PORTUGAL

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

Question 1

The recent case law of the Court of Justice makes a fundamental contribution to clarify the exclusive competence of the Union to conclude an international agreement. After considering, in *Pringle*[2], that the European Stability Mechanism (ESM) Treaty does not affect the common rules on economic and monetary policy, in *Broadcasters* judgement[3], in *Opinion 1/13*[4] and in *Green Network* case[5], the Court extends the ERTA effect to protection of neighboring rights of broadcasting organizations, to civil aspects of international child abduction (the Hague convention of 25 October 1980) and to promotion of the electricity produced from renewable energy sources in the internal electricity market, respectively.

In *Broadcasters* judgement, the Court, contrary to the narrow view of the area of the EU law taken by the Council and some Member States, opted for considering the different aspects of protection of the rights of the broadcasting

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[2] Case C-370/12, *Pringle*, judgement of 27 November 2012, EU:C:2012:756, para 101.
[3] Case C-114/12, *Commission v. Council*, judgement of 4 September 2014, EU:C:2014:224.
[4] Opinion 1/13 of 14 October 2014, EU:C:2014:2303.
[5] Case C-66/13, *Green Network*, judgement of 26 November 2014, EU:C:2014:2399

organizations (the right-holder, the subject-matter and the form of exploitation). At the end of the day, the Court concluded that the definition of the right holder may be affected if there is a discussion at the international level about the definition of the right holder, if the subject-matter of protection is extended and if the right granted is extended to cover other forms of protection, the EU law is affected. To sum up, the Court annuls the Decision of the Council and the Representatives of the Governments of the Member States meeting within the Council on the participation of the European Union and its Member States in negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organizations, of 19 December 2011.

In *opinion 1/13* on Hague the Convention on the civil aspects of international child abduction, the Commission, after the rejection by the Council of eight proposals for decisions of the Council of the European Union concerning the declarations of acceptance by the Member States, in the interest of the EU, of the accession of eight third States to the above mentioned Hague Convention, submitted the request for an opinion to the Court pursuant to Article 218(11) TFEU

The Commission takes the view that the question of the international abduction of children fell within the exclusive external competence of the EU, while the Council and most of the representatives of the Member States considered the Council to be under no legal obligation to adopt those proposals, since the EU did not, in their view, have exclusive competence in the area concerned.

The Court finds that the provisions of Regulation No 2201/2003 cover to a large extent the two procedures governed by the 1980 Hague Convention, namely the procedure concerning the return of children who have been wrongfully removed and the procedure for securing the exercise of access rights. Thus, the whole of the Convention must be regarded as covered by the EU rules.

If the Member States, rather than the EU, had competence to decide whether or not to accept the accession of a new third State to the 1980 Hague Convention, there would be a risk of undermining the uniform and consistent application of Regulation No 2201/2003 and, in particular, the rules concerning cooperation between the authorities of the Member States, whenever a situation involving international child abduction involved a third State and two Member States, one of which had accepted the accession of that third State to the Convention whilst the other had not.

For the Court, the exclusive competence of the EU encompasses the acceptance of the accession of a third State to the 1980 Hague Convention.

The *Green Network* case concerns a request for a preliminary ruling on the interpretation of Articles 3(2) TFEU and 216 TFEU, read in conjunction with Article 5 of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable

energy sources in the internal electricity market (OJ 2001 L 283, p. 33), and the Agreement between the European Economic Community and the Swiss Confederation (OJ, English Special Edition 1972 (I), p. 191), as adapted by Decision No 1/2000 of the EC-Switzerland Joint Committee of 25 October 2000 (OJ 2001 L 51, p. 1) ('the Free Trade Agreement').

The Court ruled that having regarded the provisions of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, the European Community enjoys exclusive external competence precluding a provision of national law, such as that at issue in the main proceedings, which provides for the grant of exemption from the obligation to purchase green certificates owing to the introduction, onto the national consumer market, of electricity imported from a third State, by means of the prior conclusion, between the Member State and third State concerned, of an agreement under which the electricity thus imported is guaranteed as having been produced from renewable energy sources, according to arrangements identical to those set out in Article 5 of that directive.

When a provision such as that referred to in paragraph 1 of the operative part of this judgment has not been applied by a national court because it is incompatible with EU law, it is contrary to EU law for that court to apply, by way of substitution, an earlier provision of national law in substance similar to that non applied, which provides for the grant of exemption from the obligation to purchase green certificates owing to the introduction, onto the national consumer market, of electricity imported from a third State, by means of the prior conclusion, between the national grid manager and an equivalent local authority of that third State, of an agreement determining the verification arrangements necessary for the purpose of certifying that the electricity thus imported is electricity produced from renewable energy sources.

Summing up, in comparison to the most Member States and the Council, the Court of Justice has a broader view of the external exclusive competence of the EU.

In *Broadcasters* judgement, the Council was supported by the Czech Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Poland and the United Kingdom. According to these Member States, the future Convention of the Council of Europe falls within an area of shared competences between the European Union and its Member States, namely that of the internal market, which encompasses protection of intellectual property. Consequently, both the European Union and the Member States should be involved in the forthcoming negotiations by cooperating closely in all stages of the process in order to ensure the unity of the external representation of the European Union.

The Portuguese Republic did not intervene in this case.

In *Opinion 1/13*, apart from Italy, which supported the Commission and the Parliament, the Belgian, Czech, German and Estonian Governments, Ireland, the Greek, Spanish, French, Cypriot, Latvian, Lithuanian, Austrian, Polish, Portuguese, Romanian, Slovak, Finnish, Swedish and United Kingdom Governments and the Council all maintain that the EU does not have exclusive external competence in this regard. In addition, the Greek, French and Polish Governments sustain that the EU has no competence at all in this area.

In the first place, the Member States, except Italy, argued that the declaration of acceptance of accession is not capable of undermining the uniform and consistent application of Regulation No 2201/2003 because the objective of the declaration is different, the declaration relating to cooperation with the central authorities of third States, whilst the regulation governs only cooperation between the central authorities of the Member States

In the second place, the Member States, except Italy, sustained that an exclusive external competence cannot arise merely because the area in which the Convention applies is covered to a large extent by equivalent rules of EU law. First of all, that criterion is irrelevant since it was not included in Article 3(2) TFEU, which codified the Court's case-law concerning the circumstances in which the EU has exclusive competence to conclude an international agreement. Next, it is argued that there is only a partial overlap between the scope of the Convention and that of Regulation No 2201/2003, both with regard to the nature of the relations governed and in relation to the persons to whom those instruments are applicable. Finally, it is claimed that the overlaps which do exist between the Convention and Regulation No 2201/2003 are not such as to establish exclusive competence on the part of the EU since they are abstract and do not demonstrate that the Convention has any effect on the regulation.

In the third place, even though the fact that certain Member States accept the accession of an acceding State whilst others do not may produce unwelcome situations and mean that the enforceability of the 1980 Hague Convention as against the States that accede to it varies from one Member State to another, that is inherent in the very nature of the Convention and is not an obstacle to the proper application of Regulation No 2201/2003.

This is to underline that e Portuguese Government intervened, supporting the Council.

In the recent Opinion 3/15 of 14 February 2017 on Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, mentioned in the next section, the Czech, French, Italian, Lithuanian, Romanian, Finnish and United Kingdom Governments take the view that the European Union does not have exclusive competence under

Article 3(2) TFEU to conclude that Treaty inasmuch as the latter is not capable of affecting common EU rules or of altering their scope.

They argue in that regard that it follows from the Court's case-law that any conclusion concerning competence must be based on a specific analysis of the relationship between the international agreement envisaged and the EU law in force, account being taken of, inter alia, the nature and content of the rules in question.

The Portuguese Government did not intervene.

One of the most recent examples is given by the Opinion 3/15 of 14 February 2017 on Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled above mentioned.

In this Opinion, the Court of Justice reaffirmed its former case law related to the interpretation of the last limb Article 3(2) TFEU, maintaining that "there is a risk that common EU rules may be adversely affected by international commitments undertaken by the Member States, or that the scope of those rules may be altered, which is such as to justify an exclusive external competence of the European Union, where those commitments fall within the scope of those rules (Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 71, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 29). A finding that there is such a risk does not presuppose that the area covered by the international commitments and that of the EU rules coincide fully (Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 72, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 30). In particular, such international commitments may affect EU rules or alter their scope when the commitments fall within an area which is already covered to a large extent by such rules (see, to that effect, Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 73, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 31)."

Having said that, the Court continued: "since the EU is vested only with conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the EU law in force. That analysis must take into account the areas covered, respectively, by the rules of EU law and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish (Opinion 1/13 (Accession

of third States to the Hague Convention), of 14 October 2014, EU:C:2014:2303, paragraph 74, and judgment of 26 November 2014, Green Network, C-66/13, EU:C:2014:2399, paragraph 33)."

After proceeding to that analysis, the Court held that the conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled falls within the exclusive competence of the European Union.

As far as the author of this lines knows, there has been no problems raised at the national level.

Question 2

Article 3 (2) TFEU consolidates earlier case-law of the Court of Justice concerning the implied exclusive external competences of the EU.

Recently, in 5 December 2017[6], the Court, recalling Opinion 1/03 (New Lugano Convention) of 7 February 2006 (EU:C:2006:81, paragraph 114), said:

> "the competence of the European Union to conclude international agreements may arise not only from an express conferment by the Treaties, but may equally flow implicitly from other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the EU institutions. In particular, whenever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the Union has the competence to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect."

According to Article 3 (2) TFEU the Union is exclusively competent to conclude an international agreement in three situations: i) "when its conclusion is provided for in a legislative act of the Union"; ii) when its conclusion "is necessary to enable the Union to exercise its internal competence"; and iii) in so far as its conclusion may affect common rules or alter their scope".

First option – the conclusion of an international treaty is provided for by a legislative act.

A narrower interpretation of the provision would demand that the legislative act says that the external competence is exclusive or that the exclusivity of the external competence depends on the exclusivity of the internal competence. However, nothing in the wording of Article 3 (2) TFEU so states. Therefore, the provision should interpreted in a broader way. That means where the conclusion of an international treaty is provided for in an legislative act, the Union will

[6] Case C-600/14, *Federal Republic Germany v. Council* (OTIF)

have exclusive external competence in this area, with the consequence that the Member States are pre-empted from concluding such agreement independently, from legislating or adopting any legally binding act. The same reasoning seems to be applicable where a Treaty article accords the Union the power to conclude an international treaty, unless the Treaty says the contrary.[7]

Second option – the conclusion of an international agreement "is necessary to enable the Union to exercise its internal competence"

Following the case law of the Court of Justice[8], Article 3 (2) confers external exclusive competence to the EU where it is necessary to enable the Union to exercise an internal competence. The provision does not distinguish between a shared internal competence or an internal competence that only allowed supporting action, provided that the international agreement is confined within the boundaries of this competence.

Third option – the conclusion of an international agreement may affect common rules or alter their scope.

According to the case law of the Court of Justice, the affectation of common rules or alteration of their scope does not depend on the exercise of the internal competence[9].

The notion of "common rules" does not only refer the current stage of EU Law in the area in question, but also refers to the rules in making. In other words, it does not only refer to legally binding rules, such as the Treaties themselves, legislative or individual acts, but also to its future development, insofar as that would be foreseeable at the time of analysis.

Most Member States have a rather restrictive view of Article 3 (2) TFEU. The evidence of this statement can be given by the observations of some Member States within the scope of the case law of the Court of Justice.

Giving one more example: In *Opinion 3/15*[10] concerning the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, the various governments that have submitted observations to the Court take the view that the European Union does not have exclusive competence under Article 3(2) TFEU to conclude the Marrakesh Treaty inasmuch as the latter is not capable of affecting common EU rules or of altering their scope.

[7] Paul Craig, *The Lisbon Treaty* , p. 166

[8] On this case law, see Friedrich Erlbacher, "Recent Case-Law on the External Competence of the European Union: How Member States can Embrace their own Treaty?", EPIN Paper, No. 43 / January 2017, p. 9 ff.

[9] See opinion 1/03, para. 126; Opinion 1/13, para77, Green Network, para 33; Broadcasting Organizations, para 72

[10] *Opinion 3/15* of 14 February 2017, ECLI:EU:C:2017:114.

They argue that it follows from the Court's case-law that any conclusion concerning competence must be based on a specific analysis of the relationship between the international agreement envisaged and the EU law in force, account being taken of, inter alia, the nature and content of the rules in question. They argue that Directive 2001/29 brought about only minimum harmonization of certain aspects of copyright and related rights. In particular, the directive did not harmonize the exceptions and limitations to those rights (...) The Member States thus retain their competence, both internally and externally, to render such an exception or limitation mandatory."

Portugal did not intervene in this case.

Question 3

Article 216 (1) TFEU deals with the question whether the EU has external competence to conclude international agreements.

According to the Court of Justice "It follows from the very wording of that provision, in which no distinction is made according to whether the European Union's external competence is exclusive or shared, that the Union possesses such a competence in four situations. Contrary to the arguments put forward by the Federal Republic of Germany, the scenario in which the conclusion of an agreement is liable to affect common rules or to alter their scope, a scenario where the Union competence is, under Article 3(2) TFEU, exclusive, constitutes only one of those situations.

Since the entry into force of the Lisbon Treaty, Member States and the Council have been repeatedly contesting the scope of the external competences of the EU.

Member States seek to restrict the scope of the EU external relations' competence.

Question 4

Article 216 TFEU concerns the general European Union's external competence to conclude international agreements. For this provision it does not matter if the competence is exclusive or shared. That means the provision does not proceed to any categorization.

By contrast, Article 3 (2) TFEU solely concerns situations where the Union has exclusive external competence.

According to the Court, "the European Union may have an external competence that falls outside the situations laid down in Article 3(2) TFEU."[11]

[11] Case C-600/14, para 51.

CHAPTER 2: QUESTIONS REGARDING THE NEGOTIATION AND THE CONCLUSION OF INTERNATIONAL AGREEMENTS (ARTICLE 218 TFEU)[12]

Question 5

For an answer to this question, we will take as an example the procedure for the European Union (EU) to conclude international trade and investment agreements under the common commercial policy (CCP), as they have been on the top of the EU external relations agenda, since the Lisbon Treaty. The procedure is laid down in Articles 207 and 218 on the Treaty on the Functioning of the European Union (TFEU) and according to the official entities of Portugal[13] that follow this matter in the Trade Policy Committee (TPC), the existing regime and mechanisms are considered to be satisfactory. Member States (MS) presence in the TPC allows for the participation in the elaboration of the negotiating mandate. Later on it allows for the assessment of the European Commission's compliance with this mandate, as well as for the monitoring of how MS´s interests are adequately covered by the European negotiating proposals.

The European Commission's duty of information to the MS on the progress of negotiations on trade agreements[14] is pursued through regular meetings in different formats (national experts, States' representatives or high-level policymakers, depending on the decision and the momentum), as well as reporting. The presence of the European Commission at these meetings (namely of the policy officers participating in the negotiations), the clarifications provided by the Council's Legal Service, and the compromise solutions presented by the Presidency, all contribute to the negotiating momentum.

However, the procedure for negotiating and concluding international trade and investments agreements is not without criticism and it could be improved at various levels.

Firstly, it would be important to reduce the length of the negotiating period and of the approval of the agreements (for a critical balance see, Question 17). By providing strict deadlines for the completion of several internal stages, such as public consultations, the European Parliament ´s (EP) opinion, translation,

[12] Chapters 2, 3 and 4 were written by Maria João Palma. The author thanks the contributes of Pedro Camacho, Master of Arts in Political Science and International Relations, Nova University of Lisbon; Paula Redondo Pereira, lawyer, LL. M. Georgetown University; Master on European Studies Católica-Lisbon University; Law Degree Nova University of Lisbon; Fernando Bilé, José Salgado and Tânia de Castro Parreira experts on International Trade Policy from the Portuguese Ministry of Economy and Ana Luísa Figueira expert on Common Commercial Policy from the Portuguese Ministry of Foreign Affairs.

[13] Ministry of Foreign Affairs and the Ministry of Economy.

[14] This duty of information is laid down in Article 207 (3) of the TFEU, third paragraph, and includes not only the TPC but also the EP.

or national ratification procedures, the overall duration of the procedure for the conclusion of international trade and investment agreements could be significantly shortened.

Secondly, the division of competences between the EU and the MS demands the conclusion of "mixed agreements"[15] – concluded jointly by the EU and the MS. The procedural complexity of these trade and investment agreements is greater than in the so-called "EU-only" agreements (trade agreements), which also hampers speed. In fact, "mixed agreements" require: i) a double mandate given by the Council of the EU and the MS to the European Commission, ii) a stronger reporting obligation from the EU to the MS, iii) consensus in decision-making and, iv) the intervention of the national parliaments (with the possibility of a veto)[16].

According to the official entities of Portugal that are responsible for these areas (*supra*), a potential improvement in favour of the effectiveness of the CCP could be based on replacing the current *modus operandi* – the conclusion of a mixed agreement, which includes investment protection rules – by the negotiation and conclusion of two separate agreements, an "EU-only", containing the matters of exclusive competence, and a mixed agreement containing matters of shared competence – namely, investment protection, a sensitive matter for MS and where there is not always a consensus with negotiating partners.

However, in our view and although the recent Court of Justice of the European Union´s (CJEU) ruling clarifies the allocation of competences (Opinion 2/2015) to a certain point, taking into consideration the broadening and variability of the scope of the agreements, as well as the phenomenon of pre-emption (Question 6), it will always be possible to equate new boundaries and, therefore, new issues for the delimitation of competences between the EU and the MS, which determines that "*mixity*" will be a recurrent issue, making it preferable to work on the efficiency of this procedure.

Thirdly, according to the Portuguese official entities responsible for these areas, the EU's variable geometry would recommend strengthening the current impact assessment model of the agreements, in order to integrate deeper analysis which should be both differentiated (by regions) and individualized (by MS).

Lastly, and particularly as regards the interaction between national experts and EU negotiating teams, the Portuguese officials entities are concerned about the increasing lack of substance in written reports, and the favouring of a face-to-face *debriefing* at TPC meetings. This trend significantly hampers the analysis and subsequent national decision making, as well as impoverishing contributions

[15] CJEU Opinion 2/2015 of May 2017 (Question 16).
[16] See Question 7.

and debate at the technical level. Thus, in order to safeguard the transparency of the CCP without affecting the measures deemed necessary to ensure the confidential nature of the information and the negotiations, it is suggested to split the report of the negotiating rounds into two separate documents: an institutional communication, for civil society and other stakeholders, and a detailed technical report for experts monitoring the negotiations. In addition, the late circulation of documents, in particular those constituting a consolidation of the EU position in the negotiations, together with the increasing lack of awareness of the partners' proposals/offers, often make it impossible for MS to act. That situation can damage the construction of a common policy of vital importance, the development of which has attracted growing interest from European citizens.

A final word on the declassification of the negotiating directives with a view to their publication often suggested by the European Commission and defended by some MS. According to the Portuguese official entities responsible for these areas, and referring to the CJEU's settled case-law, there should be no disclosure of the negotiating directives if it can "prejudice the protection of the public interest as regards the international relations of the Union or its Member States" (C-266/2005[17], inter alia). The Portuguese official entities consider that, as a matter of principle, publication should not take place before the conclusion of the negotiation phase. Premature publication of the mandate may weaken the EU's negotiating power vis-à-vis the partner (if the mandate is too detailed) or affect the balance of powers between the Council of the EU and the European Commission (if it is too generic or ambiguous). However, there is recognition of the need for increased transparency allowing for the scrutiny of civil society leading to the publication of the mandates.

Question 6

Article 218 (5) of the TFUE regulates the provisional application of international agreements: "*The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, <u>its</u> provisional application before entry into force.*" – emphasis added.

The provisional application has been used to anticipate the entry into force of the matters of exclusive competence of the EU in mixed agreements leaving the decision concerning shared competences between the EU and MS, or reserved to the latter, to a later stage. This decision depends on a ratification process by all national parliaments and will ultimately lead to the entry into force of the agreement in its entirety.

[17] C-266/05, *Sison v. Council*, ECLI: EU: C: 2007, p. 75.

The application of different provisions of the agreements based on competence raises the problem of the admissibility of *the partial provisional application* of the agreements.

The TFEU is silent regarding this possibility. According to the principle of good faith that governs the interpretation of international Treaties, it is admissible to conceive of two interpretations[18]: firstly, to adopt the maxim *a maiore ad minus* (he who can do more can do less) admitting the provisional entry of a part of the agreement. Following this broad interpretation, the EU, in the exercise of *ius tractum* and in accordance with Article 25 of the Vienna Convention on the Law of Treaties[19], opts, upon agreement with the third party, for the partial or total provisional application of the agreement. Another possible interpretation is to consider that the fragmentation of an agreement, as regards its application, has not been sought by the drafters of the Treaties that govern the EU legal order (Rome and the revision Treaties that follow it), who would have conceived the agreements solely as a whole. In light of this interpretation, they have established their own rules, deviating from the opening contained in Article 25 of the Vienna Convention.

In view of the recent trend of provisional application of EU international trade agreements (see EU/South Korea; EU/Colombia; EU/Peru and EU/Ukraine), where the selection criterion for the provisions of the agreement to be provisionally applied has been the competence frontier (i.e., EU exclusive competences *versus* shared or reserved competences of the MS) and, taking into account the controversies that this frontier poses[20] it would be advisable, *de iure condendo*, to introduce in the Treaties the criteria that would regulate such choice[21].

To begin with, the TFUE should clarify that the provisional application of the agreements is justified regarding matters of exclusive competence of the EU, leaving the application of the provisions which depends on a ratification procedure by the MS to a later stage.

For this to be done, there are, however, additional difficulties. One of them is the identification of matters of national competence. This is due to the omission of a list identifying exclusive national competences in the body of the Treaties.

[18] The two possible interpretations are equated *in* Maria João Palma – "A Política Comercial Comum no pós-Lisboa – a Competência para a Celebração de Acordos Internacionais de Comércio da União Europeia" – [*The Common Commercial Policy after Lisbon – the competence for the conclusion of EU international trade agreements*]
http://www.apeeuropeus.com/uploads/6/6/3/7/66379879/palma_maria_joão_2017.pdf

[19] Vienna Convention on the Law of Treaties, of 23 May 1969 (Vienna Convention).

[20] As example of the difficulty of distinguishing between different competences, it is worth to mention the request for an opinion from the European Commission to the CJEU, to assess the competences of the EU/Singapore agreement, Opinion 2/2015, of 16 May 2017.

[21] Maria João Palma, *op. cit.*, p. 171.

The Treaty of Lisbon introduced an exhaustive list of matters of exclusive EU competence in Article 3 of the TFEU and an illustrative list of matters of shared competence in Article 4 of the TFEU. We find an exercise equating the inclusion of an illustrative list of national competences to be useful, provided that the principle of conferral[22] is respected – i.e. ensuring that the EU only has the competences explicitly or implicitly attributed to it[23].

Still within the same exercise, the Treaties should also be updated regarding the list of exclusive competences to take into account CJEU decisions based on the mutation of shared into exclusive competences due to the pre-emption effect[24].

Finally, Article 218 of the TFEU should mention the EP favourable opinion on the provisional application of international agreements. The institutional practice reveals that there is a tendency to obtain a *favourable opinion* from the EP on the provisional application of trade agreements, a precedent initiated under the EU/South Korea Agreement (1 July 2011, in force since 2015). This practice should be welcomed in a future revision of the Treaties, as the provisions deemed "*suitable*" to enter into force take full effect, in practical terms – making the EP's position just as important[25].

Question 7

The entry into force of mixed agreements (e.g. the CETA)[26] depends on the ratification of all national and regional parliaments in all MS (approximately 38 parliaments), which means that each of these parliaments has a *veto power* over the entire agreement.

Besides defending that non-ratification by a MS overturn the agreement in its entirety, Advocate General Sharpston has pointed out, in the comments on the EU/Singapore Opinion (*above*), that the national and regional parliaments must base their disagreement on grounds of national or shared competences[27].

[22] See Article 5 (2) TUE: "*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*".

[23] Maria João Palma, *op. cit.*, p. 171.

[24] For a definition, see Advocate General Ruiz-Jarabo Colomber, Case C-478/07 (*Budweiser*), 2009 ECR I-07721, para 93, referring the pre-emption as "*the situation in which the concurrent competences of the member States in a particular filed may have been displaced by the activity of the Community legislature*". We tend to find that the pre-emption effect is reversible due to the fact that the competences on which it is based are of a shared nature. However, we see an advantage in the exercise of clarification of the new status of a certain competence by the revisers of the Treaties whenever they see the metamorphoses that occurred in a given matter as definitive.

[25] Maria João Palma, *op. cit.*, p. 171.

[26] Comprehensive and Trade Agreement between the EU and Canada.

[27] See paragraph 568 of the Advocate General's comments: "*The Court has held that, when an agreement requiring the participation of both the European Union and its constituent Member States is negotiated and concluded,*

In this respect, however, we advocate *a mitigated position*, in which the non-ratification of the agreement by a MS would only overturn it if the agreement is considered to have been negotiated upon a *single undertaking* logic. Should the prevailing view be that the logic behind the negotiation of the agreement was not that of a *single undertaking*, a possible non-ratification by a MS should not deter the conversion of the provisional application of the agreement into a definitive entry into force[28]. In this case, the revalidation of the matters of EU exclusive competence which the MS endorsed as members of the Council of the EU, should again take place through a new decision of the Council of the EU, and a new agreement with the other party (e.g., Canada in the case of the CETA), with no need to reopen the negotiations. According to the TFEU, such a decision will only be possible after obtaining a *favourable opinion* by the EP. Under Article 207 TFEU, the Council of the EU decides on a qualified majority. The practice however has dictated consensus to be the rule for the approval of trade agreements in the Council of the EU[29].

In view of its importance, this conversion (i.e. the possibility of transforming the provisional application of an agreement into a definitive one with no need to reopen the negotiations) should be explicitly referred to and regulated in the body of Article 218 TFEU – in order to safeguard and stabilize the negotiation consensus reached in the part of the agreement concerning matters falling under the exclusive competence of the EU.

Questions 8 – 10
No data available.

Question 11
Since the Lisbon Treaty, the EP has become more active concerning the negotiation and conclusion of international agreements, in particular trade agree-

both the European Union and the Member States must act within the framework of the competences which they have while respecting the competences of any other contracting party. It is true that, in principle, each party (including the Member States) must— as matters stand— choose between either consenting to or rejecting the entire agreement. However, that choice must be made in accordance with the Treaty rules on the allocation of competences. Were a Member State to refuse to conclude an international agreement for reasons relating to aspects of that agreement for which the European Union enjoys exclusive external competence that Member State would be acting in breach of those Treaty rules" (emphasis added).
The CJEU has not ruled on this aspect in Opinion 2/2015, as, in our view, it would overstep the scope of the European Commission's request.

[28] Maria João Palma, *op. cit.*, p. 168. In the event of a disagreement on the admissibility of conversion, we believe that the CJEU should rule on it, under Article 218 (11) TFEU, as it is a question of competences.

[29] Maria João Palma, *idem.*

ments, with significant contributions to their design[30/31]. The performance of this task by the EP has been very appreciated by the Portuguese government so far, which considers that the EP has played a determinant role, while contributing to increase transparency and democratic debate of the matters covered by the international agreements of the EU.

However, there is an imbalance between the EP's participation when compared with that of the national parliaments, in particular with regard to agreements involving both the competences of the EU and the MS. In our view, this imbalance seems to be due to the reduced prominence of national parliaments when approving international agreements involving shared competences (mixed agreements), when compared to the process of approving secondary legislation, according to the Treaties and its annexed protocols.

As stated, the Protocol on the Role of National Parliaments in the European Union (Protocol No. 1) and the Protocol on the Application of the Principles of Subsidiarity and Proportionality (Protocol No. 2), annexed to the Treaty of Lisbon, enable the management of the exercise of shared competences between the EU and the MS, calling for the good offices of national parliaments from whom the role of "*arbitrators*" in approving EU secondary law of a shared nature is required by supervising the correct implementation of the principle of subsidiarity.

However, both Protocols are silent on the participation of national parliaments in the process of concluding international agreements which involve shared competences (mixed agreements)[32].

It should be emphasized that the principle of subsidiarity applies only in respect of secondary law, where the exercise of competences is dictated by an *exclusion game*, i.e. competence will only be exercised at the EU level "(...) *if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*" (Article 5 (3) TEU).

However, in the case of the exercise of external competence – i.e. in relation to the conclusion of international agreements – we are not dealing with an

[30] This more active role played by the EP is due to the fact that with the Lisbon Treaty it gained a power similar to a veto with the imposition of obtaining a favorable opinion from it concerning trade agreements (Article 218 (6), v) TFUE and 207 (2) TFUE).

[31] Pedro Silva Pereira – "Acordo CETA: O Parlamento Europeu fez a diferença" [*CETA: The European Parliament makes the difference*], *in Revista Análise Europeia*, nº 3, (2017) pp. 183-197: *http://www.apeeuropeus.com/uploads/6/6/3/7/66379879/silva_pereira_pedro_2017.pdf.*
The author emphasizes the role of the EP in the establishment of an International Investment Court, replacing the original proposal of an arbitration system, for the investor-state disputes resolution on foreign investment in the CETA.

[32] Maria João Palma, *op. cit.*, p. 173.

exclusion game, but an *accumulation game*[33] – in that both the MS and the EU must be involved in the exercise of the competence, from the moment when they both grant the negotiating mandate to the European Commission (*double mandate*), until the conclusion of the international agreement. However, the definition of a mixed agreement and its respective procedure do not result from the Treaties[34], but from the CJEU jurisprudence (*maxime*, Opinion 1/94[35]) and the institutional practice which has fostered it.

This lack of regulation of mixed agreements in the body of the Treaties has been reflected in the mentioned Protocols, which deal only with the management of mixed competences at the internal level.

While the absence of a reference to mixed agreements appears to make sense regarding the Protocol on the Application of the Principles of Subsidiarity and Proportionality – which deals only with secondary law[36] – the same cannot be said in relation to the Protocol on the Role of National Parliaments in the European Union. The role of national parliaments is important both regarding EU secondary law, and the conclusion of EU international agreements involving mixed competences – which they have to ratify and over which they wield an effective veto power (see Question 11).

Such a fundamental power determines, in our view, that the involvement of national parliaments during the negotiating process of mixed international agreements should be reviewed to better reflect the current needs of these new trends of mixed agreements.

The Protocol on the Role of National Parliaments in the European Union refers *ad abundantiam* to the monitoring that national parliaments are expected to perform regarding *"draft legislative acts"* – which shall be sent directly to national parliaments by the proposers. In parallel, the Treaties should demand that national parliaments carry out a similar function as regards international agreements where mixed competences are involved, while highlighting that

[33] *Idem*, p. 174.

[34] The only time the Treaties made a reference to mixed agreement was in Article 133 (6) 2 para. of the Treaty on the European Community (Treaty of Nice) ex-207 TFEU. No definition was given but there was a reference to shared competences for international trade agreements as well as the definition of the procedure: "(...) *agreements relating to trade in cultural and audio-visual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States*" (emphasis added).

[35] Opinion 1/94, 15 November 1994 ECLI: EU: C: 384.

[36] In this respect, it would be important for Article 5 TEU to be amended, in order to explain that the principle of subsidiarity is not a principle governing external competences. MARIA JOÃO PALMA, *op. cit.*, p. 174.

this should necessarily be done in accordance with the constitutional traditions of each MS[37].

The unbalance situation that we find within the EU legal order can equally be found within the Portuguese legal framework. The Law on monitoring, assessment and pronouncement by the Portuguese Parliament, *Assembleia da República* (AR)[38], bearing in mind the European Union Construction Process[39], emphasizes the role of the AR in the verification of the application of the subsidiarity principle by national parliaments as regards to secondary law, with only a mere reference to the Government's obligation to inform the AR about draft agreements or treaties to be concluded by the EU or among the MS in the context of the EU[40]. Also, it does not to emphasize the role of mixed agreements[41], while it mentions the transposition of directives as an example of a more impactful act for Portugal[42].

In view of the importance and implications of the national competences involved in mixed agreements[43], it would seem appropriate to introduce an explicit reference to them in Article 4 of the aforementioned national Law[44], explicitly stating a proactive role for the AR in this proceeding[45] [46] More than a right to be informed (Article 5), the national Law must clearly and unequivocally provide a right to monitor and assess the negotiation and conclusion of mixed agreements by the AR (Article 4)[47].

[37] Only one reference to "*other issues*" appears in the Preamble of the Protocol on the Role of National Parliaments in the European Union. That being said, it should be emphasized that the Protocol does not apply only to secondary law, *vide* Article 1, in relation to consultation documents. Title II on parliamentary cooperation is also silent on international agreements.

[38] This is the official designation of the Portuguese National Parliament.

[39] Law no. 43/2006, of 25 August, as amended by Law 21/2012, of 17 May.

[40] See Article 5 (1) (a) of the aforementioned Law.

[41] Article 5 (4): "*The Government shall submit to the Portuguese National Parliament, in the first quarter of each year, a summary report to monitor Portugal's participation in the process of construction of the European Union, which should inform, namely, on the deliberations with greater impact for Portugal taken the previous year by the European institutions and the measures put in place by the Government as a result of these deliberations, with particular emphasis on the transposition of directives*" (emphasis added).

[42] Maria João Palma, *op. cit.*, p. 175.

[43] For instance, the creation of an Investment Court or *portfolio* provisions, according to the CJEU in Opinion 2/2015, of 16 may 2017.

[44] Article 4 regulates the means of accomplishment and appreciation.

[45] MARIA JOÃO PALMA, *op. cit.*, p. 175.

[46] This without prejudice to the reservation or confidentiality rules in force for the negotiation process.

[47] It is true that this right could result from paragraph 4, of Article 4, which states: "*The Assembly of the Republic or the Government may still (...) raise the debate on all the subjects and positions under discussion in the European institutions that concern matters within its competence*." However, because of its importance, we believe that the reference to draft agreements involving national competences should be explicit and not only result from the framing of a residual provision. Maria João Palma, *op. cit.*, p. 176.

In conclusion, we consider that the role of the national parliaments must be emphasized both at the EU and at the national level, especially in what refers to the procedure of mixed agreements. In particular in what refers to trade and investment agreements this improvement is needed. Although the competences that were referred as of a shared nature in Article 133 TEC (Treaty of Nice) were, with the Treaty of Lisbon, moved into the exclusive competence of the EU (sensitives services)[48], the figure of mixed agreement remains relevant to matters not covered by Article 207 TFEU, but relevant in terms of trade and investment agreements (*e.g. portfolio investment, dispute settlement between investors and the State).* This exercise of clarification and reinforcement of the role of the national parliaments is determinant, as the consequences of a "veto" of a mixed agreement are too severe for their participation and involvement in the negotiating process not to be explicitly clarified[49].

CHAPTER 3: LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS

Question 12

No data available.

Question 13

The possibility given to individuals to invoke rights arising from international agreements directly before the national courts has been referred to as *direct effect.*

Direct effect differs from *direct applicability,* another characteristic of international agreements. Article 8 of the Portuguese Constitution set forth the direct applicability of international agreements provided that their ratification or approval, and publication at the national level had occurred[50].

The full acceptance or direct applicability of international agreements in the Portuguese legal system determines that these do not need to be "transformed" into national law to be applicable in the internal order[51]. However, this does not

[48] These are now under the shield of the unanimity rule. See, Article 207 (4) a) and b). *"The Council shall also act unanimously for the negotiation and conclusion of agreements:*
(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them."

[49] Maria João Palma, *op. cit.,* p. 176.

[50] Article 8 (2) of the Constitution of the Portuguese Republic states: "*The norms contained in international conventions regularly ratified or approved shall be in force on the internal order after their official publication and as long as they bind the Portuguese State internationally*". Official publication takes place in the Portuguese Official Gazette (*Diário da República*).

[51] The Portuguese legal system is a monistic one, opposed to the dual system where incorporation of international law into national law is required.

determine *per se* that interested parties may invoke the rights contained in the agreements before the national courts. *Direct applicability* is a characteristic of the act while *direct effect* is a feature of the provisions the act may contain that make them apt to be invoked in national courts[52].

Within the EU legal framework, there is significant jurisprudence of the CJEU on this issue.

In the 1963 *Van Gend en Loos* judgment[53], the CJEU ruled for the first time that the provisions of the EC Treaty could confer rights on EU citizens. According to the CJEU, affirming such an effect depends on the concrete verification of the provisions' characteristics, which should "*clearly and unconditionally*" confer rights on individuals[54].

This relatively stabilized and recurrent jurisprudence on the enshrinement of the direct effect of international agreements[55] would, however, be different in respect of multilateral agreements, taking into account their specificity.

In the 1972 *International Fruit Company* judgment[56], the CJEU considered that the rules of the General agreement on tariffs and trade (GATT) could not have direct effect, as the agreement was characterized by a relative flexibility of its provisions once they could be derogated or suspended (retaliations)[57]. This flexibility would preclude the possibility of their invocation in the national courts.

In the 1999 *Portugal v. Council* judgment[58], the CJEU first clarified that the EU institutions, which have the power to negotiate and conclude international agreements, are free to agree on the effects that the provisions of the agreement will produce in the internal order of the contracting Parties. Only if this issue

[52] It is possible to analyse direct effect of international law (agreements, treaties or conventions) or internal law of the EU such as directives or regulations. See Maria João Palma – *A invocação das normas das directivas comunitárias perante as jurisdições nacionais dos Estados-Membros,* tese de Mestrado policopiada, Faculdade de Direito de Lisboa, [Direct effect – the case of Directives in the European Legal Order, LL.M. thesis, University of Lisbon, Faculty of Law], 1998.

[53] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 1963, ECLI 1.

[54] In *Van Gend & Loos*, the CJUE affirmed: "*To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions*". Once considering that article 12 of the ECT contained "*a clear und unconditional obligation*" the CJUE considered it "*ideally adapted to produce direct effects in the legal relationship between member states and their subjects*".

[55] The CJEU would consider not only EC Treaty provisions but also rules of international agreements concluded by the EU, such as association agreements.

[56] Joined Cases 21-24/72, *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit,* 1972, ECR 1219.

[57] *Idem*, Recital 21: "*This agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements' is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties*" (emphasis added).

[58] Case C-149/96, *Portuguese Republic v. Council of the European Union*, 1999, ECR I-08395.

is not dealt with within the agreement, are the courts, in particular the CJEU, eligible to examine it[59].

In this judgement, the CJEU reiterates its arguments with regards to the GATT in order to deny the direct effect of the rules contained in the WTO agreements: the flexibility of its provisions including the possibility of suspension of concessions (or retaliations).

We support the CJEU's understanding, i.e., a provision that can have its application suspended does not qualify as a rule of unconditional application. It will be controversial to admit that an individual could invoke a provision at a national court against the defaulting State while the State was under retaliation or negotiating for compensation due to the non-compliance of the same rule.

In addition, in the aforementioned 1999 *Portugal v. Council,* the CJEU emphasizes the lack of reciprocity *vis a vis* direct effect on the part of the (at that time) Community's trading partners, in relation to the WTO agreements[60]. The Court considers that the lack of reciprocity in the application of the agreement could lead to a non-uniform application of WTO rules, thus validating the last recital of the Preamble to Decision 94/800, where the Council stated that "*by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts*"[61].

This case law has been recurrently repeated, for example, with regards to the TRIPS Agreement (e.g. in the 1998 *Hèrmes* judgment[62] and the 2000 *Parfums Dior* judgment[63]) and with regards to the GATT 1994 (e.g. in the 2005 *Parys*[64] and the 2007 *Ikea*[65] judgments).

Recently, the direct effect of international agreements has gained importance around the EU's international trade and investment agreements – e.g. CETA and TTIP[66].

[59] *Idem*, Recital 34.

[60] Recital 45: "*However, the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on 'reciprocal and mutually advantageous arrangements' and which must ipso facto be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules*".

[61] Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

[62] Case C-53/96, *Hèrmes International/FHT Marketing*, 1998, ECR I – 3637.

[63] Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA v. Tuk Consultancy BV and others*, 2000, ECR I – 11307.

[64] Case C-377/02, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)*, 2005, ECR I– 01465.

[65] Case C-351704, *Ikea Wholesale Ltd v. Commissioners of Customs & Excise*, 2007, ECR – I-07723.

[66] Transatlantic Trade and Investment Partnership between the EU and the United States.

Taking into account the asymmetry concerning the admission of direct effect between the EU and others trading partners such as Canada or the US[67], the agreements negotiated or under negotiation by the EU do not enshrine direct effect of their provisions. Apparently, it has been understood that this would have entailed a non-reciprocal treatment between individuals of both Parties. The admission of direct effect in the EU order would represent an advantageous treatment for companies or individuals of other Parties operating in the EU, where they could invoke the direct effect of said agreements, but the reverse would not be possible. Thus, the express denial of direct effect was the solution found for the current EU international trade agreements[68], in line with the jurisprudence of the CJEU that analysed previous trade agreements.

If we examine the denial of direct effect contained in the international trade EU agreements recently negotiated or under negotiation, in the light of the CJEU case law, we can verify that the same argumentation developed for the GATT (47), and subsequently for the WTO agreements, remains valid and applicable to the present agreements.

Accordingly, a study requested by the Committee on the Environment, Public Health and Food Safety of the EP to the Department for Economic and Scientific Policy concludes that, "*While the above decisions have mostly been taken on WTO law, i.e. multilateral trade law, there is no reason to assume that the ECJ's position on a comprehensive bilateral trade and investment agreement would be any different*"[69].

Direct effect of the EU's international trade and investment agreements was subject to discussion by the Portuguese authorities, who took into consideration the above case law and the reasons set forth by the CJEU. Although there is no final conclusion concerning this complex topic, ultimately being a subject for the CJEU to deal with, the consistence of the jurisprudence on this issue seems

[67] Ronald A. Brand – "Direct Effect of International Economic Law in the United States and the European Union", *Northwestern Journal of International Law & Business*, vol. 17, issue 1, 1997, pp. 556 to 608, http://scholarlycommons.law.northwestern.edu/njilb/vol17/iss1/17.

[68] See Article 30.6 of CETA: *"1. Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties. 2. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement"*.

[69] European Parliament, Department for Economic and Scientific Policy, "*Legal Implications of TTIP for the Acquis Communautaire in ENVI Relevant Sectors*" (2013), http://www.google.pt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwik9v2Du7bVAhVIOxoKHdqEBZgQFggsMAA&url=http%3A%2F%2Fwww.europarl.europa.eu%2FRegData%2Fetudes%2Fetudes%2Fjoin%2F2013%2F507492%2FIPOL-ENVI_ET(2013)507492_EN.pdf&usg=AFQjCNFxZ76R5-DkXpg56ava6imPqG03Tw, p. 15.

to have been a factor in the Portuguese authorities assenting to explicitly setting aside the possibility of direct effect, namely, within the CETA and TTIP[70].

However, in our view, a distinction should be made between the different matters the trade and investment agreements are dealing with, and the correspondent systems of litigation.

If the system of litigation allows for compensation or retaliation (e.g. trade issues), then there is an evident parallel with the cases the CJEU has dealt with. However, where there is no place for that flexibility – which seems to be the case with the investment chapter of said agreements – only the argument of lack of reciprocity can prevail. Thus, although the reasons are different, the result is necessarily the same – no direct effect for the rules contained in international trade agreements with those characteristics.

As the direct effect of the *new generation* trade and investment agreements is set aside, individuals cannot invoke rights derived therefrom in the national courts or the CJEU. It is, therefore, necessary to enact legislation to expedite the implementation of the agreements by the Parties, subject to a possible liability action against them for non-implementation of the agreements.

In particular, with regards to investors and their investments, most of these recent trade and investment agreements ensure that rights can be invoked either before an arbitration system of litigation or an International Investment Court. Both will apply the rights derived from these Treaties to the investors and investments of both Parties, which determines that the problem of non-reciprocity of direct effect will be a non-issue. As a matter of fact, we see this possibility as a voluntary *sui generis* recognition of direct effect *rationne materia*.

Questions 14 and 15

No data available.

CHAPTER 4: TRADE AND PROTECTION OF INVESTMENTS

Question 16

With the entry into force of the Treaty of Lisbon in 2009[71], Article 207 (1) of TFUE conferred a new competence to the EU regarding Foreign Direct Investment (FDI), namely for the conclusion of international investment agreements (IIA). This new competence has an exclusive nature (Article 3 (1) (e) of the TFUE), meaning that only the EU is entitled to proceed with it; MS are therefore

[70] According to information provided by the Portuguese official entities (Ministry of Economy and Ministry of Foreign Affairs).

[71] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed 13 December 2007, Official Journal (OJ) C 306/01 of 17 December 2007.

prevented from concluding new international agreements on this issue, unless authorized by the EU under Article 2 of the TFEU (see Question 17)[72].

In order to understand the scope of the CCP on this matter, it is important to distinguish between FDI and portfolio investment, taking into account the case law of the CJEU, *maxime* the recent Opinion 2/2015[73].

In Recital 227 of the above mentioned Opinion, the CJEU recalls that: "*non-direct foreign investment may, inter alia, take place in the form of the acquisition of company securities with the intention of making a financial investment without any intention to influence the management and control of the undertaking ('portfolio' investments), and that such investments constitute movements of capital for the purposes of Article 63 TFEU (see, inter alia, judgments of 28 September 2006, Commission v Netherlands, C-282/04 and C-283/04, EU:C:2006:208, paragraph 19; of 21 October 2010, Idryma Typou, C-81/09, EU:C:2010:622, paragraph 48; and of 10 November 2011, Commission v Portugal, C-212/09, EU:C:2011:717, paragraph 47).*"

Bearing in mind the Opinion, it should be assumed that the expression "direct investment" in Article 207 of the TFUE only includes investments with the characteristics identified above. Therefore, appropriate conclusions should be drawn in terms of the EU's competence, i.e. the EU will be exclusively competent to approve either secondary law to implement the CCP, the subject of which is FDI (Article 207 (2) of the TFEU), or to conclude international agreements with the same subject (Article 207 (1) of the TFEU)[74].

To this extent, indirect investment (e.g. *portfolio* investment) should be classified as shared competence, which determines that:

1. In the case of secondary law (regulations, directives) concerning indirect investment, the EU must comply with the principle of subsidiarity[75]

[72] Article 2 (1) of the TFEU provides that, *"When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts"* (emphasis added).

[73] Opinion 2/2015, 16 May 2017, not yet published.

[74] See, Maria João Palma – "A nova Política Europeia de Investimento Estrangeiro decorrente do Tratado de Lisboa: o Regulamento *Grandfathering* e a articulação entre a competência da União Europeia e as competências remanescentes dos Estados-Membros", [The new European Policy on Foreing Investment after the Treaty of Lisbon: The Grandfathering Regulation and the articulation between the competences of the EU and the competences of Member States] *in Revista Internacional de Arbitragem e Conciliação*, Almedina, Vol. VIII, 2015, p. 92.

[75] Shared competences require the subsidiarity test for the EU to regulate *in lieu* of the MS. To that extent, Article 5 (3) of the TEU provides that *"under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level"* (emphasis added). It also states that "*the institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of*

(Article 5 (3) of the TEU, articulated with Article 4 (2) (a) of the TFEU on the internal market – *in casu*, free movement of capital, Article 63 et seq. of the TFEU).

2. When the act regards both FDI and *portfolio*, it requires a dual legal basis, namely, Article 64 (2) and Article 207 (2) of the TFEU[76] [77].
3. The celebration of international agreements involving both direct investment and indirect investment should follow the procedure of mixed agreements, i.e. the mandate to the European Commission to carry out the negotiations should be granted jointly by the Council of the EU on behalf of the EU and by the MS and the conclusion of the agreement should be done by both of them (see Opinion 2/2015).

It should also be noted that, in our view, the mixed nature of IIA derives not only from the fact that both exclusive and shared competences of the EU are involved, but also from the fact that those agreements (e.g. CETA)[78] involve competences reserved for the MS, *inter alia*, expropriation, compensation for damages, dispute resolution system[79] or provisions on restrictions on capital movements which are set forth and are subject to a specific procedure under Article 65 (1) of the TFEU, as well as measures to restore public order or public security[80].

However, in Opinion 2/2015 the CJEU did not identify any competences reserved for the MS. The *mixity of competences* the CJEU affirmed is based only in a dichotomy of competences: exclusive of the EU and shared between the EU and the MS. No identification of national exclusive competences was done by the

subsidiarity in accordance with the procedure set out in that Protocol." It should be emphasized that, since the Treaty of Lisbon, the role of national parliaments was strengthened concerning the assessment of the principle of subsidiarity through preventive control (*early warning mechanism*), in accordance with the provisions of the Protocol (No. 2) on the application of the Principles of Subsidiarity and Proportionality referred to in Article 5 (4) TEU. Maria João Palma, *op. cit.*, p. 92.

[76] For that reason, we have questioned the legality of the Grandfathering Regulation, based only on Article 207 of the TFEU. Maria João Palma, *op. cit.*, p. 102 et seq.

[77] In the case the act pursues more than one objective, or has several components and one of them is not identifiable as the main one, it must be based on several legal bases provided that the procedures for which the legal bases refer are not incompatible. See, Judgment C-130/10, *European Parliament v. Council* 2012, Recitals 42-45. In the case *sub judice*, we see no procedural incompatibility since both Articles 64 and 207 (2) of the TFEU refer to the ordinary legislative procedure.

[78] The EU and Canada agreed on 21 September 2017 as the date to start the provisional application of the CETA: http://europa.eu/rapid/press-release_STATEMENT-17-1959_en.htm.

[79] At least those connected with the competences of the MS. In Opinion 2/2015, the CJEU considered the dispute resolution system as a matter of share competence. However, in our view, the CJEU should have established a parallelism of competences when analyzing the dispute system competence, noting a trilogy of competences evolved: exclusive of the EU (FDI matters); shared competences (portfolio) and reserved to MS (e.g., expropriation, compensation for damages).

[80] Maria João Palma, *op. cit.*, p. 95.

Court. This, in our view, is contrary to the *principle of conferral*[81]. For that reason, some parts of the Opinion may be unconstitutional.

If we compare the list of matters which the Council of the EU considered as shared competences in the CETA provisional application Decision[82] and those identified by the German Constitutional Court decision that looked at CETA's provisional application, with the enumeration of the CJEU in Opinion 2/2015, we see no coincidence between them, the list of the first two being much longer[83].

Because of this divergence of understandings, reactions can be expected from the Constitutional Courts of the MS or the national parliaments, in the *post-Opinion 2/2015* period.

However, in practical terms, the impact of those divergences can be diminished as the procedure to celebrate mixed agreements is the same independently of the inclusion within the agreements of competences of a shared nature or competences of national reserve nature, both of them imposing the unanimous ratification by MS. For that reason, the need of identification of reserved competences risks being relegated to second rank status in this discussion, as the procedure imposed by shared competences is the same as that for reserved competences of MS, making it possible to refer to a *free riding effect* of the consensus for the national competences through the procedure of celebration for mixed agreements.

Obviously, the Treaties will have to deal with these unclear boundaries concerning competences – see Question 6 about the need for clarification on competences as a *de iure condendo* exercise.

Question 17

In order to implement the FDI competence, the EU adopted the Regulation (EU) No 1219/2012 of the European Parliament and of the Council, of 12 December

[81] See Article 5 (2) of the TUE: "*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*" (emphasis added).

[82] Council Decision (10974/16), 5 October 2016, listing the articles to be provisionally applied http://data.consilium.europa.eu/doc/document/ST-10974-2016-INIT/pt/pdf.

[83] Maria Joao Palma – "A Política Comercial Comum no pós-Lisboa – a Competência para a Celebração de Acordos Internacionais de Comércio da União Europeia" [The Common Commercial Policy after Lisbon – the competence of the EU to celebrate international trade agreements] – *Revista Análise Europeia*, nº 3, maio de 2017, p. 171 http://www.apeeuropeus.com/analiseeuropeia-2-3.html, p. 169. When analysing the CETA, the German Constitutional Court listed as matters not apt for definitive application chapters 8 and 13 (investment protection including the system of litigation and portfolio); chapter 11 (mutual recognition of professional qualifications); chapter 14 (maritime transportation); and chapter 23 (labour). The CJEU only classifies portfolio and the system of litigation concerning investment as shared competences.

2012[84], which established transitional arrangements for bilateral investment agreements between MS and third countries (Grandfathering Regulation)[85].

The Grandfathering Regulation ensures the validity of Bilateral Investment Treaties (BITs) of the MS until they are replaced by the IIA concluded by the EU (see Article 3 of the Regulation). The application of Article 351 of the TFEU was thereby excluded[86], which would result in the obligation by MS to terminate their BITs in light of the transfer of competence to the EU concerning FDI. This Regulation safeguarded a large number of BITs signed by the MS (41 in the case of Portugal, from a total of 1,392 for all of the MS)[87]. The maintenance of such protection net can be referred as a positive aspect of the Regulation, inasmuch as it ensured a continuous line of protection of investors and their investments under national BITs, until the entry into force of the EU's IIAs with a certain Party.

The Grandfathering Regulation thus resulted in a *peaceful coexistence* between the provisions for the protection of foreign investment in the BITs of the MS and the IIA of the EU[88].

This coexistence is based on a *trilogy*, in which the old BITs of the MS coexist with the EU's IIAs as long as the Parties are not identical, and the new BITs concluded by MS authorized by the EU on the basis of *empowerment* under Article 2 of the TFEU, provided that the EU has no interest in the Parties chosen by the MS[89].

The possibility of empowerment granted by the EU to the MS (see Article 7 of the Regulation) is seen as the second positive aspect of the scheme outlined in the Regulation, as it allows for a *catching up* exercise by MS whose BIT network is less dense than other MS[90].

[84] Published in the OJEU, L 351/40, 20.12.2012.

[85] Maria João Palma, *op. cit.*, (2015), pp. 83 to 110.

[86] Article 351 of the TFEU provides that: "*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.* To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. *Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude (...)*" – (emphasis added). The expression "*... all appropriate steps...*" includes the termination or withdrawal of the agreement.

[87] The list of agreements referred to in Article 4 of the Regulation can be found in OJ C 131, of 8 May 2013, p. 2 et seq.

[88] Maria João Palma, *op. cit.*, (2015), p. 106.

[89] Maria João Palma – "A Proteção do Investimento Estrangeiro – uma Nova Política Europeia", [Foreign investment protection – a new European Union Policy?] *in Revista Análise Europeia*, (1) nº 1, 2016, http://www.apeeuropeus.com/uploads/6/6/3/7/66379879/palma_maria_joao__2016_.pdf.

[90] The Grandfathering Regulation entered into force in January 2013. In June 2013, Germany had 136 signed BITs, of which 127 were in force; whereas Portugal had 55 signed BITs and 41 in force (see http://investmentpolicyhub.unctad.org/IIA). In May 2017, figures indicate that Portugal had 55 signed BITs and 45 in force http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (accessed May 2017).

However, when reviewing the first years of implementation of the CCP (2009/2017), including of the Grandfathering Regulation (2013/2017), some concerns have to be outlined: as of September 2017 there is no agreement concluded by the EU with investment provisions in force to refer to. We can only indicate the conclusion of the negotiations of the UE/Vietnam agreement in December 2015, pending signature and ratification, expected to enter into force in early 2018; or the foreseeable provisional entry into force of CETA (21 September 2017)[91], which is limited to matters within the exclusive competence of the EU, leaving out the regime of investment protection which will depend on the ratification of all MS (see Question 7).

If, on the one hand, one must emphasise the ambitious agenda of negotiations the UE has assumed taking into account the whole set of agreements being negotiated (inter alia, EU/Japan, EU/China, EU/Myanmar, EU/India, EU/Singapore)[92], on the other hand, it has to be noted that the EU has not made much progress since the European investment policy began to be implemented[93].

While we highlight a less visible result from the EU side, we also find national investment protection networks still to be unbalanced, e.g. when comparing the number of BITs from Germany, the United Kingdom or the Netherlands with countries like Portugal[94]. The expected result – to harmonize protection networks under the umbrella of the IIA EU agreements – is not being achieved in the short/medium term.

The starting point gave an advantage to certain MS and this becomes increasingly more relevant due to the impasse of the negotiations carried out by the EU.

This is partly due to what is established on Article 9 (1) (b) of the Grandfathering Regulation, where it is considered sufficient for the EU to signal a negotiating interest in a Party to prevent an authorization for a MS to negotiate a BIT[95].

The fact that Portugal maintains the same number of BITs signed in both periods reveals the complexity of the authorization process and the period of deadlock that occurred in a phase after the Grandfathering Regulation entered into force.

[91] http://europa.eu/rapid/press-release_STATEMENT-17-1959_en.htm.

[92] The TTIP negotiations were suspended after the election of President Trump.

[93] See the Communication on the European international investment policy (COM (2010) 343), of 7 July 2010, where the European Commission listed those whom it considered to be value added partners – Canada, India, Singapore, Mercosur, in the short term; China and Russia, in the medium term. For the state of the current negotiations, see: http://ec.europa.eu/trade/.

[94] Analysing data of May 2017, Portugal has about half the total number of BITs in force vis-à-vis the countries with the largest BIT networks in the EU. France has 104 signed BITs, 96 in force; Germany has 135 signed BITs, 131 in force; the Netherlands has 94 signed BITs, 90 in force; Italy has 84 signed BITs, 73 in force; Spain has 80 signed BITs, 73 in force; the United Kingdom has 106 signed BITs, 95 in force. Portugal has 55 signed BITs, 45 in force. See http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu.

[95] According to Article 9 of the Regulation, one of the cases in which the EU does not grant empowerment is when this is considered to "*be superfluous, because the Commission has submitted or has decided to*

In practical terms, however, it has been understood that only the presentation of negotiating directives by the European Commission to the Council acts as a deterrent to negotiations by the MS. Otherwise, and according to the Regulation, the mere reference to a particular partner in a Communication by the European Commission could have that implication. In our view, the Regulation should be amended, at least concerning this aspect.

But we find the problem to be even more acute: the *stand-still* obligation imposed on MS while the EU is negotiating the IIAs did not favour harmonization of the level of protection of the various MS, instead contributing to the increase of the gap between them. As the negotiations of IIAs have spanned several years, during this period investors and investments of MS enjoying the protection afforded by BITs compete side by side with those who do not – and cannot – enjoy this protection, leading to an uneven playing field.

Such a scenario leads us to propose the complete deletion of (1) (b) of Article 9 of the Grandfathering Regulation, given the negotiating history and the delays in the negotiations[96]. In our opinion, it should be possible for MS to submit applications for authorization to negotiate new BITs until the EU has concluded an agreement containing investment protection provisions with the same Party[97].

This suggestion has, however, no support within Portugal's official entities (Ministry of Economy and Ministry of Foreign Affairs), which are responsible for the national negotiation process for BITs and for monitoring the negotiation process of investment agreements by the EU, insofar as they consider that parallel negotiations by the MS may block the negotiation procedure at the EU level.

However, in our view, Article 9 (1) (d) would be sufficient to deal with this possibility as the European Commission could avoid giving the authorization concerning a certain request, should it consider that the prospective negotiation would present a "*serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the Union*."

It should also be noted that, since the European Commission suggested that MS amend their national Model BITs in accordance with the provisions contained in CETA's investment chapter (similar to the one suggested for TTIP), it is not clear that the permission for MS to negotiate BITs, in parallel with the EU, would collide with the harmonization of the level of protection that is intended to achieve within the EU.

submit a recommendation to open negotiations with the third country concerned pursuant to Article 218(3) TFEU" (emphasis added).

[96] For instance, the negotiations of the CETA stated in 2009. From this moment on, those with no BIT with Canada where blocked from having one.

[97] The relevant moment must be the definitive entry into force of the agreement.

To finalize, we also suggest that the possibility of parallel negotiations should be done according to the authorization procedure by the European Commission, to whom it competes to maintain the level playing field as it has to be done when authorising BITs with partners where the European Commission has no interest. In both cases, the EU IIA would substitute the BIT assuring a continuous line of protection from the national level to the EU level.

Question 18

Although the EU has not approved a Model for an IIA, it is nonetheless possible to verify that the provisions in different EU IIA are very similar, to the point of it being possible to consider the existence of an '*invisible model*'[98] for EU IIAs and, inclusively, for the BITs of the MS *post-Grandfathering.*

The shaping of this invisible model had two stages. Firstly, the EU IIAs were inspired by the provisions of the BITs of the MS. Secondly, the recent BITs of the MS absorbed the novelties contained within the EU IIAs: on the one hand, the enshrinement of the MS' *right to regulate* on behalf of the public interest (*policy space*) and, on the other hand, a demand for judicialisation of the dispute settlement[99].

This has resulted in two frequent features common to all *new age* IIAs and BITs of the MS – the right to regulate and the judicialisation of the dispute settlement system. It must be emphasized that these two aspects are interlinked, as they both contribute to ensure a better balance between the rights of investors and the rights and obligations of MS hosting investors and investments and, therefore, are both seen as positive aspects of the EU IIAs.

Firstly, the fact that *policy space* is enshrined within investment agreements is considered to be a positive aspect, allowing for the possibility of justifying the exercise of the right to legislate in accordance with the public interest, without any obligation imposed on States or the EU to compensate investors who may have been harmed[100].

CETA sets public health, safety and the environment as public interest objectives (Annex 8A: Expropriation). In a broader formulation, the TTIP agreement[101] mentions public health, safety, environment, public morals, social or consumer

[98] The expression is found in Bungenberg and A. Reinisch – "The Anatomy of the (Invisible) EU Model BIT", *The Journal of World Investment and Trade* (2014) 15. It should be highlighted that, not only are the investment provisions contained in the different EU IIA similar, but they also share similarities with the clauses of the MS' BITs. See, Maria João Palma, *op. cit.*, (2016), p. 131.

[99] Maria João Palma, *op. cit.*, (2016), *idem.*

[100] Damages deriving from legislative measures depreciating the value of investments are referred to, in international investment law, as "*indirect expropriations*".

[101] See http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230.

protection and the promotion and protection of cultural diversity (Annex I. Expropriation).

Portugal still does not have a BIT signed under a procedure of empowerment *post-Grandfathering*, although it has received several authorizations by the European Commission to start negotiations procedures[102]. However, according to information provided by the official entities responsible for the negotiation of BITs in Portugal (Ministry of Economy and Ministry of Foreign Affairs), the Portuguese Model BIT to be used includes a *policy space* clause, similar to that contained within the TTIP agreement.

Concerning the *reform of the arbitration system* and its transition towards a judicial system[103], Portugal is sensitive to the arguments traditionally made against international arbitration in respect of investments[104]:

- on the one hand, the tendency by arbitrators to decide in favour of investors, possibly in view of their interest in future appointments;
- on the other, the fact that arbitration tribunals for investment are private in nature and that there is no public control of their establishment or decisions;
- and lastly, the fact that arbitration undermines the State's right to public regulation, which could potentially lead to an abuse of a right of action against measures taken in the public interest by States[105/106].

[102] Namely, Nigeria, Saudi Arabia, Azerbaijan, Moldova, Georgia, Ivory Coast, Ghana, Bahrain, Iran and Ethiopia.

[103] On the investor-State dispute settlement system in the EU IIA, see August Reinisch and Lukas Stifter – "What about ISDS in EU Investment Agreements", *in Revista Internacional de Arbitragem e Conciliação*, Almedina, Vol. VIII, 2015, pp. 7-34. In the national doctrine, Dário Moura Vicente: "Os mecanismos de resolução de litígios entre Estados e investidores na perspetiva europeia: desenvolvimentos recentes" [Investor-State dispute settlement in an European perspective: recent developments"], *in Liber Amicorum Fausto de Quadros,* Vol. 1, Coordenação de Marcelo Rebelo de Sousa e Eduardo Vera-Cruz Pinto, Almedina, Coimbra, 2016, p. 695; Luís de Lima Pinheiro: "Mecanismos de resolução de litígios com os investidores nos Acordos CETA e TTIP" [Investor-State dispute settlement in CETA and TTIP] *in União Europeia, Reforma ou Declínio*, Coordenação de Eduardo Paz Ferreira, ed. Veja, Lisboa, 2016, pp. 259 to 375.

[104] In the national doctrine, a review of these arguments can be found in Ricardo do Nascimento Ferreira "A judicialização do Sistema de ISDS no TTIP", *in Revista Internacional de Arbitragem e Conciliação*, Almedina, Vol. VIII, 2015, p. 114.

[105] *Idem*.

[106] For instance, the *Abaclat* case (ICSID arbitrations initiated by foreign investors against measures to restructure public debt by Argentina to deal with the economic and financial crisis) or the *Vattenfall* case (initiated against Germany, also in ICSID, by virtue of its decision in phasing-out nuclear energy), referred to in Maria João Palma, *op. cit.*, (2016), p. 132.
For a critical analysis of these cases, *vide*, Maude Barlow and Raoul Marc Jennar – "Le fléau de l´arbitrage international", Le Monde diplomatique, 01.02.2016. http://www.monde-diplomatique.fr/2016/02/BARLOW/54744.

Taking into account the arguments against investment arbitration, the evolution of the traditional arbitration system towards the creation of an *International Investment Court,* enshrined in the CETA was well received by Portugal's official entities.

This development follows a public consultation held in 2014 by the European Commission on the TTIP agreement[107] and the criticisms directed at the possibility of recourse to international arbitration on investment. In response, the European Commission introduced proposals for improving the system in May 2015[108], including the possible creation of an *investment court of a judicial, permanent and multilateral nature.*

Along the same lines, the EP adopted a Resolution on 8 of July 2015, recommending that the European Commission adopts a new system for settling disputes between investors and States, subject to democratic principles and control, public prosecution and in accordance with transparency rules, with recourse to professional and independent judges, appointed by a public authority, including the possibility of appeal in order to ensure the consistency of the decisions, which, taken as a whole, would allegedly contribute to preventing private interests from jeopardizing the pursuit of the public interest[109] [110]. On 16 of September 2015, the European Commission published the proposed TTIP chapter on investment for discussion, including provisions on a *permanent judicial system for the settlement of investment disputes*, simultaneously affirming its commitment to the creation of an *International Investment Court* to replace all the dispute settlement systems provided for in IIAs[111].

In the course of the legal scrubbing exercise of CETA[112], a new dispute settlement system between investors and States was introduced in the Agreement: the Investment Court System (ICS), imported from the exercise performed for the TTIP.

It should be emphasized that all of these steps merited Portugal's agreement.

In short, the two-pronged EU exercise – enshrinement of the *policy space* and evolution from a private arbitration system to an *International Investment Court*

[107] The European Commission's report on the outcome of the public consultation, of 13 January 2015, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf.

[108] Concept Paper, of May 2015 http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

[109] See www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML.

[110] An assessment of the EP's performance in this area can be found in Pedro Silva Pereira – "Acordo CETA: o Parlamento Europeu fez a diferença", [CETA: the European Parliament has made the difference] *in* Revista Análise Europeia, 3 (2), May 2017, pp. 183-197. http://www.apeeuropeus.com/uploads/6/6/3/7/66379879/silva_pereira_pedro_2017.pdf.

[111] See http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf and http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm.

[112] The legal scrubbing of the CETA Agreement ended on 29 February 2016.

– are considered, at the national level, to be very positive (Ministry of Economy and Ministry of Foreign Affairs), to the extent that they promote a fair balance of positions between investors and States or the EU within a dispute.

Question 19
No data available.

Question 20
In this respect, it should be noted that, since the Treaty of Lisbon, the CCP has come under the umbrella of the general provisions on "European Union's External Action" including Article 21 TEU, which states that the Union should promote "*in the wider world: democracy, the rule of law (...) respect for human dignity (...)" (no. 1),* but also *"work for a high degree of cooperation in all fields of international relations" (no. 2),* in order to, *inter alia, "(...) (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development (...)".*

The verification of compliance with these requirements should prevail through the negotiation process of international trade agreements, with emphasis on the *favourable opinion* by the EP, whether in respect of the entire agreement or in exceptional situations of "*partial*" provisional application including in case of the conversion from provisional to definitive application (see Question 6)[113].

We also believe that this monitoring is a matter for national parliaments, especially during the ratification stage, which justifies their greater participation and involvement during the negotiating stage of the agreements[114].

In a globalized world, trade cannot be treated separately from other issues – trade liberalization interacts with other areas such as labour, social and environmental policy, the *good neighbourliness* of which must be scrutinized by both the European and national parliaments.

Article 21 TEU was designed to determine the necessary accommodation of EU external action, including the CCP, to socially and environmentally sustain-

[113] The partial provisional application should put into perspective the possibility of making the whole agreement evolve to fulfil the obligations contained in Article 21 TEU. On the other hand, in case of conversion, it will be necessary that the dropped "*parties or provisions of the agreement*" are not considered essential to the fulfilment of the dictates of article 21 TEU. See, Maria João Palma, *op. cit*, (2017), p. 172.
[114] *Idem*.

able economic development and global poverty eradication[115]. In short, it assigns an important role to be played by national parliaments also in what refers to the areas of exclusive competences of trade agreements, as trade cannot be disconnected from others issues of national competence.

Question 21
This question was answered above (see Question 5).

[115] In the national doctrine, see Teresa Moreira, Comentário ao artigo 206º do TFUE, [Comments on Article 206 TFUE], *in Tratado de Lisboa, Anotado e Comentado*, Coordenação de Manuel Lopes Porto e Gonçalo Anastácio, Almedina, Coimbra, 2012, p. 808.