

# **The Netherlands and (Facultative) Mixity: Pragmatism over Principles?**

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## **1 Introduction**

### ***1.1 General considerations***

The 2013 ‘Guidelines for external action by the Union and its Member States’<sup>1</sup> of the government of the Netherlands are intended to guide the decisions related to the division of competences, the position in international fora and the negotiation and conclusion of international agreements. The very first sentence in that document indicates that the EU Treaties are leading in all cases.

Yet, pragmatism is in the Dutch genetic code. This Dutch pragmatism also influences its approach towards mixed agreements and facultative mixity. Thus, legal considerations influence the assessment of competences but this legal assessment can be adjusted on the basis of political or pragmatic considerations. This finding has been earlier summarised as “principles when necessary, practical when useful”.<sup>2</sup> That this may also lead to giving priority to pragmatism over principles is reflected in the general guidelines for external representation in international organisations which have been adopted in 2010 by the Council of Ministers of the Netherlands.<sup>3</sup> These guiding principles are relevant for the question who should represent the Union and the Member States in those international organizations and negotiations in which both are represented. The first guiding principle, again, is that the EU Treaties are leading in all cases. The second guideline expresses the Dutch aim to strive for decisive, coherent and effective external action by the Union and the Member States. The Netherlands acts jointly with other EU partners as much as possible, taking into account the means by which the EU and the Member States could act most effectively. The guiding principles also indicate that the Netherlands shall, as much as possible, uphold the unity of the EU’s external representation.<sup>4</sup>

Hence, the Dutch government generally adopts the position that a mixed agreement is considered

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\* Opinions in this contribution are personal and do not necessarily reflect the views of the Dutch government or the Ministry for Foreign Affairs of the Netherlands.

<sup>1</sup> See ‘Vuistregels voor extern optreden van de EU en haar lidstaten’ (2013) ICER (the Interministerial Committee on European Law), 2013 <<https://ecer.minbuza.nl/ecer/bijlagen/icer/handleidingen/2013/vuistregels-voor-extern-optreden-van-de-eu-en-haar-lidstaten.html>>.

<sup>2</sup> IVO VAN DER STEEN, ‘Mixity in Practice – A View From the Netherlands’, in: HILLION & KOUTRAKOS (eds), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, p. 295.

<sup>3</sup> See ‘Externe vertegenwoordiging – Richtsnoeren optreden EU voorzitterschap in multilaterale onderhandelingen’, <<https://ecer.minbuza.nl/nl/ecer/voorzitterschap/beleid-voorzitterschap/externe-vertegenwoordiging/externe-vertegenwoordiging-%E2%80%93-richtsnoeren-optreden-eu-voorzitterschap-in-multilaterale-onderhandelingen.html>>.

<sup>4</sup> Cf. in general on the approach of the Netherlands in EU external relation ANDREA OTT & RAMSES WESSEL, ‘The Netherlands’, in: DA CRUZ VILAÇA, PIÇARRA, LEANDRO VASCONCELOS & SAAVEDRA (eds), *The External Dimension of the EU Policies: Horizontal Issues; Trade and Investment; Immigration and Asylum*, Congress Proceedings XXVIII FIDE Congress, Lisbon/Estoril, Vol. 3, 2018, p. 755.

necessary if an agreement falls in part in an area which is not covered by *a priori* exclusive EU competences and which comes under shared competences that have not (yet) been exercised internally by the Union. In the terminology used by Rosas,<sup>5</sup> the Netherlands would have a tendency to plead for mixity in the case of *concurrent* shared competences (where the Union could in principle conclude the Agreement despite parts not being covered by exclusivity), in addition to the case of *coexistent* shared competences (where parts of the Agreements fall under exclusive Member State competences). As we will see, this approach may result in a political obligation to aim for a mixed agreement in cases of facultative mixity

At the same time, this starting point can be pragmatically adapted but it is the combination of legal and political considerations that determines that a political choice can prevail, if it is legally defensible. Furthermore, the Netherlands, in general, prefers mixed agreements over EU-only agreements in order to ensure adequate national parliamentary control. The exceptional case of the Association Agreement with Kosovo – which was concluded as an EU-only agreement – despite some elements that are clearly not covered by EU exclusive competences and the consistent practice to conclude Association Agreements as mixed agreements – does not contradict these findings. In contrast, it underlines the prevalence of pragmatism over principles.

## 1.2 *Facultative mixity*

As stated above, the Netherlands (and the Council) usually prefers a mixed agreement when an agreement is covered by shared competences which have not (yet) been exercised internally by the Union. After Opinion 2/15 on the EU-Singapore FTA, the question arose whether the Court had rejected facultative mixity by arguing that a shared competence would by definition lead to mixity.<sup>6</sup> This uncertainty about the existence of facultative mixity was caused in particular by the Court's finding that the provisions of the agreement concerning indirect investments could not be approved by the European Union alone.<sup>7</sup> However, this misunderstanding was later expressly clarified by the *COTIF* judgment.<sup>8</sup>

In this light, it can be noted that the Netherlands has a cautious approach towards allowing *prima facie* facultative mixity to lead to 'mandatory EU-only' agreements by virtue of Article 3(2) TFEU. This concerns especially the adoption of internal legislation which can then result in EU exclusive competence because EU common rules could be affected or altered by Member States individual or collective actions.<sup>9</sup> The contingency preparations for a 'no-deal' Brexit scenario in the field of transport,<sup>10</sup> in particular in the field of air transport, provide a nice illustration of this. Traditionally, in this field the EU and the Member States conclude mixed agreements with third countries, in particular, because the EU has not exercised its shared competence with regard to air traffic rights. However, Brexit required the Netherlands – alongside other members of the Council – to make the politically difficult choice between retaining 'its competences' in this field, or adopting (unilateral) EU-internal legislation ensuring basic connectivity to prepare for a no-deal Brexit scenario (and thus allowing the Union to

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<sup>5</sup> See the Chapter by Rosas in this Volume.

<sup>6</sup> See LUCA PRETE, 'Some Thoughts on Facultative and Obligatory Mixity after Singapore and COTIF, and before CETA', (2018) *Verfassungsblog*, available at: <https://verfassungsblog.de/some-thoughts-on-facultative-and-obligatory-mixity-after-singapore-and-cotif-and-before-ceta/> (last accessed 28.08.2019).

<sup>7</sup> See Opinion 2/15 re *the Singapore FTA*, EU:C:2017:376, para. 244.

<sup>8</sup> See Case C-600/14, *Germany v. Council*, EU:C:2017:296, para. 68.

<sup>9</sup> See on this Opinion 1/03 re *the Lugano Convention*, EU:C:2006:81; and Opinion 1/13 re *the Accession of Third States to the Hague Convention*, EU:C:2014:2303, para.71-74; Joined Cases C-626/15 and C-659/16, *Commission v. Council*, EU:C:2018:925, paras.113-114.

<sup>10</sup> See Regulation 2019/502 of the European Parliament and of the Council on common rules ensuring basic road freight and road passenger connectivity with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union, OJ [2019] L 85I/39 and Regulation 2019/502 of the European Parliament and of the Council on common rules ensuring basic air connectivity with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union, OJ [2019] L 85I/49.

exercise its competences).<sup>11</sup> It is for this reason that the Council insisted – with support of the Netherlands – on the inclusion of ‘disclaimers’<sup>12</sup> in the Regulation, clarifying that this exercise of shared competences by the Union is because of “*the exceptional and unique circumstances that necessitate the adoption of this Regulation.*” Although the Union will have an exclusive external competence by virtue of article 3(2) TFEU, it is stressed that the exercise by the Union of the shared competence is stressed in scope and in time (it only covers the elements governed by this regulation and is limited to the period of application of the Regulation). This is emphasized in the preamble (recital 10): “*The Union will therefore cease to exercise the competence exercised through this Regulation after that date. Without prejudice to other Union measures, and subject to compliance with those measures, that competence will, in accordance with Article 2(2) TFEU, again be exercised by the Member States thereafter. The respective competences of the Union and of the Member States with respect to the conclusion of international agreements in the area of road transport are to be determined in accordance with the Treaties and taking into account relevant Union legislation.*”

It is noted that the exercise of Union competence pursuant to these Regulations shall be without prejudice to the competence of the Member States concerning traffic rights in any ongoing or future negotiations, signature, or conclusion of international agreements related to air services with any third country, and with the United Kingdom with respect to the period after this Regulation has ceased to apply.<sup>13</sup> In addition, the 27 Member States adopted a statement in which they emphasize that they consider it important for the future comprehensive air transport agreement with the UK to be a mixed agreement. It is the Member States’ view that nothing in the regulation precludes a decision in this sense.<sup>14</sup>

This cautious approach with regard to the exercise of shared competences by the Union exemplifies the default position of the Netherlands and was also visible in its views during the negotiations on the amendment of the Gas Directive.<sup>15</sup> Although the Netherlands eventually voted in favour of the adoption of the Directive,<sup>16</sup> it had concerns about the exclusive external competence that would emerge once internal legislation was adopted (the last alternative in Article 3 (2) TFEU). According to the Netherlands, this constituted an undesirable development limiting the competence of the Netherlands to design its own energy policy.<sup>17</sup>

While the Council (supported by the Netherlands) usually opts for mixity if an agreement covers more than EU exclusive competences, it exceptionally happens that the Council deliberately decides that the Union should conclude an EU-only agreement. An example is the Stabilisation and Association

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<sup>11</sup> Article 218 TFEU only provides for the conclusion of international agreements by the Union with third countries or international organisations. It was therefore not possible to conclude an air transport agreement with the UK whilst it is still a Member State.

<sup>12</sup> See recital 7 and article 2 of the Regulation 2019/502, *supra* fn 10.

<sup>13</sup> See Article 2(2) of Regulation 2019/502.

<sup>14</sup> See the statements by Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden in Council of the European Union, Doc. 7165/19 ADD 1 REV 1.

<sup>15</sup> Directive 2019/692 of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, OJ [2019] L 117/1.

<sup>16</sup> See Council of the European Union, Doc. 8610/19.

<sup>17</sup> See <https://zoek.officielebekendmakingen.nl/kst-22112-2447.html> and <https://www.rijksoverheid.nl/documenten/kamerstukken/2019/02/19/kamerbrief-over-verzoek-ten-aanzien-van-wijziging-europese-gasricht>.

Agreement with Kosovo.<sup>18</sup> The usual option to conclude such association agreements as mixed agreements proved not to be feasible as Kosovo was only recognized under international law by 23 EU Member States. The recitals of the Agreement clarify that the Agreement is without prejudice to positions on status, and is in line with UN Security Council Resolution 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence. In addition, pursuant to Article 2 of the agreement “*none of the terms, wording or definitions used in this Agreement, including the Annexes and Protocols thereto, constitute recognition of Kosovo by the EU as an independent State nor does it constitute recognition by individual Member States of Kosovo in that capacity where they have not taken such a step.*” This results in what one may perhaps term a ‘false’ EU-only agreement.<sup>19</sup>

Another example which was also clearly supported by the Netherlands,<sup>20</sup> is formed by the recent amendments of agreements between the EU and Morocco. After the CJEU had decided in the *Western Sahara* cases that the Agreement between the EU and Morocco concerning liberalisation measures on agricultural and fishery products ( “the Liberalisation Agreement”)<sup>21</sup> and the Fisheries Partnership Agreement the Fisheries Partnership Agreement<sup>22</sup> do not apply to the territory of the Western Sahara or the waters adjacent to the territory of the Western Sahara, the Commission recommended the Council to adopt a negotiating mandate to amend these agreements by means of an Exchange of Letters between the EU and Morocco in order to extend the agreements to the (waters adjacent to) the territory of the Western Sahara. While the compatibility of these agreements with international and EU law is still subject to discussion,<sup>23</sup> it is interesting to note that both agreements have been concluded as EU-only agreements.<sup>24</sup> In a first case the Court held that the Association Agreement between the EU and its Member States and Morocco does not apply to the territory of the Western Sahara.<sup>25</sup> In light of the special connection between the Liberalisation Agreement and the Association Agreement (the Liberalisation Agreement is an agreement designed to amend the Association Agreement), the Court found that the Liberalisation Agreement could also not be understood as meaning that its territorial scope included the territory of the Western Sahara. In the second case, the Court held that the Fisheries Partnership Agreement is one of a body of agreements that is framed by the Association Agreement and

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<sup>18</sup> Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, OJ [2016] L 71/3.

<sup>19</sup> By analogy, see section 3 of the Chapter by Rosas in this Volume.

<sup>20</sup> See <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/11/27/kamerbrief-over-voortgang-visserijbeleid> and <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/09/14/beantwoording-kamervragen-over-het-handelsverkeer-tussen-de-eu-en-de-westelijke-sahara>

<sup>21</sup> Council Decision 2012/497 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, OJ [2012] L 241/2.

<sup>22</sup> Council Regulation 764/2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, OJ [2006] L 141/1

<sup>23</sup> Both Council decisions on the conclusion of these agreements are – at the time of writing – the subject of an action for annulment by Front Polisario. See Cases T-356/19, *Front Polisario v. Council* (pending); T-344/19, *Front Polisario v. Council* (pending) and T-279/19, *Front Polisario v. Council* (pending).

<sup>24</sup> See Council Decision 2019/217 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, OJ [2019] L 34/1 and Council Decision () 2019/441 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement, OJ [2019] L 77/4.

<sup>25</sup> Case C-104/16 P, *Council v. Front Polisario*, EU:C:2016:973, para. 107.

therefore, the concept of “territory of Morocco” in the Fisheries Partnership Agreement should be construed in the same way as the concept of “territory of the Kingdom of Morocco” in the Association Agreement.<sup>26</sup> Thus, in both judgments the Court established the territorial scope of the agreements on the basis of the territorial scope of the Association Agreement. One could therefore have argued that, in order to change the territorial scope of these agreements, the territorial scope of the Association Agreement should have been amended. Yet, the Union specifically opted to only change the territorial scope of the specific agreements. This outcome fits the general position of the Netherlands as it implies that the arrangements between Morocco and the EU only extend to the Western Sahara in so far as it concerns fisheries and agriculture.

## **2 The treaty-making process and mixity**

Article 218 TFEU lays down a single procedure of general application concerning, in particular, the negotiation and conclusion of international agreements by the Union.<sup>27</sup> Questions of mixity can arise, not only in the various stages of the procedure for the negotiation and conclusion of an international agreement, but also in the stage of the fulfilment of the commitments entered into by the contracting parties. In the following paragraphs the Dutch perspective on mixity will be illustrated in the various stages of the procedure for the negotiation and conclusion of an international agreement, and, finally, the stage of the fulfilment of the commitments entered into.

### ***2.1 Negotiation of international agreements***

#### ***2.1.1 ‘Splitting’ of trade agreements***

In its Opinion 2/15, the Court held that the envisaged FTA with Singapore could not be concluded by the EU alone. It clarified that the EU did not have exclusive competence with regard to the provisions of the agreement relating to non-direct foreign investments and the provisions governing dispute settlement between investors and states.<sup>28</sup> In response to this judgment, the Commission announced its intention to ‘split’ trade agreements, by recommending draft negotiating directives for FTAs covering exclusive EU competence on the one hand (EU-only agreements) and separate mixed investment agreements on the other.<sup>29</sup> The same day, the Commission presented two recommendations for Council decisions authorizing the opening of negotiations for (‘EU-only’) free trade agreements with New Zealand and Australia.<sup>30</sup> The

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<sup>26</sup> Case C-266/16, *Western Sahara*, EU:C:2018:118, paras 59-61.

<sup>27</sup> See Case C-658/11, *Parliament v. Council*, EU:C:2014:2025, para. 52 and Case C-244/17, *Commission v. Council*, EU:C:2018:662, para. 21.

<sup>28</sup> Before the Opinion, the Netherlands had always taken the view that provisions in trade agreements relating to expropriation decisions touch upon the sovereignty of the Member States. The Netherlands had also always held that indirect investments such as portfolio investments do not fall within the scope of Article 207 TFEU and therefore do not come under exclusive EU competence. See <https://www.rijksoverheid.nl/documenten/kamerstukken/2016/09/07/aanbiedingsbrief-bij-de-geannoteerde-agenda-voor-de-informele-raad-buitenlandse-zaken-rbz-over>, p. 5. While the first point was rejected by the Court, it did confirm the second point, see Opinion 2/15 re *the Singapore FTA*, EU:C:2017:376, paras 107 & 83.

<sup>29</sup> See European Commission, ‘A Balanced and Progressive Trade Policy to Harness Globalisation’, COM(2017) 492 final.

<sup>30</sup> See European Commission, Recommendation for a Council Decision authorizing the opening of negotiations for a Free Trade Agreement with New Zealand, COM(2017) 469 final; European Commission, Recommendation for a Council Decision authorizing the opening of negotiations for a Free Trade Agreement with Australia, COM/2017/0472 final.

proposed negotiating directives did not include provisions on indirect investment and investor-state dispute-settlement. This approach was not welcomed by all Member States, since some of them were of the opinion that trade agreements should also contain investment protection rules.<sup>31</sup> The Netherlands, however, agreed with the Commission that it was not necessary to agree on investment protection rules in all trade agreements, such as the ones with New Zealand and Australia.<sup>32</sup> It held that the inclusion of investment protection rules should be considered on a case-by-case basis and that investment protection rules are particularly important when the national legislation and the institutions of the third party concerned do not provide adequate legal certainty.<sup>33</sup>

The Dutch position coincided with the position ultimately adopted by the Council which was that the Commission's recommendations on negotiations with New Zealand and Australia should not set a precedent for the future.<sup>34</sup> The Council stressed that it is for the Council to decide, on a case-by-case basis, on the splitting of trade agreements and that negotiating EU-only trade agreements should not lead to a loss of negotiation leverage for the EU to obtain ambitious standalone investment agreements. Therefore, a first reflection in the Council on the need for investment protection rules with the negotiating partner concerned should take place at the earliest possible stage of the so-called 'scoping exercise'. In principle, EU investment agreements should be negotiated in parallel to FTAs. And indeed, the Council's concern about a loss of negotiation leverage to finalise standalone investment agreements with third countries is a genuine risk. The negotiations between the EU and Japan on the Economic Partnership Agreement<sup>35</sup> illustrate how difficult it can be to agree upon investment protection rules with a third country. Although the negotiating directives adopted by the Council instructed the Commission to negotiate a chapter on investment protection in the agreement,<sup>36</sup> it was impossible to convince Japan of this necessity.<sup>37</sup>

The EU did, however, succeed in splitting the results of the negotiations with Singapore<sup>38</sup> and Vietnam<sup>39</sup> by separating the EU-only FTAs from the mixed investment protection agreements. 'Splitting' these agreements was supported by the Netherlands, although it did stress the importance of transparency and the involvement of national parliaments and other stakeholders in the process of negotiating EU-only trade agreements<sup>40</sup> (see further below). For other trade agreements, such as the (association) agreements with Mexico, Mercosur and Chile, the Council held (with support by the Netherlands) that these should remain mixed.<sup>41</sup> The Netherlands has also supported the recent recommendations<sup>42</sup> of the Commission to negotiate EU-only trade agreements – without investment protection rules – with the United States of

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<sup>31</sup> See <<https://www.rijksoverheid.nl/documenten/kamerstukken/2018/05/31/kamerbrief-inzake-verslag-raad-buitenlandse-zaken-over-handel-op-22-mei-2018>>

<sup>32</sup> See <<https://zoek.officielebekendmakingen.nl/kst-22112-2438.html>>

<sup>33</sup> See <<https://zoek.officielebekendmakingen.nl/kst-21501-02-1806.html>>

<sup>34</sup> See Council of the European Union, Conclusions on the negotiation and conclusion of EU trade agreements, Doc. 9120/18. See also section 5 of the chapter by Kübek & Van Damme in this Volume.

<sup>35</sup> Agreement between the European Union and Japan for an Economic Partnership Agreement, OJ [2018] L 330/3.

<sup>36</sup> See Council of the European Union, Directives for the negotiation of a Free Trade Agreement with Japan, Doc. 15864/12 ADD 1 REV 2 DCL 1.

<sup>37</sup> See <<https://zoek.officielebekendmakingen.nl/kst-21501-02-1826.pdf>>

<sup>38</sup> The FTA and the Investment Protection Agreement were both signed in Brussels on 19 October 2018.

<sup>39</sup> The FTA and the Investment Protection Agreement were both signed in Hanoi on 30 June 2019.

<sup>40</sup> See <<https://www.rijksoverheid.nl/documenten/kamerstukken/2018/05/31/kamerbrief-inzake-verslag-raad-buitenlandse-zaken-over-handel-op-22-mei-2018>>

<sup>41</sup> See Council of the European Union, Conclusions on the negotiation and conclusion of EU trade agreements, Doc. 9120/18, para. 3

<sup>42</sup> See European Commission, Recommendation for a Council Decision authorising the opening of negotiations of an agreement with the United States of America on conformity assessment, COM (2019) 15 final; European Commission, Recommendation for a Council Decision authorising the opening of negotiations with the United States of America on the elimination of tariffs for industrial goods, COM (2019) 16 final.

America.<sup>43</sup>

### 2.1.2 Transparency

The involvement of the national parliament and stakeholders in the process leading up to new agreements is an essential concern for the Netherlands. As mentioned above, FTAs (that do not include provisions on portfolio investments or the resolution of investment disputes) are fully covered by the Union's exclusive competence under Article 207 TFEU and are concluded as EU-only agreements. The Netherlands considers it essential that the negotiation of trade agreements is based on a transparent and inclusive process in which democratic legitimacy is guaranteed.<sup>44</sup> In this light, the government of the Netherlands also strives for its national Parliament to be involved as much as possible, namely by informing and engaging the Dutch Parliament in the different phases of the procedure for negotiating and concluding an international agreement. The government of the Netherlands periodically sends progress reports on EU trade agreements to the Parliament, reports which are also published on the government website.<sup>45</sup> In addition, the Parliament receives an annotated agenda of every (Foreign Affairs) Council meeting, the government engages in a General Consultation with Parliament on the position which the Netherlands intends to take in the Council and sends a report to Parliament about the outcome of each meeting.

The government of the Netherlands has also created a specific page on its website to make the contents and process of the negotiation and conclusion of EU trade agreements more transparent.<sup>46</sup> In order to create broad support for EU-trade agreements, the Netherlands has also set up a Trade Policy Advisory Group ('Breed Handelsberaad')<sup>47</sup> which consists of business representatives, representatives of trade unions, and representatives of civil society organisations and local authorities.<sup>48</sup> The Netherlands has welcomed the Commission's decision to publish its recommendations for negotiations on FTAs, such as the ones with New Zealand and Australia. This practice enables the government to inform the national parliament about these envisaged FTAs and to engage in discussions with the Dutch parliament in an early stage.<sup>49</sup> While the Council of the European Union takes the position that a decision to publicize negotiating directives is decided on a case-by-case basis,<sup>50</sup> the Netherlands supports the Commission's decision to publish every recommendation for negotiating directives for trade agreements.<sup>51</sup> The Dutch government also advocates a regular practice to publish related Council decisions and negotiating directives.<sup>52</sup> On some occasions, the Dutch efforts have been successful, as proven by the Directives for

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<sup>43</sup> See <<https://www.rijksoverheid.nl/documenten/kamerstukken/2019/02/01/kamerbrief-over-eu-conceptmandaten-voor-onderhandelingen-met-vs>>

<sup>44</sup> See <<https://zoek.officielebekendmakingen.nl/kst-21501-02-1806.html>>

<sup>45</sup> See for example Voortgangsrapportage handelsakkoorden – Februari 2019, <<https://www.rijksoverheid.nl/documenten/rapporten/2019/02/15/bijlage-1-voortgangsrapportage-handelsakkoorden-%E2%80%93-februari-2019>>

<sup>46</sup> See <<https://www.rijksoverheid.nl/onderwerpen/handelsverdragen-europese-unie>>

<sup>47</sup> See <<https://www.rijksoverheid.nl/onderwerpen/handelsverdragen-europese-unie/breed-handelsberaad>>

<sup>48</sup> See <<https://www.rijksoverheid.nl/documenten/kamerstukken/2016/10/24/beantwoording-kamervragen-over-handelsakkoorden-nieuwe-stijl>>

<sup>49</sup> See <<https://zoek.officielebekendmakingen.nl/kst-21501-02-1806.html>>

<sup>50</sup> See Council of the European Union, Conclusions on the negotiation and conclusion of EU trade agreements, Doc. 9120/18.

<sup>51</sup> See European Commission, 'A Balanced and Progressive Trade Policy to Harness Globalisation', COM(2017) 492 final, p. 7

<sup>52</sup> See <<https://www.rijksoverheid.nl/documenten/vergaderstukken/2018/02/22/verslag-schriftelijk-overleg-informele-raad-buitenlandse-zaken-over-handel-op-26-en-27-februari-2018>>

the negotiation of a Modernised Association Agreement with Chile.<sup>53</sup> The Council has made this negotiating directive public after repeated requests by the Netherlands and Austria.<sup>54</sup>

### 2.1.3 Investment protection and Member States bilaterals

Investment agreements, such as those with Canada, Singapore and Vietnam mentioned above, stipulate that bilateral investment treaties between Member States and the third countries concerned shall be terminated and shall cease to have effect. These bilateral investment treaties shall be replaced and superseded by the EU-investment agreements.<sup>55</sup> In this regard, it is worthwhile to note that the Netherlands currently still is a party to 77 bilateral investment treaties (BITs)<sup>56</sup> as it attaches great importance to an excellent investment climate and considers BITs to be necessary as long as the EU has not provided for equally high standards of investment protection. However, following the judgment of the Court in *Achmea*<sup>57</sup> the Netherlands is currently in the process of terminating 11 treaties which it has concluded with other EU Member States ('intra-EU BITs').<sup>58</sup> Post-Lisbon, the Netherlands has concluded only one new bilateral investment agreement, with the United Arab Emirates (signed in 2013) which, however, is currently not yet in force.<sup>59</sup> The Commission was duly notified of this agreement under the Regulation 1219/2012.<sup>60</sup> Partly in response to the criticism on international arbitration which arose with CETA and TTIP<sup>61</sup> the Netherlands has revised its model BIT text<sup>62</sup> and is currently in the process of renegotiating its remaining BITs.<sup>63</sup>

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<sup>53</sup> See Council of the European Union, Directives for the negotiation of a Modernised Association Agreement with Chile, Doc. 13553/17 ADD 1 DCL 1.

<sup>54</sup> See the statement made by the Netherlands and Austria in the minutes of the 2647<sup>th</sup> meeting of Coreper, Council of the European Union Doc. 14741/17.

<sup>55</sup> See Article 30.8(1) of CETA, Article 4.12(3)(a) of the Investment Protection Agreement with Singapore, and Article 4.20(4) of the Investment Protection Agreement With Vietnam. See also Opinion 1/17 re *CETA*, EU:C:2019:341, para. 250.

<sup>56</sup> See the list on the UNCTAD Investment Policy Hub website.

<sup>57</sup> In Case C-284/16, *Achmea*, EU:C:2018:158, the Court held that Articles 267 and 344 TFEU must be interpreted as precluding investor-state arbitration clauses contained in bilateral investment treaties between Member States, such as Article 8 of the Bilateral Investment Treaty concluded between the Kingdom of the Netherlands and the Slovak Republic. After this judgement, 22 Representatives of the Governments of the Member States (including the Netherlands) signed a declaration on the legal consequences of the *Achmea* judgment and on investment protection (see [https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties\\_en](https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en)) in which they committed to terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognized as more expedient, bilaterally.

<sup>58</sup> See Kamerstukken II, 2017-2018, 21 501-02, nr. 1863.

<sup>59</sup> For the text, see Tractatenblad 2014, 1.

<sup>60</sup> Regulation 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ [2012] L 351/40.

<sup>61</sup> See Kamerstukken II, 2018-2019, 35 154, nr. 4, p. 4.

<sup>62</sup> See <https://www.rijksoverheid.nl/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden>

<sup>63</sup> See <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/10/26/kamerbrief-over-modeltekst-investeringsakkoorden>

## 2.2 Signature and provisional application of mixed agreements

### 2.2.1 Provisional application

Provisional application, pending the entry into force, is restricted to those provisions in a mixed agreement that are based on Union competences. It is, therefore, standard practice that only the EU may provisionally apply an 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>64</sup> In relation to the Association Agreement with Ukraine, the referendum which the Netherlands held on it and the difficulties which existed to find support from all Member States in relation to the signature of CETA, the question arose what should happen to the provisional application of an agreement in case of non-ratification of a mixed agreement by one or more Member States.<sup>65</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, that mixed agreement cannot enter into force; as at least in the case of bilateral mixed agreements the ratification by all parties is usually required.<sup>66</sup> The Netherlands takes the view that, 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 situation leads to the impossibility by a Member State to ratify the agreement, consultation should take place, preferably, at the level of the European Council, in order to seek to find a solution.<sup>67</sup> The Dutch referendum on the approval act of the Association Agreement with Ukraine provides an example: the (factually correct or not) concerns of part of the electorate,<sup>68</sup> eventually have been solved through an additional declaration to the agreement.<sup>69</sup> While the position of the Netherlands is that the solution found is legally sound,<sup>70</sup> it has also been

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<sup>64</sup> See also the Explanatory memoranda which the Government has sent to the parliament with regard to the provisional application of: the Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba of the other part, (<https://zoek.officielebekendmakingen.nl/kst-35186-3.html>); the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada of the other part (<https://zoek.officielebekendmakingen.nl/kst-35155-3.html>) and the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (<https://zoek.officielebekendmakingen.nl/kst-35062-3.html>).

<sup>65</sup> On this generally, see GUILLAUME VAN DER LOO & RAMSES WESSEL, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions', (2017) 54 *CMLRev.* 3.

<sup>66</sup> See the notion of 'incomplete' mixed agreements in the Chapter by Rosas in this Volume.

<sup>67</sup> See for the response of the Netherlands 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>>; and <<https://zoek.officielebekendmakingen.nl/ah-tk-20152016-1401.html>>

<sup>68</sup> In the public debate some had argued that ratification of the agreement would lead to Ukraine's accession to the EU or that it would lead to military co-operation.

<sup>69</sup> See 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' which was adopted on 15 December 2016 after the outcome of the Dutch Referendum on 6 April 2016 on the bill approving the EU-Ukraine Association agreement.

<sup>70</sup> See <<https://www.rijksoverheid.nl/documenten/kamerstukken/2017/02/13/verslag-schriftelijk-overleg-associatieovereenkomst-oekraine>>

criticized.<sup>71</sup> The Netherlands is of the opinion that in case of a clear impossibility for one Member State to ratify, the Council should take a decision taking into account that the continued provisional application of the agreement would not be consistent with the fact it would never formally enter into force.<sup>72</sup> After all, an agreement is provisionally applied pending the entry to force of an agreement. This position is also in line with the Council's position regarding the provisional application of CETA.<sup>73</sup>

A somewhat related question is whether a Member State could decide not to ratify a mixed agreement for reasons relating to parts of the agreement that fall within the exclusive competence of the EU. In response to questions raised by the national parliament, the Dutch government has consistently held that a mixed agreement should be approved by Parliament in its entirety and that it therefore can also decide on the elements of an agreement which fall within the (exclusive) competence of the Union.<sup>74</sup> While this point of view is certainly true from an international law perspective, it could raise difficulties in the sphere of the division of competences between the Union and its Member States, and it has been argued that denying the Union the possibility to exercise its own competences would be contrary to EU law.<sup>75</sup>

Another issue related to provisional application is its timing. Although the specific institutional balance incorporated in the Treaty procedure under Article 218 TFEU foresees no role for the Parliament in the adoption of the Decisions on signature and provisional application, there may be instances where the actual provisional application is postponed until the European Parliament has given its consent. 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.<sup>76</sup>

### 2.2.2 *Common accord*

Another stage in the process in which The Netherlands has shown particular interest, is the so-called 'common accord' between the Member States as 'states'.<sup>77</sup> Legal conflicts have arisen from the Council and Member States' practice in the case of mixed agreements whereby the Council decisions on signature and conclusion are usually not put to the vote until all Member States have indicated their position to commit themselves internationally, as far as their competence is concerned.<sup>78</sup> Relying on the need for unity in external representation, the Council

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<sup>71</sup> See for instance Ramses Wessel, 'The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement', (2016) 1 *European Papers* 3, pp. 1305-1309.

<sup>72</sup> See <<https://zoek.officielebekendmakingen.nl/ah-tk-20152016-1401.html>>

<sup>73</sup> See in this regard, Statement no. 20 of the Council regarding the termination of provisional application of CETA: "If the ratification of CETA fails 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." See Council of the European Union, Doc. 13463/1/16 REV 1.

<sup>74</sup> See <<https://www.rijksoverheid.nl/documenten/kamerstukken/2016/09/12/beantwoording-kamervragen-over-de-voorlopige-toepassing-van-het-vrijhandelsverdrag-tussen-de-eu-en-canada-ceta>> and <<https://zoek.officielebekendmakingen.nl/kst-21501-02-1653.html>>

<sup>75</sup> See more extensively VAN DER LOO AND WESSEL, *supra* fn 65.

<sup>76</sup> See <<https://zoek.officielebekendmakingen.nl/kst-21501-02-1653.html>>.

<sup>77</sup> On the decisional rule of common accord, see also section 7.1 of the Chapter by Boelaert and sections 2.1 and 2.2 of the Chapter by De La Torre in this Volume.

<sup>78</sup> See DA CRUZ VILAÇA, ET AL., *supra* fn 4, p. 165.

has defended this practice.<sup>79</sup> It has, however, been attacked by the Commission for violating the treaty-making procedure and specifically the voting procedure under qualified majority voting as in practice achieving consensus became part of the procedure. This practice was successfully challenged by the Commission in the *Hybrid Act* case as it merges two decisions in one. In the eyes of the Court, it merged “*on the one hand, an act relating to the signing of the agreements at issue on behalf of the European Union and their provisional application by it and, on the other, an act relating to the provisional application of those agreements by the Member States, without it being possible to discern which act reflects the will of the Council and which the will of the Member States.*”<sup>80</sup> The Council and the intervening Member States in the case – including the Netherlands – argued, amongst others, that the Treaties do not contain express provisions that lay down detailed arrangements relating to the negotiation and conclusion of mixed agreements and the adoption of a joint decision was an expression of the close cooperation between the Member States and the Union with regard to mixed agreements, ensuring unified representation of the European Union in international relations.<sup>81</sup> The Court, however, considered this hybrid decision a clear breach of Article 218(2), (5) and (8) TFEU and, therefore, of Article 13(2) TEU.<sup>82</sup>

Practice indeed shows that mixity can cause difficulties when one or more Member States refuse to bind themselves to a mixed agreement and in some of these situations The Netherlands has shown a particular interest. Apart from the above-mentioned example on the EU-Ukraine Association Agreement, this occurred shortly after the Court rendered its judgment in the *Hybrid Act* case. The specific situation concerned the discussions on the Commission proposals<sup>83</sup> for Council Decisions on the signing of the Council of Europe Convention on the Manipulation of Sports Competitions (CETS No. 215) also known as the ‘Macolin’ or ‘Matchfixing’ Convention. Although there was broad support for the decisions in November 2015, it became clear that one Member State was not in a position to give its consent.<sup>84</sup> Thus, the adoption of the Council Decisions on the signing on behalf of the EU of the Convention was withheld until all delegations could express their consent to sign.<sup>85</sup> Up until the time of writing, the decisions have still not been adopted by the Council.<sup>86</sup>

A similar situation has arisen in respect of the United Nations Convention on Transparency in

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<sup>79</sup> The need for unity in the international representation of the Union is a requirement flowing from well-established case law. See i.a. Ruling 1/78 re *the Draft Convention of the IAEA on the Physical protection of Nuclear Materials, Facilities and Transports*, EU:C:1978:202; Opinion 2/91 re *ILO Convention No 170*, EU:C:1993:106; Opinion 1/94 re *WTO*, EU:C:1994:384; Case C-25/94, *Commission v. Council*, EU:C:1996:114. See also section x of the Chapter by Chamon and Hillion in this volume.

<sup>80</sup> Case C-28/12 *Commission v. Council*, EU:C:2015:282, para. 49.

<sup>81</sup> *Ibid.*, paras. 27-28 and 36-37.

<sup>82</sup> *Ibid.*, paras 49-50.

<sup>83</sup> See European Commission, Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on the manipulation of sports competitions with regard to matters not related to substantive criminal law and judicial cooperation in criminal matters, COM(2015) 84 final; European Commission, Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on the manipulation of sports competitions with regard to matters related to substantive criminal law and judicial cooperation in criminal matters, COM(2015) 86 final.

<sup>84</sup> See Council of the European Union, Doc. 14284/15, p. 19.

<sup>85</sup> See Council of the European Union, Doc. 5632/16, p. 5.

<sup>86</sup> See Council of the European Union, Doc. 9576/19, p. 18.

Treaty-based Investor-State Arbitration (also known as the ‘Mauritius Convention’).<sup>87</sup> By signing and concluding the Convention, the EU could become a party to the Convention in respect of the Energy Charter Treaty and the Member States could become party to the Convention in respect of their bilateral investment treaties. However, the discussions within the Council have ended in a deadlock because not all Member States agree that the Mauritius Convention should be applied to the Energy Charter Treaty.<sup>88</sup> During its Presidency of the Council of the European Union in 2016 the Netherlands was committed to reaching progress in the discussions on the Matchfixing and Mauritius Conventions. However, its attempts to convince the opposing Member States of signing the Conventions remained unsuccessful.<sup>89</sup>

The Netherlands found the deadlock in the Council regrettable<sup>90</sup> and, given the absence of consensus, it decided – together with some other Member States<sup>91</sup> – to sign the Mauritius Convention.<sup>92</sup> The Netherlands had already signed the Matchfixing Convention prior to the Commission’s proposals to sign and conclude the Convention.<sup>93</sup> However, it takes the view that it cannot ratify the Convention before the discussions at the level of the EU have been completed.<sup>94</sup>

It should be noted that the proposed substantive legal bases for the Council Decisions on the signature of the Matchfixing Convention (Articles 114 and 165 TFEU<sup>95</sup>; and Articles 82(1) and 83(1) TFEU<sup>96</sup>) and regarding the Mauritius Convention (Article 207(4), first subparagraph, TFEU) only require qualified majority voting in the Council. Therefore, the Council’s approach to verify the common accord amongst all Member States to be bound by an agreement with respect to their competences, is controversial in light of the *Hybrid Act* case.<sup>97</sup> With respect to the Matchfixing Convention, the responsible Commissioner stated: “[...]While the contents of the proposals were agreed at COREPER in November 2015, the proposals were blocked as the Council requested confirmation of a common accord by all Member States before proceeding to a vote. This allows one Member State to continue blocking the process. The Commission

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<sup>87</sup> See European Commission, Proposal for a Council Decision on the signing, on behalf of the European Union, of the United Nations Convention on transparency in treaty-based investor-State arbitration, COM(2015) 21 final

<sup>88</sup> See the Reply to the European Parliament by the Dutch Presidency on 3 February 2016 in the debate on the UN convention on transparency in Treaty-based investor-state arbitration.

<sup>89</sup> On Matchfixing see <<https://zoek.officielebekendmakingen.nl/kst-21501-31-420.html>> and <<https://www.rijksoverheid.nl/documenten/kamerstukken/2016/07/07/kamerbrief-over-terugkoppeling-eu-voorzitterschap-vws>>. On Uncitral see the Reply to the European Parliament by the Dutch Presidency on 3 February 2016 in the debate on the UN convention on transparency in Treaty-based investor-state arbitration.

<sup>90</sup> See the Reply to the European Parliament by the Dutch Presidency on 3 February 2016 in the debate on the UN convention on transparency in Treaty-based investor-state arbitration

<sup>91</sup> The Netherlands has signed the Mauritius Convention on 18 May 2016. Belgium, Germany, Finland, France, Italy, Luxembourg, the United Kingdom and Sweden have also signed the agreement.

<sup>92</sup> See <<https://www.rijksoverheid.nl/documenten/kamerstukken/2016/02/19/beantwoording-kamervragen-over-conventie-voor-transparantie-investeerder-staat-arbitrage>>

<sup>93</sup> The Netherlands signed the Convention on 18 September 2014.

<sup>94</sup> See <<https://zoek.officielebekendmakingen.nl/kst-21501-31-420.html>>. The agreement entered into force on 1 September 2019 since the minimum number of required states was reached after the ratification of Switzerland.

<sup>95</sup> For the decision with regard to matters not related to substantive criminal law and judicial cooperation in criminal matters.

<sup>96</sup> For the decision with regard to matters related to substantive criminal law and judicial cooperation in criminal matters.

<sup>97</sup> See for example written question E-001592-19 to the European Commission with regard to the Matchfixing Convention.

*disagrees with this approach. The applicable procedure and voting is clear: the Treaty clearly stipulates qualified majority voting for this kind of Council decision. The Court of Justice has also confirmed in a recent judgment that “the rules regarding the manner in which the EU institutions arrive at their decisions are laid down by the Treaties and are not at the disposal of the Member States or of the institutions themselves.”*<sup>98</sup> However, this point of view was not shared during the discussions in COREPER in November 2015 when the Presidency refused to proceed to a vote.<sup>99</sup> Despite the efforts of the Dutch Presidency in 2016 to resolve this matter, it was unable to find a compromise which would enable a breakthrough.<sup>100</sup>

Indeed, it can be questioned whether the Council’s ‘common accord’ or collective acting<sup>101</sup> is in line with the *Hybrid Act* ruling. On the one hand, the EU and Member State aspects are separated and Article 218 TFEU only addresses the EU part of the treaty-making process. However, for a mixed agreement, the EU will, in principle, be the last to ratify, after all Member States have ratified an international agreement. Therefore, considering whether the successful enforcement of a mixed agreement is feasible is reasonably pragmatic and subject to a political choice. For the Netherlands this forms another example whereby legal considerations have to be reconciled with pragmatic and political arguments. The European Parliament has now finally decided to bring this question before the Court,<sup>102</sup> by adopting a resolution seeking an opinion of the Court relating to the EU’s accession to the Convention on preventing and combating violence against women and domestic violence (also known as the ‘Istanbul Convention’).<sup>103</sup> Although decisions on the signature of the Istanbul Convention have already been adopted by the Council,<sup>104</sup> it appears that the common accord at the time of signature<sup>105</sup> is no longer present before the adoption of the decisions on the conclusion of the Convention.<sup>106</sup> One of the questions on which the European Parliament is seeking the Court’s opinion is whether the “*practice of a ‘common accord’ by the Council in its decision-making, which is applied in addition to or alternatively to the relevant decision-making procedure in the Treaties, is compatible with the Treaties.*”

### 2.2.3 *The conclusion of international agreements*

As mentioned above, the Singapore agreement was ‘split’ after Opinion 2/15. The agreements with Singapore were signed prior to Opinion 1/17 on the compatibility of the Investment Court System (ICS) in the Comprehensive Economic Trade Agreement with Canada (CETA). The Netherlands supported the signature of these agreements and agreed with the Commission that the *Achmea* judgment (on the intra-

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<sup>98</sup> Case C-28/12, *Commission v. Council*, EU:C:2015:282, para. 42.

<sup>99</sup> See Council of the European Union, Doc. 14284/15, p. 19.

<sup>100</sup> See the Reply to the European Parliament by Commissioner Navracsics on 15 September 2016 in the debate on Match-fixing.

<sup>101</sup> DA CRUZ VILAÇA, ET AL., *supra* fn 4, p. 164.

<sup>102</sup> Opinion 1/19, information not yet available.

<sup>103</sup> See European Parliament resolution of 4 April 2019 seeking an opinion from the Court of Justice relating to the EU accession to the Convention on preventing and combating violence against women and domestic violence.

<sup>104</sup> Council Decision 2017/865 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, OJ [2017] L 131/11 and Council Decision 2017/866 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement, OJ [2017] L 131/13.

<sup>105</sup> See Council of the European Union, Doc. 8306/17, para. 3.

<sup>106</sup> See Council of the European Union, Doc. 8594/18, p. 13.

EU BITs) had no impact on the investment protection agreement with Singapore.<sup>107</sup> However, the Council stated that it would refrain from approving the conclusion of the agreement before the Court rendered its Opinion 1/17 and the Commission did not propose the provisional application of the agreement.<sup>108</sup>

As regards CETA itself, the Council obviously also decided to wait for Opinion 1/17 before adopting its decision on the conclusion. The Netherlands was of the opinion that the ICS in CETA was compatible with EU law and also participated in the procedure before the Court to argue that CETA should be distinguished from e.g. the investment agreement in the *Achmea* case. The main line of reasoning was that the CETA tribunals would have no jurisdiction to interpret and apply rules of EU law other than the provisions of CETA. Meanwhile, the Netherlands had already started the ratification process at national level, so that the entry into force of CETA would not be unnecessarily delayed by the suspension of national ratification procedures pending Opinion 1/17. However, unlike some other Member States,<sup>109</sup> the Netherlands took the view that it should not send the required written notification provided for in Article 30.7(2) of CETA certifying that it had completed its internal requirements and procedures, before the CJEU delivered its Opinion.<sup>110</sup> By now, Opinion 1/17 has paved the way for the ratification of CETA<sup>111</sup> and other investment treaties such as the ones with Vietnam and Singapore.

Whereas the previous paragraphs have illustrated that the Council is often cautious about signing and concluding mixed agreements without having all Member States on board, the conclusion by the Union of the Paris Agreement illustrates that under certain (political) circumstances non-simultaneous action by the Union and its Member States is considered necessary – even if there are legal objections to this. At the 21<sup>st</sup> Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 21), the text of the Paris Agreement was adopted. Prior to the signature of the Agreement on the 22<sup>nd</sup> of April 2016, the European Council already stressed the need for the European Union and its Member States to be able to ratify this mixed agreement as soon as possible and on time so as to be Parties as of its entry into force.<sup>112</sup> The Dutch Presidency made sure that this call was repeated by the Council on the 20<sup>th</sup> of June 2016 in a statement, as it considered it important to maintain the ‘Paris momentum’ to continue preparations for the effective and comprehensive implementation of the Paris Agreement and to proceed with its ratification.<sup>113</sup> In its statement, the Council called upon the Member States and the European Union “*to start taking the necessary steps to finalise their respective ratification procedures, as soon as possible, with the aim to deposit collectively their ratification instruments with the UN Secretary General*”<sup>114</sup> and affirmed its intention to regularly take stock of progress made in the domestic ratification procedures in all Member States.

Indeed, it is settled case-law of the CJEU that it is essential to ensure close cooperation between

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<sup>107</sup> See <<https://www.rijksoverheid.nl/documenten/kamerstukken/2018/05/31/kamerbrief-inzake-verslag-raad-buitenlandse-zaken-over-handel-op-22-mei-2018>>. This view was later confirmed by the Court of Justice in Opinion 1/17. The Court held that the *Achmea* judgment concerned an agreement between Member States and clarified that the question of compatibility with EU law of the creation or preservation of an investment tribunal by means of such an agreement must be distinguished from the compatibility of the creation of such a tribunal by means of an agreement between the Union and a non-Member State. See Opinion 1/17 re *CETA*, EU:C:2019:341, para. 127.

<sup>108</sup> See the statement by the Commission in Council of the European Union, Doc. 13431/18.

<sup>109</sup> The Czech Republic, Denmark, Estonia, Spain, the United Kingdom, Croatia, Lithuania, Latvia, Malta, Portugal, Sweden and Finland ratified CETA prior to Opinion 1/17. See: <https://www.consilium.europa.eu/nl/documents-publications/treaties-agreements/agreement/?id=2016017&DocLanguage=en>.

<sup>110</sup> See <<https://zoek.officielebekendmakingen.nl/kst-35154-3.html>>

<sup>111</sup> At the moment of writing, the ratification process is still ongoing in the Netherlands. The government has sent all the requirement documents for approval to the Parliament.

<sup>112</sup> Conclusions of the European Council of 17 and 18 March 2016, Doc. EUCO 12/1/16 REV 1, para. 16.

<sup>113</sup> See Council of the European Union, Draft Council statement on the ratification of the Paris agreement, Doc. 9855/1/16.

<sup>114</sup> *Ibid.*, p. 3 (emphasis added).

the Member states and the EU institutions, not just in the process of negotiation (as we have seen above), but also in relation to the conclusion of mixed agreements and in the fulfilment of the commitments entered into.<sup>115</sup> The need for the EU and the Member States to act jointly in respect of the Paris Agreement, also becomes particularly apparent from Article 4(18) of the Agreement which provides, for Parties acting jointly with a regional economic integration organization such as the European Union that “*each member State of that regional economic integration organization individually, and together with the regional economic integration organization, shall be responsible for its emission level as set out in the [joint action] agreement*”. It was therefore clear that the fulfilment of this obligation under the Agreement required joint action by the Union and its Member States. Therefore, and in order to be in a position to honour their obligations under the Agreement, it would have been best if the instruments of ratification of the agreement were deposited simultaneously by the EU and its Member States – as proposed by the Dutch.

However, the process for entry into force of the Paris Agreement accelerated after the ratification of the Agreement by the United States of America and China on the 3<sup>rd</sup> of September 2016.<sup>116</sup> This increased the risk that the agreement would enter into force before both the EU and its Member State were party to it, which would prevent them from participating in the decision-making on the interpretation and implementation of the agreement at the Meetings of the Parties to the Paris Agreement (CMA).<sup>117</sup> For this reason, the Netherlands fully supported the Council Decision<sup>118</sup> to conclude the Paris Agreement on behalf of the Union – before it could be ratified by all Member States.<sup>119</sup> However, the Netherlands was committed to finalise its own ratification-process as soon as possible, in order to ensure that its observer-status at the CMA would be limited in time.<sup>120</sup> The Council, the Member States and the Commission adopted a statement clarifying that the early ratification on behalf of the EU was reached unanimously in a unique context and cannot be interpreted as a precedent for any other ratification process. The statement also underlined the essential role of the national parliaments in the ratification process and that the process of ratification by the Union and its participation at the CMA would not affect the division of competences between the Union and the Member States.<sup>121</sup>

In addition, the EU made a declaration of competence upon ratification, in which it clarified (amongst others) that the commitment contained in its intended nationally determined contribution would be fulfilled through joint action by the Union and its Member States within the respective competence of each.<sup>122</sup>

#### 2.2.4 Implementation of international agreements

The Netherlands has actively participated in a number of cases which have brought more clarity on the

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<sup>115</sup> See amongst others, Case C-246/07, *Commission v. Sweden*, EU:C:2010:203, para. 73.

<sup>116</sup> Pursuant to Article 21(1), the Paris Agreement would enter into force on the 30<sup>th</sup> day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55% of the total global greenhouse gas emissions deposited their instruments of ratification.

<sup>117</sup> Pursuant to Article 16(2) of the Paris Agreement, Parties to the Convention that are not Parties to the Agreement may participate as observers in the proceedings of any session of the Conference of the Parties serving at the meeting of the Parties to the Agreement, but cannot participate in the decision-making.

<sup>118</sup> Council Decision 2016/1841 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, OJ [2016] L 282/1.

<sup>119</sup> See <<https://www.rijksoverheid.nl/documenten/kamerstukken/2016/10/12/verslag-buitengewone-milieuraad-30-september-2016>> and <<https://www.rijksoverheid.nl/documenten/kamerstukken/2016/10/03/nederlandse-inzet-cop22-te-marrakesh>>.

<sup>120</sup> See <<https://www.rijksoverheid.nl/documenten/kamerstukken/2016/09/26/geannoteerde-agenda-milieuraad-30-september-2016>>

<sup>121</sup> See the Council of the European Union, Doc. 12788/16.

<sup>122</sup> See Council of the European Union, Declaration by the Union made in accordance with Article 20(3) of the Paris Agreement, Doc. 12256/16 ADD 2 and ADD 2 COR 1.

scope of article 218(9) TFEU. Thus, in 2012, the Netherlands did not agree with the Commission's Proposal for a Council Decision establishing the position to be adopted on behalf of the European Union with regard to certain resolutions to be voted in the framework of the International Organisation for Vine and Wine (OIV).<sup>123</sup> However, at the time of the adoption of the Council Decision the Netherlands voted in favour in order to safeguard the interests of the Union.<sup>124</sup> In doing so, it took note of the statement of the Commission in the meeting of the Special Committee on Agriculture on 11 June 2012, that it would not pursue the infringement procedures which it had launched the year before against certain EU Member States who are also Member of the OIV (including the Netherlands) if they were to vote in favour of the draft Council Decision in preparation for the OIV General Assembly on the 22<sup>nd</sup> of June 2012.<sup>125</sup> The Netherlands clarified that, while it is in favour of a pragmatic approach according to its duty of loyal cooperation and to safeguard the interests of the EU, its vote could not be interpreted as a relinquishment of its original position or in any way as an acceptance of Article 218(9) TFEU as an appropriate legal basis for the Council Decision. In spite of its vote in favour, the Netherlands supported Germany in its action for annulment against the Council Decision brought two months after its adoption. It was argued that Article 218(9) TFEU is not applicable in the context of an international agreement which, like the OIV Agreement, has been concluded by the Member States and not by the EU and that Article 218(9) TFEU only covers acts which are binding under international law.<sup>126</sup> In addition, the Netherlands argued before the Court that the competence in this case was shared and did not lie exclusively in the hands of the EU. Furthermore, it took the view that Article 218(9) TFEU was not a conceivable legal basis since it was not clear at the time when the decision was adopted which resolutions would be put forward in the General Assembly for agreement. It also argued that the decision failed to state reasons as regards the question why a Council Decision was needed, despite the fact that neither the EU nor all of its Member States are members of the OIV, and despite the forty-year-long practice of cooperation between the Member States in this area within the framework of the OIV and its predecessor organisation. Finally, the Netherlands also took the view that the Council's action jeopardised consensus within the OIV and hence also the interests of the EU.<sup>127</sup> Meanwhile, pending the judgment of the CJEU, the Commission proposed another Council decision establishing the position to be adopted on behalf of the EU at the General Assembly of the OIV in 2013.<sup>128</sup> This time however, the Netherlands voted against the adoption of the decision and stated that it was compelled to do so in light of both the pending infringement procedure (which had not been withdrawn yet<sup>129</sup>) and the pending *OIV* case.<sup>130</sup> However, the Dutch position proved to be wrong when the Court dismissed Germany's action of annulment in the *OIV* case.<sup>131</sup>

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<sup>123</sup> European Commission, Proposal for a Council Decision establishing the position to be adopted on behalf of the European Union with regard to certain resolutions to be voted in the framework of the International Organisation for Vine and Wine (OIV), COM(2012) 192 final

<sup>124</sup> See Statement from the Netherlands, supported by Hungary and Finland in Council of the European Union, Doc. 11436/12.

<sup>125</sup> See the statement by the Netherlands in Council of the European Union, Doc. 11277/12.

<sup>126</sup> Case C-399/12, *Germany v. Council*, EU:C:2014:2258.

<sup>127</sup> See Opinion of AG Cruz Villalón in Case C-399/12, *Germany v. Council*, EU:C:2014:289.

<sup>128</sup> European Commission, Proposal for a Council Decision establishing the position to be adopted on behalf of the European Union with regard to certain resolutions to be voted in the framework of the International Organisation for Vine and Wine (OIV), COM(2013) 243 final.

<sup>129</sup> Case 20112135, closed on 16 December 2014, see < [https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/index.cfm?lang\\_code=EN&typeOfSearch=true&active\\_only=0&noncom=0&r\\_dossier=20112135&decision\\_date\\_from=&decision\\_date\\_to=&title=&submit=Search](https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true&active_only=0&noncom=0&r_dossier=20112135&decision_date_from=&decision_date_to=&title=&submit=Search) >

<sup>130</sup> See Council of the European Union, Doc. 9504/13.

<sup>131</sup> In its judgment, the Court clarified that article 218(9) TFEU also applies on positions to be adopted on the Union's behalf in bodies, such as the OIV, set up by an international agreement to which the Union is not a party and that recommendations of an international organisation may have legal effects, in particular by reason of their incorporation into EU law by virtue of Regulations adopted by the EU. Finally, the Court clarified that article 218(9) TFEU is to be used, regardless of whether the acts in respect of which the position is established will actually be

One year after its *OIV* judgment the CJEU handed down another judgment concerning the scope of article 218(9) TFEU in which the Netherlands had participated.<sup>132</sup> This time it concerned an action for annulment brought by the Council against the Commission's decision to make a submission to the International Tribunal for the Law of the Sea (ITLOS). The Netherlands supported the Council's view that by failing to submit the content of its written statement for prior approval by the Council, the Commission had disregarded the prerogatives of the Council pursuant to (amongst others) Article 218(9) TFEU.<sup>133</sup> However also this case was dismissed by the CJEU, which clarified that Article 218(9) TFEU applies to positions to be taken "in a body set up by an international agreement" and not "*before an international judicial body requested to give an advisory opinion, the adoption of which falls solely within the remit and responsibility of the members of that body, acting, to that end, wholly independently of the parties.*"<sup>134</sup>

More recently, the Netherlands participated in the cases concerning an action for annulment brought by the Commission against two decisions taken within the Council on the submission of a paper on behalf of the Union and its Member States, and the establishment of a position of the Union in bodies of the Convention on the Conservation of Antarctic Marine Living Resources. The CJEU agreed with the Council and the intervening Member States (including the Netherlands) that the decisions concerned did not fall within the exclusive competence of the Union laid down in Article 3(1)(d) TFEU (conservation of marine biological resources), but within the competence under Article 4(2)(e) TFEU (protection of the environment) and had been correctly submitted on behalf of the Union and its Member States, and not by the Union alone as argued by the Commission.<sup>135</sup>

Another interesting point in relation to the implementation of EU-international agreements is the exercise of the voting rights by the Union and/or the Member States. The European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access (ETS 178, 2001) provides a good example of the difficulties which may arise in respect of the exercise of voting rights. In 2012, the Commission brought an action for annulment against the Council Decision authorizing the signature of this Convention.<sup>136</sup> In the case before the CJEU, the Netherlands was among the intervening states supporting the Council in submitting that the decision had correctly been based on Article 114 TFEU. The CJEU however, agreed with the Commission that Article 207(4) TFEU was the appropriate legal basis for the Council decision and that signing the Convention fell within the exclusive competence of the Union, pursuant to Article 3(1)(e) TFEU.<sup>137</sup> While some EU Member States which had initially ratified the Convention have denounced it following the judgment of the CJEU, the Netherlands, France and Romania are still a party to the Convention – in spite of the exclusive competence of the European Union.<sup>138</sup> It should however be noted that the EU, pursuant to Article 9(2) of the Convention exercises its right to vote and casts a number of votes "*equal to the number of its member States that are Parties to the Convention*". Thus, if all Member States would have denounced the Convention, votes exercised by the Union would have no more weight. For this reason, France, the Netherlands and Romania have indicated

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voted on by the competent body.

<sup>132</sup> See Case C-73/14, *Council of v. Commission*, EU:C:2015:663.

<sup>133</sup> *Ibid.*, para. 41.

<sup>134</sup> *Ibid.*, para. 66 (emphasis added).

<sup>135</sup> See Joined Cases C-626/15 and C-659/16, *Commission v. Council*, EU:C:2018:925. On AMP Antarctique, see also section 4 of the Chapter by Chamon, sections 4.2 and 5 of the Chapter by Govaere and section x of the Chapter by Prete in this Volume.

<sup>136</sup> Council Decision 2011/853 on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access, OJ [2011] L 336/1.

<sup>137</sup> See Case C-137/12, *Commission v. Council*, EU:C:2013:675, para. 76.

<sup>138</sup> Bulgaria, Croatia, Cyprus and Finland have denounced the agreement. See [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/178/signatures?p\\_auth=OhO81GdB](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/178/signatures?p_auth=OhO81GdB).

that they are willing to remain parties to the Convention notwithstanding Article 3(1)(e) TFEU.<sup>139</sup> The Commission has underlined the temporary nature of this situation and expects the Member States concerned to withdraw from the Convention as soon as the EU's voting right modalities under the Convention have been amended.<sup>140</sup>

### **3 Conclusion**

The aim of this contribution was to assess the position of the Netherlands – both in theory and in practice – in relation to the conclusion of mixed agreements and the (legal or political) need to do so. Our analysis supports the view that the Netherlands is among those Member States that see a clear advantage in a unified role of the Union in its external relations. At the same time, the various cases discussed reveal an almost constant awareness of a possible extension of the Union's exclusive competences. In situations of *concurrent* competences, the Dutch are aware that any ad hoc exercise of Union competences results in a structural loss of national competences in the longer run. For outsiders it may be striking to note that a general support for the European integration process and the further development of the EU's external relations can go hand in hand with a careful weighing of the consequences of a competence shift in the longer run. The arguments used by the Dutch are mainly legal – staying close to the Treaty provisions and the case law – although there do not seem to be any problems with political pragmatism when this serves the national interest better.

The Netherlands thus makes a choice for mixity on the basis of a number of considerations, including the following: the nature of the competence, the need to organise support for the agreement at home, and the need for parliamentary approval of an international agreement. Practice reveals a negative attitude towards EU-only agreements when the concerned competences have not (yet) been exercised internally. Yet, in the end, the choice for either EU-only or mixed agreement is a combination of legal and political factors, although any political choice is reviewed for its legal feasibility.

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<sup>139</sup> See the Statement by the France, the Netherlands and Romania upon the adoption of Council Decision concluding the Conditional Access Convention in Council of the European Union, Doc.15081/15, p. 17.

<sup>140</sup> See the Statement by the Commission upon the adoption of Council Decision concluding the Conditional Access Convention in Council of the European Union, Doc.15081/15, p. 1.