

# THE NETHERLANDS

ANDREA OTT  
RAMSES A. WESSEL\*

## 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<sup>1</sup> aims to be an ‘EU-law abiding citizen’. The so-called ‘Guidelines for external action by the Union and its Member States’,<sup>2</sup> 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.<sup>3</sup> Opinion 2/15 concerned the draft Free

\* Contributions by: Pieter Jan Kuijper, Liesbeth A Campo, Juliane Dieroff, Jaap Feenstra, Bart Driessen, Claudio Matera, Thomas Nauta and Ivo van der Steen.

<sup>1</sup> In this report, ‘the Netherlands’ is used to refer to ‘the government of the Netherlands’, unless otherwise indicated.

<sup>2</sup> ‘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>.

<sup>3</sup> 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<sup>4</sup>. 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<sup>5</sup>).

<sup>4</sup> 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.

<sup>5</sup> 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<sup>6</sup>. 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.<sup>7</sup> The CJEU applies Article 3(2) TFEU widely: 1) a finding that there is a risk that common rules might be affected/alterd 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;<sup>8</sup> 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;<sup>9</sup> 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.

<sup>6</sup> See Cases C-22/70 (ERTA-AETR), paras 22 and 30 and Case C-114/12, para. 68.

<sup>7</sup> See Opinion 3/15, para. 108; Opinion 1/13, para. 74 and Case C-66/13, para. 33

<sup>8</sup> See Opinion 1/13, paras. 72-73 and Case C-66/13 paras 30-31.

<sup>9</sup> See Opinion 1/03, para. 126 and Opinion 2/91, para. 25.

and the EU rules;<sup>10</sup> 4) the fact that an international agreement contains *minimum requirements* does not necessarily mean that it cannot lead to exclusive external Union competence.<sup>11</sup>

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<sup>12</sup> and has recently been reaffirmed by the CJEU in Opinion 2/15.<sup>13</sup> 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,<sup>14</sup> 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”.<sup>15</sup> 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.<sup>16</sup> And the latter option would require that the international agreement affects common rules established through supporting competences, which is also rather unlikely.

<sup>10</sup> See Opinion 1/13, para. 86; Opinion 2/91, paras. 25 and 26.

<sup>11</sup> 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.

<sup>12</sup> See Opinion 2/92, para. 36.

<sup>13</sup> See para. 229-235.

<sup>14</sup> 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.

<sup>15</sup> See the ‘Vuistregels voor extern optreden van EU en haar lidstaten’, *op.cit.* n.2.

<sup>16</sup> 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 Netherlands' 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),<sup>17</sup> 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,<sup>18</sup> 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).<sup>19</sup>

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,*

<sup>17</sup> Case C-389/15 *Commission v. Council*, currently pending, the Netherlands has intervened on the side of the Council.

<sup>18</sup> Opinion 2/15 para.107.

<sup>19</sup> 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 continue 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.<sup>20</sup>

#### 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'.

<sup>20</sup> 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.<sup>21</sup> 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

<sup>21</sup> 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.<sup>22</sup> 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*)<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> However, the special committee/Council cannot establish detailed negotiating positions of the Union.<sup>26</sup> 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.

<sup>22</sup> See also Opinion 2/15, para. 171-172.

<sup>23</sup> Case C-425/13, *Commission v. Council (Gas emissions)* (Grand Chamber), EU:C:2015:483, points 66-90.

<sup>24</sup> Paras. 66-67.

<sup>25</sup> Para. 78.

<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> In order to accom-

<sup>27</sup> 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-oekraïne>

<sup>28</sup> 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”.<sup>29</sup> Several Council decisions even explicitly state that “the provisional application of parts of the Agreement does not prejudice the allocation of competences between the Union and its Member States in accordance with the Treaties.”<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> 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).

<sup>29</sup> See for example the Council decisions mentioned in the previous note.

<sup>30</sup> 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 prejudice 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.

<sup>31</sup> 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.

<sup>32</sup> 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*”<sup>33</sup> – 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.”*<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup> 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

<sup>33</sup> Article II:2 of the U.S. Constitution.

<sup>34</sup> 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.

<sup>35</sup> 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.

<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup>

One can claim that, as long as not all the parties have ratified the agreement, the provisional application can continue indefinitely.<sup>41</sup> The clauses on

<sup>37</sup> 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=l&sortorder=4>

<sup>38</sup> 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.

<sup>39</sup> 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.

<sup>40</sup> 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 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*" (emphasis added).

<sup>41</sup> 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”.<sup>42</sup> Therefore, the failure of the ratification procedure would require the termination of the provisional application.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup> 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*

<sup>42</sup> 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.

<sup>43</sup> 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.

<sup>44</sup> 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).

<sup>45</sup> 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*<sup>46</sup>.

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.<sup>47</sup> A broader reading was advocated by the European Parliament but has not yet been confirmed by a judicial interpretation.<sup>48</sup> 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.<sup>49</sup>

<sup>46</sup> See: <http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>

<sup>47</sup> 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, 3<sup>rd</sup> edn. 2011, para. 26-012. The WTO Agreements provide an example.

<sup>48</sup> 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.

<sup>49</sup> 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.<sup>50</sup> 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.

<sup>50</sup> 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*<sup>51</sup> and *Tanzania*<sup>52</sup> 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.<sup>53</sup> 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”*.<sup>54</sup>

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”*.<sup>55</sup>

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).

<sup>51</sup> Case C-658/11, *Parliament v. Council (Mauritius)*, EU:C:2014:2025, paras. 77-81 and 86.

<sup>52</sup> Case C-263/14, *Parliament v. Council (Tanzania Agreement)*, EU:C:2016:435, para.68.

<sup>53</sup> *Mauritius* case, paras. 78 and 80.

<sup>54</sup> *Tanzania* case, para. 77.

<sup>55</sup> *Ibid.*, point 73.

In addition, the Interinstitutional Agreement on Better Law-Making<sup>56</sup> 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).<sup>57</sup> 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.<sup>58</sup>

### 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.<sup>59</sup> 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,<sup>60</sup> which concerned the interpretation of the Open Skies Agreement between the EU and the US.<sup>61</sup>

<sup>56</sup> Interinstitutional Agreement on Better Law-Making, OJ L123 of 12 May 2016, p. 1, para. 40.

<sup>57</sup> See for the work undertaken by the Maltese Presidency: <http://data.consilium.europa.eu/doc/document/ST-10006-2017-INIT/en/pdf>).

<sup>58</sup> 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.

<sup>59</sup> 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.

<sup>60</sup> The case came from the Raad van State, ECLI:NL:RVS:2015:2773.

<sup>61</sup> 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.<sup>62</sup> In other rulings, international IP rights agreements in the form of WIPO and TRIPS<sup>63</sup> play a role and the question asked how far EU law has to be interpreted in conformity with these international treaty obligations.<sup>64</sup> For example, IP-related preliminary references from 2016 with a Dutch origin were Case C-174/15<sup>65</sup> or Case C-169/15<sup>66</sup>, 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,<sup>67</sup> 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.

<sup>62</sup> See only ECLI:NL:RBDHA:2016:3336.

<sup>63</sup> 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)

<sup>64</sup> 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.

<sup>65</sup> *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.

<sup>66</sup> 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.

<sup>67</sup> 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.<sup>68</sup> 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),<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup>

#### 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.<sup>72</sup> 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

<sup>68</sup> P. van Dijk, Constitutional Review in the Netherlands, [http://www.venice.coe.int/WCCJ/Papers/NED\\_vanDijk\\_E.pdf](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](https://www.ejcl.org/64/art64-17.html#_ftn2).

<sup>69</sup> Case 01409190/1/R6, 27 May 2015, ECLI:NL:RVS:2015:1702.

<sup>70</sup> 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.

<sup>71</sup> ECLI:NL:GHDHA: 2013:BZ4871 and ECLI:NL:HR:2014:2928.

<sup>72</sup> Case C-92/07 *European Commission v. The Netherlands*, ECLI:EU:C:2010:228.

these countries to terminate their intra-EU bilateral investment treaties.<sup>73</sup> 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 Sub-regional 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.<sup>74</sup>

### 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*.<sup>75</sup> In this Grand Chamber Opinion, the Court confirmed the *Daiichi*<sup>76</sup> 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*

<sup>73</sup> European Commission, September infringements ‘package: key decisions, 29 September 2016.

<sup>74</sup> C-73/14, *Council v. Commission* (ITLOS), ECLI:EU:C:2015:663.

<sup>75</sup> Opinion 2/15, *Singapore FTA*, EU:C:2017:376.

<sup>76</sup> 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”.*<sup>77</sup>

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.<sup>78</sup> 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*”.<sup>79</sup> 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”.*<sup>80</sup>

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”.*<sup>81</sup>

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 ...”*<sup>82</sup>

<sup>77</sup> Opinion 2/15, Singapore FTA, paras 36-37. Emphasis added.

<sup>78</sup> *Ibid.*, para. 73.

<sup>79</sup> *Ibid.*, para. 126. See for similar comments paras. 135 and 165.

<sup>80</sup> *Ibid.*, para. 152.

<sup>81</sup> *Ibid.*, para. 158.

<sup>82</sup> *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”*.<sup>83</sup>

The Court logically applies this definition, which originally was developed in the context of internal market, to Article 207 TFEU.<sup>84</sup> The concept of foreign direct investment (FDI) in Article 207 excludes other types of investment,<sup>85</sup> 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*”.<sup>86</sup>

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.<sup>87</sup>

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*”.<sup>88</sup> 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-

<sup>83</sup> *Ibid.*, para.80 and the case law mentioned there.

<sup>84</sup> *Ibid.*, para.81.

<sup>85</sup> *Ibid.*, para.83.

<sup>86</sup> *Ibid.*, para. 227.

<sup>87</sup> *Ibid.*, paras.56-68.

<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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,<sup>91</sup> 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.<sup>92</sup>

### Question 17

The Netherlands has no specific opinion on this. The relationship between Member States' BIT's and EU agreements is to a great extent laid down in Regulation 2019/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.<sup>93</sup> 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.<sup>94</sup> The Commission was duly notified of this agreement under the above-mentioned EP/Council Regulation 1219/2012.<sup>95</sup>

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.<sup>96</sup> The Court relied here on its case law concerning the EU's

<sup>89</sup> Opinion 2/15, para.129.

<sup>90</sup> Ibid.

<sup>91</sup> See, for example, the comparable discussion on sustainable development in points 153-155.

<sup>92</sup> Available at: <https://www.rijksoverheid.nl/documenten/kamerstukken/2016/09/07/aanbiedingsbrief-bij-de-geannoteerde-agenda-voor-de-informele-raad-buitenlandse-zaken-rbz-over>.

<sup>93</sup> OJ L 351, 20.12.2012, p. 40-46.

<sup>94</sup> 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>.

<sup>95</sup> 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.

<sup>96</sup> Ibid., paras.248-250.

succession of the Member States in the GATT.<sup>97</sup> However, this replacement theory only applies to the extent that the BITs concerned relate to FDI.<sup>98</sup> 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’.<sup>99</sup> That, however, disregards the question of provisional application, which occurs before the “entry into force”.<sup>100</sup> 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.*

<sup>97</sup> Joined Cases 21/72 to 24/72, *International Fruit Company*, EU:C:1972:115, points 10 to 18.

<sup>98</sup> Opinion 2/15, para.247.

<sup>99</sup> *Ibid.*, para. 254.

<sup>100</sup> 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”.*<sup>101</sup>

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.<sup>102</sup>

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.<sup>103</sup>

### **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.<sup>104</sup> 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

<sup>101</sup> 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.

<sup>102</sup> [https://diplomatie.belgium.be/sites/default/files/downloads/ceta\\_summary.pdf](https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf)

<sup>103</sup> 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.

<sup>104</sup> 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.<sup>105</sup> By reading<sup>106</sup> that provision in conjunction with Article 205 TFEU,<sup>107</sup> the Court integrates the obligations on sustainable development into Article 207(1) TFEU. In addition, the Court points to Articles 9<sup>108</sup> and 11<sup>109</sup> 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'*<sup>110</sup> 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

<sup>105</sup> Opinion 2/15, paras, 141 et seq.

<sup>106</sup> Ibid., para, 143.

<sup>107</sup> *"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"*.

<sup>108</sup> *"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"*.

<sup>109</sup> *"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"*.

<sup>110</sup> 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;<sup>111</sup> 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.<sup>112</sup> 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

<sup>111</sup> 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

<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> 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 Tunisia in case of women and rights of lesbian, gay, bisexual, transgendered and intersex (LGBTI).<sup>116</sup> 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

<sup>113</sup> <https://www.rijksoverheid.nl/onderwerpen/asielbeleid/vraag-en-antwoord/lijst-van-veilige-landen-van-herkomst>.

<sup>114</sup> 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 (Staatssecretaris 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.

<sup>115</sup> ECLI:NL:RVS:2016:2474

<sup>116</sup> 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.<sup>117</sup>

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.<sup>118</sup> At this moment, several referrals from Netherlands courts are pending.<sup>119</sup> In one case, the accelerated Court procedure (PPU) has been followed<sup>120</sup> 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.<sup>121</sup> The impression is that many Netherlands courts are well able to interpret EU provisions and to examine complicated and intransparent 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.<sup>122</sup>

<sup>117</sup> See <https://www.rijksoverheid.nl/onderwerpen/asielbeleid/documenten/kamerstukken/2016/12/06/tk-uitbreiding-lijst-veilige-landen-van-herkomst-vierde-tranche>.

<sup>118</sup> 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).

<sup>119</sup> 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).

<sup>120</sup> 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.

<sup>121</sup> The court directly applies the relevant Union regulation and directives to establish these obligations.

<sup>122</sup> 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 be 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 partnerships 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.<sup>123</sup> 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.<sup>124</sup>

<sup>123</sup> Commission Communication 'The Global Approach to Migration and Mobility', COM (2011) 743 final, 18.11.2011.

<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup>

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.<sup>127</sup>

which copies the readmission commitment into the arrangement, however it was concluded as a political commitment between the EU and Afghanistan.

<sup>125</sup> European Commission Press release 13 June 2017, [http://europa.eu/rapid/press-release\\_IP-17-1595\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1595_en.htm)

<sup>126</sup> COM(2016) 385 final, p.8

<sup>127</sup> 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.<sup>128</sup> Thus, the Netherlands has concluded readmission agreements with the Western Balkans (Macedonia,<sup>129</sup> Montenegro,<sup>130</sup> Bosnia-Herzegovina,<sup>131</sup> Serbia,<sup>132</sup> Kosovo<sup>133</sup>) and Eastern European countries (Moldova<sup>134</sup> Armenia<sup>135</sup> Georgia<sup>136</sup> and Kazakhstan 2015).<sup>137</sup> These agreements were concluded between the Benelux

<sup>128</sup> Kamerstuk 34283. 18 September 2015.

<sup>129</sup> 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.

<sup>130</sup> Protocol of 4.7.2012.

<sup>131</sup> Agreement of 19.7.2006 and Protocol of 2008.

<sup>132</sup> 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.

<sup>133</sup> Readmission agreement with Kosovo of 12.5.2011, (set into force 1 April 2014).

<sup>134</sup> 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.

<sup>135</sup> Readmission Agreement of 3.6.2009.

<sup>136</sup> Readmission agreement with Georgia of 5.9.2013 and Protocol of 5.9. 2013.

<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup>

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.”<sup>140</sup>*

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.

<sup>138</sup> 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/>.

<sup>139</sup> Agreement of 2 March 2013, Text at: <http://wetten.overheid.nl/BWBV0005246/1974-01-01>.

<sup>140</sup> <http://www.benelux.int/nl/nieuws/benelux-top-gezamenlijke-communicatie/> 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 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.<sup>141</sup> 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

<sup>141</sup> 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.<sup>142</sup>

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.

<sup>142</sup> 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.