinion 2/15, Singapore FTA, paras 36-37. Emphasis added.
[78] Ibid., para. 73.
[79] Ibid., para. 126. See for similar comments paras. 135 and 165.
[80] Ibid., para. 152.
[81] Ibid., para. 158.
[82] Ibid., para.166.

Arguably, the line drawn between standards laid down in the Singapore FTA itself and "*international standards*" laid down in international agreements which the Singapore FTA requires the Parties to uphold has a 'whiff of arbitrariness' hanging around it. There is no logical reason why the reference in an agreement to a standard laid down in a multilateral agreement should be treated differently from a standard laid down in the agreement itself.

Direct investment consists of:

> "*investments of any kind made by natural or legal persons 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 in order to carry out an economic activity. Acquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable him to participate effectively in the management of that company or in its control*".[83]

The Court logically applies this definition, which originally was developed in the context of internal market, to Article 207 TFEU.[84] The concept of foreign direct investment (FDI) in Article 207 excludes other types of investment,[85] such as portfolio investment. That concept is defined by the Court as "*the acquisition of company securities with the intention of making a financial investment without any intention to influence the management and control of the undertaking*".[86]

As far as transport services are concerned, the Court in Opinion 2/15 has clearly reaffirmed that these fall within the scope of the Common Transport Policy and not within the scope of the Commercial Policy.[87]

As regards TRIPs, the Court has clarified in *Daiichi* that international commitments concerning intellectual property entered into by the Union fall within the 'commercial aspects' of intellectual property "*when they display a specific link with international trade in that they are essentially intended to promote, facilitate or govern such trade and have direct and immediate effects on it*".[88] In the *Singapore FTA* case, the question was not so much whether the entirety of TRIPs-like commitments falls within the Common Commercial Policy, but rather whether there were other, non-commercial, aspects of intellectual property that did not. One Member State in particular stressed that this was the case for Article 11.4 of the Singapore FTA which, with regard to copyright and related rights, refers to multilateral conven-

[83] Ibid., para.80 and the case law mentioned there.
[84] Ibid., para.81.
[85] Ibid., para.83.
[86] Ibid., para. 227.
[87] Ibid., paras.56-68.
[88] Case C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, points 49-52. See also Opinion 2/15, *Singapore FTA*, para. 112.

tions which include a provision relating to moral rights.[89] The Court rejected this point succinctly, holding that a mere reference by the agreement to international conventions on moral rights is not sufficient to conclude that the subject matter falls outside the Common Commercial Policy.[90] The Court's general logic of ignoring references to international conventions for the determination of competence is consistent with other parts of Opinion 2/15,[91] although it raises the question whether such references are without real legal value or practical import.

Finally, during the negotiations on the scope of the provisional application of CETA, the Dutch minister for foreign trade and development cooperation has argued that indirect investments such as portfolio investments do not fall within the scope of Article 207 TFEU and are therefore no exclusive EU competence.[92]

Question 17

The Netherlands has no specific opinion on this. The relationship between Member States' BIT's and EU agreements is to a great extend laid down in Regulation 2019/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.[93] The Netherlands currently has 90 BITs in force as it attaches great importance to an excellent investment climate. They still prove necessary as long as the EU has not provided for equally high standards of investment protection. The Netherlands has concluded post-Lisbon only one new bilateral investment agreement with the United Arab Emirates from 26.11.2013 which, however, is currently not yet in force.[94] The Commission was duly notified of this agreement under the above-mentioned EP/Council Regulation 1219/2012.[95]

In its Opinion 2/15, the Court reasoned that the EU had succeeded the Member States as parties to the BITs that those Member States had concluded with Singapore.[96] The Court relied here on its case law concerning the EU's

[89] Opinion 2/15, para.129.

[90] Ibid.

[91] See, for example, the comparable discussion on sustainable development in points 153-155.

[92] Available at: https://www.rijksoverheid.nl/documenten/kamerstukken/2016/09/07/aanbiedingsbrief-bij-de-geannoteerde-agenda-voor-de-informele-raad-buitenlandse-zaken-rbz-over.

[93] OJ L 351, 20.12.2012, p. 40–46.

[94] Text of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the United Arab Emirates at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/4774.

[95] Currently a preliminary ruling is pending where the German BFH asks questions on the compatibility of investor-State dispute settlement mechanism established by an intra-European Union bilateral investment treaty Netherlands Slovakia with Articles 18(1) TFEU, 267 TFEU and 344 TFEU), Case C-284/16 *Slovak Republic* v. *Achmea* BV, ECLI:EU:C:2017:699.

[96] Ibid., paras.248-250.

succession of the Member States in the GATT.[97] However, this replacement theory only applies to the extent that the BITs concerned relate to FDI.[98] The Court's interpretation leads to a compounded difficulty and, since the clauses concerned recur in almost identical form in other agreements, this matter is of importance to the practice of the Council: First, Article 9.10(2) of the Singapore FTA provides for the suspension, during the provisional application, of the BITs concluded between individual Member States and Singapore. To the extent that these BITs cover investment other than FDI, the situation now arises that the EU has the competence to suspend these BITs as far as they concern FDI, but cannot suspend them as far as they concern portfolio investment. Thus, there is a severe risk that the Court's solution leads to the co-existence of two different investment protection systems. This has the potential of leading to unworkable situations.

Secondly, some parties in the case argued that Article 351 TFEU applies *mutatis mutandis* in such cases. Under this provision, bilateral agreements that are not compatible with the Treaties remain in force. However – and see also the above-mentioned case *Commission v. Sweden* – the Member State concerned must "*take all appropriate steps to eliminate the incompatibilities established*". This combines an obligation to deal with difficulties arising from conflicting obligations whilst respecting the Member States' constitutional procedures. However, the Court concluded that Article 351 TFEU is not germane since, in the case at hand, it is clear from Article 9.10 that Singapore '*expresses the wish that those bilateral agreements come to an end upon the entry into force of the envisaged agreement*'.[99] That, however, disregards the question of provisional application, which occurs before the "*entry into force*".[100] Arguably, a clause suspending BITs that cover portfolio investment cannot be applied provisionally.

Question 18

Focusing on the legal issues, the first point to note is that the Council and the Member States accepted the principle of the Investment Court System (ICS) when they signed CETA. Only, one Member State made a declaration at the time of signature to the effect that:

> "*Belgium will ask the European Court of Justice for an opinion on the compatibility of the ICS with the European treaties, in particular in the light of Opinion A-2/15.*

[97] Joined Cases 21/72 to 24/72, *International Fruit Company*, EU:C:1972:115, points 10 to 18.

[98] Opinion 2/15, para.247.

[99] Ibid., para. 254.

[100] As a matter of international law (Article 25 of the Vienna Convention on the Law of Treaties 1969). Article 17.12(4)(d) of the Singapore FTA provides that, in case of provisional application of the agreement, the term "*entry into force of this Agreement*" shall be understood to mean the date of provisional application. However, Article 9.10(5) of the agreement excludes investment from this definition.

Unless their respective parliaments decide otherwise, the Walloon Region, the French Community, the German-speaking Community, the French-speaking Community Commission and the Brussels-Capital Region do not intend to ratify CETA on the basis of the system for resolving disputes between investors and Parties set out in Chapter 8 of CETA, as it stands on the day on which CETA is signed".[101]

This creates a political – rather than legal – difficulty that needs to be resolved. The way forward will probably lie in the request, by Belgium, of an Opinion from the Court under Article 218(11) TFEU on the compatibility of ICS with the Union's legal order as per the above declaration. This Opinion was asked in September 2017.[102]

The Netherlands is in favour of modern rules on the settlement of disputes between foreign investors and states on the basis of an international agreement. The Netherlands has been one of the EU-Member States calling for a revision of the former ISDS-system and has approved, both politically and legally, the new EU Investment Court System. Furthermore, the Netherlands greatly supports the EU's initiatives to set up a multilateral investment court.

In addition to these developments at the EU level, the Netherlands is revising its model BIT text with the aim of renegotiating its existing BITs.[103]

Question 19

The assignment of the liability of the Union and of the Member States for breaches of investment protection is regulated by EP/Council Regulation 912/2014.[104] There is no specific position of the Netherlands on this issue.

Question 20

There is no specific Dutch position on this question. It seems however indispensable that EU foreign policy is coherent. This implies that also trade agreements should take broader objectives of the EU's foreign policy into account. However, the Court it's reasoning in Opinion 2/15 to use this point in broadening the scope of Article 207 is questionable. Nothing in the treaties prevents the Union to add

[101] Statement (37) by the Kingdom of Belgium on the conditions attached to full powers, on the part of the Federal State and the federated entities, for the signing of CETA, OJ L 11 of 14 January 2017, p. 1 at 21.

[102] https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf

[103] See e.g. AIV advice no. 95 International investment dispute settlement, from ad hoc arbitration to a permanent court. Available at http://aiv-advies.nl/7rn, together with a formal response of the government of the Netherlands. See also the reference in that document for further information on the position of the government.

[104] Regulation (EU) No 912/2014 of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257 of 28 August 2014, p. 121.

a legal basis if the substance of an agreement is broadened in order to comply with the EU's objectives for external action.

The Court of Justice pronounced on this relationship in Opinion 2/15 when it discussed the legal basis for the provisions in the Singapore FTA on sustainable development (environmental and labour law clauses). The Court noted the changes brought about by the Treaty of Lisbon in the provisions on external relations and clearly placed the Common Commercial Policy in the context of Article 21 TEU.[105] By reading[106] that provision in conjunction with Article 205 TFEU,[107] the Court integrates the obligations on sustainable development into Article 207(1) TFEU. In addition, the Court points to Articles 9[108] and 11[109] TFEU, which are horizontal provisions infusing the other provisions of the TFEU.

This reasoning calls for two comments. First, the Court seems to go very far in its expansive view of what falls within the Common Commercial Policy. Whilst, on the one hand, it is evident that the CCP must be cognisant of other strands of external relations policy (something Articles 21 TEU and Article 205 TFEU seek to ensure), it does not logically follow that everything in Article 21 ipso facto falls within the scope of Article 207. For example, Article 153(5) TFEU explicitly excludes, from the scope of Article 153, the right of association of workers. Under Article 156 TFEU, the EU's competence in this field is very limited and does not involve any rule-making. Against this light, the Court's conclusion that '*the objective of sustainable development … forms an integral part of the common commercial policy*'[110] seems too expansive. Secondly, the Court's logic permits the inclusion of many other items listed in Article 21 TEU, as well as of other horizontal provisions (see, for example, Articles 8 to 17 TFEU).

Question 21

There is no specific Dutch position on this question. It could however be argued that it is desirable in terms of effectiveness, legitimacy and transparency to assess at the earliest possible stage whether an agreement will be EU-only or mixed. In practice this is only decided at the latest stage when the Council decides upon a

[105] Opinion 2/15, paras, 141 et seq.

[106] Ibid., para, 143.

[107] "*The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union*".

[108] "*In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health*".

[109] "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*".

[110] Opinion 2/15, point 148.

proposal of the Commission to sign an agreement. If a decision is made earlier, national parliaments, stakeholders and negotiating parties will be in a better position to play their respective role in the creation of an EU trade agreement. It is sometimes argued that it is only possible to decide upon the legal basis, and thus the nature, of an EU agreement when the negotiations have been finalised. The general nature of this statement could be questioned. In most cases it is perfectly possible to decide with a very high level of certainty upon the basis of the EU's negotiation mandate whether the agreement will completely fall within the scope of Article 207 TFEU or not.

Some aspects which the Council used to consider as falling (partly) within the competence of the Member States, the Court declared to be falling within the scope of the Common Commercial Policy. This concerns, among other things, sustainable development and at least a good part of transport services. To the extent that trade agreements do not involve investment or investment dispute settlement or other matters falling outside the scope of the Union's competence, they no longer are of a mixed nature. Thus, the procedure for their adoption is simplified since, in such cases, it is no longer necessary to have them ratified in all Member States. However, the 'flagship' trade agreements (such as CETA, the agreement with Japan) do contain chapters on indirect investment as well as investment dispute settlement. There the Court's Opinion 2/15 will only bring changes to the scope of provisional application, since more matters can now be provisionally applied by the Union than under previous practice.

The issue of the second and third sub-paragraphs of Article 207(4) TFEU in practice hardly arises. First, it is very rare that provisions are negotiated that fall within the scope of those provisions. Secondly, even if an agreement would contain such provisions, they will only have a tangible practical effect on the decision-making process if the agreement is not mixed. If the agreement is mixed (for example, because it comprises rules on portfolio investment) then the Council will in practice, before it processes to the adoption of the decision on signature, ascertain whether all Member States are in a position to sign the agreement. This step is necessary in order to avoid situations whereby an agreement is signed by some Member States, but not by others, raising questions to what extent it applies on the territory of the latter. Thus, in such cases, it is in practice of little import whether the Council decision is passed with unanimity or with qualified majority since in any event the Council will need to have the support from all Member States.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

A summary overview indicates that the Netherlands did enter independently into agreements with some third countries in the field of freedom, security and justice since the adoption of the Amsterdam Treaty and Protocol (No 23). The Netherlands closely follows the lists of third countries attached to Regulation 539/2001 (the Dublin III regulation) as far as visas requirements and the notion of safe countries are concerned.

More in general, it is an open question what the correct interpretation of the concept of shared competences within the meaning of Article 4(2) TFEU in the field of external relations should be. Admittedly, Protocol (No 23) recognizes the possibility for the Member States to maintain and enter into agreements with third countries in the field of freedom, security and justice, especially the crossing of external borders. On the other hand, mixed agreements concluded by both the Union and its Member States are mostly divided, from the perspective of substance, into two separate segments, one where the Union is competent and (exclusively) entitled to adhere to international obligations and the other part comprising issues where the Member States are still competent. That is why third countries and international organisations (mostly in multilateral agreements) often require the EU and the Member States to certify such substantive division in an explicit document. Such (horizontal) split in EU and Member States competences must be distinguished from the concept of shared competences mentioned in Article 4(2) TFEU. There, shared competences follow a more traditional element of EU law doctrine. In that case, both the EU and the Member States are authorized to act, however, the Member States are competent as long and to the extent that the Union institutions did not operate. This is a more vertical division of powers. Internally, conflicts can be set aside with the supremacy rule for Union legislation and policy. For external competences, the scope for such residuary competence for the Member States must be rather restricted as the risk for jeopardising the autonomous execution of an external competence by the European Union is quite substantial and serious. Conflicting international obligations accepted by Member States towards third countries are difficult to set aside in case the Union has concluded an international agreement with comparable obligations. Accordingly, the room for international obligations assumed by Member States is very limited. The wording of Protocol 23 seems to confirm this assessment.

Furthermore, it must be recognised that, similar to for instance the subject of trade policy towards third countries, the external competences can be

exercised unilaterally by the EU Institutions or through the conclusion of international agreements with third countries. The system of shared competences which Article 4(2) TFEU and Protocol 23 mention for measures on freedom, security and justice, only relate to the implementation through the conclusion of conventional instruments. The unilateral exercise by the EU of external elements of this competence is not covered by Protocol 23. That means that a system of shared competences is not dictated by this Protocol.

It should also be borne in mind that Protocol (23) on the external relations of the Member States with regard to the crossing of external borders should be read in conjunction with another provision: Declaration 36 on Article 218 TFEU concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice. This declaration too sought to preserve the faculty of the Member States to conclude international agreements in the various fields of the AFSJ. However, that declaration expressly *excludes* from its scope Chapter Two of Title V of Part III of the TFEU; i.e. the chapter on borders, migration and asylum. This means that the Conference did not want to protect in the same way the prerogatives of the Member States in relation to the external dimension of the AFSJ. From a systematic perspective the combined reading of these two annexes to the Treaties suggests that Protocol (23) and the express reference to Article 77 (2)b TFEU should be interpreted narrowly. Yet, it is precisely on the basis of the latter provision that some of the key instruments of the Schengen area have been adopted; for example, Regulation 562/2006, also known as the Schengen Border Code;[111] i.e. a policy area in which the EU has harmonised national legislation and in relation to which it is difficult to envisage independent national action outside the boundaries set by EU law itself. This is the case for instance of policies such as the so-called Local Border Traffic agreements that can be negotiated by Member States, but under the supervision of the Commission; and other examples of such delegation of powers can be found in the Schengen Borders code itself.[112] Bearing these elements in mind, it appears difficult to argue that the aforementioned Protocol confers on Member States the power to act disrespectfully from the level of internal harmonization and the existence of EU initiatives. Rather, the Protocol should be read as a safeguard for initiatives of the Member States in the fields of border checks only to the extent that cooperation instruments of other initiatives have not or cannot, by virtue of the subsidiarity principle, be handled at the EU level. Such circumstances and initiatives pertain a large array of issues, from

[111] Regulation 562/2006, establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.4.2006, p. 1

[112] Article 4(2) TFEU.

local border traffic agreements to visa requirements in specific context such as the implementation of asylum policy.

Finally, the issue of freedom, security and justice is closely connected with basic human values and rights which constitute the basic framework of EU integration. Both the Member States and the EU must respect these international rules. That could reduce the risks that separate Member States would enter into international obligations which would limit or disrespect EU legislation and/or international obligations accepted by the EU.

Question 23

As a result of the Netherlands' system of open access to appeal public law decisions, migrants can effectively challenge restrictive measures in many ways and at various stages of the procedures. This implies that there is ample case law before Netherlands courts. The general increase of immigration in the EU and the growing strictness of admission and residence policy has resulted in much more litigation. The Netherlands regularly amends the list of safe third states based on the security in the respective country and this assessment is based on information provided by EASO, UNHCR, Council of Europe and other international organisations.[113] The Netherlands is confronted with a high influx of asylum seekers from Western Balkans states and North Africa which, according to this list, are considered safe countries with the exception of Libya.[114] These asylum applications are dealt with in a shortened procedure. Asylum seekers can challenge the listing of their country on the List of safe countries, as confirmed by a decision of the Council of State of 14 September 2016. This requires the judge to check whether the State Secretary for Security and Justice and Minister for Immigration made the assessment based on legal and factual grounds.[115] On 29 July 2016, the Dutch Advocate General argued that it should remain possible that a country is declared to be only partially safe as in case of Algeria and Tunisa in case of women and rights of lesbian, gay, bisexual, transgendered and intersex (LGBTI).[116] This has been taken up by the Ministry since October 2016, and for instance, Tunisia is considered a safe country except for LGBTI and Togo

[113] https://www.rijksoverheid.nl/onderwerpen/asielbeleid/vraag-en-antwoord/lijst-van-veilige-landen-van-herkomst.

[114] Despite the advice of the European Commission, it was not decided to place Turkey on the list of safe countries in Turkey in November 2015 by the State Secretary for Security and Justice and Minister for Immigration (Staatssecretatis van Veiligheid en Justitie) and finally decided after the July 2016 coup d'état to not place the country on the safe third country list.

[115] ECLI:NL:RVS:2016:2474

[116] 201603036/3/V2, ECLI:NL:RVS:2016:2040

is a safe country except for LGBTI and special attention has to be given to political activists, journalists and NGO workers.[117]

In many cases, the relevant EU regulations and directives are invoked by the interested parties or, sometimes, even a court itself, on its own initiative, may apply the EU provisions. In various cases, preliminary rulings in the field of this legislation on freedom, security and justice and the Charter on fundamental rights have been requested from the Court of Justice.[118] At this moment, several referrals from Netherlands courts are pending.[119] In one case, the accelerated Court procedure (PPU) has been followed[120] Furthermore, such cases and judgments are often closely intertwined with international law obligations to which the Netherlands is committed, such as the Refugees Agreement and the ECHR.

In recent years, the Dutch government strengthened its approach to extradite migrants without a residence license or to withdraw licenses in cases for instance of criminal offenses being committed and in cases where countries of origin had become safe. Such steps are easily being contested before Netherlands courts. Such courts require the governmental authorities to investigate and give evidence themselves that a country is safe or has become safe. Authorities undertake such investigations autonomously in order to update the lists of safe countries which are attached to EU legislation. Courts require national authorities to undertake their own investigations and to make their own assessment.[121] The impression is that many Netherlands courts are well able to interpret EU provisions and to examine complicated and intransparant political circumstances in such foreign countries. In many cases, the courts are professionally sufficiently equipped to decide a case without a preliminary ruling on a certain issue of EU law. Only where appropriate, questions are referred to the Court of Justice. [122]

[117] See https://www.rijksoverheid.nl/onderwerpen/asielbeleid/documenten/kamerstukken/2016/12/06/tk-uitbreiding-lijst-veilige-landen-van-herkomst-vierde-tranche.

[118] See for instance interim judgments of 29 March 2017 (ECLI:NL:RVS:2017:858), 13 April 2016 (ECLI:NL:RVS: 2016:890) and 27 September 2017 (ECLI:NL:RVS: 2017:2571 and ECLI:NL:RVS:2017:2572).

[119] Court cases C-47/17 and C-48/17 (District Court the Hague), C-180/17 (Council of State) and C-213/17 (District Court of The Hague).

[120] See judgment of the Court (Grand Chamber) of 15 February 2016, C-601/15 PPU after a referral from the Council of State of 17 November 2015.

[121] The court directly applies the relevant Union regulation and directives to establish these obligations.

[122] The cases where preliminary decisions from the EU Court are requested are a small minority in substantial case load of the Netherlands courts in the field of freedom, security and justice. In many cases, courts apply, where appropriate, Union legislation and the case law. However, the impression is that after a long period of reluctance, the Council has become inclined to raise preliminary questions in recent years.

Question 24

The operation of international policy and foreign affairs is often an exercise of small steps and mostly requires many efforts to coincide with a view to achieve success. The conclusion of such partnership frameworks can well constitute an important step to contain and regulate migration. It seems that the Netherlands does not follow or seek special relations with many foreign countries in this respect. One exception could the relationship of The Netherlands with the African country Mali. However, this could be explained as the current Netherlands Foreign Affairs Minister was the UN Special Representative for Mali prior to his nomination as Cabinet member. The Netherlands is also a substantial supplier of the UN peacekeeping force which was established for this region several years ago.

Since the launch of the Global Approach to Migration and Mobility, the EU has promoted the use of 'soft law' initiatives to foster cooperation with third countries on migration, target countries were in Africa Mali, Ghana and Cote d'Ivoire and Afghanistan in Asia. Since 2011, the biggest development has been marked by the adoption of a number of Mobility Partnerships with third countries. Mobility partnership are considered to be an instrument, a tool, at the disposal of the EU in order to implement the four pillars of the EU's Global Approach to Migration and Mobility (GAMM). According to the 2011 Communication of the Commission, the four pillars are: (1) organising and facilitating legal migration and mobility; (2) preventing and reducing irregular migration and trafficking in human beings; (3) promoting international protection and enhancing the external dimension of asylum policy; (4) maximising the development impact of migration and mobility.[123] With these objectives (or pillars) in mind, Mobility Partnerships are positioned as a cushion between Association Agreements or other traditional frameworks of cooperation and implementation such as the Action Plans used in the framework of the ENP. Possibly, one main reason lies behind the launch of Mobility Partnerships: these are flexible instruments of external relations because the participation of the Member States is on a voluntary basis that allows Member States to be in control of the content. In addition, GAMM also launched Common Agenda on Migration and Mobility (CAMM) as an alternative instrument to be used with third countries that are geographically distant from the EU and that do not have an interest but aims to eventually conclude binding readmission agreements with African and Asian countries.[124]

[123] Commission Communication 'The Global Approach to Migration and Mobility', COM (20111) 743 final, 18.11.2011.

[124] Until now only a readmission agreement has been set into force with Cap Verde, with Nigeria negotiations have started in 2016 and with Afghanistan a so-called Joint Way forward has been concluded

Bearing this in mind, the newer Partnership Framework possibly integrates GAMM and displaces the EU's migration policy to a broader policy context in which security and development cooperation concerns play a greater role. In other words, it appears that whereas GAMM introduced more flexible instruments to develop cooperation mechanisms on migration with third countries, the new Partnership Framework seeks to bring together migration policy with the fight against organized crime (human trafficking) and development cooperation in order to assist third countries that have a special position in the current migratory crisis. Under the new Partnership Framework, the Commission and the High Representative have identified a number of third countries that are either countries of origin of migrants or transit countries to the Mediterranean route towards the EU.[125] With these countries the EU has led a number of capacity building measures to tackle human trafficking, and build national capacity to manage borders and develop migration and asylum policies. In this respect, the Partnership Framework promotes more than the instruments developed under GAMM the integration of migration issues with Development Cooperation and technical cooperation with third countries. At the same time, the EU makes clear that the short-term goal of the Partnership Framework is to tackle the current crisis. Similarly to the instruments under GAMM, also in this case soft law instruments (compacts) have been introduced as the preferred policy tool that the EU uses, but contrary to GAMM, compacts under the Partnership aim at the integration of policies and instrument used and developed under a plurality of EU external policies.[126]

In a manner similar to Mobility Partnerships also the Partnership Framework is conceived as an instrument in which the EU and Member States create synergies to create action plans with third countries with a view to combine EU-based and national-base initiatives for the targeted third country. Thus, the Netherlands has strengthened bilateral cooperation with Uganda, Kenya, Tanzania, Ethiopia, Congo DR, Rwanda, Somalia, Sudan and Burundi. These cooperation tools are soft law instruments in the form of memoranda of understanding, exchanges of letters, pacts, and police co-operation agreements, which include a readmission clause.[127]

which copies the readmission commitment into the arrangement, however it was concluded as a political commitment between the EU and Afghanistan.

[125] European Commission Press release 13 June 2017, http://europa.eu/rapid/press-release_IP-17-1595_en.htm

[126] COM(2016) 385 final, p.8

[127] See generally: J.P. Cassarino, 'The Co-operation on Readmission and Enforced Return in the African-European Context', pp. 50–72, *Regional Challenges of West African Migration*, 2009.

Question 25

The EU has been concluding readmission agreements since 2004, and to this date seventeen have been concluded and have entered into force whilst others are being negotiated. The EU has been particularly successful in concluding agreements with neighbouring countries, whilst the rate of success has been less remarkable with other third countries. On top of readmission agreements anchored to Article 79 (3) TFEU, the EU has been equally successful in inserting readmission clauses in a number of agreements concluded between the EU and third countries under the umbrella of external policies such as the ENP and Development cooperation.

Yet, Member States have indeed continued to conclude readmission agreements independently. This competence is a shared competence, so that as long as the Union has not concluded a readmission agreement with the respective country, the individual Member States are still able to conclude readmission agreements.[128] Thus, the Netherlands has concluded readmission agreements with the Western Balkans (Macedonia,[129] Montenegro,[130] Bosnia-Herzegovina,[131] Serbia,[132] Kosovo[133]) and Eastern European countries (Moldova[134] Armenia[135] Georgia[136] and Kazakhstan 2015).[137] These agreements were concluded between the Benelux

[128] Kamerstuk 34283. 18 September 2015.

[129] Agreement between the Benelux States (the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands) and the Macedonian Government on the readmission of persons residing without authorisation of 30.5.2006; Protocol between the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands) and the Macedonian Government on the implementation of the Agreement between the European Community and the Former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation of 30.7.2012.

[130] Protocol of 4.7.2012.

[131] Agreement of 19.7.2006 and Protocol of 2008.

[132] Agreement between the Government of the Kingdom of the Netherlands, the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg and the Federal Government of the Federal Republic of Yugoslavia on readmission and acceptance of persons that do not or no longer fulfil the conditions for entering or staying on the territory of the other Contracting State and Protocol between the Governments of the States of the Benelux (the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands) and the Government of the Republic of Serbia on the implementation of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation.

[133] Readmission agreement with Kosovo of 12.5.2011, (set into force 1 April 2014.

[134] Uitvoeringsprotocol tussen de Regeringen van de Benelux-Staten (het Koninkrijk België, het Groothertogdom Luxemburg, het Koninkrijk der Nederlanden) en de Regering van de Republiek Moldavië bij de Overeenkomst tussen de Europese Gemeenschap en de Republiek Moldavië betreffende de overname van personen die zonder vergunning op het grondgebied verblijven of 25.1.2013.

[135] Readmission Agreement of 3.6.2009.

[136] Readmission agreement with Georgia of 5.9.2013 and Protocol of 5.9. 2013.

[137] Readmission agreement between the Benelux and Kazakhstan, 2 March 2015.

countries and third countries and aim to implement the Dutch/Benelux policy to conclude such readmission agreements with strategic important countries.[138] This cooperation of the Benelux countries is based on the Convention between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands on the transfer of control of persons to the external frontiers of Benelux territory.[139]

It is important to note that the Benelux intends to continue to conclude readmission agreements. At the 2016 Summit the Benelux ministers stated the following:

> *"The Benelux countries already have a close cooperation concerning the movement of people, for example by jointly concluding visa waiver agreements for holders of diplomatic and service passports, readmission agreements and implementing protocols. In addition to this, the Benelux Prime ministers decided to engage in closer cooperation concerning the return of irregular migrants in order to enhance the credibility of policies in the field of international protection and legal migration. Common actions will be explored notably towards countries where repatriation is particularly difficult, for example by joint visits and joint demarches and, under the overarching framework of the EU, by organizing joint return flights, organizing joint meetings to exchange best practices by posting joint liaison officers in a country of origin and by developing joint reintegration actions to stimulate voluntary return. At the political and administrative level, the Benelux countries will continue to conclude Benelux readmission agreements and implementing protocols."*[140]

More in general, it remains important to understand the operability of readmission agreements and the key role that Member States retain in this respect. Indeed, because the EU is not the authority that would ultimately be in charge of the return process on the one side, and because the return process must guarantee the respect, on a case-by-case basis, of the rights of the individuals concerned, including the non–refoulement principle, Member States authorities must be able to establish cooperative frameworks and procedures with third countries in relation to readmission. For this purpose, EU readmission agreements always include the following key provisions: an article in which the relationship with bilateral agreement concluded by Member States is regulated and an article dedicated to implementing protocols.

[138] Kamerstukken II 2012/13 29344 nr.11; Kamerstukken II 2013/14, 30573 nr.124). A total of 17 readmission agreement between the Benelux and third countries have been concluded, Benelux ondertekent terug- en overname overeenkomst met Kosovo, http://www.benelux.int/nl/nieuws/benelux-ondertekent-terug-en-overname-overeenkomst-met-kosovo/.

[139] Agreement of 2 March 2013, Text at: http://wetten.overheid.nl/BWBV0005246/1974-01-01.

[140] http://www.benelux.int/nl/nieuws/benelux-top-gezamenlijke-communique/ For an example see the 2015 agreement between the Benelux and Kazakhstan: http://wetten.overheid.nl/BWBV0006473/2017-06-01.

In relation to the first issue, and using the EU–Cape Verde agreement of 2014 as an example, Article 20 affirms that:

> *"The provisions of this Agreement shall take precedence over the provisions of any legally binding instrument on the readmission of persons residing without authorisation which, under Article 19, have been or may be concluded between individual Member States and Cape Verde, in so far as the provisions of any such legally binding instrument are incompatible with those of this Agreement."*

This provision tells us that EU agreements prime over those concluded by Member States either before or after the conclusion of the EU one. Such rule of precedence must be interpreted jointly with the provision on the non-affectation clause vis-à-vis human rights protection standards stemming from international law; and such clause must be read in a systematic manner, i.e. under the precepts of internal human rights law stemming from the EU Charter of Fundamental Rights.

As EU readmission policy develops, the EU restricts the margin of discretionary powers left to Member States when concluding their (operation) readmission agreements with third countries that have concluded a readmission agreement with the EU. In fact, the example of Cape Verde above shows us that the there is a hierarchical relationship between EU and national readmission agreements. Thus, the EU predetermines a number of issues: from the identification of the competent authorities, to conditions of the return process and other elements.[141] This is particularly significant because recent readmission agreements such as the one with Cape Verde, go as far as affirming that, an implementing agreement concluded by a Member State enters into force only once such an agreement is notified to the Joint Readmission Committee; i.e. the managerial committee

[141] Article 20 of the EU – Cape Verde Agreement: 1. At the request of a Member State or Cape Verde, Cape Verde and that Member State shall draw up an implementing Protocol which shall, inter alia, lay down rules on:
(a) designation of the competent authorities, border crossing points and exchange of contact points;
(b) conditions for escorted returns, including the transit of third-country nationals and stateless persons under escort;
(c) evidence and documents additional to those listed in Annexes 1 to 4 to this Agreement;
(d) the arrangements for readmission under the accelerated procedure;
(e) the procedure for interviews.
2. The implementing Protocols referred to in paragraph 1 shall enter into force only after the Readmission Committee provided for in Article 18 has been notified.
3. Cape Verde agrees to apply any provision of an implementing Protocol drawn up with one Member State also in its relations with any other Member State upon request of the latter.

tasked with monitoring and managing the implementation of the agreement concluded by the EU and Cape Verde.[142]

In general, the Netherlands takes the position that Member States are free to conclude readmission agreements as long as the EU has *not* concluded a readmission agreement or any other agreement such as a Development and Cooperation agreement with a readmission clause. On the other hand, Member States remain the public entities charged with implementation of readmission and they are responsible for guaranteeing that human rights protection standards guaranteed at EU and ECHR level are fully respected in practice.

[142] See Article 18 of the EU–Cape Verde Agreement; this is similar to the managing committees seen in relation to the visa agreement analysed above. This is not the case in relation to the agreement with Macao: OJ L 143/99, 30.04.2004.

UNITED KINGDOM

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CHAPTER 1: DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES

Question 1

The *AETR* doctrine has been interpreted broadly by the Court of Justice (see answer to Question 2 below). This has raised a concern that it might impinge on areas of national competence and has given rise to an ensuing need in Member States to somehow rein in an expansive reading of the principle. This has become apparent in the area of environmental policy. A case in point is the conclusion of the Minimata Convention on Mercury in the context of which the House of Commons European Scrutiny Committee urged the Government to ensure that the EU would only exercise competence that was exclusive, and would not prevent Member States from exercising their own competence.[1]

Question 2

Article 3(2) TFEU provides for the EU's exclusive competence to conclude an international agreement in three sets of circumstances: first, when its conclusion is provided for in a legislative act of the Union; second, when it is necessary to enable the Union to exercise its internal competence; third, insofar as its conclusion may affect common rules or alter their scope.

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[1] House of Commons European Scrutiny Committee, 29 March 2017.

The terms in which Article 3(2) TFEU is couched draw on the long and at times complex case-law of the Court of Justice which has developed the doctrine of exclusive competence since the early 1970s. In doing so, they seek to convey the principles laid down in this case-law. Viewed independently from the latter, Article 3(2) TFEU may be interpreted too broadly. In fact, separated from its context, this provision could be interpreted so widely as to impinge upon the principle of conferral (Article 5(1) TEU).

Such an approach has been rightly rejected by the Court of Justice. In Opinion 2/15, in determining the Union's 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.[2] Article 3(2) TFEU, therefore, is to be construed in the light of the principles that the Court has already set out. This is an important point, as the broad wording of this provision fails to capture the subtleties of the *AETR* principle and its development over the years.

Viewed against this context, the first and second sets of circumstances are reasonably contained. The conferment of express competence in a Union's legislative act had already been held to render the Union's competence exclusive;[3] as for the test of necessity referred to in Article 3(2) TFEU, it refers to the principle introduced in Opinion 1/76[4] which has been construed subsequently in such narrow terms[5] that its relevance was confined to the case in which it was introduced. It is, therefore, the third set of circumstances provided for in Article 3(2) TFEU that is bound to raise questions in practice about the scope of the Union's exclusive competence.

The *AETR* principle has been construed in broad terms by the Court of Justice. This is not a recent phenomenon. Earlier case-law made it clear 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.[6] 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 effected.[7] This broad approach was also illustrated in

[2] EU:C:2017:376, paras 231 et seq.

[3] See Opinion 1/94 EU:C:1994:384, para. 95.

[4] EU:C:1977:63.

[5] See Opinion 1/94, n3 above, paras 85-6 and 100, Case C-476/98 *Commission v Germany (Open Skies)* EU:C:2002:631, para. 85.

[6] See Opinion 1/03 (*New Lugano Convention*) EU:C:2006:81, para. 126; C-114/12 *Commission v Council* EU:C:2014:2151, paras 69-70; Opinion 1/13 (*Accession of third States to the Hague Convention*) EU:C:2014:2303, paras 72-73; Opinion 3/15 (*Marrakesh Treaty on access to published works*) EU:C:2017:114, paras 106-107).

[7] See Opinion 1/03, ibid, paras 143, 151-153; Opinion 1/13, ibid, paras 84-90; C-66/13 *Green Network* EU:C:2014:2399, paras 48 and 49 and, even earlier, Opinion 2/91 EU:C:1993:106, paras 25-6 and Case C-467/98 *Commission v Denmark (Open Skies)* EU:C:2002:625, para. 82.

Opinion 1/03 where the Court held that 'a comprehensive and detailed analysis must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area covered by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish'.[8]

The above formulation of the circumstances under which the conclusion of an international agreements may affect common rules or alter their scope may broaden up the scope of the application of the *AETR* principle. This was illustrated recently in Opinion 2/15 where the Court held that the Union's implied competence was exclusive in relation to commitments on transport services and public procurement on such services. In fact, Opinion 2/15 illustrated this approach with considerable force. For instance, the references to the specific provisions of the Agreement and those of the internal secondary legislation are lacking in detail. Whilst the conclusion draws on the approach articulated in Opinion 1/03, it is not based on a 'comprehensive and detailed analysis' of the provisions of the Agreement with Singapore and the internal common rules in the area.[9] Such analysis is not present in Opinion 2/15. Whilst the Court takes the Chapters of the Agreement with Singapore in turn and examines them against EU secondary legislation, it does so only in broad terms. This analytical sparseness is also reflected by the streamlined form of Opinion 2/15.[10] 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 is a constraint on the scope of exclusive competence pursuant to Article 3(2) TFEU that was articulated in Opinion 2/15: an international agreement may 'affect' common rules in the meaning of Article 3(2) TFEU if the latter are set out in secondary legislation.[11] It was for this reason that the Court held that the indirect foreign investment provisions of the Agreement with Singapore could not affect Article 63 TFEU in the meaning of Article 3(2) TFEU. This is a welcome classification, as the argument to the contrary by the Commission had advocated an even more expansive interpretation of the *AETR* principle.

[8] Opinion 1/03, ibid, para. 133.

[9] Opinion 1/03, ibid, para. 133.

[10] The Opinion is much shorter than the detailed and in-depth analysis provided by AG Sharpston in her Opinion (EU:C:2016:992).

[11] Opinion 2/15, EU:C:2017:376 para. 230.

Question 3

Whilst they are couched in similar terms, the scope of Article 216(1) TFEU is distinct from that of Article 3(2) TFEU. The former is about the existence of the Union's competence to conclude international agreements, whereas the latter is about the circumstances under which such competence is exclusive. This distinction was somewhat blurred in the early case-law on external competence.[12] In Opinion 1/03, the Court examined clearly the existence of the Union's competence to conclude the Lugano Convention separately from the nature of this competence. And in Opinion 2/15, once it had ruled out exclusivity pursuant to Article 3(2) TFEU, the Court went on to examine the existence of the EU's competence under Article 216(1) TFEU: it held that the provisions of the Agreement with Singapore on foreign indirect investment were 'necessary' in the meaning of Article 216(1) TFEU in order to achieve the objectives of free movement of capital (Article 63 TFEU). As this field relates to the internal market (Article 4(2)(a) TFEU) over which the EU has shared competence (Article 4(1) TFEU), the EU 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.

Article 216(1) TFEU endows the EU with competence to conclude international agreements in four sets of circumstances: first, where the Treaties so provide; second, where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties; third, where the conclusion of an agreement is provided for in a legally binding Union act; fourth, where the conclusion of an agreement is likely to affect common rules or alter their scope.

The first of the above is straightforward, as it refers to express competence. The second is drafted in such terms as to appear to amount to an autonomous substantive legal basis. Such interpretation would be incorrect, as this provision should be understood in the context of a specific legal basis which confers on the Union a specific internal competence. The third case follows from the *AETR* principle, as adjusted in Opinion 1/94 where, in the context of GATS, the Court referred to secondary legislation on free movement of services and freedom of establishment that provided for the conclusion of international agreements. The wording of Article 216(1) TFEU may appear to suggest an unlimited power of the legislature to endow the EU with external. This view, however, would not take into account the specific context within which Opinion 1/94 was rendered and which made it clear that the conclusion of international agreements was the necessary corollary for the application of internal market legislation.

[12] Case 22/70 *Commission v Council (AETR)* EU:C:1971:32, Opinion 1/76, n4 above.

As for the fourth case, the terms in which it is couched are identical to those in Article 3(2) TFEU. If, therefore, the conclusion of an agreement satisfies the former, it would also satisfy the latter.[13]

Question 4

The answer to Question 3 above highlighted a thread that brings together the circumstances under which the EU is endowed with competence to conclude an international agreement (Article 216(1) TFEU) and those under which that competence is exclusive (Article 3(2) TFEU). This similarity is not helpful. On the one hand, it illustrates the perils of codifying a long and complex line of case-law in Treaty language. It is somewhat ironic that, whilst it aimed to clarify the state of the law, the introduction of Articles 216(1) TFEU and 3(2) TFEU would have introduced further complexity. On the other hand, it suggests that the interpretation of these two provisions is subject to an inherent condition that is not spelled out expressly in either, namely the case-law of the Court of Justice. It is in the light of this case-law that the terms in which these provisions are couched must be understood. The attempt, therefore, at codification that that Lisbon Treaty represented in this respect has by no means reduced the significance of the role of the Court of Justice: its case-law is vital in our effort to understand and apply Article 216(1) TFEU and Article 3(2) TFEU in practice.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)

Question 5

The interactions between the Commission and the special committee envisaged in Article 218(4) TFEU are governed by the duty of inter-institutional cooperation. Article 13(2) TEU, as amended at Lisbon, requires that the institutions 'shall practice mutual sincere cooperation'. The addition of the latter provision at Lisbon, however, has not increased the intensity of cooperation between the Commission and the special committee, neither has it spurred the EU institutions to show greater respect for the prerogatives of each other. In fact, since the entry into force of the Treaty of Lisbon, the Commission has challenged the content of the Council's the negotiating directives adopted under Article 218(4) TFEU, hence raising questions about the scope and intensity of its interactions with the negotiating committee.[14]

[13] See Opinion of Advocate General Sharpston in Opinion 2/15, EU:C:2016:992, para. 70.

[14] Case C-425/13 *Commission v Council* EU:C:2015:483. It had also done so in Case C-114/12 *Commission v Council* EU:C:2014:2151, but the Court did not examine the plea.

The Commission's distinct effort to protect its prerogatives is not only reflected by litigation. In practice, national authorities observe that the flow of information by the Commission to the negotiation committee is by no means consistently generous.

Question 6

The determination of the parts of an international agreement that would apply provisionally is determined on an *ad hoc* basis. As its aim is to unshackle the application of the agreement from the legal and practical constraints of the latter's conclusion, provisional application is easier to agree where it is about the Union's exclusive competence: the parts of the agreement that are covered by it would be provisionally applied pursuant to the relevant Council Decision. This, however, is not applied without exception. In the case of the Comprehensive Economic and Trade Agreement (CETA), for instance, its provisional application was accompanied by a number of statements entered into the Council minutes which suggested that the provisional application of specific provisions did not prejudge the allocation of competence between the EU and the Member States.[15]

The determination of the parts of an international agreement that would apply provisionally amounts, ultimately, to a policy choice to be made by the Council on a case-by-case basis. There is, therefore, a degree of uncertainty that is inherent in this process. The latter could become more streamlined if the international agreements themselves determined which of their provisions would be subject to provisional application.[16] On the other hand, competence-based concerns would not be part of the process of deciding the provisional application of international agreements in the cases where the EU would conclude EU-only agreements.

The participation of the European Parliament in the process of the provisional application of mixed agreements is now confined to the general role laid down in Article 218(10) TFEU: the Parliament 'shall be immediately and fully informed at all stages of the procedure' set out in Article 218 TFEU. There is no appetite in the United Kingdom for increasing the formal participation of the European Parliament in the process of the provisional application of mixed agreements. This would slow down a process which aims to facilitate and speed up the application of international agreements. It would, also, introduce further uncertainty in a process that can ill afford it.

[15] Council Decision 2017/38 on the provisional application of CETA [2017] OJ L 11/1080, and Statements to be entered in the Council minutes [2017] OJ L 11/9.

[16] Examples (Iraq).

Question 7

A mixed agreement whose provisional application has not been ratified by a Member State would still be binding on that State as a matter of EU law pursuant to Article 216(2) TFEU. This would be the case, even though the agreement in question would not be binding on that Member State as a matter of international law. Similarly, the agreement would also be binding on the Union as a matter of international law.

Non-ratification by a Member State would have implications for the provisional application of the agreement in the EU and the third party/ies if either terminated it. This would not follow strictly from an EU or an international law obligation. It would be, instead, a policy decision which would be made on the basis of a number of factors, including the scope of the provisional application, the reason for the non-ratification by the Member State, and the broader political and economic context.

As far as the applicable procedure under EU law for the termination of the provisional application of an agreement is concerned, the Treaties are silent. It is argued that the procedure governing the provisional application of the agreement, laid down in Article 218(5) TFEU, would apply by analogy.[17]

As for the implications of non-ratification for the definitive entry into force of the agreement, they could be contained depending on the scope of the agreement and the political will in the EU for a deal with the contracting party/ies. There are different ways of achieving this outcome. The EU could conclude the Agreement as an EU-only agreement: the exclusion of the participation of the Member States would rule out risks to the application of the agreement. If that was not possible, the agreement could be renegotiated in order to assuage the concerns of the State that failed to ratify it. This option, however, would be fraught with difficulties: on the one hand, it may not be assumed that the third party/ies would be willing to reopen the negotiations in order to address the specific concerns raised by a Member State; if they did, they might also be tempted to unpack other aspects of the negotiations in order to achieve an outcome to which the EU or certain Member States might object; in any case, the concerns raised by the Member State that failed to ratify the provisional application of the agreement may be somewhat unclear and broad in scope or not easily addressed by specific modifications of the agreement.

[17] As for the international law dimension of the termination of the provisional application of an agreement, a number of international agreements set out the applicable provision: eg the Association Agreement between the EU and Ukraine which provides for termination six months after receipt of a notification to that effect ([2014] OJ L 161/3, Art. 486(7). Other Agreements do not provide for such provision: eg the EU-Iraq Partnership and Cooperation Agreement ([2012] OJ L 204/20). Article 25(2) of the Vienna Convention on the Law of Treaties, however provides for the termination of the provisional application of international agreements which it makes subject to notification by either party.

Finally, the implications of non-ratification may be contained by legal ingenuity: certain legal arrangements may be introduced which would assuage domestic policy concerns without necessitating a re-negotiation of the agreement itself. The source of such arrangements may be both the third party/ies and the EU and its Member States: this was the case in CETA where a Joint Interpretative Instrument was adopted in order to set out the interpretation of certain CETA provisions, while the terms of the latter had not been renegotiated.[18] Such arrangements may be made by the Member States themselves: in the case of the EU-Ukraine Association Agreement, for instance, a Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, was adopted in order to underline the interpretation of the Agreement agreed upon by the Member States.[19] This *ad hoc* method of tackling the implications of non-ratification by a Member State is pragmatic and seeks to contain them within the EU side. It is relied upon, however, at times of increasing public disquiet about international treaty-making. The Member States would need to think about whether such legal ingenuity may contain the underlying public scepticism in the long run.

Question 8

The scope of the agreements envisaged under Article 218(6)(a)(iii) TFEU ('agreements establishing a specific institutional framework by organising cooperation procedures') is unclear and has not been interpreted by the Court of Justice so far. It is sufficiently flexible to adjust to the evolving structures of international cooperation. So far, it has applied to agreements such as those governing the World Trade Organisation and the Hague Conference on Private International Law, and the European Economic Area Agreement. The application of this provision has not given rise to problems.

The scope of Article 218(6)(iv) TFEU ('agreements with important budgetary implications for the European Union') is also unclear. It has been interpreted by the Court of Justice in Case C-189/97 *European Parliament v Council (EC-Mauritania fisheries)*[20] in a flexible manner. The application of this provision, too, has not given rise to problems.

[18] [2017] OJ 11/3.

[19] Annexed to the European Council Conclusions on Ukraine, 15 Dec. 2016. On the legal nature of this document, see Opinion of the legal counsel, Brussels, 12 Dec. 2016 (OR. en), EUCO 37/16, LIMITE, JUR 602.

[20] EU:C:1999:366.

Question 9

The experience of suspension of international agreements by the Union has been limited. In the pre-Lisbon era, the Council and the Member States had suspended the application of the Co-operation Agreement with Yugoslavia.[21] In the post-Lisbon days, the Union has only suspended an international agreement pursuant to Article 218(9) TFEU twice, in the case of the Cooperation Agreement with Syria.[22]

It is political will that underpins the application of this procedure. The suspension of an international agreement is an assertive and powerful policy statement on behalf of the Union in a politically charged and sensitive policy context. Reaching political agreement in such circumstances is bound to be difficult. This was illustrated in the case of the SWIFT Agreement between the EU and the United States: following the revelations by Edward Snowden about the US National Security Agency's tapping of EU citizens' bank data, the European Parliament adopted a non-binding resolution suggesting that the Union suspend the application of the Agreement.[23] This did not happen.

Question 10

I am not aware of such cases.

Question 11

The European Parliament has exercised its powers under Article 218(10) TFEU with confidence. In its effort to ensure that its role is construed broadly, the Parliament has sought to enforce its prerogatives before the Court of Justice.[24] The latter has construed the scope of Article 218(10) TFEU broadly, hence cementing the role of the European Parliament in treaty-making. The right to 'be immediately and fully informed at all stages of the negotiation and conclusion procedure' ought to be seen in the wider context of the considerable powers with which the Lisbon Treaty has endowed the Parliament. Given its input in the conclusion of most international agreements, it is in the interest of the Council and the Commission, as well as that of the European Union as a whole, to engage with the Parliament under Article 218(10) TFEU as much and as openly as possible.

[21] Decision of the Council and the Representatives of the Governments of the Member States meeting within the Council 91/586 [1991] OJ L 315/47.

[22] Council Dec. 2011/523 [2011] OJ L 228/19 and Council Dec. 2012/123/CFSP [2012] OJ L 54/18.

[23] European Parliament resolution of 23 October 2013 on the suspension of the TFTP agreement as a result of US National Security Agency surveillance (2013/2831(RSP)).

[24] Case C-658/11 *European Parliament v Council* EU:C:2014:2025 and Case C-263/14 *European Parliament v Council* EU:C:2016:435.

Compliance with Article 218(10) TFEU requires the sharing of information between the Union's institutions. As some of this information is sensitive or even classified, there are concerns about maintaining its confidential nature. In order to address these concerns, the Parliament has amended its security rules[25] and concluded an agreement with the Council about the rules that govern the handling of classified information.[26] The application of the procedures laid down in this agreement is considered successful.

As far as the role of domestic parliaments is concerned, both Houses in the United Kingdom, that is the House of Commons and the House of Lords, are involved in the treaty-making process. Once the Council has adopted negotiating directives, the Government informs the Scrutiny Committees in both Houses.[27] There is acknowledgment of the need to strike the balance between sharing information and the complexities that ensue from the practicalities of international organisations. In its Guidance, the Cabinet Office notes that 'there is a difficult balance to be struck between preserving the confidentiality of the negotiating process and keeping Parliament informed of events in good time. Where it appears likely that an important negotiation will be concluded within about six months, with rapid submission of formal proposals to the Council thereafter, you should consider writing to the Committees about the opening of negotiations and their scope, although without providing details of EC or partners' negotiating positions'.[28]

The process of the ratification of treaties in the United Kingdom is governed by the Constitutional Reform and Governance Act (CRaG) 2010. This provides that most treaties that are subject to ratification,[29] including those concluded by the EU and the Member States, along with an Explanatory Memorandum must be laid by a minister of the Crown before Parliament for 21 sitting days

[25] Decision of the Bureau of the European Parliament of 6 June 2011 concerning the rules governing the treatment of confidential information by the European Parliament [2011] OJ C 190/2.

[26] Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, [2014] OJ C95/1.

[27] Cabinet Office, Parliamentary Scrutiny of European Union Documents Guidance for Departments (August 2013).

[28] Ibid, para. 2.3.6.

[29] This requirement does not apply to: a treaty covered by section 12 of the European Parliament Election Act 2002 or section 5 of the European Union (Amendment) Act 2008; a treaty for which an Order in Council may be made under section 158 of the Inheritance Tax Act 1984, section 2 of the Taxation (International and Other Provisions) Act 2010 or section 173 of the Finance Act 2006 (International Tax Enforcement Arrangements); a treaty concluded (under authority by the Government of the United Kingdom) by the government of a British overseas territory, or any of the Channel Islands or of the Isle of Man.

without either the House of Commons or the House of Lords having resolved that it should not be ratified. If either House passes a resolution objecting to ratification, the Government must then give reasons explaining its decision to insist on ratification. The House of Commons may object to ratification again during another 21 day period. It is necessary that this further period passes without the House of Commons having resolved that the agreement should not be ratified. Otherwise, the agreement is not ratified. This process can continue indefinitely, albeit only with the House of Commons (the House of Lords may only object to the ratification once).

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

I am not aware of such case-law.

Question 13

The direct effect of an international agreement binding on the EU depends on a two-tier test: first, the agreement in question as a whole must be capable of conferring enforceable rights; secondly, the specific provision of the agreement relied upon by an individual must be sufficiently clear, precise and not subject to further implementing measures. If either of these conditions is not met, the agreement may not be relied upon by an individual in order to challenge the validity of EU law or national law in the area of EU law before either national courts or the CJEU. This two-tier approach applies both to challenges against EU law brought by individuals and Member States.[30] Whilst for a long time WTO law was the only case of rules contained in an agreement concluded by the EU which was deemed incapable of conferring any rights directly enforceable before domestic courts, more recently the Court held that other treaties also felt at this hurdle: these include the United Nations Convention on the Law of the Sea (UNCLOS),[31] the Kyoto Protocol,[32] and the United Nations Convention on the rights of persons with disabilities.[33]

[30] Case C–61/94 *Commission v Germany* EU:C:1996:313, Case C-149/96 *Portuguese textiles* EU:C:1999:574; Case C-53/96 *Hermès* EU:C:1998:292.

[31] Case C-308/06 *Intertanko* EU:C:2008:312.

[32] Case C-366/10 *ATAA* ECLI:EU:C:2011:864. The Court, however, went on to examine the specific provision of the Protocol relied upon by the claimants, that is Art. 2(2), which provided that the parties would seek to limit emissions of certain greenhouse gases working through the ICAO. It held that this was not unconditional and sufficiently precise and, therefore, incapable of being relied upon by individuals in order to challenge the validity of Dir. 2008/101.

[33] Case C-363/12 *Z* EU:C:2014:159. See also Case C-356/12 *Glatzel* EU:C:2014:350.

The case-law of the Court of Justice on the direct effect of international agreements is broadly welcome. The United Kingdom is a dualist state: unless international agreements are transposed under domestic legislation, they may not be relied upon directly before domestic courts.[34] There is, therefore, a symmetry between the approach of the Court of Justice and that of domestic law in the United Kingdom about containing the enforcement of international agreements in the domestic legal order. There is also a thread that brings together this approach and the EU's recent treaty-making activity which is characterized by an unmistakable preference for ruling out direct effect, albeit couched in different ways.[35]

Question 14
I am not aware of such actions.

Question 15
I am not aware of special mechanisms to that effect introduced in the domestic legal order.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16
In its submissions in Opinion 2/15,[36] the UK argued for a narrow interpretation of foreign direct investment pursuant to Article 207(1) TFEU that would not extend beyond the initial admission of investment and that would exclude portfolio investment. It was also submitted that transport services were excluded from the scope of CCP.

[34] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500, and, more recently, *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5 at paras 55-7.
[35] See the Agreements with South Korea (Article 8 of Council Decision 2011/265/EU [2011] OJ L 127/1 and Article 336 of the Agreement [2011] OJ L127/6), the Agreement with Colombia and Peru (Article 336 [2012] OJ L 354/3, and Article 7 of Council Dec. 2012/735 on the signing, on behalf of the Union, and provisional application of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/1), the Free Trade Agreement with Singapore (Article 17.15), the Agreement with Vietnam (Art. X.19), the Association Agreement with Central America (Art. 356, [2012] OJ L 346/3 and Art. 7 of Council Dec. 2012/734 [2012] OJ L 346/1), CETA (Art. 30.6(2); both the Draft Decisions on the signature and provisional application of CETA also rule out direct effect), as well as provisions of the Association Agreements with Ukraine (Ch. 14 of the Agreement, as well as provisions on services and establishment. See also Art. 5 of Council Dec. 2014/295/EU [2014] OJ L 161/1), Georgia (Art. 5 of Council Dec. 2016/838/EU [2016] OJ L 141/26.), and Moldova (Art. 5 of Council Dec. 2016/839/EU [2016] OJ L 141/28).
[36] EU:C:2017:376.

In the area of intellectual property, the United Kingdom acknowledged that, following the judgment in *Daiich Sankyo,*[37] the TRIPS Agreement fell within the scope of the CCP. It argued, however, that the Commission's interpretation of the term 'the commercial aspects of intellectual property rights' in Article 207(1) TFEU was overly broad and that rendered the distinction between them and the non-commercial aspects of such rights redundant. The UK argued that, in understanding *Daiich Sankyo*, more emphasis should be given in the specific context of TRIPS[38] and that, therefore, Article 207(1) TFEU could not extend to the entire scope of other intellectual property treaties, such as the Berne Convention, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty.

Question 17

The relationship between Bilateral Investment Treaties (BITs) and EU law is governed by Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (the Grandfathering Regulation).[39] This instrument addressed a specific policy objective, that is to strike the balance between, on the one hand, the exclusive EU competence that had emerged after the entry into force of the Lisbon Treaty pursuant to Article 207(1) TFEU and, on the other hand, the need for the EU to develop its own investment policy. Given that the latter would entail a process that would, inevitably, take considerable time and energy for the EU institutions, it was essential that the protection afforded to investors under the BITs that the Member States had concluded would not be undermined.

It was for that reason that the Grandfathering Regulation was adopted and set out a procedural framework that would bring the application and development of BITs concluded by Member States closer to EU law. In doing so, it ensures that any new BIT entered into by a Member State would be in accordance with the EU primary law. This system has achieved its policy objective and has worked well. The implications of the approach it sets out are considerable. For instance, the Commission's recent proposal for an authorisation to negotiate the establishment a multilateral investment court is also extended to existing BITs concluded by Member States.[40]

[37] Case C-414/11 *Daiich Sankyo* EU:C:2013:520.

[38] In his Opinion in *Daiich Sankyo*, Advocate General Cruz Villalón stressed the reference to the commercial aspects of intellectual property in Article 207(1) TFEU and the distinction with other aspects which would not fall within the Union's exclusive competence (EU:C:2013:49, para. 80).

[39] [2012] OJ L 351/40.

[40] COM (2017) 493 final *Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes* (Brussels, 13 September 2017).

Question 18

The British Government believes that there is some misunderstanding about the function and implications of the existing Investment State Dispute Settlement (ISDS)procedures and stresses the need to ensure confidence for investors.[41] In the context of TTIP, for instance, it pointed out that not a single claim has been brought successfully against the UK under the ISDS mechanism laid down in its BITs (the majority of which include such mechanisms).[42]

This emphasis on investor protection also underpins the United Kingdom's approach to the Investor Court system set out in CETA. The Government has had reservations about this mechanism, but has not expressed an objection to it.[43] In particular, what the Government considers controversial is that the CETA system 'removes the rights of the EU Governments and investors to appoint arbitrators. The arbitrators are pre-selected by parties. The areas that we will want to consider are whether the rules on conflicts of interest and the lower retainer fees will produce the cadre of candidates we want, and whether the concept of the tribunals will add extra delay'.[44]

The debate about CETA in the UK Parliament illustrates both the increasing concerns about ISDS and the cautious approach of the British Government. The House of Commons European Scrutiny Committee relied upon the ISDS provisions, amongst others, in order to ask for more scrutiny and urge the Government to hold a debate in the floor of the House.[45] This did not happen, raising concern in the House, and, instead, there was a debate in the House of Commons European Committee. The Government stresses, on the one hand, that the CETA provisions about investor protection would not be subject to provisional application and, on the other hand, that the Agreement would not impinge on the regulatory autonomy of the Member States.

In this vein, the United Kingdom is cautious about the Commission's proposal for the establishment of a multilateral court[46] and its recent proposal for

[41] Government Response to the House of Lords European Union Committee's Fourteenth Report: The Transatlantic Trade and Investment Partnership (July 2014).

[42] In practice, only two publicly known claims have been brought against the UK under ISDS, and neither was in connection with a change in public policy: *Eurotunnel Group v. France and United Kingdom* 2003 (awarded in favour of investor) and *Sancheti v. United Kingdom* 2006 (unknown outcome).

[43] Debate in European Committee B, 6 February 2017, statement by the Minister for Trade and Investment.

[44] Secretary of State for International Trade, European Scrutiny Committee: Oral evidence: Parliamentary Scrutiny of EU Trade Deal: Canada/EU Comprehensive Economic and Trade Agreement (CETA), HC 792 (26 October 2016), Q.16.

[45] House of Commons European Scrutiny Committee, Thirteenth Report of Session 2016-17, 18 October 2016, HC 71-xi p4.

[46] 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.*

an authorisation by the Council on the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.[47] Whilst the UK 'supports the principle of ensuring investor-state arbitration delivers fair dispute outcomes, is transparent and maintains high ethical standards', it wishes 'to examine the details of this draft proposal carefully as they are discussed in Council to ensure that any new mechanism improves the existing investment dispute settlement framework and does so in a cost effective manner'.[48]

Question 20

One of the main innovations of the Lisbon Treaty in external relations is 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). These objectives are broad in their scope and include, amongst 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 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 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 in Opinion 2/15 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

[47] COM (2017) 493 final (Brussels, 13 September 2017).

[48] Explanatory Memorandum for EU legislation and documents submitted by Department for International Trade on 5 October 2017, para. 21.

of its common commercial policy', of which 'the objective of sustainable development henceforth forms an integral part'.[49]

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[50] 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.[51] 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.

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,[52] 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

[49] Opinion 2/15, n11 above, paras 143 and 147 respectively.

[50] 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.

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

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

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.[53]

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 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.[54] 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[55]).

Aside from the wording of Article 21 TEU, the Court has traditionally acknowledged the discretion that the EU institutions enjoy in policy-making 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.[56] 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'.[57] 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

[53] In the words of Opinion 2/15, 'Article 3(1)(e) TFEU does not prevail over these other provisions of the FEU Treaty [namely Article 3(1)(d) and (2) and Article 4(2)(b) and (e) TFEU on the nature of the EU's competence]' (n11 above, para. 164).

[54] Art 23(2)(d) and (f) TEU respectively.

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

[56] See Case C-249/96 *Portugal v Council* EU:C:1999:574, Case C-377/02 *Van Parys* EU:C:2005:121, and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Fedon* EU:C:2008:476.

[57] C-150/94 *UK v Council (re: toy import quotas from China)*, EU:C:1998:547, para 67.

is a matter for the EU's decision-making institutions, the latter enjoy discretion that is inherent in the conduct of CCP. 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.

Question 21

The procedure for the negotiation and conclusion of international agreements regarding the CCP does not raise particular problems. After all, in practice, there is a distinct effort for decisions to be taken by consensus. As for the requirement for unanimity in Article 207 (4)(2) and (3) TFEU, it has not raised particular difficulties in practice, as it functions as a safety net for Member States in areas of acute political sensitivity.

CHAPTER 5: AREA OF FREEDOM, SECURITY AND JUSTICE (POLICIES ON BORDER CONTROLS, ASYLUM AND IMMIGRATION)

Question 22

Protocol 23 on the external relations of the Member States with regard to the crossing of external borders was considered sufficiently important by the drafters of the Treaties to retain it in the post-Amsterdam amendments of primary law. In fact, even the effort at Lisbon to clarify the circumstances under which the Union is endowed with external exclusive competence (Articles 3(2) TFEU and 216(1) TFEU) were not deemed sufficient to render Protocol 23 redundant. On the one hand, the Protocol makes it clear that the Union's competence to define the checks applicable to external borders pursuant to Article 77(2)(b) TFEU is not exclusive *a priori*. On the other hand, it raises the question whether the adoption of internal harmonising legislation in the area would render the Union's external competence exclusive.

The formula used in Protocol 23 is not unique in primary law. We find a similar formulation in the provisions governing environmental policy (Article 191(4) subparagraph 2 TFEU) and development cooperation (Article 209(2) subparagraph 2 TFEU).[58] These cases, however, do not take us very far. In the area of environmental law, the exercise of the Union's competence internally affects the

[58] In relation to the economic and monetary union, Article 219(4) TFEU provides it is the competence of the Member States to conclude international agreements that is to be exercised without prejudice to the Union's competence and agreements concluded by the EU. Notice, however, that Article 3(1)(c) TFEU provides that the monetary policy of the Member States the currency of which is the euro falls within the Union's exclusive competence.

nature of the external competence.[59] In the area of development co-operation, the exercise of the Union's competence may not pre-empt the exercise of national competence (Article 4(4) TFEU).[60]

The United Kingdom does not participate in measures adopted under in the Area of Freedom, Security and Justice pursuant to Protocol (No) 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, unless it opts in. It does not participate, in particular, in the border controls elements of the Schengen system.

Question 23

The UK is not bound by Directive 2013/32 pursuant to Articles 1, 2 and 4a(1) of Protocol (No) 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice. It applies, therefore, the previous rules laid down in Directive 2005/85.

A safe third country is defined as follows: (i) the applicant's life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country; (ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention; (iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected in that country; (iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country; (v) there is a sufficient degree of connection between the person seeking asylum and that country on the basis of which it would be reasonable for them to go there; and (vi) the applicant will be admitted to that country (345C Immigration Rules).

The assessment of whether it is reasonable for an individual to be removed to a safe third country is made by the Secretary of State on the basis of factors including, but not confined to, (i) any time the applicant has spent in the third country; (ii) any relationship with persons in the third country which may include: a. nationals of the third country; b. non-citizens who are habitually resident in the third country; c. family members seeking status in the third country; (iii) family lineage, regardless of whether close family are present in the third country; or (iv) any cultural or ethnic connections (345C Immigration Rules).

In 2016, the High Court considered Turkey an unsafe country in the context of transfers to Hungary under the Dublin regime (the question of potential

[59] See, for instance, Opinion 2/00 EU:C:2001:664, paras 45-7.

[60] See Case C-316/91 *European Parliament v Council* EU:C:1994:76 para. 26 (and also Joined Cases C-181/91 and C-248/91 *European Parliament v Council and Commission* EU:C:1993:271 para. 16 (re: humanitarian aid)).

refoulement from Hungary was raised).[61] This conclusion was reached of, amongst others, the geographical limitation that the latter placed on the application of the Refugees Convention) It did so by placing considerable emphasis on the UNHCR. This conclusion may well be relevant in the context of a direct safe third country transfer to Turkey. It is noteworthy, however, that the High Court also referred to a number of caveats regarding the determination of a safe third country: the inevitably partial evidence, the extreme fluidity of the situation in third countries, the possibility that satisfactory assurances may be obtained from third states as to the treatment of applicants.

Question 24

The United Kingdom adopted a positive approach to the Global Approach to Migration and Mobility. It 'particularly welcome[d] [its] focus on practical cooperation, and [its] non-binding and voluntary character ..., which allows Member States to decide how they can best contribute to joint initiatives in this area'.[62] The British Government also viewed the implementation of the Global Approach and the determination of possible candidates for future Mobility and Common Agenda Partnerships by the Commission as an illustration of a welcome focus on domestic immigration pressures.[63]

On the Partnership Framework, the British Government suggested that 'a full assessment on the effectiveness of progress with current priority countries' be carried out prior to any further expansion.[64]

Of the priority countries with which the Commission proposed to negotiate compacts, the UK has most significant bilateral interests with Nigeria and Ethiopia.[65]

Question 25

As far as readmission agreements concluded by the EU, the UK 'decide[s] whether to participate ... on a case-by-case basis, depending on the priority we attach to the country concerned in terms of numbers of immigration returns and the degree to which we enjoy a good bilateral relationship with that country'.[66]

The UK participates in EU readmissions agreements with Albania, Bosnia-Herzegovina, Former Yugoslav Republic of Macedonia, Georgia, Hong Kong,

[61] (*Ibrahimi and Abasi* [2016] EWHC 2049 (Admin)).
[62] Letter by Minister for Immigration to House of Lords EU Committee, 18 February 2013.
[63] House of Commons European Scrutiny Committee, 19 March 2014, para. 16.28.
[64] Parliamentary Under-Secretary of State for International Development, 13 December 2016, House of Commons, Written statement – HCWS348.
[65] Letter by Minister for Europe and the Americas to House of Lords EU Committee, 21 July 2017.
[66] House of Commons, Written Statement HCWS369 by Minister For Immigration (16 December 2016).

Macau, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, Turkey and Ukraine.

Since the entry into force of the Treaty of Amsterdam, and excluding States which subsequently acceded to the UK, the UK has finalised readmission agreements with Switzerland (2005), Algeria (2006), and South Korea (2011). It also has memoranda of understanding for the return of nationals found illegally in the UK with Afghanistan, Angola, Burundi, China, Democratic Republic of Congo, Guinea, Iraq, Kuwait, Malaysia, Nigeria, Rwanda, Sierra Leone, Somaliland, South Sudan and Vietnam.

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