XXVIII FIDE Congress

Topic 3: The external dimension of EU policies

National report: UNITED KINGDOM

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

The *AETR* doctrine has been interpreted broadly by the Court of Justice (see answer to Question 2 below). This has raised a concern that it might impinge on areas of national competence and has given rise to an ensuing need in Member States to somehow rein in an expansive reading of the principle. This has become apparent in the area of environmental policy. A case in point is the conclusion of the Minimata Convention on Mercury in the context of which the House of Commons European Scrutiny Committee urged the Government to ensure that the EU would only exercise competence that was exclusive, and would not prevent Member States from exercising their own competence.[1]

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

Article 3(2) TFEU provides for the EU's exclusive competence to conclude an international agreement in three sets of circumstances: first, when its conclusion is provided for in a legislative act of the Union; second, when it is necessary to enable the Union to exercise its

[1] House of Commons European Scrutiny Committee, 29 March 2017.

internal competence; third, insofar as its conclusion may affect common rules or alter their scope.

The terms in which Article 3(2) TFEU is couched draw on the long and at times complex case-law of the Court of Justice which has developed the doctrine of exclusive competence since the early 1970s. In doing so, they seek to convey the principles laid down in this case-law. Viewed independently from the latter, Article 3(2) TFEU may be interpreted too broadly. In fact, separated from its context, this provision could be interpreted so widely as to impinge upon the principle of conferral (Article 5(1) TEU).

Such an approach has been rightly rejected by the Court of Justice. In Opinion 2/15, in determining the Union's competence on indirect foreign investment, the Court confirms that that provision is to be interpreted in the light of the previous case-law on implied competence.[2] Article 3(2) TFEU, therefore, is to be construed in the light of the principles that the Court has already set out. This is an important point, as the broad wording of this provision fails to capture the subtleties of the *AETR* principle and its development over the years.

Viewed against this context, the first and second sets of circumstances are reasonably contained. The conferment of express competence in a Union's legislative act had already been held to render the Union's competence exclusive;[3] as for the test of necessity referred to in Article 3(2) TFEU, it refers to the principle introduced in Opinion 1/76[4] which has been construed subsequently in such narrow terms[5] that its relevance was confined to the case in which it was introduced. It is, therefore, the third set of circumstances provided for in Article 3(2) TFEU that is bound to raise questions in practice about the scope of the Union's exclusive competence.

The *AETR* principle has been construed in broad terms by the Court of Justice. This is not a recent phenomenon. Earlier case-law made it clear that the provisions of an agreement need not coincide fully with internal common rules in order to risk affecting the latter or altering

[2] EU:C:2017:376, paras 231 et seq.
[3] See Opinion 1/94 EU:C:1994:384, para. 95.
[4] EU:C:1977:63.
[5] See Opinion 1/94, n3 above, paras 85-6 and 100, Case C-476/98 *Commission v Germany (Open Skies)* EU:C:2002:631, para. 85.

their scope.[6] It had also held that a contradiction between the agreement and internal common rules is not necessary for exclusivity to be triggered, as long as the meaning, scope and effectiveness of the latter might be effected.[7] This broad approach was also illustrated in Opinion 1/03 where the Court held that 'a comprehensive and detailed analysis must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area covered by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish'.[8]

The above formulation of the circumstances under which the conclusion of an international agreements may affect common rules or alter their scope may broaden up the scope of the application of the *AETR* principle. This was illustrated recently in Opinion 2/15 where the Court held that the Union's implied competence was exclusive in relation to commitments on transport services and public procurement on such services. In fact, Opinion 2/15 illustrated this approach with considerable force. For instance, the references to the specific provisions of the Agreement and those of the internal secondary legislation are lacking in detail. Whilst the conclusion draws on the approach articulated in Opinion 1/03, it is not based on a 'comprehensive and detailed analysis' of the provisions of the Agreement with Singapore and the internal common rules in the area.[9] Such analysis is not present in Opinion 2/15. Whilst the Court takes the Chapters of the Agreement with Singapore in turn and examines them against EU secondary legislation, it does so only in broad terms. This analytical sparseness is also reflected by the streamlined form of Opinion 2/15.[10] All in all, it becomes clear that the threshold to meet the *AETR* test and its codification in Article 3(2) TFEU is by no means high.

[6] See Opinion 1/03 (*New Lugano Convention*) EU:C:2006:81, para. 126; C-114/12 *Commission v Council* EU:C:2014:2151, paras 69-70; Opinion 1/13 (*Accession of third States to the Hague Convention*) EU:C:2014:2303, paras 72-73; Opinion 3/15 (*Marrakesh Treaty on access to published works*) EU:C:2017:114, paras 106-107).

[7] See Opinion 1/03, ibid, paras 143, 151-153; Opinion 1/13, ibid, paras 84-90; C-66/13 *Green Network* EU:C:2014:2399, paras 48 and 49 and, even earlier, Opinion 2/91 EU:C:1993:106, paras 25-6 and Case C-467/98 *Commission v Denmark (Open Skies)* EU:C:2002:625, para. 82.

[8] Opinion 1/03, ibid, para. 133.

[9] Opinion 1/03, ibid, para. 133.

[10] The Opinion is much shorter than the detailed and in-depth analysis provided by AG Sharpston in her Opinion (EU:C:2016:992).

There is a constraint on the scope of exclusive competence pursuant to Article 3(2) TFEU that was articulated in Opinion 2/15: an international agreement may 'affect' common rules in the meaning of Article 3(2) TFEU if the latter are set out in secondary legislation.[11] It was for this reason that the Court held that the indirect foreign investment provisions of the Agreement with Singapore could not affect Article 63 TFEU in the meaning of Article 3(2) TFEU. This is a welcome classification, as the argument to the contrary by the Commission had advocated an even more expansive interpretation of the *AETR* principle.

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

Whilst they are couched in similar terms, the scope of Article 216(1) TFEU is distinct from that of Article 3(2) TFEU. The former is about the existence of the Union's competence to conclude international agreements, whereas the latter is about the circumstances under which such competence is exclusive. This distinction was somewhat blurred in the early case-law on external competence.[12] In Opinion 1/03, the Court examined clearly the existence of the Union's competence to conclude the Lugano Convention separately from the nature of this competence. And in Opinion 2/15, once it had ruled out exclusivity pursuant to Article 3(2) TFEU, the Court went on to examine the existence of the EU's competence under Article 216(1) TFEU: it held that the provisions of the Agreement with Singapore on foreign indirect investment were 'necessary' in the meaning of Article 216(1) TFEU in order to achieve the objectives of free movement of capital (Article 63 TFEU). As this field relates to the internal market (Article 4(2)(a) TFEU) over which the EU has shared competence (Article 4(1) TFEU), the EU also has shared competence to conclude an agreement on capital movements. This line of reasoning is clear and takes seriously both the new provision of Article 216 TFEU and the distinction between the existence and nature of implied external competence.

Article 216(1) TFEU endows the EU with competence to conclude international agreements in four sets of circumstances: first, where the Treaties so provide; second, where the conclusion

[11] Opinion 2/15, EU:C:2017:376 para. 230.
[12] Case 22/70 *Commission v Council (AETR)* EU:C:1971:32, Opinion 1/76, n4 above.

of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties; third, where the conclusion of an agreement is provided for in a legally binding Union act; fourth, where the conclusion of an agreement is likely to affect common rules or alter their scope.

The first of the above is straightforward, as it refers to express competence. The second is drafted in such terms as to appear to amount to an autonomous substantive legal basis. Such interpretation would be incorrect, as this provision should be understood in the context of a specific legal basis which confers on the Union a specific internal competence. The third case follows from the *AETR* principle, as adjusted in Opinion 1/94 where, in the context of GATS, the Court referred to secondary legislation on free movement of services and freedom of establishment that provided for the conclusion of international agreements. The wording of Article 216(1) TFEU may appear to suggest an unlimited power of the legislature to endow the EU with external. This view, however, would not take into account the specific context within which Opinion 1/94 was rendered and which made it clear that the conclusion of international agreements was the necessary corollary for the application of internal market legislation.

As for the fourth case, the terms in which it is couched are identical to those in Article 3(2) TFEU. If, therefore, the conclusion of an agreement satisfies the former, it would also satisfy the latter.[13]

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

The answer to Question 3 above highlighted a thread that brings together the circumstances under which the EU is endowed with competence to conclude an international agreement (Article 216(1) TFEU) and those under which that competence is exclusive (Article 3(2) TFEU). This similarity is not helpful. On the one hand, it illustrates the perils of codifying a long and complex line of case-law in Treaty language. It is somewhat ironic that, whilst it aimed to clarify the state of the law, the introduction of Articles 216(1) TFEU and 3(2) TFEU would have introduced further complexity. On the other hand, it suggests that the interpretation of these two provisions is subject to an inherent condition that is not spelled out expressly in either,

[13] See Opinion of Advocate General Sharpston in Opinion 2/15, EU:C:2016:992, para. 70.

namely the case-law of the Court of Justice. It is in the light of this case-law that the terms in which these provisions are couched must be understood. The attempt, therefore, at codification that that Lisbon Treaty represented in this respect has by no means reduced the significance of the role of the Court of Justice: its case-law is vital in our effort to understand and apply Article 216(1) TFEU and Article 3(2) TFEU in practice.

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

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

The interactions between the Commission and the special committee envisaged in Article 218(4) TFEU are governed by the duty of inter-institutional cooperation. Article 13(2) TEU, as amended at Lisbon, requires that the institutions 'shall practice mutual sincere cooperation'. The addition of the latter provision at Lisbon, however, has not increased the intensity of cooperation between the Commission and the special committee, neither has it spurred the EU institutions to show greater respect for the prerogatives of each other. In fact, since the entry into force of the Treaty of Lisbon, the Commission has challenged the content of the Council's the negotiating directives adopted under Article 218(4) TFEU, hence raising questions about the scope and intensity of its interactions with the negotiating committee.[14]

The Commission's distinct effort to protect its prerogatives is not only reflected by litigation. In practice, national authorities observe that the flow of information by the Commission to the negotiation committee is by no means consistently generous.

QUESTION 6. With regard to the provisional application of international agreements, what is the perspective of the Member States on how to determine which provisions are to be applied provisionally? The TFEU provides for a proposal by the negotiator and a decision by the Council of the European

[14] Case C-425/13 *Commission v Council* EU:C:2015:483. It had also done so in Case C-114/12 *Commission v Council* EU:C:2014:2151, but the Court did not examine the plea.

Union. Should the participation of the European Parliament be considered, even if the TFEU does not provide for it? If yes, in what form?

The determination of the parts of an international agreement that would apply provisionally is determined on an *ad hoc* basis. As its aim is to unshackle the application of the agreement from the legal and practical constraints of the latter's conclusion, provisional application is easier to agree where it is about the Union's exclusive competence: the parts of the agreement that are covered by it would be provisionally applied pursuant to the relevant Council Decision. This, however, is not applied without exception. In the case of the Comprehensive Economic and Trade Agreement (CETA), for instance, its provisional application was accompanied by a number of statements entered into the Council minutes which suggested that the provisional application of specific provisions did not prejudge the allocation of competence between the EU and the Member States.[15]

The determination of the parts of an international agreement that would apply provisionally amounts, ultimately, to a policy choice to be made by the Council on a case-by-case basis. There is, therefore, a degree of uncertainty that is inherent in this process. The latter could become more streamlined if the international agreements themselves determined which of their provisions would be subject to provisional application.[16] On the other hand, competence-based concerns would not be part of the process of deciding the provisional application of international agreements in the cases where the EU would conclude EU-only agreements.

The participation of the European Parliament in the process of the provisional application of mixed agreements is now confined to the general role laid down in Article 218(10) TFEU: the Parliament 'shall be immediately and fully informed at all stages of the procedure' set out in Article 218 TFEU. There is no appetite in the United Kingdom for increasing the formal participation of the European Parliament in the process of the provisional application of mixed agreements. This would slow down a process which aims to facilitate and speed up the application of international agreements. It would, also, introduce further uncertainty in a process that can ill afford it.

[15] Council Decision 2017/38 on the provisional application of CETA [2017] OJ L 11/1080, and Statements to be entered in the Council minutes [2017] OJ L 11/9.
[16] Examples (Iraq)

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

A mixed agreement whose provisional application has not been ratified by a Member State would still be binding on that State as a matter of EU law pursuant to Article 216(2) TFEU. This would be the case, even though the agreement in question would not be binding on that Member State as a matter of international law. Similarly, the agreement would also be binding on the Union as a matter of international law.

Non-ratification by a Member State would have implications for the provisional application of the agreement in the EU and the third party/ies if either terminated it. This would not follow strictly from an EU or an international law obligation. It would be, instead, a policy decision which would be made on the basis of a number of factors, including the scope of the provisional application, the reason for the non-ratification by the Member State, and the broader political and economic context.

As far as the applicable procedure under EU law for the termination of the provisional application of an agreement is concerned, the Treaties are silent. It is argued that the procedure governing the provisional application of the agreement, laid down in Article 218(5) TFEU, would apply by analogy.[17]

As for the implications of non-ratification for the definitive entry into force of the agreement, they could be contained depending on the scope of the agreement and the political will in the EU for a deal with the contracting party/ies. There are different ways of achieving this outcome. The EU could conclude the Agreement as an EU-only agreement: the exclusion of the participation of the Member States would rule out risks to the application of the agreement. If that was not possible, the agreement could be renegotiated in order to assuage the concerns of the State that failed to ratify it. This option, however, would be fraught with difficulties: on the one hand, it may not be assumed that the third party/ies would be willing

[17] As for the international law dimension of the termination of the provisional application of an agreement, a number of international agreements set out the applicable provision: eg the Association Agreement between the EU and Ukraine which provides for termination six months after receipt of a notification to that effect ([2014] OJ L 161/3, Art. 486(7). Other Agreements do not provide for such provision: eg the EU-Iraq Partnership and Cooperation Agreement ([2012] OJ L 204/20). Article 25(2) of the Vienna Convention on the Law of Treaties, however provides for the termination of the provisional application of international agreements which it makes subject to notification by either party.

to reopen the negotiations in order to address the specific concerns raised by a Member State; if they did, they might also be tempted to unpack other aspects of the negotiations in order to achieve an outcome to which the EU or certain Member States might object; in any case, the concerns raised by the Member State that failed to ratify the provisional application of the agreement may be somewhat unclear and broad in scope or not easily addressed by specific modifications of the agreement.

Finally, the implications of non-ratification may be contained by legal ingenuity: certain legal arrangements may be introduced which would assuage domestic policy concerns without necessitating a re-negotiation of the agreement itself. The source of such arrangements may be both the third party/ies and the EU and its Member States: this was the case in CETA where a Joint Interpretative Instrument was adopted in order to set out the interpretation of certain CETA provisions, while the terms of the latter had not been renegotiated.[18] Such arrangements may be made by the Member States themselves: in the case of the EU-Ukraine Association Agreement, for instance, a Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, was adopted in order to underline the interpretation of the Agreement agreed upon by the Member States.[19] This *ad hoc* method of tackling the implications of non-ratification by a Member State is pragmatic and seeks to contain them within the EU side. It is relied upon, however, at times of increasing public disquiet about international treaty-making. The Member States would need to think about whether such legal ingenuity may contain the underlying public scepticism in the long run.

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

The scope of the agreements envisaged under Article 218(6)(a)(iii) TFEU ('agreements establishing a specific institutional framework by organising cooperation procedures') is unclear and has not been interpreted by the Court of Justice so far. It is sufficiently flexible to adjust to the evolving structures of international cooperation. So far, it has applied to

[18] [2017] OJ 11/3.
[19] Annexed to the European Council Conclusions on Ukraine, 15 Dec. 2016. On the legal nature of this document, see Opinion of the legal counsel, Brussels, 12 Dec. 2016 (OR. en), EUCO 37/16, LIMITE, JUR 602.

agreements such as those governing the World Trade Organisation and the Hague Conference on Private International Law, and the European Economic Area Agreement. The application of this provision has not given rise to problems.

The scope of Article 218(6)(iv) TFEU ('agreements with important budgetary implications for the European Union') is also unclear. It has been interpreted by the Court of Justice in Case C-189/97 *European Parliament v Council (EC-Mauritania fisheries)*[20] in a flexible manner. The application of this provision, too, has not given rise to problems.

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

The experience of suspension of international agreements by the Union has been limited. In the pre-Lisbon era, the Council and the Member States had suspended the application of the Co-operation Agreement with Yugoslavia.[21] In the post-Lisbon days, the Union has only suspended an international agreement pursuant to Article 218(9) TFEU twice, in the case of the Cooperation Agreement with Syria.[22]

It is political will that underpins the application of this procedure. The suspension of an international agreement is an assertive and powerful policy statement on behalf of the Union in a politically charged and sensitive policy context. Reaching political agreement in such circumstances is bound to be difficult. This was illustrated in the case of the SWIFT Agreement between the EU and the United States: following the revelations by Edward Snowden about the US National Security Agency's tapping of EU citizens' bank data, the European Parliament adopted a non-binding resolution suggesting that the Union suspend the application of the Agreement.[23] This did not happen.

QUESTION 10. The TFEU provides for the procedure to be followed for establishing the positions to be adopted on behalf of the European Union in a body set up by an international agreement.

[20] EU:C:1999:366.
[21] Decision of the Council and the Representatives of the Governments of the Member States meeting within the Council 91/586 [1991] OJ L 315/47.
[22] Council Dec. 2011/523 [2011] OJ L 228/19 and Council Dec. 2012/123/CFSP [2012] OJ L 54/18.
[23] European Parliament resolution of 23 October 2013 on the suspension of the TFTP agreement as a result of US National Security Agency surveillance (2013/2831(RSP)).

Have there been any examples of decisions challenged and/or discussed at national level that have not been challenged before the Court of Justice?

I am not aware of such cases.

QUESTION 11. Pursuant to Article 218 (10) TFEU, the European Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion procedure regarding international agreements. How do the Member States perceive this obligation? What is the role of national and/or regional parliaments?

The European Parliament has exercised its powers under Article 218(10) TFEU with confidence. In its effort to ensure that its role is construed broadly, the Parliament has sought to enforce its prerogatives before the Court of Justice.[24] The latter has construed the scope of Article 218(10) TFEU broadly, hence cementing the role of the European Parliament in treaty-making. The right to 'be immediately and fully informed at all stages of the negotiation and conclusion procedure' ought to be seen in the wider context of the considerable powers with which the Lisbon Treaty has endowed the Parliament. Given its input in the conclusion of most international agreements, it is in the interest of the Council and the Commission, as well as that of the European Union as a whole, to engage with the Parliament under Article 218(10) TFEU as much and as openly as possible.

Compliance with Article 218(10) TFEU requires the sharing of information between the Union's institutions. As some of this information is sensitive or even classified, there are concerns about maintaining its confidential nature. In order to address these concerns, the Parliament has amended its security rules[25] and concluded an agreement with the Council about the rules that govern the handling of classified information.[26] The application of the procedures laid down in this agreement is considered successful.

As far as the role of domestic parliaments is concerned, both Houses in the United Kingdom, that is the House of Commons and the House of Lords, are involved in the treaty-making

[24] Case C-658/11 *European Parliament v Council* EU:C:2014:2025 and Case C-263/14 *European Parliament v Council* EU:C:2016:435.
[25] Decision of the Bureau of the European Parliament of 6 June 2011 concerning the rules governing the treatment of confidential information by the European Parliament [2011] OJ C 190/2.
[26] Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, [2014] OJ C95/1.

process. Once the Council has adopted negotiating directives, the Government informs the Scrutiny Committees in both Houses.[27] There is acknowledgment of the need to strike the balance between sharing information and the complexities that ensue from the practicalities of international organisations. In its Guidance, the Cabinet Office notes that 'there is a difficult balance to be struck between preserving the confidentiality of the negotiating process and keeping Parliament informed of events in good time. Where it appears likely that an important negotiation will be concluded within about six months, with rapid submission of formal proposals to the Council thereafter, you should consider writing to the Committees about the opening of negotiations and their scope, although without providing details of EC or partners' negotiating positions'.[28]

The process of the ratification of treaties in the United Kingdom is governed by the Constitutional Reform and Governance Act (CRaG) 2010. This provides that most treaties that are subject to ratification,[29] including those concluded by the EU and the Member States, along with an Explanatory Memorandum must be laid by a minister of the Crown before Parliament for 21 sitting days without either the House of Commons or the House of Lords having resolved that it should not be ratified. If either House passes a resolution objecting to ratification, the Government must then give reasons explaining its decision to insist on ratification. The House of Commons may object to ratification again during another 21 day period. It is necessary that this further period passes without the House of Commons having resolved that the agreement should not be ratified. Otherwise, the agreement is not ratified. This process can continue indefinitely, albeit only with the House of Commons (the House of Lords may only object to the ratification once).

Chapter 3 Legal effects of international agreements

UESTION 12 Is there any national case law on the application and/or interpretation of international agreements concluded solely by the European Union or of mixed agreements, which were not source of references for a preliminary ruling? Is there any national case law concerning the challenge of

[27] Cabinet Office, Parliamentary Scrutiny of European Union Documents Guidance for Departments (August 2013).
[28] Ibid, para. 2.3.6.
[29] This requirement does not apply to: a treaty covered by section 12 of the European Parliament Election Act 2002 or section 5 of the European Union (Amendment) Act 2008; a treaty for which an Order in Council may be made under section 158 of the Inheritance Tax Act 1984, section 2 of the Taxation (International and Other Provisions) Act 2010 or section 173 of the Finance Act 2006 (International Tax Enforcement Arrangements); a treaty concluded (under authority by the Government of the United Kingdom) by the government of a British overseas territory, or any of the Channel Islands or of the Isle of Man.

international agreements concluded solely by the European Union or of mixed agreements, without there being any references for a preliminary ruling on the interpretation of validity? If so, give a brief summary of those cases.

I am not aware of such case-law.

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

The direct effect of an international agreement binding on the EU depends on a two-tier test: first, the agreement in question as a whole must be capable of conferring enforceable rights; secondly, the specific provision of the agreement relied upon by an individual must be sufficiently clear, precise and not subject to further implementing measures. If either of these conditions is not met, the agreement may not be relied upon by an individual in order to challenge the validity of EU law or national law in the area of EU law before either national courts or the CJEU. This two-tier approach applies both to challenges against EU law brought by individuals and Member States.[30] Whilst for a long time WTO law was the only case of rules contained in an agreement concluded by the EU which was deemed incapable of conferring any rights directly enforceable before domestic courts, more recently the Court held that other treaties also felt at this hurdle: these include the United Nations Convention on the Law of the Sea (UNCLOS),[31] the Kyoto Protocol,[32] and the United Nations Convention on the rights of persons with disabilities.[33]

The case-law of the Court of Justice on the direct effect of international agreements is broadly welcome. The United Kingdom is a dualist state: unless international agreements are transposed under domestic legislation, they may not be relied upon directly before domestic courts.[34] There is, therefore, a symmetry between the approach of the Court of Justice and that

[30] Case C–61/94 *Commission v Germany* EU:C:1996:313, Case C-149/96 *Portuguese textiles* EU:C:1999:574; Case C-53/96 *Hermès* EU:C:1998:292.
[31] Case C-308/06 *Intertanko* EU:C:2008:312.
[32] Case C-366/10 *ATAA* ECLI:EU:C:2011:864. The Court, however, went on to examine the specific provision of the Protocol relied upon by the claimants, that is Art. 2(2), which provided that the parties would seek to limit emissions of certain greenhouse gases working through the ICAO. It held that this was not unconditional and sufficiently precise and, therefore, incapable of being relied upon by individuals in order to challenge the validity of Dir. 2008/101.
[33] Case C-363/12 *Z* EU:C:2014:159. See also Case C-356/12 *Glatzel* EU:C:2014:350.
[34] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500, and, more recently, *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5 at paras 55-7.

of domestic law in the United Kingdom about containing the enforcement of international agreements in the domestic legal order. There is also a thread that brings together this approach and the EU's recent treaty-making activity which is characterized by an unmistakable preference for ruling out direct effect, albeit couched in different ways.[35]

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

I am not aware of such actions.

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

I am not aware of special mechanisms to that effect introduced in the domestic legal order.

Chapter 4 Trade and protection of investments

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

In its submissions in Opinion 2/15,[36] the UK argued for a narrow interpretation of foreign direct investment pursuant to Article 207(1) TFEU that would not extend beyond the initial

[35] See the Agreements with South Korea (Article 8 of Council Decision 2011/265/EU [2011] OJ L 127/1 and Article 336 of the Agreement [2011] OJ L127/6), the Agreement with Colombia and Peru (Article 336 [2012] OJ L 354/3, and Article 7 of Council Dec. 2012/735 on the signing, on behalf of the Union, and provisional application of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/1), the Free Trade Agreement with Singapore (Article 17.15), the Agreement with Vietnam (Art. X.19), the Association Agreement with Central America (Art. 356, [2012] OJ L 346/3 and Art. 7 of Council Dec. 2012/734 [2012] OJ L 346/1), CETA (Art. 30.6(2); both the Draft Decisions on the signature and provisional application of CETA also rule out direct effect), as well as provisions of the Association Agreements with Ukraine (Ch. 14 of the Agreement, as well as provisions on services and establishment. See also Art. 5 of Council Dec. 2014/295/EU [2014] OJ L 161/1), Georgia (Art. 5 of Council Dec. 2016/838/EU [2016] OJ L 141/26.), and Moldova (Art. 5 of Council Dec. 2016/839/EU [2016] OJ L 141/28).

[36] EU:C:2017:376.

admission of investment and that would exclude portfolio investment. It was also submitted that transport services were excluded from the scope of CCP.

In the area of intellectual property, the United Kingdom acknowledged that, following the judgment in *Daiich Sankyo*,[37] the TRIPS Agreement fell within the scope of the CCP. It argued, however, that the Commission's interpretation of the term 'the commercial aspects of intellectual property rights' in Article 207(1) TFEU was overly broad and that rendered the distinction between them and the non-commercial aspects of such rights redundant. The UK argued that, in understanding *Daiich Sankyo*, more emphasis should be given in the specific context of TRIPS[38] and that, therefore, Article 207(1) TFEU could not extend to the entire scope of other intellectual property treaties, such as the Berne Convention, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty.

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

The relationship between Bilateral Investment Treaties (BITs) and EU law is governed by Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (the Grandfathering Regulation).[39] This instrument addressed a specific policy objective, that is to strike the balance between, on the one hand, the exclusive EU competence that had emerged after the entry into force of the Lisbon Treaty pursuant to Article 207(1) TFEU and, on the other hand, the need for the EU to develop its own investment policy. Given that the latter would entail a process that would, inevitably, take considerable time and energy for the EU institutions, it was essential that the protection afforded to investors under the BITs that the Member States had concluded would not be undermined.

It was for that reason that the Grandfathering Regulation was adopted and set out a procedural framework that would bring the application and development of BITs concluded by Member States closer to EU law. In doing so, it ensures that any new BIT entered into by a Member State would be in accordance with the EU primary law. This system has achieved its

[37] Case C-414/11 *Daiich Sankyo* EU:C:2013:520
[38] In his Opinion in *Daiich Sankyo*, Advocate General Cruz Villalón stressed the reference to the commercial aspects of intellectual property in Article 207(1) TFEU and the distinction with other aspects which would not fall within the Union's exclusive competence (EU:C:2013:49, para. 80).
[39] [2012] OJ L 351/40.

policy objective and has worked well. The implications of the approach it sets out are considerable. For instance, the Commission's recent proposal for an authorisation to negotiate the establishment a multilateral investment court is also extended to existing BITs concluded by Member States.[40]

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

The British Government believes that there is some misunderstanding about the function and implications of the existing Investment State Dispute Settlement (ISDS)procedures and stresses the need to ensure confidence for investors.[41] In the context of TTIP, for instance, it pointed out that not a single claim has been brought successfully against the UK under the ISDS mechanism laid down in its BITs (the majority of which include such mechanisms).[42]

This emphasis on investor protection also underpins the United Kingdom's approach to the Investor Court system set out in CETA. The Government has had reservations about this mechanism, but has not expressed an objection to it.[43] In particular, what the Government considers controversial is that the CETA system 'removes the rights of the EU Governments and investors to appoint arbitrators. The arbitrators are pre-selected by parties. The areas that we will want to consider are whether the rules on conflicts of interest and the lower retainer fees will produce the cadre of candidates we want, and whether the concept of the tribunals will add extra delay'.[44]

The debate about CETA in the UK Parliament illustrates both the increasing concerns about ISDS and the cautious approach of the British Government. The House of Commons European Scrutiny Committee relied upon the ISDS provisions, amongst others, in order to ask for more

[40] COM (2017) 493 final *Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes* (Brussels, 13 September 2017).
[41] Government Response to the House of Lords European Union Committee's Fourteenth Report: The Transatlantic Trade and Investment Partnership (July 2014).
[42] In practice, only two publicly known claims have been brought against the UK under ISDS, and neither was in connection with a change in public policy: *Eurotunnel Group v. France and United Kingdom* 2003 (awarded in favour of investor) and *Sancheti v. United Kingdom* 2006 (unknown outcome).
[43] Debate in European Committee B, 6 February 2017, statement by the Minister for Trade and Investment.
[44] Secretary of State for International Trade, European Scrutiny Committee: Oral evidence: Parliamentary Scrutiny of EU Trade Deal: Canada/EU Comprehensive Economic and Trade Agreement (CETA), HC 792 (26 October 2016), Q.16.

scrutiny and urge the Government to hold a debate in the floor of the House.[45] This did not happen, raising concern in the House, and, instead, there was a debate in the House of Commons European Committee. The Government stresses, on the one hand, that the CETA provisions about investor protection would not be subject to provisional application and, on the other hand, that the Agreement would not impinge on the regulatory autonomy of the Member States.

In this vein, the United Kingdom is cautious about the Commission's proposal for the establishment of a multilateral court[46] and its recent proposal for an authorisation by the Council on the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.[47] Whilst the UK 'supports the principle of ensuring investor-state arbitration delivers fair dispute outcomes, is transparent and maintains high ethical standards', it wishes 'to examine the details of this draft proposal carefully as they are discussed in Council to ensure that any new mechanism improves the existing investment dispute settlement framework and does so in a cost effective manner'.[48]

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

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

One of the main innovations of the Lisbon Treaty in external relations is the articulation of a set of principles and objectives in Article 21 TEU which would apply to all strands of the Union's external action (CCP, development cooperation, economic, financial and technical cooperation with third countries, humanitarian aid, restrictive measures, international agreements, the Union's relations with international organisations and third countries and

[45] House of Commons European Scrutiny Committee, Thirteenth Report of Session 2016-17, 18 October 2016, HC 71-xi p4.
[46] Concept Paper - *Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court.*
[47] COM (2017) 493 final (Brussels, 13 September 2017).
[48] Explanatory Memorandum for EU legislation and documents submitted by Department for International Trade on 5 October 2017, para. 21.

Union delegations). These objectives are broad in their scope and include, amongst others, sustainable development through measures designed to preserve and improve the quality of the environment and the sustainable management of global natural resources (Article 21(2)(d) TEU). The introduction of a set of common principles and objectives aimed to improve the coherence of the EU's external policies.

In this vein, the Lisbon Treaty introduced for the first time the term 'external action' to describe all aspects of the EU's external policies, including the CCP. Semantics matter, and the singular term chosen by the drafters of the Treaties conveys an understanding of the different strands of the Union's external policies (trade, economic, development, social, political, security) as an integrated whole. This is translated in the requirement that whatever the EU does in the world should respect the common principles and pursue the common objectives set out in Article 21 TFEU. This point is brought home in different contexts in primary law, both in relation to external action in general (Articles 21(3) TEU and 205 TFEU), and in relation to the CCP in particular (Article 207(1) TFEU).

It was in the light of the above context that in Opinion 2/15 the Court brought the provisions of the EU-Singapore Agreement on sustainable development within the scope of CCP and, therefore, the EU's exclusive competence. In particular, it concluded that there is an 'obligation on the European Union to integrate those objectives and principles [set out in Article 21 TEU] into the conduct of its common commercial policy', of which 'the objective of sustainable development henceforth forms an integral part'.[49]

The implications of the above approach to the scope of CCP are twofold. On the one hand, Opinion 2/15 gives specific meaning to the reorganisation of the primary rules on external action introduced at Lisbon. Neither the provision of common principles and objectives in Article 21 TEU, nor the cross references to them in other parts of the Treaties[50] are merely rhetoric. They have legal implications which the Court is prepared to monitor. On the other hand, a richer and more dynamic conception of CCP emerges, the trade aspects of which are understood within the context of a multidimensional and evolving international economic policy. The wording in Opinion 2/15 is noteworthy: rather than merely acknowledging the implications of trade policy for sustainable development, the Court construes the latter as 'an

[49] Opinion 2/15, n11 above, paras 143 and 147 respectively.
[50] Art 205 TFEU in relation to external action in general, and Art 207(1) TFEU in relation to CCP. See also Art. 23(1) TEU in relation to CFSP.

integral part' of the conduct of the former. This, in itself, is not novel in the history of EU external relations. After all, in its early case-law on CCP in the 1970s, the Court had construed the scope of CCP sufficiently broadly to enable it to adjust to the developing patterns of international trade.[51] Opinion 2/15, however, goes farther, as its interpretation is embedded in, and gives teeth to, the revamped legal landscape set out in the Lisbon Treaty.

The above broad interpretation of the scope of CCP in the light of Article 21 TEU and Articles 205 and 207(1) TFEU raises two questions about the overall reach of the policy. The first is about competence: may the richer and more diverse content of CCP erode, for instance, the development cooperation policy of the EU (Article 208 TFEU)? Given the Union's exclusive competence over the former and its shared competence over the latter,[52] such an outcome would have serious repercussions for the powers of the Member States. Opinion 2/15, however, suggests that there is a substantive limit to the reach of CCP. This is based on the specific provisions of the Agreement on sustainable development. As the Court pointed out, the latter do not entail harmonisation of social and environmental protection in the contracting parties. Instead, they are about rendering trade between the EU and Singapore subject to compliance with the international obligations that both parties have assumed concerning social protection of workers and environmental protection. Put differently, had the relevant provisions introduced harmonisation in the EU, they would have fallen beyond the scope of CCP. This is because competence in social policy and environmental protection is shared, and Article 207(6) TFEU prevents the conduct of the CCP from affecting the delimitation of competences between the EU and its Member States. There is also another aspect of the Agreement's provisions on sustainable development that is noteworthy: their wording was carefully couched in such terms as to underline their links with the conduct of trade. These provisions read as if their drafters had an eye on protecting them from scrutiny that might question their trade-related credentials. All in all, there appears to be a substantive limitation on how far the Union's exclusive competence in CCP could take us where the exercise of other competences is at stake.[53]

The second question about the reach of CCP is policy-related: does the duty of the EU to integrate all the objectives set out in Article 21 TEU in its CCP enable the Court to exercise

[51] See, for instance, the approach to commodity agreements in Opinion 1/78 ECLI:EU:C:1979:224.
[52] Art. 4(2)(b) and (e) TFEU.
[53] In the words of Opinion 2/15, 'Article 3(1)(e) TFEU does not prevail over these other provisions of the FEU Treaty [namely Article 3(1)(d) and (2) and Article 4(2)(b) and (e) TFEU on the nature of the EU's competence]' (n11 above, para. 164).

judicial review of the substantive policy underpinning a given agreement? In other words, would it be possible for the Court to annul the conclusion of an international agreement concluded under Article 207 TFEU because its provisions do not give sufficient weight to the objective of sustainable development? The answer to this question must be negative. Primary law itself is couched in terms that grant the Union's institutions policy leeway. For instance, no absolute obligation of result is imposed in this area: the EU is to 'foster' the sustainable social development of developing countries, and to 'help' develop measures about the sustainable management of global natural resources.[54] The other objectives of external action are couched in similarly broad terms (for instance, the EU is to 'encourage' the integration of third countries into the world economy[55]).

Aside from the wording of Article 21 TEU, the Court has traditionally acknowledged the discretion that the EU institutions enjoy in policy-making on the international scene. The best-known example is the refusal to exercise direct judicial review of EU law in the light of WTO rules.[56] In the context of CCP in particular, the Court has declined to read into the objective of 'the progressive abolition of restrictions on international trade' laid down in Article 206 TFEU a general obligation on the EU institutions to liberalise trade with third countries 'where to do so would be contrary to the interests of the Community'.[57] It is the Union's interest that determines the specific substantive choices that EU makes on the international scene. As the determination of the Union's interest is a matter for the EU's decision-making institutions, the latter enjoy discretion that is inherent in the conduct of CCP. Viewed from this angle, and in addition to the substantive limit set out above, there is, therefore, a policy-related limit on the broad interpretation of CCP and its anchoring in the common set of objectives that govern all strands of the EU's external action.

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

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[54] Art 23(2)(d) and (f) TEU respectively.
[55] Art. 23(2)(e) TEU.
[56] See Case C-249/96 *Portugal v Council* EU:C:1999:574, Case C-377/02 *Van Parys* EU:C:2005:121, and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Fedon* EU:C:2008:476.
[57] C-150/94 *UK v Council (re: toy import quotas from China)*, EU:C:1998:547, para 67.

The procedure for the negotiation and conclusion of international agreements regarding the CCP does not raise particular problems. After all, in practice, there is a distinct effort for decisions to be taken by consensus. As for the requirement for unanimity in Article 207 (4)(2) and (3) TFEU, it has not raised particular difficulties in practice, as it functions as a safety net for Member States in areas of acute political sensitivity.

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

Question 22

Protocol 23 on the external relations of the Member States with regard to the crossing of external borders was considered sufficiently important by the drafters of the Treaties to retain it in the post-Amsterdam amendments of primary law. In fact, even the effort at Lisbon to clarify the circumstances under which the Union is endowed with external exclusive competence (Articles 3(2) TFEU and 216(1) TFEU) were not deemed sufficient to render Protocol 23 redundant. On the one hand, the Protocol makes it clear that the Union's competence to define the checks applicable to external borders pursuant to Article 77(2)(b) TFEU is not exclusive *a priori*. On the other hand, it raises the question whether the adoption of internal harmonising legislation in the area would render the Union's external competence exclusive.

The formula used in Protocol 23 is not unique in primary law. We find a similar formulation in the provisions governing environmental policy (Article 191(4) subparagraph 2 TFEU) and development cooperation (Article 209(2) subparagraph 2 TFEU).[58] These cases, however, do not take us very far. In the area of environmental law, the exercise of the Union's competence internally affects the nature of the external competence.[59] In the area of development co-operation, the exercise of the Union's competence may not pre-empt the exercise of national competence (Article 4(4) TFEU).[60]

[58] In relation to the economic and monetary union, Article 219(4) TFEU provides it is the competence of the Member States to conclude international agreements that is to be exercised without prejudice to the Union's competence and agreements concluded by the EU. Notice, however, that Article 3(1)(c) TFEU provides that the monetary policy of the Member States the currency of which is the euro falls within the Union's exclusive competence.
[59] See, for instance, Opinion 2/00 EU:C:2001:664, paras 45-7.
[60] See Case C-316/91 *European Parliament v Council* EU:C:1994:76 para. 26 (and also Joined Cases C-181/91 and C-248/91 *European Parliament v Council and Commission* EU:C:1993:271 para. 16 (re: humanitarian aid)).

The United Kingdom does not participate in measures adopted under in the Area of Freedom, Security and Justice pursuant to Protocol (No) 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, unless it opts in. It does not participate, in particular, in the border controls elements of the Schengen system.

Question 23

The UK is not bound by Directive 2013/32 pursuant to Articles 1, 2 and 4a(1) of Protocol (No) 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice. It applies, therefore, the previous rules laid down in Directive 2005/85.

A safe third country is defined as follows: (i) the applicant's life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country; (ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention; (iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected in that country; (iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country; (v) there is a sufficient degree of connection between the person seeking asylum and that country on the basis of which it would be reasonable for them to go there; and (vi) the applicant will be admitted to that country (345C Immigration Rules).

The assessment of whether it is reasonable for an individual to be removed to a safe third country is made by the Secretary of State on the basis of factors including, but not confined to, (i) any time the applicant has spent in the third country; (ii) any relationship with persons in the third country which may include: a. nationals of the third country; b. non-citizens who are habitually resident in the third country; c. family members seeking status in the third country; (iii) family lineage, regardless of whether close family are present in the third country; or (iv) any cultural or ethnic connections (345C Immigration Rules).

In 2016, the High Court considered Turkey an unsafe country in the context of transfers to Hungary under the Dublin regime (the question of potential *refoulement* from Hungary was

raised).[61] This conclusion was reached of, amongst others, the geographical limitation that the latter placed on the application of the Refugees Convention) It did so by placing considerable emphasis on the UNHCR. This conclusion may well be relevant in the context of a direct safe third country transfer to Turkey. It is noteworthy, however, that the High Court also referred to a number of caveats regarding the determination of a safe third country: the inevitably partial evidence, the extreme fluidity of the situation in third countries, the possibility that satisfactory assurances may be obtained from third states as to the treatment of applicants.

Question 24

The United Kingdom adopted a positive approach to the Global Approach to Migration and Mobility. It 'particularly welcome[d] [its] focus on practical cooperation, and [its] non-binding and voluntary character …, which allows Member States to decide how they can best contribute to joint initiatives in this area'.[62] The British Government also viewed the implementation of the Global Approach and the determination of possible candidates for future Mobility and Common Agenda Partnerships by the Commission as an illustration of a welcome focus on domestic immigration pressures.[63]

On the Partnership Framework, the British Government suggested that 'a full assessment on the effectiveness of progress with current priority countries' be carried out prior to any further expansion.[64]

Of the priority countries with which the Commission proposed to negotiate compacts, the UK has most significant bilateral interests with Nigeria and Ethiopia.[65]

Question 25

As far as readmission agreements concluded by the EU, the UK 'decide[s] whether to participate … on a case-by-case basis, depending on the priority we attach to the country

[61] (*Ibrahimi and Abasi* [2016] EWHC 2049 (Admin)).
[62] Letter by Minister for Immigration to House of Lords EU Committee, 18 February 2013.
[63] House of Commons European Scrutiny Committee, 19 March 2014, para. 16.28,
[64] Parliamentary Under-Secretary of State for International Development, 13 December 2016, House of Commons, Written statement - HCWS348.
[65] Letter by Minister for Europe and the Americas to House of Lords EU Committee, 21 July 2017.

concerned in terms of numbers of immigration returns and the degree to which we enjoy a good bilateral relationship with that country'.[66]

The UK participates in EU readmissions agreements with Albania, Bosnia-Herzegovina, Former Yugoslav Republic of Macedonia, Georgia, Hong Kong, Macau, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, Turkey and Ukraine.

Since the entry into force of the Treaty of Amsterdam, and excluding States which subsequently acceded to the UK, the UK has finalised readmission agreements with Switzerland (2005), Algeria (2006), and South Korea (2011). It also has memoranda of understanding for the return of nationals found illegally in the UK with Afghanistan, Angola, Burundi, China, Democratic Republic of Congo, Guinea, Iraq, Kuwait, Malaysia, Nigeria, Rwanda, Sierra Leone, Somaliland, South Sudan and Vietnam.

[66] House of Commons, Written Statement HCWS369 by Minister For Immigration (16 December 2016).