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Less is more? The role of national parliaments in the conclusion of mixed (trade) agreements

Guillaume Van der Loo

CLEER PAPERS **2018/1**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

LESS IS MORE? THE ROLE OF NATIONAL PARLIAMENTS IN THE CONCLUSION OF MIXED (TRADE) AGREEMENTS

GUILLAUME VAN DER LOO

CLEER PAPERS **2018/1**

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ABSTRACT

The aim of this paper is to shed more light on the role of national parliaments in the conclusion of mixed (trade) agreements. Whereas the involvement of national parliaments in the conclusion of mixed agreements has for a long time not raised serious legal or political problems, in the context of the arduous signature of CETA, the Dutch referendum on the EU-Ukraine Association Agreement and the broader debate on the consequences of major trade agreements such as TTIP and CETA, several legal questions and dilemmas came to the surface. For example, is there a duty on the Member States and their national parliaments to ratify a mixed agreement? What are the consequences of non-ratification? Which elements of a mixed agreement do national parliaments need to ratify? And what is the role of national parliaments with regard to provisional application of mixed agreements? This discussion took place in parallel with important judicial developments, in particular with Opinion 2/15 on the conclusion of the EU-Singapore FTA.

After first discussing briefly the impact of Opinion 2/15 on the EU's trade policy and the future of mixed free trade agreements (FTAs), this paper will explore the legal and political reasons to opt for the mixed formula. In addition, the role of the European Parliament and the different national parliaments in the conclusion of mixed agreements is briefly analysed. Then, three key legal questions or dilemmas related to national parliaments and mixed agreements are addressed; i.e. is there a duty on the national parliaments to ratify, what exactly do national parliaments need to ratify and what is their role with regard to the provisional application of such agreements.

This paper identifies a potential "constitutional deadlock" related to the ratification of mixed agreements: if a national parliament chooses to exercise its sovereign right not to ratify a mixed agreement, by the same token, it de facto blocks the Union from exercising its competences (as the agreement, including the provisions falling under Union competences, cannot enter into force). Considering the relevant case-law, the Treaty rules on the allocation of competences and, in particular, the duty of sincere cooperation, it can be concluded that there is a duty on the Member State to initiate its national ratification procedure (i.e. the parliamentary approval procedure) within a reasonable period after signature of the mixed agreement, but that this obligation has no impact on the outcome of this procedure. In addition, this contribution demonstrates that Member States, or their national parliaments, cannot unilaterally terminate the EU's provisional application of an international agreement (although this may frustrate some members of national parliaments or even constitutional Courts in Member States). It is true that different statements adopted in the context of CETA's signature have illustrated that there is an understanding between the EU institutions that if a Member State, or its national parliament, would not ratify an agreement, the provisional application would need to be

terminated. However, such a decision needs to be taken by the Union, according to Union procedures.

Keywords: National Parliaments, Mixed Agreements, FTAs, International Agreements, Ratification, Provisional Application, Trade

ABOUT THE AUTHOR AND ACKNOWLEDGEMENTS

Guillaume Van der Loo is a postdoctoral researcher at the Ghent European Law Institute (GELI) and a researcher at the Centre for European Policy Studies (CEPS). The author is grateful to the anonymous reviewers for their valuable comments. The author also wishes to thank Ramses Wessel, Soledad Rodríguez Sánchez-Tabernero and Juan Santos Vara for their useful feedback and input to earlier drafts of this study. The usual disclaimer applies.

1. INTRODUCTION[1]

Since the conclusion of the first mixed agreement in 1961, the EEC-Greece Association Agreement,[2] national parliaments have always been involved in the conclusion of mixed agreements, although their role was often reduced to 'rubber-stamping' the agreement after it had been signed by their government.[3] However, it appears that the heated debate triggered by the negotiations on the EU-Canada Comprehensive and Economic Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP) has marked an important change, incrementally leading to the stronger involvement and interest of national parliaments in (some) mixed agreements.[4] Moreover, the Dutch referendum on the EU-Ukraine Association Agreement (AA) and the temporary refusal of the Walloon government to sign CETA in October 2016 opened a fundamental debate among academics and practitioners on the tension between the effectiveness and legitimacy of EU external action and parliamentary oversight in international affairs.[5] In particular, the question of whether the involvement of the national parliaments of 28 Member States would be desirable and/or required when concluding an international agreement to ensure democratic legitimacy was raised. Or, alternatively, would the involvement of these national parliaments in the conclusion of EU international agreements fragment democratic control, equipping each Member State (or their respective national parliaments) with a veto-power and allowing a small minority to jeopardize an agreement for the entire EU?[6]

This discussion took place in parallel with important judicial developments, in particular with Opinion 2/15 of the Court of Justice of the European Union (CJEU) which dealt with the question of whether the EU had the competence

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[1] A revised version appears in JS Vara and S Rodriguez Sánchez-Tabernero (eds) *The Democratisation of EU International Relations Through EU Law* (Routledge 2018), forthcoming. Several arguments in this paper related to non-ratification of mixed agreements are based on the author's analysis in G Van der Loo, RA Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 CML Rev 735-770.

[2] OJ, 1963, L 26/294.

[3] On this point, see for example S Woolcock, 'Regional Economic Diplomacy: the European Union' in N Bayne, S Woolcock (eds), *The New Economic Diplomacy. Decision Making and Negotiation in International Economic Relations* (Ashgate 2007) 231.

[4] For some recent case-studies on the role of national parliaments in the conclusion of mixed agreements, see Y Bollen, F De Ville and N Gheyle, 'From Nada to Namur: National Parliaments' Involvement in EU Trade Politics and the Case of Belgium' in J Broschek and P Goff (eds) *Multilevel Trade Politics: Configurations, Dynamics, Mechanisms* (Toronto University Press 2018); and D Jančić, 'TTIP and legislative-executive relations in EU trade policy' (2017) 40 West European Politics 202-221.

[5] For an analysis on the consequences of non-ratification of mixed agreement, see G Van der Loo, RA Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 CML Rev 735-770.

[6] For two different positions in this debate (focused on EU trade agreements), see the 'Namur Declaration' <http://declarationdenamur.eu/nl/> accessed 30 July 2017; and the 'Trading Together' Declaration <https://www.trading-together-declaration.org/> accessed 30 July 2017.

to conclude the EU-Singapore Free Trade Agreement (FTA) on its own, or whether the Member States (and consequently their national parliaments) had to be taken on board by concluding a mixed agreement.[7] The Court broadly interpreted the EU's post-Lisbon trade competences and concluded that the entire EU-Singapore FTA falls within the exclusive competences of the EU, with the notable exceptions of portfolio investment and the Investor-State dispute settlement mechanism, which fall within competences shared between the EU and the Member States.[8] Consequently, with this Opinion the Court has paved the way for broad and ambitious 'EU-only FTAs', which do not require the involvement of all the Member States (and their parliaments) in the ratification process, provided that portfolio investment and ISDS are not included or covered in a separate 'mixed' agreement.[9]

In this context, the Commission adopted, in light of the September 2017 State of the Union Speech, a new trade Communication in which it 'encourage[d] Member States to continue and, whenever possible, ensure the involvement of national Parliaments in trade talks at the earliest possible stage'.[10] The Commission recognised that national parliaments have an important role to play 'in monitoring their government's positioning toward EU trade negotiations' and that the legal division of competences 'should in no way impact the legitimacy and inclusiveness of the adoption process', irrespective of the nature of the agreement (i.e. mixed or 'EU-only'). However, at the same time, and in the light of the Opinion 2/15, the Commission now seems to pursue EU-only FTAs, avoiding the burdensome and unpredictable ratification procedure by 28 Member States (and their national parliaments). The Commission's recent recommendations to open negotiations for trade agreements with Australia and New Zealand indeed suggest EU-only FTAs, as they exclude the elements which the CJEU considered in Opinion 2/15 as falling within shared competences (i.e. portfolio investment and investment protection).[11] With regard to the resolution of investment disputes, the Commission instead adopted a recommendation to launch negotiations on a multilateral investment court.[12] Moreover, it has been reported that the Commission is also currently aiming at 'splitting off' the investment protection chapter from the rest of the negotiated EU-Japan FTA,

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[7] Opinion 2/15 (*Singapore FTA*), ECLI:EU:C:2017:376.

[8] For a more detailed commentary on this Opinion, see G. Van der Loo, 'The Court's Opinion on the EU-Singapore FTA: Throwing off the shackles of mixity?' (2017) CEPS Policy Insights no 2017/17.

[9] Ibid.

[10] European Commission, 'A Balanced and Progressive Trade Policy to Harness Globalisation' (Communication) COM(2017) 492 final.

[11] Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with Australia, SWD(2017) 292). The Recommendation does neither include investment protection. It only refers to foreign direct investment and not portfolio investment. Moreover, in the Annex to the Recommendation the Commission echoes the Court's reasoning in Opinion 2/15 by stressing that "all commitments under the Agreement are undertaken with a view to have direct and immediate effect on trade and, where relevant, within the scope of common EU rules.

[12] Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM(2017) 493 final, 13 September 2017.

keeping an 'EU-only' EU-Japan FTA and a separate mixed agreement on investment protection.[13] The Commission stressed that the debate on the best architecture of EU trade agreements and investment protection agreements must be completed and discussed further with the Council and the European Parliament (EP). Whereas the former still needs to take a clear position on this issue,[14] the EP has adopted two Resolutions on the envisaged EU-New Zealand FTA and the EU-Australia FTA in which it called on the Commission and Council to put forward as soon as possible a proposal about the general architecture of trade agreements "taking into account CJEU Opinion 2/15 […] and to clearly distinguish between a trade and liberation of foreign direct investment (FDI) agreement containing only issues that fall within the EU's exclusive competence, and a potential second agreement which covers subjects whose competences are shared with Member States".[15] However, the EP adds that such a distinction is "not intended to circumvent national democratic processes, but is a matter of democratic delegation of responsibilities based on the European treaties".[16]

Although this debate is focused on EU trade agreements, this article will explore the role of national parliaments in the conclusion of mixed agreements in general, covering also other types of mixed agreements. Mixed agreements are the result of the EU's multilevel governance structure in the area of external relations. In one legal instrument both the EU and the Member States make international commitments towards a third country (or countries). Therefore, democratic control over the conclusion of mixed agreements takes place at two levels: the Union, on the one hand, and the Member States, on the other. National parliaments can exercise *indirect* parliamentary oversight over mixed agreements at the level of the Union by holding the actions of their national government in the Council accountable (as stressed and promoted by the Commission in its recent Trade Communication (cf. *supra*)). On the other hand, at the level of the Member States, national parliaments have *direct* parliamentary oversight over mixed agreements as (in most cases) their approval is required in the national ratification procedure (which the Commission now aims to avoid by pursuing 'EU-only' trade agreements (cf. *supra*)).

The Commission also mentioned in its recent trade Communication that 'our institutional decision-making must be clear, predictable and fit for purpose',

[13] This has been reported in, for example, 'EU-Japan free trade deal still pencilled in for end of 2017', *Euractiv*, 21 November 2017 (to consult at: <https://www.euractiv.com/section/economy-jobs/news/eu-japan-free-trade-deal-still-pencilled-in-for-end-of-2017/>) and 'EU and Japan Agree to split trade deal', *Politico*, 16 November 2017, to consult at: <https://www.politico.eu/pro/eu-and-japan-agree-to-split-trade-deal>) (both accessed on 6 January 2018).

[14] For example, the Council Conclusions of the Foreign Affairs (Trade) Council of 10 November 2017 does not even mention the different Commission proposal with regard to the Multilateral Investment Court or the future architecture of EU trade agreements (Council Conclusions 2573rd Council meeting, 10 November 2017).

[15] European Parliament resolution of 26 October 2017 containing Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand (2017/2193(INI)), para. 11 and European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia (2017/2192(INI)).

[16] Ibid.

which means 'ensuring that our institutional set-up allows us to ratify and implement our negotiated agreements in an accountable, legitimate and effective manner'. Although the Court indeed clarified the division of competences between the EU and the Member States in Opinion 2/15, several important questions related to the role of Member States (and their national parliaments) in mixed agreements remain unanswered. Most of these issues only recently came to the surface in the context of the Dutch referendum on the EU-Ukraine AA and of CETA's arduous signature. For example, is there a duty on the Member States and their national parliaments to ratify a mixed agreement? What are the consequences of non-ratification? Which elements of a mixed agreement do national parliaments need to ratify? And what is the role of national parliaments with regard to provisional application of mixed agreements? The fact that the role of national parliaments in the conclusion of (mixed) agreements is not specified in the Treaties (e.g. in Article 218 TFEU), contrary to the role of the EP, contributes to the haziness surrounding these legal questions.

Therefore, this contribution will analyse some key questions and dilemmas related to the involvement of national parliaments in mixed agreements. The focus of this contribution will be on bilaterally-structured mixed agreements (concluded by the EU and Member States on the one hand and a third party to the other) and not multilateral mixed agreements (where the EU, its Member States and usually many other states are all individual parties to the agreement).[17] First, the legal and political reasons to opt for the mixed formula are explored (2). In addition, the role of the EP and the different national parliaments in the conclusion of mixed agreements is briefly analysed (3). Then, three key legal questions or dilemmas related to national parliaments and mixed agreements are addressed (4): (i) is there a duty on the national parliaments to ratify (4.1) (ii) what exactly do national parliaments need to ratify (4.2) and (iii) what is their role with regard to the provisional application of such agreements (4.3).

2. WHY MIXITY?

Before exploring the role of national parliaments in mixed agreements, the *raison d'être* of mixed agreements needs to be briefly clarified. The legal reason to opt for a mixed agreement, rather than for a so-called 'EU-only' agreement, is that the agreement falls partly within the competences of the Union and partly within the competences of the Member States. Whereas mixity is *mandatory* when an agreement partly falls under exclusive Union competences and partly under Member State competences,[18] it is excluded if an agreement cov-

[17] See more in general on mixed agreements J Heliskoski, *Mixed Agreements as a Technique for Organizing the External Relations of the European Community and its Member States* (Kluwer Law International 2001); as well as the various contributions to C Hillion and P Koutrakos (eds), *Mixed Agreements in EU Law Revisited: The EU and its Member States in the World* (Hart Publishing 2010). For an analysis of some of the specificities of multilateral mixed agreements, see Van der Loo and Wessel (n 5).

[18] As AG Kokott famously mentioned in her Opinion in case C-13/07, individual provisions falling under the competences of Member States, however secondary, 'infect' the agreement as

ers exclusive Union competences only. In the latter case, the agreement can cover *a priori* exclusive Union competences, identified by Article 3(1) TFEU, and/or *supervening* Union exclusive competences, through the operation of the so-called ERTA doctrine and Opinion 1/76 principles, enshrined in Article 3(2) TFEU.[19] Mixity is considered *optional* if it covers an area of shared competences (whether or not together with areas falling under exclusive EU competences).[20] In the case of shared competences, several Advocate Generals (AG) have argued that the choice between a mixed agreement or an 'EU-only' agreement is a matter for the discretion of the EU legislature.[21] Indeed, recent EU treaty-making practice includes some examples of such 'facultative mixity'. For example, in order to prevent several Member States from *de facto* recognising Kosovo through a national ratification procedure, the EU opted to conclude the EU-Kosovo Association Agreement as an 'EU-only' agreement.[22] The Court's Opinion 2/15 on the EU-Singapore FTA was however criticized because it appeared that the Court ignored the possibility of facultative mixity by concluding that where the agreement falls under shared competences, 'the

a whole and trigger mixity (i.e. the pastis doctrine) (case C-13/07, *Commission v Council*, Opinion of AG Kokott, ECLI:EU:C:2009:190, para. 121). However, this argument was never explicitly recognised by the Court. The Court has nevertheless stated that 'when examining the nature of the competence to conclude an international agreement, there is no need to take account of the provisions of that agreement which are extremely limited in scope' (Opinion 2/15 (n 3), para. 217; Opinion 1/08 (*Agreements modifying the Schedules of Specific Commitments under the GATS*), ECLI:EU:C:2009:739, para. 166). However, the Court considered in these cases the horizontal division of EU competences (i.e. the *nature* of EU competences), and not the vertical division (i.e. the *existence* of EU competences). It seems however that several AGs apply the 'center of gravity' test to the vertical division of competences (see Opinion 3/15, Opinion of AG Wahl, ECLI:EU:C:2016:657, para. 122; and case C-600/14, *Germany v Council*, Opinion of AG Szpunar, ECLI:EU:C:2017:296, para. 85).

[19] Opinion 1/76, ECLI:EU:C:1977:63. On the difference between *a priori* exclusivity and supervening exclusivity, see A Dashwood, 'Mixity in the Era of the Treaty of Lisbon', in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 351-366; A Rosas, 'EU External Relations: Exclusive Competence Revisited' (2015) 38 Fordham Intl Law J 1073-1096; and G De Baere, 'EU external action' in C Barnard and S Peers (eds) *European Union Law* (OUP 2014) 704-750. It has to be noted that the Court recently stressed in *Germany v Council* that the Union may have an external competence that falls outside the situations laid down in Article 3(2) TFEU, such as the competence provided in the second situation laid down in Article 216(1) TFEU (Case C-600/14 *Germany v Council,* ECLI:EU:C:2017:935, paras. 50-53).

[20] For a more detailed classification of mixed agreements, centered on the scope and nature of the EU's competences, see M Klamert, *The Principle of Loyalty in EU Law* (OUP 2013) 183-186; A Rosas, 'Mixed Union–Mixed agreements' in M Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International 1998) 125-148. However, according to Eeckhout, the practice of mixity does not readily lend itself to such attempts (P Eeckhout, *EU External Relations Law* (OUP 2011)).

[21] Opinion of AG Wahl (n 18), paras. 111-120; Opinion 2/15, Opinion of AG Sharpston, ECLI:EU:C:2016:992, paras. 73-75; Opinion of AG Szpunar (n 18), paras 83-87).

[22] On this point, see also D Kleimann and G Kübek, 'The Singapore Opinion or the End of Mixity as We Know It' (*Verfassungsblog*, 23 May 2017); P Van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo' (2017) 22 EFA Rev 393-410.

agreement cannot be approved by the EU alone'.[23] However, in *Germany v. Council* (C-600/14), the Court clarified its reasoning in Opinion 2/15 by stating that "in making that finding [in Opinion 2/15], the Court did no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area", and therefore recognising the option of facultative mixity.[24]

However, it is clear that the choice for mixity is not always purely legal. This is despite the Court's observation that the need for unity or rapidity of EU external action, or the procedural difficulties which may arise from mixity, cannot change the answer of who has competence to conclude an agreement.[25] Not surprisingly, the Commission prefers in most cases the conclusion of 'EU-only' agreements as it traditionally applies a broad interpretation of EU exclusive competences and because the ratification process of mixed agreements can easily take years (and indeed runs the risk of being slowed-down by national parliamentary objections or referenda). The Member States (and the Council) on the other hand often prefer the mixed formula. The national ratification process equips the Member States with a veto-right, nullifying the qualified majority voting in the Council,[26] and increases their presence and visibility during the process of concluding the agreement and on the international stage. However, mixity is often the result of pragmatic considerations. As discussed in detail below, mixed agreements don't require a clear vertical delimitation of competences between the EU and the Member States, which allows them to go ahead with ambitious agreements without getting stuck in endless competence battles. As observed by AG Sharpston, 'the mixed agreement is itself a creature of pragmatic forces – a means of resolving the problems posed by the need for international agreements in a multi-layered system'.[27] Maresceau even argues that 'if there is political consensus among the Member States that an agreement ought to be mixed, they will almost certainly manage to impose the mixed procedure, particularly by adding provisions which stand on their own and need member State involvement'.[28]

While the popular view may be that the EU is increasingly taking over international relations from its Member States,[29] mixed agreements seem to be

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[23] See for example paras. 244 and 304 of the Opinion 2/15 (n 7). On this issue, see G Van der Loo, 'The Court's Opinion on the EU-Singapore FTA: Throwing off the shackles of mixity?' (2017) CEPS Policy Insights no 2017/17 and L Ankersmit, 'Opinion 2/15 and the future of mixity and ISDS', European Law Blog, 18 May 2017.

[24] Case C-600/14 *Germany v Council,* ECLI:EU:C:2017:935, para. 68.

[25] Opinions 1/94, ECLI:EU:C:1994:384, para. 107, and 1/08 (n 9), para. 127.

[26] Art. 218(8) TFEU (Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47).

[27] Opinion in Case C-240/09 *Lesoochranárske zoskupenie*, ECLI:EU:C:2010:436, para. 56.

[28] M Maresceau, 'A Typology of Mixed Bilateral Agreements' in C Hillion and P Koutrakos (eds), *Mixed Agreements in EU Law Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 11-29.

[29] See more extensively on this question: RA Wessel, 'Can the European Union Replace its Member States in International Affairs? An International Law Perspective' in I Govaere, E Lan-

here to stay. Since the entry into force of the Lisbon Treaty, 34 international agreements were signed as mixed agreements.[30] Mixed agreements still cover a wide range of policy areas, including those that primarily fall under the EU's exclusive competences. Just as in the pre-Lisbon era, all broad framework agreements, such as AAs or Partnership and Cooperation Agreements (PCAs) are mixed.[31] In addition, several sectoral agreements, for example in the area of aviation and environment, were concluded by the Union and the Member States jointly.[32] Paradoxically, despite the broadening of the Common Commercial Policy (CCP) in the Lisbon Treaty,[33] all post-Lisbon FTAs have also been signed as mixed agreements.[34] However, as discussed above, the Court's landmark Opinion 2/15 on the conclusion of the EU-Singapore FTA may open the door to the conclusion of 'EU-only' FTAs.

non and others (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers 2013) 129-147.

[30] Author's own calculation on the basis of a combined reading of the EU Treaties Office Database (<http://ec.europa.eu/world/agreements/default.home.do> accessed 30 July 2017) and the Council's database of agreements (<http://www.consilium.europa.eu/en/documents-publications/treaties-agreements/> accessed January 2018).

[31] See for example the EU-Georgia AA (Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261/4), the EU-New Zealand Partnership Agreement on Relations and Cooperation (Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part [2016] OJ L321/3) and the EU-Mongolia Framework Agreement on Partnership and Cooperation (Council Decision 2012/273/EU of 14 May 2012 on the signing, on behalf of the Union, of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part [2012] OJ L134/4).

[32] See for example the EU-Jordan Euro-Mediterranean Aviation Agreement (Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part, and Hashemite Kingdom of Jordan, of the other part [2012] OJ L334/3); and the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety [2013] OJ L46/4.

[33] See quite extensively M Bungenberg and C Herrmann (eds), *Common Commercial Policy after Lisbon* (Springer 2013).

[34] This is the case for both 'stand-alone' FTAs (e.g. CETA (Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23) and the EU-Korea FTA (Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6)) and FTAs included in broader (association) agreements (e.g. the Deep and Comprehensive FTAs included in the Association Agreements concluded with Georgia (n 31), Ukraine (Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3) and Moldova (Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4). A notable exception is the FTA included in the EU-Kosovo AA (on this point, see Van Elsuwege (n 22)).

3. PARLIAMENTARY INVOLVEMENT IN MIXED AGREEMENTS AT EU AND MEMBER STATE-LEVEL

Because both the EU and the Member States are parties to a mixed agreement, parliamentary oversight over the conclusion of such an agreement can – or has to – take place at three levels: the Union (involving the EP), the Member States (involving the national parliaments) and possibly the national parliament of the other contracting party. Although in the case of bilateral mixed agreements the EU and the Member States are presented as one party, both the Union and its Member States are indeed contracting parties.[35] As recognised by the Court, when such an agreement is negotiated each of the parties will have to act within the boundaries of their own competences.[36] This is often underlined by the preamble, where it provides that the agreement is concluded between the third country, of the one part, *and the European Union and its Member States*, of the other part, jointly referred to as 'the Parties'.[37] Significantly, several mixed agreements include a clause defining the term 'Parties' as 'the Union *or* its Member States, or the Union *and* its Member States, in accordance with their respective competences, on the one hand, and [the third country], on the other'.[38] Therefore, in order to express their consent to be bound by the agreement, both the individual Member States and the Union are to sign the agreement[39] and, in order to ratify the agreement, the specific procedures included in the entry-into-force clauses need to be fulfilled.[40] All bilateral mixed agreements include an entry-into-force clause stating that the agreement can only enter into force after 'all the Parties' have completed their own internal or constitutional procedures and have deposited or notified their respective instruments of ratification.[41] The situation is different for the conclusion of multilateral mixed agreements because most of these agreements can enter into force once a number of signatory states have ratified it.[42]

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[35] Case C-316/91, *Parliament v Council*, ECLI:EU:C:1994:76, para. 29.

[36] Case C-28/12, *Commission v Council*, ECLI:EU:C:2015:282, para. 47.

[37] See for instance CETA.

[38] E.g. Art. 55 of EU-New Zealand Agreement on Relations and Cooperation (n 31); Art. 34 of EU-Canada Strategic Partnership Agreement (Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part [2016] OJ L329/45); and Art. 482 of the EU-Ukraine AA (n 34) (emphasis added).

[39] Art. 12(1) of the Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969 (VCLT).

[40] Art. 14(1) VCLT.

[41] See for example Art. 86(1) of EU-Cuba Political Dialogue and Cooperation Agreement (Council Decision (EU) 2016/2232 of 6 December 2016 on the signing, on behalf of the Union, and provisional application of the Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part [2016] OJ LI 337/1); Art. 431(1) of EU-Georgia AA (n 31); Art. 138(1) of EU-Serbia SAA (Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part [2013] OJ L278/16), Art. 281(1) of EU-Kazakhstan PCA (Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part [2016] OJ L29/3).

[42] For example, the Paris Agreement adopted under the United Nations Framework Convention on Climate Change enters into force when at least 55 Parties to the Convention, account-

Thus, parliamentary involvement in the process of the conclusion of a mixed agreement depends on the specific procedural or constitutional requirements in the Union on the hand, and the Member States on the other. With regard to the Union, the role of the EP in the process of the negotiation and conclusion of (mixed) international agreements, as foreseen in Treaties, is well-known and discussed elsewhere.[43] In brief, since the Treaty of Lisbon the consent of the EP is *de facto* required for almost all international agreements, including association agreements, agreements covering fields to which the ordinary legislative procedure applies, or agreements establishing a specific institutional framework or with important budgetary implications.[44] Moreover, the EP needs to be 'immediately and fully informed at all stages of the procedure',[45] as further specified in the 2010 Framework Agreement on relations between the EP and the European Commission.[46] For instance, with regard to international agreements requiring the Parliament's consent, the Commission needs to provide to the EP during the negotiation process all relevant information that it also provides to the Council, including draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialing the agreement and the text of the agreement to be initialed. The EP has already demonstrated that it is not afraid to reject the ratification of international agreements (e.g. ACTA, Swift Agreement and the 2011 EU-Morocco Fisheries Partnership Agreement).[47] Significantly, all mixed agreements signed since the Treaty of Lisbon required the consent of the EP. This is largely the result of the fact that the main group of international agreements which does not require the consent of the EP, i.e. agreements that 'exclusively' relate to the CFSP, are not mixed.[48]

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ing in total for at least an estimated 55 per cent of the total global greenhouse gas emissions, have deposited their instruments of ratification, acceptance, approval or accession (Art. 21(1)) (Paris Agreement [2016] OJ L282/4). After the EU's ratification in October 2016 (but not by all the Member States) both thresholds were crossed so that the agreement could enter into force on 4 November 2016.

[43] See for example C Eckes, 'How the European Parliament's participation in international relations affects the deep tissue of the EU's power structures' (2014) 12 *International Journal of Constitutional Law*, 904-929.

[44] Art. 218(6) TFEU.

[45] Art. 218(10) TFEU. With regard to trade agreements, Art. 207(3) TFEU also states that 'the Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations'.

[46] Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L304/47).

[47] On these issue, see for example N Copeland, 'EU response to the US Terrorist Finance Tracking Programme' (*Library Briefing*, 28 April 2011); J Santos Vara, 'The role of the European Parliament in the conclusion of the Transatlantic Agreements on the transfer of personal data after Lisbon' (2013) CLEER Working Papers 2013/2.

[48] Art. 218(6) TFEU states that only association agreements that 'exclusively' relate to CFSP matters must be adopted without the EP's consent. In the case C-658/11 (*Parliament v Council (Mauritius)*, ECLU:EU:C:2014:2025) the Court of Justice clarified that the substantive legal basis of a Council decision adopted for the conclusion of an international agreement determines the procedures to followed. Hence, only when the substantive legal basis exclusively relates to the area of CFSP, the EP does not play a role in this process.

Contrary to the role of the EP, the involvement of national parliaments in mixed agreements is not laid down in the Treaties. Instead, the role of the national parliaments in the conclusion of international agreements (and therefore also mixed EU agreements) is specified in the constitutions and legislation of each Member State. It is not the ambition of this contribution to give a detailed overview of the different procedures in each Member State, but some general comments are formulated.

Overall, the role of the national parliaments during the negotiations of an international agreement, as laid down in national (constitutional) law, is limited since this process is traditionally dominated by the executive. However, in several Member States there is a duty on the government to regularly inform the parliament, for example in order to enable it to exercise its role in the ratification process effectively.[49] With regard to mixed agreements negotiated by the EU, the national parliaments can nevertheless 'indirectly' exercise parliamentary oversight by holding the actions of their respective government in the Council or specific Council Committees (e.g. Trade Policy Committee) accountable (cf. *supra*). However, national parliaments do have an important 'direct' role to play in the ratification procedure, after the agreement is signed. In almost every Member State the approval of the national parliament, through the adoption of a national approval act, is required to complete to ratification procedure. It is difficult to give a definitive number of national (or in some cases even regional) parliaments involved in the ratification of mixed agreements because in several Member States the approval of the national parliament depends on the type of agreement. However, it is argued that this number is around 38, including regional and bicameral parliaments.[50]

All Member States with a unicameral parliament (15 in total) require that most agreements (in particular 'important' agreements such as trade and/or economic cooperation agreements, agreements modifying state borders or national legislation, agreements on participation in international organizations, agreements of military nature or agreements with important financial implications)[51] need to be approved by parliament by the adoption of a legislative act. One notable exception is Malta, where the cases for which the approval of the national parliament is compulsory are very limited.[52]

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[49] For example, the *Bundesverfassungsgericht* does not consider it sufficient for the government to inform the Bundestag only in the final outcome of the negotiations. On this issue, see Deutscher Bundestag, 'Parliament's role in international treaties' (*Wissenschaftliche Dienste*, WD 2 – 3000 – 038/17).

[50] See for example, European Parliament Research Service, 'Ratification of international agreements by EU Member States', November 2016.

[51] Art. 85 Constitution Bulgaria; Art. 140 Constitution Croatia, Art. 169 (2) Constitution Cyprus, Art. 19(1) Constitution Denmark, Art. 65(4) and 121 Constitution Estonia, Art. 94 Constitution Finland, Art. 36 Constitution Greece, Art. 68 Constitution Latvia, Art. 138 Constitution Lithuania, Art. 37 Constitution Luxembourg, Art. 161 (i) Constitution Portugal, Art. 7(4) Constitution Slovakia, Chapter 10 Art. 3 Constitution Sweden.

[52] Art. 3 of the Ratification of Treaties Act (9 March 1983) only requires Parliamentary approval for agreements that touch upon Malta's status under international law, security, sovereignty independence, territorial integrity or relations with a multinational organization.

In most Member States with a bicameral parliament both chambers need to approve all agreements, or in any case the 'important' agreements.[53] In Belgium, Ireland and Slovenia only the lower chambers (respectively 'de Kamer', the 'Dáil Éireann' and the National Assembly)[54] need to ratify the agreement, and not the upper chambers. In Germany and Austria the involvement of the upper chamber depends on the treaty type and its relevance for the regions (represented in those chambers).[55] A specific case is the UK, where both Houses are involved, but cannot formally reject an agreement. However, the House of Commons can indefinitely delay the ratification, whereas the House of Lords can only delay the ratification once.[56]

Only in Belgium can regional parliaments play an active role in the ratification process, although in other Member States regions can be involved through their seats in the second chambers. In Belgium the participation of regional parliaments is guided by the *in foro interno, in foro externo* principle, i.e. where agreements directly affect federated competences, approval from the respective regional parliaments is required.[57] In Belgium an international agreement that is not about the exclusive competences of the Communities, Regions or the Federal State is also referred to as a 'mixed agreement'. Similar to 'EU

[53] Art. 53 Constitution France, Art. 49 Constitution Czech Republic, Art. 72 and 80 Constitution Italy; Art. 91 of the Constitution of the Netherlands and 'Rijkswet van 7 juli 1994, houdende regeling betreffende de goedkeuring en bekendmaking van verdragen en de bekendmaking van besluiten van volkenrechtelijke organisaties', Art. 89 Constitution Poland, Art. 11(2) Constitution Romania and Art. 94 Constitution Spain.

[54] Art. 29(5)(1) Constitution Ireland, Art. 169 Rules of Procedure of the National Assembly Slovenia, Art. 167(2) Constitution Belgium.

[55] Art. 59(2) of the Basic Law States that "Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law". In terms of the Bundesrat's rights, this means that an approval act requires the Bundesrat's consent when the adoption of a domestic law with similar content would, according to the Basic Law, likewise require the consent of the Bundesrat. If the Bundesrat denies approval of such an international agreement, the agreement cannot come into force. If the Basic Law does not require the Bundesrat's consent for national implementation of the content of an international treaty, the treaty law must still be forwarded to the Bundesrat, but here the Bundesrat only has a right of objection (in the second „reading"). In such cases, the Bundestag can override the Bundesrat's objections, thus opening the way for treaty ratification (see Deutscher Bundestag, 'Parliament's role in International Treaties', WD 2 – 3000 – 038/17). For the procedure in Austria, see Article 50 of the Austrian Constitution.

[56] After signing an agreement, the Government needs to lay down the signed treaty before Parliament, along with an Explanatory Memorandum. The Government cannot ratify the agreement the following 21 days. In this period either House can resolve against ratification, after which the Government must explain why it wants to ratify anyway. The House of Commons can effectively block ratification by passing repeated resolutions (UK Constitutional Reform and Governance Act (2010)).

[57] Art. 167(3) and (4) 'Samenwerkingsakkoord Tussen de federale overheid, de Gemeenschappen en de Gewesten over de nadere regelen voor het sluiten van gemengde verdragen', 8 March 1994. These regional parliaments are: The Flemish Parliament (qualified for regional and community affairs), the Walloon Parliament, the Brussels-Capital Region Parliament, the Parliament of the French Community, the Parliament of the German speaking Community and the Assembly of the French Community Commission. On this issue, see also Declaration 51, made by the Kingdom of Belgium, annexed to the Treaties.

mixed agreements', such 'Belgian mixed agreements' need to be approved by all parliaments involved.

4. NATIONAL PARLIAMENTS AND MIXED AGREEMENTS: TRICKY LEGAL QUESTIONS AND DILEMMAS

This chapter will discuss three key legal questions that may arise during the process of ratification of mixed agreements by national parliaments. First, the question whether there is an obligation under EU law for national parliaments to ratify a mixed agreement will be explored. Then, the scope of the national ratification procedure and the role of national parliaments with regard to the provisional application of mixed agreements will be discussed.

4.1. **A duty to ratify?**

As noted above, in almost all Member States the ratification of a mixed agreement requires parliamentary approval. In practice, with regard to bilateral mixed agreements, there has never been a situation in which a national parliament has failed to approve a mixed agreement.[58] There are examples of mixed agreements that have required a very long ratification period or the conclusion of which has been jeopardized by a single Member State wanting to extract some last-minute concessions.[59] However, in these situations it was in most cases the executive branch which threatened a veto, and not the parliament.[60]

In the event that a Member State is not able to ratify a mixed agreement due to a parliamentary rejection, the agreement cannot enter into force as the entry-into-force clauses of mixed agreements require that 'all' the Parties ratify the agreement (cf. supra). In such a scenario the Member State would however need to notify this to the other party in conformity with the procedures of the agreement.[61] The mere rejection of a mixed agreement by a national parliament has no legal implications beyond the domestic legal order as long as there is no notification of the non-ratification.

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[58] There are however numerous examples of multilateral mixed agreements which were not ratified by a Member State. For examples and analysis, see Van der Loo and Wessel (n 1).

[59] There was for example the quite well known episode where Italy initially refused to ratify the agreement with South-Africa until 'a deal' concerning Grappa was designed (reported by A Rosas in 'The Future of Mixity' in C Hillion and P Koutrakos (eds), *Mixed Agreements in EU Law Revisited: The EU and its Member States in the World* (Hart Publishing 2010)). For an example of a long ratification period, the Agreement on Cooperation and Customs Union between the European Economic Community and San Marino was signed in December 1991 and entered into force in May 2002 (OJ, 2002, L 84/43).

[60] Also in the case of CETA, the temporary Walloon rejection was essentially the result of the refusal of the Minister-President of the government of the Walloon region Paul Magnette to give the consent of his government to the federal Belgian government to sign CETA. However, it has to be noted that also the Walloon parliament already adopted a resolution on 27 April 2016 in which it called on the Walloon Government not to grant federal government the required authorization to sign CETA (Résolution sur l'Accord économique et commercial global (AECG), 27 April 2016).

[61] Art. 65(1) and 67(2) VCLT. In practice, the notification will need to be sent to the other Party and/or the Depository of the agreement.

Thus, the rejection of a mixed agreement by a national parliament of a Member State implies that it cannot enter into force for the EU and the other Member States, even in the case where they have all completed their respective ratification procedures (together with the third State). This would mean that a national parliament could block the EU from exercising its competences, even with regard to those areas of mixed agreements falling under exclusive Union competences.[62] Such an action would therefore trigger legal problems considering the Treaty rules on the allocation of external competences. Because exclusivity, as enshrined in Art. 2(1) TFEU, precludes independent internal as well as external action of Member States, one can argue that it also prevents Member States, or their national parliaments, from vetoing the application of those areas of a mixed agreement that fall under EU exclusive powers.[63] The Court has held that for mixed agreements 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.[64] It is true that, in principle, each Party (including the Member States) must 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.[65] Therefore, it can be argued that ratification by national parliaments can only cover those elements of an agreement falling within their (i.e. Member State) competence (cf. *infra*).

The question therefore arises as to whether there is an obligation on the Member States and their national parliaments to ratify a mixed agreement. Although Member States remain free after signature to ratify those provisions of the agreement falling within their own competences, this freedom is not absolute. Under international law, Member States (and therefore their national parliaments) are obliged not to defeat the object and purpose of the agreement[66] and, according to EU law, they are bound by the duty of sincere cooperation expressed in Article 4(3) TEU.[67] The Court has held on various occasions that, where the subject of an agreement falls partly within the competence of the EU and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. This flows from the requirement of unity in the international representation of the Union.[68] The Court has even explicitly recognised this prin-

[62] Heliskoski, *op. cit.*, pp. 92-95.
[63] Kleimann and Kübek, *op. cit.*, p. 23.
[64] C-28/12 (n 36), para. 47.
[65] Opinion of AG Sharpston (n 21), para. 568.
[66] Article 18(a) VCLT.
[67] See for instance C Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the Duty of Cooperation' in C Hillion and P Koutrakos (eds), *Mixed Agreements in EU Law Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 87-115; as well as Klamert (n 20).
[68] See, inter alia, Opinions 1/94 of 15 November 1994, EU:C:1994:384, para. 108, and 2/00 of 6 December 2001, EU:C:2001:664, para. 18; and judgments of 20 April 2010, *Commission v. Sweden*, C-246/07, ECLI:EU:C:2010:203, para. 73, and of 28 April 2015 in C-28/12, para. 54.

ciple with regard to the ratification of mixed agreements.[69] Moreover, the Court has held that the duty of cooperation "is of general application and does not depend either on whether the Community [now Union] competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries".[70]

With regard to mixed agreements, the Court has indeed established specific procedural obligations that stem from the duty of cooperation.[71] It has been argued that the duty of cooperation even implies that both the Member States and the EU need to refrain from acting in a way that would make the ratification of a mixed agreement more difficult.[72] However, whereas the duty of cooperation implies that Member States should refrain from actions that "call in question the EU's capacity for independent action in its external relations",[73] this principle cannot be stretched to oblige Member States or their national parliaments to ratify a mixed agreement. If this would be the case, one would fail to see the meaning of national ratifications in the first place. Moreover, this would basically violate the fundamental international law notion that a 'consent to be bound' can only be expressed voluntarily.[74] The duty of cooperation cannot be interpreted in such a way as to dictate the voting behaviour of national parliaments. As noted by AG Sharpston, Member States are parties to the agreement as sovereign States, "not as a mere appendage of the European Union".[75] The fact that they remain an independent actor under international law reflects the continuing international competence that Member States have in those areas of the agreement not falling under Union competences.

There are no procedural rules in the Treaties or in mixed agreements which specify when Member States (and consequently their national parliaments) need to ratify the agreement.[76] A practice has been developed on the basis of which the Union ratifies those agreements only after all the Member States have done so, despite the absence of this requirement in the Council decisions approving the signing or conclusion of these agreements.[77] Again, the situation

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[69] Opinion 2/91 ILO Convention 170, ECLI:EU:C:1993:106, para. 38.

[70] Case C-226/03, *Commission v. Luxembourg*, para. 58; Case C-246/07 *PFOS*, ECLI:EU:C:2010:203, para. 64.

[71] For example, in the MOX Plant case on the mixed UNCLOS agreement, the Court prescribed a duty of the Member States "to inform and consult" the Community (now Union) before launching dispute settlement procedures against another Member State Case C- C-459/03, *Commission v. Ireland* (MOX Plant), ECLI:EU:C:2006:345, para. 179.

[72] Hillion (n 67) 101.

[73] Case C-28/12, *Commission v Council*, Opinion of AG Mengozzi, ECLI:EU:C:2015:43, para. 63.

[74] Cf. Art. 51 VLCT on the coercion to express a consent to be bound.

[75] Opinion of AG Sharpston (n 21), para. 77.

[76] Only the Euratom Treaty is clear on this point as Article 102 EAEC states that international agreements concluded with a third State to which "in addition to the Community, one or more Member States are parties" shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements have been ratified according to their respective national laws.

[77] A notable exception is the Agreement between the European Union and its Member States, on the one part, and Iceland, on the other part, concerning Iceland's participation in the joint fulfilment of the commitments of the European Union, its Member States and Iceland for the

is rather different for multilateral mixed agreements, where the Union often attempts to encourage the Member States to ratify these agreements as soon as possible. Numerous Council decisions concluding such mixed agreements call on the Member States to ratify these agreements "as soon as possible" or to (try to) deposit their instrument of ratification simultaneously with the Union.[78] However, Member States are reluctant to accept legal obligations to deposit their instrument of ratification at a particular time or in a certain manner.

Significantly, the Commission has initiated several infringement procedures against Member States which fail to ratify a mixed agreement on the basis of Article 258 TFEU. For example, the Commission has asked Croatia, Germany and Spain to ratify the Protocol of Accession of the European Community to the Eurocontrol International Convention, and to Germany and Spain to ratify the Protocol consolidating the Eurocontrol International Convention of 13 December 1960.[79] The Commission has also sent reasoned opinions to Belgium and Greece urging them to ratify the Common Aviation Area Agreement concluded with the Western Balkans.[80] In these procedures the Commission has argued that these countries are violating the principle of sincere cooperation under Article 4(3) TFEU which "underlines the obligation of the Member States to facilitate the achievement of the Union's tasks and to refrain from any measure that could jeopardize the attainment of the Union's objectives". In the latter case, the Commission argued that by not ratifying the agreement, "Belgium and Greece do not facilitate the achievement of the Union tasks and the attainment of relevant objectives in the field of aviation in line with their duty for sincere cooperation enshrined in the Treaty".[81] None of these procedures entered into the litigation phase before the CJEU.[82] It is important to note that the

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second commitment period of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (OJ, 2015, L 207/17). This bilateral mixed agreement is already concluded by the Union, but not yet by all the Member States. For the specific context of the conclusion of this agreement, see the Commission's proposal for the decision concluding this agreement (COM(2014) 290).

[78] For such examples in the Post-Lisbon period, see the recent Council Decision concluding the Paris Agreement which states that "Member States shall endeavour to take the necessary steps with a view to depositing instruments of ratification simultaneously with the Union or as soon as possible thereafter" (*op. cit*).

[79] European Commission, 'infringement package April 2016' <http://europa.eu/rapid/press-release_MEMO-16-1452_EN.htm>. The different infringement procedures are meanwhile closed, with the exception of the German case. The Commission has also urged Ireland to ratify the Convention on International Carriage by Rail in a reasoned opinion ('June 2015 infringement package', to consult at <http://europa.eu/rapid/press-release_MEMO-15-5162_EN.htm>) (accessed 7 January 2018) and the Commission has sent a formal notice pursuant to Article 258 TFEU to Belgium for the non-ratification of the EU-Morocco aviation agreement (infringement number 20132012).

[80] European Commission, 'Air transport: Commission urges Belgium and Greece to proceed with ratification of the agreement with the Western Balkans on a Common Aviation Area', 30 May 2013.

[81] *Ibid.*

[82] In November 2016 the Commission decided to refer Croatia to the Court for the non-ratification and non-deposition of the Protocol of Accession of the European Community to the Eurocontrol International Convention. However, no procedure was lodged with the registry of the Court and the infringement procedure (No 20152060) is now closed. A case which is relevant in this

Commission urged in these cases to initiate or proceed with the ratification procedure (i.e. the parliamentary approval process). It did not challenge the negative outcome of such a parliamentary procedure (which in practice never occurred). In line with what was argued above, launching an infringement procedure against a Member State because it decided not to ratify a mixed agreement, for example because its national parliament has rejected it, would violate the sovereign rights of that Member State (and its parliament) as a contracting party to that agreement.

Considering the case-law and practice above, and in particular the duty of sincere cooperation, it can be concluded that there is a duty on the Member States to initiate their respective national ratification procedure (i.e. the parliamentary approval procedure) within a reasonable time after signature of the mixed agreement, but that this obligation has no impact on the outcome of this procedure. However, if a national parliament chooses to exercise its right not to ratify a bilateral mixed agreement, by the same token, it *de facto* blocks the entry into force of the entire agreement, including those elements falling under Union competences. Such a move would, in the case of bilateral mixed agreements, breach the Treaty principles on the allocation of competences as the national parliament's non-ratification would preclude the Union from exercising its competences. The only way out would be to tweak the entry-into-force clauses of bilateral mixed agreements, allowing for 'incomplete' mixity. Such 'incomplete' mixed agreements would fully enter into force in the territory of the Member States that did ratify the agreement (i.e. covering both the Union and Member States' competences of the agreement). However, the Member State(s) that did not ratify the agreement would only be bound by the areas of the agreement falling under Union competences pursuant to Article 216(2) TFEU. However, such 'incomplete' mixed agreements would also face several legal and practical challenges.[83]

4.2. **What do national parliaments need to ratify?**

The second issue which deserves closer attention is the scope of the national (parliamentary) approval procedure. As noted above, the Court has held that for mixed agreements both the EU and the Member States must act within the framework of the competences which they have while respecting the competences of any other contracting party.[84] Therefore, AG Sharpston argued that,

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context is *Commission v. Ireland* (Case C-13/00). The subject of this case was not non-ratification of mixed agreements as discussed in this contribution, but Ireland's non-ratification of the Berne Convention (which Ireland was obliged to ratify pursuant to Article 5 of Protocol 28 to the EEA Agreement). In this case the Court ruled, *inter alia*, that Ireland failed to fulfill its obligation under Article 300(7) TEC (i.e. "Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States" (now Article 216(2) TFEU)). In April 2004 the Commission asked the Court to impose a penalty payment on Ireland as it still did not ratify the agreement (Case C-165/04). However, in December 2004 the Commission discontinued its action and the case was removed from the register.

[83] See Van der Loo and Wessel (n 5).

[84] C-28/12 (n 36), para. 47.

in principle each Party (including the Member States) must choose between either consenting to or rejecting the entire agreement and that this choice must be made in accordance with the Treaty rules on the allocation of competences.[85] Indeed, from a strict legal point of view the ratification procedure of the Member States can only cover the elements of the agreement falling under their competences, i.e. provisions falling under exclusive Member State competences or under shared competences that are not exercised by the Union or which did not became exclusive through the ERTA-doctrine. The Council decision concluding the agreement for the Union can only cover the elements falling under Union competences. AG Sharpston even argued that if a Member State refuses to conclude a mixed agreement for reasons relating to aspects of that agreement for which the EU enjoys exclusive external competence, that Member State would be acting in breach of the Treaty rules on the allocation of competences.[86]

However, as noted above, mixed agreements do not include a strict vertical delimitation of competences between the EU and the Member States (which often makes mixity an attractive option, avoiding competence battles). Neither the mixed agreements themselves, nor the relevant Council decisions signing or concluding the agreement define or list which elements of the agreement fall under Union competences, or which fall under Member States competences (and are thus the source of the mixed nature of the agreement).[87] A few Council decisions only refer to the participation of Member States in the agreement alongside the Union,[88] or explain in general terms that the agreement is only concluded insofar as the agreement's provisions fall under Union competences.[89] Apart from the mentioned political pragmatism, there are also legal reasons why an exact demarcation of competences is avoided. Such a division of competences in definitive terms would ignore the dynamic character of the Union's competences in the area of external relations, in particular the conse-

[85] Opinion of AG Sharpston (n 21), para. 56.

[86] Ibid, para. 568.

[87] It has to be noted that the explanatory memorandum of the Commission proposal for a Council decision for the singing and/or conclusion of a mixed agreement sometimes gives an indication of the provisions which the Commission considers as not falling under Union competences, and thus lead to mixity. See for example the Commission's proposal for a Council Decision on the signature and provisional application of the EU-Korea FTA, which identifies the Protocol on Cultural Cooperation as being responsible for the mixed nature of the agreement (COM (2010) 136 final).

[88] For example, the Council Decision 2010/48/EC concerning the conclusion of the United Nations Convention on the Rights of Persons with Disabilities states that "both the Community and its Member States have competence in the fields covered by the UN Convention. The Community and the Member States should therefore become Contracting Parties to it, so that together they can fulfil the obligations laid down by the UN Convention and exercise the rights invested in them, in situations of mixed competence in a coherent manner."

[89] Such a disclaimer was for the first time used in the Council Decision 94/800/EC on the conclusion of the WTO Agreement and its Annexes, which states that these agreements "are hereby approved on behalf of the European Community with regard to that portion of them which falls within the competence of the European Community" (OJ, 1994, L 336). For a more recent example, see Council Decisions 2008/801/EC on the conclusion of the United Nations Convention against Corruption (OJ, 2008, L 287).

quences of the ERTA-principle, codified in the third paragraph of Article 3(2) TFEU. The Court argued that due to this dynamic character it is not necessary to set out and determine the division of competences between the Member States and the Union with regard to the conclusion of a mixed agreement.[90] The Union therefore better avoids a clear delimitation of competences as this would "freeze" the Union's competences.[91]

Nevertheless, two features of mixed agreements may give an indication of the delimitation of competences between the EU and its Member States, albeit that both of them fail to do so in any clear fashion. The first is the declarations of competences adopted by the Union in the context of the conclusion of multilateral mixed agreements which aim to clarify the scope of the competence and responsibility of the EU and the Member States over specific provisions or chapters of the agreement.[92] Mainly due to the dynamic nature of the EU's external competences and the complexities related to competences the Union shares with the Member States, the declarations are considered too vague[93] and "suffer from a lack of clarity and elegance".[94] The second aspect of mixed agreement which gives an (incomplete) indication on the delimitation of competences is the scope of the provisional application of mixed agreements. The provisional application of mixed agreements can only cover the elements of the agreement falling under Union competences (exclusive or shared), unless the Member States declare that they will also provisionally apply those elements falling under their competences.[95] Several mixed agreements even allow only the Union and the third party to provisionally apply the agreement, excluding this possibility for the Member States.[96] However, the scope of the provisional application does not give a complete or correct overview of the agreement's provisions falling under Union competences because traditionally only a certain part of the provisions falling under Union competences is provisionally applied. A practice has been developed in which for broad framework agreements such as Association Agreements and Partnership and Cooperation Agreements – which are in principle concluded as mixed agreements – the trade-related provisions provisionally enter into force.[97] However, the scope of the provi-

[90] Opinion 1/78, ECLI:EU:C:1978:202, para. 35.

[91] Dolmans, *op. cit.*, p. 52.

[92] For a detailed analysis, see Delgado Casteleiro, "EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?", *European Foreign Affairs Review* 17(4), (2012), 491-509.

[93] For example, several declarations simply refer to the relevant Treaty articles and the principle of implied powers as established by the Court (e.g. the declaration on competences with respect to UNCLOS, *OJ,* 1998*,* L 179/1).

[94] Opinion of AG Maduro in Case C-459/03 (MOX Plant), ECLI:EU:C:2006:42, para. 36.

[95] However, the Member States' provisional application cannot be approved in the same act (hybrid decision) concerning the Union's provisional application (Case 28/12 (n 36)).

[96] See for example Art. 58 (2) of the EU-New Zealand Partnership Agreement on Relations and Cooperation (n 31); and Art. 86(3) of the EU-Cuba Political Dialogue and Cooperation Agreement (n 41). However, other mixed agreements allow "the Parties" (thus the EU and the Member States) to provisionally apply the agreement (e.g. Art. 30.7(3)(a) CETA). Nevertheless, this provision should be read together with the provision that defines 'the Parties' (cf. *supra*).

[97] For example, with regard to the EU-Central America AA, only part IV on trade is provisionally applied (with the exception of Art. 271 on criminal enforcement of IPR) (*OJ*, 2012, L 346/1).

sional application of bilateral mixed agreements has broadened over the years, often going beyond trade-related elements into areas ranging from economic cooperation, political dialogue to even CFSP.[98] In order to accommodate the concerns of several Member States that the scope of the provisional application would also touch upon Member State competences, the Council decisions on signature and provisional application now state that the listed provisions shall only provisionally apply "to the extent that they cover matters falling within the Union's competence".[99] Several Council decisions even explicitly state that "the provisional application of parts of the Agreement does not prejudge the allocation of competences between the Union and its Member States in accordance with the Treaties".[100] Thus, the provisional application does not provide either a clear blueprint of the provisions falling under Union/Member State competences.[101]

The lack of a clear demarcation of competences in mixed agreements has been criticized.[102] It can be held that this leads to the Union's autonomy being undermined as conditions are being created allowing Member States to interfere with (exclusive) Union competences. Moreover, this makes it very difficult for national parliaments to properly exercise their constitutional role in the national ratification process, if they have no clear idea which provisions of the agreement they need to consider for approval.[103] However, although from a

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The provisional application of the EU-Chile AA covers in addition to trade-related provisions also institutional provisions (*OJ*, 2002, L 352/1).

[98] See for example the provisional application of the EU-Ukraine AA (combined reading of the Council Decision 2014/295/EU and Council Decision 2014/668/EU) (on this issue, see G Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A Legal Instrument for EU integration without membership* (Brill/Nijhoff 2016). For other examples, see the scope of the provisional application of the EU-New Zealand Partnership Agreement on Relations and Cooperation (Council Decision 2016/1970/EU of 29 September 2016 on the signing, on behalf of the European Union, and provisional application of the Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part [2016] OJ L304/1) and the Enhanced Partnership and Cooperation Agreement with Kazakhstan (Council Decision (EU) 2016/123/ of 26 October 2015 on the signing, on behalf of the European Union, and provisional application of the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part [2016] OJ L29/1).

[99] See for example the Council decisions mentioned in the previous note.

[100] See for example Council Decision 2016/2232/EU on the signing on the EU-Cuba Political Dialogue and Cooperation Agreement (n 41). A similar formulation can also be found in Council Decision 2017/38/EU of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part ([2017] OJ L11/1080). The Council and Member States also adopted numerous Statements and Declarations to the Council minutes in which they emphasize that the provisional application of the agreement in several areas such as transport and moral rights does not prejudge the allocation of competences between the EU and the Member States. On the various statements, see G Van der Loo, 'CETA's signature: 38 statements, a joint interpretative instrument and an uncertain future' (*CEPS Commentary*, 31 October 2016).

[101] In addition, the Council is not always clear or consistent in defining the scope of the provisional application. For examples and comments, see Van der Loo and Wessel (n 5).

[102] Heliskoski, *op. cit.*, p. 98.

[103] Kuijper, *Of 'Mixity' and 'Double-Hatting': EU External Relations Law Explained* (Vossiuspers Uva, 2008), p. 11.

strictly legal point of view they only need to consider those elements of the mixed agreements falling under Member State competences, in practice national parliaments consider the entire agreement. Therefore the national approval acts do not specify which elements they cover. At best, some preparatory documents (e.g. reports of parliamentary committees or parliamentary questions to the government) try to identify which provisions fall under exclusive Member State competences (and thus trigger mixity), but without providing an overall demarcation of competences.[104] For example, when considering EU mixed agreements, the European Scrutiny Committee in the UK has repeatedly asked their Government to specify which elements fall under Union/Member State competences.[105]

It is therefore argued that also the national approval acts should include a disclaimer stating that the legal instrument only approves those elements of the agreement falling under the competences of the Member States (but without specifying them in detail – in order to respect the dynamic nature of EU external competences),[106] similar to the EU practice in some Council decisions.[107] Although this difficult exercise would perhaps render mixity a less attractive option, it would improve transparency and legal certainty. According to Kuijper such a vague phrase leaves room for some difference of judgment about where the frontier between exclusive EU competences and Member State competences exactly lies, while nevertheless indicating the intention to respect this border.[108]

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[104] See for example 'Rapport fait au nom de la Commission des Affaires Étrangères [France] sur le projet de loi autorisant la ratification de l'accord d'association entre l'Union européenne et la Communauté européenne de l'énergie atomique et leurs États membres, d'une part, et la République de Moldavie, d'autre part, No. 2667, 18 March 2015'. This report mentions Article 9 of this agreement on "national export controls as well as transit of WMD-related goods" as an example of an element of the agreement that falls under Member States' competences, and thus triggering mixity. In the context of the ratification by the Netherlands of the EU-Ukraine AA, only the 'Memorie van Toelichting' (i.e. explanatory note) of the approval act discussed in general terms the mixed nature of the EU-Ukraine Association Agreement (House of Representatives of the Netherlands, 2014-2015, 34 116, no. 3). However, in some parliamentary questions Dutch members of parliament asked their government to clarify the competence division of the agreement (Minister of Foreign Affairs Bert Koenders, 'Answers to Members Omtzigt, Verhoeven, Voordewind on the provisional application of the EU-Ukraine Association Agreement', Tweede Kamer der Staten Generaal, 3 February 2016 and 'Kamerbrief verzoek toelichting bevoegdheidsverdeling EU associatieakkoord Oekraïne', DIE-0710/2016 , 7 October 2016).

[105] UK Parliament, European Scrutiny Committee, Twenty-Fourth Report, DFID (36339), Committee's conclusions on the Economic Partnership Agreement with the West African region, 3 December 2014 or its report on the EU-Ukraine Association Agreement of 11 March 2015 (36677).

[106] P-J. Kuijper, 'Post-CETA: How we got there and how to go on', ACELG Blog, 28 October 2016, <https://acelg.blogactiv.eu/2016/10/28/post-ceta-how-we-got-there-and-how-to-go-on-by-pieter-jan-kuijper/> (accessed on 6 January 2018).

[107] See (text to) note 89.

[108] P.J. Kuyper, *op. cit.*

4.3. **A role for national parliaments when adopting or terminating the provisional application?**

Finally, the role of national parliaments in the decision to provisionally apply a mixed agreement (or to terminate the provisional application) needs to be explored. In order to circumvent the long ratification procedure of mixed agreements, a part of the agreement falling under Union competences is usually provisionally applied (cf. *supra*).[109] As we have seen above, most bilateral mixed agreements indeed include a provision which allows the Union and the partner country, or "the Parties" (covering also the Member States), to provisionally apply the agreement "in accordance with their respective internal procedures and legislation".[110] However, in practice only the Union provisionally applies mixed agreements.

From the perspective of the national parliaments, or of some of its members, provisional application may be considered as 'undemocratic' because it leads to the application of a large part of the mixed agreement before national parliaments have voted on the approval of the agreement. For example, when the Portuguese Parliament ratified CETA in September 2017, some members of Parliament proposed a resolution in which they rejected the provisional application of CETA because they found it undemocratic.[111] Also some members of the Dutch parliament were very critical towards the provisional application of the EU-Ukraine AA as this was initiated before the outcome of the popular referendum on the agreement.[112]

However, as noted above, the EU's provisional application only covers EU competences and needs to be approved in accordance with EU procedures and the Treaty rules on the allocation of competences. Pursuant to Article 218(5) TFEU the provisional application is adopted by the Council (deciding with QMV, unless the agreement falls under one of the exceptions mentioned in Article 218(8) TFEU) on a proposal by the negotiator. Although there are no legal obligations to ask for the consent of the EP, a practice has been developed by the Commission and Council to only initiate the provisional application of important mixed trade agreements after having heard the EP.[113] This is an impor-

[109] A legal basis for the provisional application of international agreements concluded by the EU was included in the Amsterdam Treaty (now Article 218(5) TFEU), reflecting Article 25 VCLT.

[110] However, not all recent bilateral mixed agreements provide for provisional application. See for instance the Framework Agreement on Comprehensive Partnership and Cooperation with Vietnam (*op. cit.*); and the Framework Agreement on Partnership and Cooperation with the Philippines (OJ, 2012, L 134/3) and Mongolia (OJ, 2012, L 134/4).

[111] Projeto de Resolução N.º 930/XIII/2ª. Pela rejeição do CETA – Acordo Económico e Comercial Global entre a União Europeia e o Canadá Exposição de motivos. This Resolution was not adopted. The parliamentary Act that approved CETA did not mention the provisional application of the agreement (Proposta de Resolução n.º 49/XIII/2.ª (GOV)).

[112] Minister of Foreign Affairs Bert Koenders, 'Answers to Members Omtzigt, Verhoeven, Voordewind on the provisional application of the EU-Ukraine Association Agreement', Tweede Kamer der Staten Generaal, 3 February 2016.

[113] G Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A Legal Instrument for EU integration without membership* (Brill/Nijhoff 2016), p. 128. Nevertheless, there are still some examples of trade agreements being provisionally applied without prior approval from the EP (see for example Council Decision 2010/314/EU of

tant development because if an agreement is already provisionally applied, the non-consent of the EP with regard to the conclusion of the agreement implies that the provisional application needs to be terminated (if the consent of the EP is required pursuant to Article 218(6) TFEU).[114] Therefore, it has been argued that the EP should be placed in a situation where it can express its views on provisional application before it is decided by the Council.[115] This view is in line with the Court's judgements in the *Tanzania* case, in which it ruled that the duty to inform the EP, enshrined in Article 218 (10) TFEU, also includes "the decision on the provisional application of the agreement before its entry into force and the conclusion of the agreement".[116]

Thus, whereas the EP plays a role in the process of adopting the provisional application of an agreement, Member States, and consequently their national parliaments, are not directly involved in this process.[117] As the Court has recognised in *Commission* v. *Council (US Air Transport Agreement)*, "no competence is granted to the Member States for the adoption of such a decision".[118] The Court argued in this case that the Council cannot set aside the procedural rules laid down in Article 218 TFEU and take the Member States on board in a decision concerning the EU's signature and provisional application of a mixed agreement, not even by invoking the duty of cooperation.[119] National parliaments can only indirectly exercise parliamentary oversight over Council decisions on the provisional application of mixed agreements by scru-

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10 May 2010 on the signing and provisional application of the Geneva Agreement on Trade in Bananas between the European Union and Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Venezuela and of the Agreement on Trade in Bananas between the European Union and the United States of America (OJ, 2010, L161/1). After the Parliament ratified the agreement in February 2011, it was concluded by the Council in March 2011.

[114] For example, the Council provisionally applied the SWIFT Agreement and the Second Protocol annexed to the Fisheries Partnership Agreement with Morocco without seeking the views of the EP. However, both agreements were rejected by the EP, leading to the termination of their provisional application. In both cases the EP criticized the fact that its consent was made more difficult because the agreements were already provisionally applied. On this issue, and on role of the EP related to provisional application, see R. Passos, 'Some Issues Related to the Provisional Application of International Agreements and the Institutional Balance', in J. Czuczai, F. Naert (Eds) *The EU as a Global Actor- Bridging Legal Theory and Practice. Liber Amicorum in Honour of Ricardo Gosalbo Bono* (Brill Nijhoff, 2017), pp. 380-393.

[115] On this issue, see R. Passos, ibid. Significantly, the EP stressed in a resolution on the implementation of the Treaty of Lisbon "the need to avoid the provisional application of international agreements before Parliament´s consent has been given, unless Parliament agrees to make an exception" (European Parliament resolution of 13 March 2014 on the implementation of the Treaty of Lisbon with respect to the European Parliament (2013/2130(INI)).

[116] Case C-263/14 *Parliament v Council* EU:C:2016:435, para. 76. On this case, see SR Sánchez-Tabernero, 'The choice of legal basis and the principle of consistency in the procedure for conclusion of international agreements in CFSP contexts: *Parliament v. Council* (Pirate-Transfer Agreement with Tanzania)' (2017) 54 *Common Market Law Review*, Issue 3, pp. 899-920.

[117] However, it has to be noted that a single Member can *de facto* veto the provisional application of a mixed agreement by not signing the agreement. This scenario took almost place when the Belgian federal government was first unable to sing CETA after the Walloon 'non' (on this issue, see Van der Loo and Wessel (n 1) 759).

[118] Case C-28/12 (n 36), para. 44.

[119] Ibid, para. 55.

tinizing the actions of their government in the Council. For example, the Dutch Parliament (Tweede Kamer) has requested their government to have a parliamentary debate on the provisional application of CETA before taking a position in the Council on this issue.[120]

Another issue which can be perceived as 'undemocratic' by national parliaments is the lack of immediate consequences of a negative vote concerning the ratification of a mixed agreement for its provisional application. For example, although this situation was triggered by a referendum and not a negative vote in parliament, in the Netherlands several members of Parliament complained that even after the negative outcome of the referendum on the EU-Ukraine AA the provisional application of the agreement would not be terminated.[121] As this situation actually never occurred, several legal issues related to the termination of provisional application remain unclear. One can claim that, as long as the agreement has not been ratified by all parties, the provisional application can continue indefinitely. The clauses on provisional application in mixed agreements or the respective Council decisions do not impose a 'deadline' on the provisional application. The situation would change if a national parliament were to reject the agreement and the Member State in question deposited a notification that it therefore could not ratify the agreement. As argued above, considering the 'entry into force clauses' of bilateral mixed agreements (which require the ratification of "all" the contracting parties), this would imply that the ratification procedure of the agreement has failed and that the agreement cannot be concluded. Although mixed agreements or their respective Council decisions do not set a time-limit on the provisional application, they often state that the provisional application can only take place "pending its entry into force" or "pending the completion of the procedures for its conclusion".[122] Therefore, the failure of the ratification procedure would require the termination of the provisional application.[123] This was also the view of the Council in one of the many statements adopted in the context of the signature of CETA. The Council stated in plain terms that:

> *"If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and*

[120] Beantwoording vragen van de leden Bruins (ChristenUnie), Jasper van Dijk (SP), Dijkgraaf (SGP), Grashoff (GroenLinks), De Roon (PVV), Jan Vos (PvdA) en Agnes Mulder (CDA) over voorlopige inwerkingtreding van het handelsakkoord tussen de EU en Canada (CETA), 1 June 2016.

[121] Minister of Foreign Affairs Bert Koenders, 'Answers to Members Omtzigt, Verhoeven, Voordewind on the provisional application of the EU-Ukraine Association Agreement', Tweede Kamer der Staten Generaal, 3 February 2016 and 'Kamerbrief verzoek toelichting bevoegdheidsverdeling EU associatieakkoord Oekraïne', DIE-0710/2016 , 7 October 2016.

[122] See for instance the Council Decisions 2016/1970/EU mentioned with regard the EU-New Zealand Partnership Agreement on Relations and Cooperation (n 98) and the EU-Kazakhstan Enhanced PCA (n 41).

[123] Article 25(2) VCLT states that "'unless the treaty otherwise provides or the negotiating States and negotiating organizations […] have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being provisionally applied of its intention not to become a party to the treaty.

> *formal notification by the government of the concerned state, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures."*[124]

Moreover, statements by Germany, Poland, Belgium and Austria declare that as parties to the agreement they can exercise their right to terminate the provisional application as provided in CETA (Art. 30.1(3)(c)) but also add that this needs to take place "in accordance with EU procedures".[125] Also the German Bundesverfassungsgericht declared in its "Application for a Preliminary Injunction in the 'CETA' Proceedings" that the German Federal Government has the possibility to terminate the provisional application of the Agreement "for the Federal Republic of Germany" (thus not for the entire EU), by means of written notification pursuant to Art. 30.7(3)(c).[126]

Again, this interpretation seems to be at odds with the allocation of competences between the EU and the Member States. As discussed above, only matters within the scope of EU competences are subject to provisional application, which is approved by a Council decision pursuant to Article 218(5) TFEU. The Court made it very clear in *Commission* v. *Council (US Air Transport Agreement)* that Member States could not be taken on board in such a decision.[127] Contrary to the Bundesverfassungsgericht, the French Constitutional Court took into account these principles concerning the allocation of EU competences when rejecting the argument of several members of the French Parliament that CETA's provisional application "calls into question the essential conditions for the exercise of national sovereignty".[128] The Conseil Constitutionnel ruled that, because CETA's provisional application only covers matters falling under excusive EU competences (and includes a procedure to terminate this), it does not jeopardize the exercise of national sovereignty.

Thus, only the Union (and not one or more Member States or their national parliaments) can terminate the provisional application of the agreement. The aforementioned statements indeed underline that the termination needs to take place "in accordance with EU procedures". However, what the appropriate procedure would be is not entirely clear. Not all mixed agreements include a specific procedure for the termination of the provisional application.[129] Those agreements that provide for such a procedure state that "either Party" or "a Party" may terminate the provisional application by means of a written notification delivered to the other Party or the Depositary of the agreement.[130] The

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[124] These different statements were included in the *Official Journal* (OJ, 2017, L11/9).

[125] Ibid.

[126] Bundesverfassungsgericht, Applications for a Preliminary Injunction in the 'CETA' Proceedings Unsuccessful, 13 October 2016.

[127] Case C-28/12 (n 36), para. 44.

[128] Décision no 2017-749 DC du 31 juillet 2017, Accord économique et commercial global entre le Canada, d'une part, et l'Union européenne et ses États membres, d'autre part.

[129] Eg the EU-New Zealand Partnership Agreement on Relations and Cooperation (n 31), as well as the Partnership and Cooperation Agreement with Iraq (*OJ,* 2012, L 204/20). However, the provisional application of these agreements can be terminated pursuant to Article 25(2) VCLT.

[130] For example, in the case of the Ukraine AA, the termination of the agreement shall take place six months after receipt of the notification (Art. 486(7)) and in the case of CETA the termina-

combined reading of such a clause together with the clause that defines "the Parties" (cf. *supra*) confirms that only the EU can terminate the provisional application. Article 218 TFEU does not provide procedural rules for the Union's termination of the provisional application of an international agreement. In an answer to a parliamentary question concerning the mixed CETA agreement, the Commission stated that "a Member State can trigger a process to terminate provisional application [but that] it should be stressed that a decision of the EU institutions can only be reversed by the same EU institutions".[131] It has been argued that a termination decision could be qualified as the '*actus contrarius'* of the conclusion decision, implying that the Council would have to terminate the provisional application upon a proposal of the Commission and after approval of the European Parliament (Article 218(5) TFEU).[132] Under this approach the Council would need to decide with qualified majority, and in several cases even unanimity (Art. 218(8) TFEU). Indeed, in 2009 the Council terminated, upon a Commission proposal, the provisional application of the EU-Guinea Fisheries Agreement (which was not a mixed agreement) because of serious human rights violations committed by Guinea. The Council adopted a decision repealing the decision concerning the provisional application of this agreement on the procedural basis of Articles 218(5) and 218(8) TFEU, but the EP was not asked for approval or consulted.[133] The Council President designated the competent Commissioner to notify the Guinean authorities, in accordance with Article 25(2) VCLT, that the EU no longer intends to become a party to the agreement and terminates its provisional application.[134] This illustrates that in any case a single Member State (or national parliament) cannot terminate the EU's provisional application of a mixed agreement.

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tion shall take effect on the first day of the second month following that notification (Article 30.7(3)(c)).

[131] Answer given by Ms Malmström on behalf of the Commission (E-008912/2016), 1 March 2017.

[132] On this point, see F. Hoffmeister, 'Of Transferred Competence, Institutional Balance and Judicial Autonomy – Constitutional Development in EU Trade Policy Seven Years after Lisbon', in J Czuczai, F Naert (Eds) *The EU as a Global Actor- Bridging Legal Theory and Practice. Liber Amicorum in Honour of Ricardo Gosalbo Bono* (Brill Nijhoff, 2017), p. 327. Alternatively, Hoffmeister argues that the termination can also be considered as an executive act (p. 328).

[133] Council Decision 2009/1016/EU of 22 December 2009 repealing Decision 2009/473/EC concerning the conclusion of an Agreement in the form of an Exchange of Letters on the provisional application of the Fisheries Partnership Agreement between the European Community and the Republic of Guinea (OJ, 2009, L348/53). Hoffmeister notes that in this procedure the EP was not asked for approval or consulted although it had also become competent under the Lisbon Treaty to approve this agreement. Therefore, he argues that the Council is "the competent institution for termination decisions" and that the prior involvement of the EP is not legally necessary in such situations. On the Guinea case, see also J Czuczai, 'The Autonomy of the EU Legal Order and the Law-Making Activities of International Organizations. Some Examples Regarding the Council's most Recent Practice', *College of Europe Research Paper in Law*, 03/2012.

[134] Another option could be the procedure to suspend an agreement (Article 218(9) TFEU). However, this provision was never used as a legal basis to terminate the provisional application of an agreement.

5. CONCLUSION

The aim of this contribution was to shed more light on the role of national parliaments in the conclusion of mixed (trade) agreements. Whereas the involvement of national parliaments in the conclusion of mixed agreements has for a long time not raised serious legal or political problems, in the context of the arduous signature of CETA, the Dutch referendum on the EU-Ukraine AA and the broader debate on the consequences of major trade agreements such as TTIP and CETA, several legal questions and dilemmas came to the surface.

Whereas the political reasons why the Council (and the Member States) prefers the mixed formula are obvious, the legal conditions that make mixity mandatory or facultative are still not entirely clear, although the Court recently clarified the 'facultative mixity' scenario in *Germany v. Council*. It is true that the EU's exclusive competences in the area of external relations keep broadening through Treaty revisions, the case-law of the Court of Justice and the ERTA-principles, reducing the need for mixity. However, the post-Lisbon practice has illustrated that mixity "is here to stay".[135] But whereas all the EU's FTAs concluded since the Treaty of Lisbon have been concluded as mixed agreements, it appears the outcome of Opinion 2/15 has led to a crucial shift considering that the European Commission, with the support of the European Parliament, is now envisaging 'EU-only' FTAs, avoiding mixity (and consequently national ratification procedures).

Although it is at this point too early to predict whether this new approach of the Commission will become a standard practice (mainly because the Council and the Member States still have to take a clear position in this debate), national parliaments will remain a key player in the conclusion of a number of important agreements concluded by the EU and the Member States. The 'indirect' parliamentary oversight of national parliaments over mixed agreements (by monitoring and holding the actions of their national government in the Council accountable) does not raise serious legal questions. Moreover, the active – and as early as possible – involvement of national parliaments in trade agreements is now even favoured by the Commission which pledged in its recent trade communication to make public all its recommendations for negotiating directives, and transmitting them automatically to all EU national parliaments.[136] However, this commitment can also be considered as a move from the Commission to keep national parliaments still 'indirectly' involved in EU trade agreements, compensating for the loss of the national parliament's 'direct' oversight (i.e. their approval in the national ratification procedure) over trade agreements, now that the Commissions is advocating for 'EU-only' FTAs. However, it should be stressed that at the level of the Union parliamentary oversight over mixed agreements is exercised by the EP. The EP has already demonstrated that it is not afraid to exercise its newly acquired competences in the process of concluding (mixed) international agreements. Moreover, as noted

[135] A Rosas, 'The Future of Mixity' in C Hillion and P Koutrakos (eds), *Mixed Agreements in EU Law Revisited: The EU and its Member States in the World* (Hart Publishing 2010), p. 367.

[136] European Commission, *op. cit.*, p. 7.

in this contribution, all mixed agreements signed since the Treaty of Lisbon require(d) the consent of the EP.

The 'direct' parliamentary oversight of national parliaments over bilateral mixed agreements, on the other hand, triggers important legal questions and dilemmas. As illustrated in this contribution, most national parliaments – and in the case of Belgium even its regional parliaments – need to give their consent before a mixed agreement can enter into force. The entry-into-force clauses of bilateral mixed agreements, which require the ratification of all the Parties, can therefore create a "constitutional deadlock": if a national parliament chooses to exercise its sovereign right not to ratify a mixed agreement, by the same token, it *de facto* blocks the Union from exercising its competences (as the agreement, including the provisions falling under Union competences, cannot enter into force). 'Incomplete' mixed agreements could provide a way out, as such agreements would enter into force for those parties that have ratified to agreement (i.e. the Union and the other Member States). But it has been demonstrated that such an option would trigger new complex practical problems and legal questions.[137]

Considering the relevant case-law, the Treaty rules on the allocation of competences and, in particular, the duty of sincere cooperation, it can be concluded that there is a duty on the Member State to *initiate* its national ratification procedure (i.e. the parliamentary approval procedure) within a reasonable period after signature of the mixed agreement, but that this obligation has no impact on the outcome of this procedure. The duty of sincere cooperation, invoked by the European Commission in several infringement procedures against Member States concerning the non-ratification of mixed agreements, can indeed not be stretched to the extent that it would oblige national parliaments to vote in a certain way.

Another legal feature that complicates the national parliaments' 'direct' oversight is the lack of a clear vertical delimitation of competences. Although from a strict legal point of view national parliaments can – or may – only ratify the provisions of the agreement falling under Member State competences, in practice they consider the entire agreement. An elegant solution would be that both the Council decision concluding the agreement and the national approval acts indicate as clearly as possible which elements of the agreement they cover, but leaving just enough ambiguity to avoid competence-battles and to respect the dynamic nature of EU external competences.

Finally, it has been demonstrated that national parliaments have no 'direct' role to play in the decisions to initiate or terminate the Union's provisional application of mixed agreements. The EU's provisional application only covers Union competences and needs to be approved (or terminated) in accordance with EU procedures and the Treaty rules on the allocation of competences. National parliaments can only indirectly exercise parliamentary oversight over Council decisions on the provisional application of mixed agreements by scrutinizing the actions of their government in the Council. Although this may frus-

[137] Van der Loo and Wessel (n 5).

trate some members of national parliaments or even constitutional Courts in Member States, the legal reality remains that Member States, or their national parliaments, cannot unilaterally terminate the EU's provisional application of mixed agreements. However, the different CETA statements have illustrated that there is an understanding between the EU institutions that if a Member State, or its national parliament, would not ratify an agreement, the provisional application would need to be terminated. But such a decision needs to be taken by the Union, according to Union procedures.