XXVIII FIDE Congress

Topic 3: The external dimension of EU policies

An update on the roles of the EU institutions and Member States
An assessment of the current challenges on trade, investment protection and the Area of Freedom, Security and Justice

General rapporteurs: **Christine Kaddous** and **Nuno Piçarra**

Christine Kaddous
Professor, Jean Monnet Chair *ad personam*
Director of the *Centre d'études juridiques européennes* (CEJE), University of Geneva

Nuno Piçarra
Professor at the Law Faculty of the Nova University of Lisbon
Member of the Academic Network for Legal Studies on Immigration and Asylum in Europe (Odysseus)

Introduction

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

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

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

may also include national official positions in the reports, comment them and discuss them. We are aware that it will not always be easy to identify the problems raised at the national level. The rapporteurs are also strongly encouraged to present their own opinion as well as that of the national doctrine on the subjects covered in the questionnaire.
We hope that the national reports, thanks to their rich content, will enable us to present a comparative perspective on the development of the law of external relations in the Member States of the Union.
Institutional rapporteurs are also invited to react /interact on the questions asked.

Chapter 1 Division of competences between the European Union and the Member States

1. In accordance with the ERTA judgment, the European Union has exclusive competence to conclude an international agreement where that agreement affects or is likely to affect internal rules of the Union.
   The European Union's legislation is developing in many areas. In what areas has the AETR effect been perceived recently? What is the position of the Member States in relation to this effect? What recent examples can be mentioned? Have there been any problems raised at the national level? If yes, of what nature: political, legal or other problem?

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

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

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

Chapter 2 Questions regarding the negotiation and the conclusion of international agreements (Article 218 TFEU)

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

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

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

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

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

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

11. Pursuant to Article 218 (11) TFEU, the European Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion procedure regarding

international agreements. How do the Member States perceive this obligation? What is the role of national and/or regional parliaments?

Chapter 3 Legal effects of international agreements

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

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

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

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

Chapter 4 Trade and protection of investments

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

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

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

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

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

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

Chapter 5 Area of freedom, security and justice (policies on border controls, asylum and immigration)

22. While the Union, in accordance with Article 3 (1) (e) TFEU, has exclusive competence in the field of the common commercial policy, in the field of the area of freedom, security and justice it has a shared competence with the Member States pursuant to Article 4 (2) (j). As regards, in particular, the sub-area covered by this chapter (border controls, including the common policy on short-term visas, asylum and immigration), the « AETR effect » (see Chapter 1, Question 1) is perceived primarily in what concerns international agreements on exemption from the short-term visa requirement. Indeed, the Union has acquired exclusive competence to conclude such agreements as a result of the total harmonization, effected by Regulation No 539/2001, of the list of third countries whose nationals are subject to the visa requirement when crossing the external borders of the Member States and the list of those whose nationals are exempt from that requirement.
On the other hand, in accordance with the Protocol (No 23) on the external relations of the Member States with regard to the crossing of external borders, Article 77 (2) (b) TFEU (granting the Union competence to define the checks applicable to those borders) does not prejudice the competence of the Member States « to negotiate or

conclude agreements with third countries as long as they respect Union law and other relevant international agreements ». What meaning and what scope do you give to this protocol in the light of, notably, Article 3 (2) TFEU (see Chapter 1, Question 2)? Has your Member State entered into agreements on this matter since the entry into force of the protocol, or does it maintain in force agreements of this type concluded previously?

23. Under the combined provisions of Articles 33 (2) (c) and 38 of Directive 2013/32/EU of 26.6.2013 on common procedures for granting and withdrawing international protection, a Member State may apply the safe third country concept in order to declare an application for international protection submitted by a third-country national from that country inadmissible and to return the applicant to the territory of that third country – even if the State Member at stake admitted that it was responsible for examining that application pursuant to Regulation No 604/2013 of 26.6.2013 (see judgment of the Court of Justice of 17.2.2016, Mirza, C-695/15, paragraphs 42 and 46). At this stage of development of the Common European Asylum System (Article 78 (2) TFEU), it is for the Member States to draw up the list of safe third countries, subject to the conditions provided for in Article 38.
    Is there national case law on the interpretation and application of the safe third country concept? Does such a case law extend to the delimitation of this concept in relation to the concept of European safe third country (« super-safe third country ») provided for in Article 39 of Directive 2013/32/EU ? What is the approach of the national legal literature in this regard? How do you assess under EU law the link actually established by the Member States between, on the one hand, the policies and practices relating to the concept of a safe third country and, on the other hand, the extraterritorial control of immigration ?

24. According to the conclusions of the European Council of 26/27.6.2014 defining the strategic guidelines for legislative and operational planning within the area of freedom, security and justice, « [a] sustainable solution [to irregular migration] can only be found by intensifying cooperation with countries of origin and transit, including through assistance to strengthen their migration and border management capacity. Migration policies must become a much stronger integral part of the Union's external and development policies, applying the « more for more » principle and building on the Global Approach to Migration and Mobility » (point 1.8.), established by the Commission communication of 18.11.2011, COM(2011) 743 final [see also the communication of 21.2.2014, COM(2014) 96 final]. However, considering that « a solution to the irregular and uncontrolled movement of people [has become] a

priority for the Union as a whole », the Commission proposed a « new results-oriented concept of cooperation », namely a new Partnership Framework with third countries in the context of the European Agenda for Migration [Communications of 7.6.2016, COM(2016) 385 final and of 18.10.2016, COM(2016) 700 final). Finally, in its conclusions of 20/21.10.2016, the European Council stressed that, with regard to the « implementation of a Partnership Framework of cooperation with individual countries of origin or transit, [the] initial focus [is] on Africa » (point 4).
What is your view on the practical impact of the Global Approach to Migration and Mobility? Do you consider that the new Partnership Framework with third countries displaces and replaces this global approach? If so, to what extent? Does your Member State maintain special relations with third countries « reflecting political, historic and cultural ties fostered through decades of contacts, [which] should also be exploited to the full for the benefit of the EU » and/or « the most developed bilateral relationships with a particular partner country » so as to « be fully involved in the EU's discussions with it » [see COM(2016) 385 final, p. 9] ? Has your Member State already concluded bilateral or multilateral pacts with African countries which could serve as an example for the launch of the pacts between the EU and the priority African countries?

25. It is generally accepted that, notwithstanding the competence of the Union since the entry into force of the Treaty of Amsterdam to conclude agreements with third countries for the readmission, in the countries of origin or provenance, of nationals of third countries which do not fulfill or no longer fulfill the conditions for entry to, presence in or residence on the territory of one of the Member States (Article 79 (3) TFEU), the latter maintain their competence to conclude such agreements with third countries, either on bilateral or a multilateral level. Moreover, according to the recent Regulation 2016/1624 of 14.9.2016 on the European Border and Coast Guard, « [t]he possible existence of an arrangement between a Member State and a third country does not absolve the Agency or the Member States from their obligations under Union or international law, in particular as regards compliance with the principle of non-refoulement » (recital 36).
Do you consider that the practice of concluding readmission agreements with third countries by the Member States is correct under, notably, Article 79 (3) or Article 3 (2) TFEU? If so, how should, on the one hand, readmission agreements concluded between the EU and a third country and, on the other hand readmission agreements concluded between a Member State and the same third country relate? Has your Member State concluded any readmission agreements after the entry into force of the Treaty of Amsterdam? Is it bound by readmission agreements containing « problematic clauses » such as the one providing for the repatriation of

irregular migrants through simplified procedures, which was found to be contrary to the ECHR by the Strasbourg Court (see judgment of 1.9.2015, Khlaifia and Others v. Italy, application no. 16483/12, § 45).