

# What Kind of Global Actor Will the Member States Permit the EU to Be?

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### A. The Union's Ambitious Mission: Role Model and Moral Compass for the Wider World

The general theme of our 65th anniversary symposium is "The European Union as a Global Actor". This raises three questions: What kind of global actor does the EU want to be? What will it take for the Union to be a global actor of the intended kind? And most importantly: What kind of global actor will the Member States – the masters of the Treaties – permit the EU to be?

Article 3(5) TEU actually mandates the Union to function as a global actor, charging it with nothing less than making the world a better place for all. Sentence 1 of the provision contains the egoistic version of that mandate, ordering the Union to

"uphold and promote its values and interests and contribute to the protection of its citizens."

Sentence 2 of the provision, on the other hand, sets forth the altruistic version of the Union's global mission:

"It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

Article 21(1) subparagraph 1 TEU reaffirms and extends that mandate:

"The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."

Article 2 TEU identifies these cited principles as the fundamental values of the EU and Article 49 TEU underlines that EU membership is reserved for European States which respect these values and are committed to promoting them.

The Union portrays itself as a role model of integration for other regions of the world, having indeed inspired primarily economic integration processes in Central

and South America,<sup>1</sup> Africa<sup>2</sup> and Asia.<sup>3</sup> None of these have, however, reached the depth of supranational integration embodied in the current *acquis* of the Union. The EU also advertises its values as universal standards, offering a moral compass for piloting the international community as a whole into a better world. It can do so with some confidence because the Union's values largely reflect the Purposes and Principles of the United Nations<sup>4</sup> and the common standards of achievement set forth in the Universal Declaration of Human Rights.<sup>5</sup>

There are of course questions as to whether the Union can credibly be a role model for the wider world with regard to human rights and the rule of law. Has it not for many years failed to fulfil its own promise and mandate to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms and submit to the external oversight by the European Court of Human Rights pursuant to Article 6(2) TEU?<sup>6</sup> Has it not failed to introduce effective internal mechanisms to implement human rights and preserve the rule of law vis-à-vis Member States that are again turning towards authoritarian forms of government?<sup>7</sup>

## B. The Inchoate Instruments for Accomplishing the Union's Mission

### I. The Principle of Conferral

However credible and ambitious the Union's world-wide mission is, the EU can only be a global actor, if it is both willing and able to act effectively on the international scene. According to the principle of conferral, which is a fundamental rule of the EU

1 On the Caribbean Community see *Byron/Malcolm*, Caribbean Community (CARICOM), in: Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (OUP online); on the Andean Community of Nations, see *Porrata-Doria Jr.*, Andean Community of Nations (CAN), in: *ibid.*; on MERCOSUR, see *Schmidt*, in: *ibid.*

2 East African Community, Southern African Development Community (SADC), Economic Community of West African States (ECOWAS) – see *Killander*, Regional Co-operation and Organization: African States, in: Wolfrum, (fn. 1), para. 10 et seq.; *Mossner*, Westafrikanische Wirtschaftsintegration im Mehrebenensystem, 2016. See also Article 3 of the Economic Partnership Agreement between the EU and its Member States, of the one part, and the SADC EPA States, of the other part of 10/6/2016, OJ L 250 of 16/9/2016, p. 1 – not yet in force.

3 On the ASEAN Economic Community, see *Choi*, Regional Co-operation and Organization: Asian States, in: Wolfrum, (fn. 1), para. 3 et seq.; *Dosch*, Die ASEAN Wirtschaftsgemeinschaft, 2016.

4 Articles 1 and 2 UN Charter.

5 Of 10/12/1948, UN General Assembly Resolution 217A(III).

6 The CJEU virtually annihilated the first draft of an accession agreement, see CJEU, opinion 2/13, *Accession to the ECHR*, EU:C:2014:2454.

7 See Articles 7 TEU, 354 TFEU and the European Commission's new EU Framework to strengthen the Rule of Law – COM (2014) 158 final/2 of 19/3/2014. Documents concerning the problematic situation in Hungary and Poland can be found at [http://ec.europa.eu/justice/effective-justice/rule-of-law/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/rule-of-law/index_en.htm) (15/9/2017). *Wilms*, Protecting Fundamental Values in the European Union through the Rule of Law, European University Institute, Robert Schuman Centre for Advanced Studies, 2017.

constitution,<sup>8</sup> this primarily depends on whether the Treaties<sup>9</sup> have conferred the necessary competences upon the Union. Whenever the Union wants to act either inwards or outwards, it must establish a sufficient treaty basis of authority for its action.

There are numerous such bases for external action of the EU, both in the TFEU and in the TEU. The TEU bases pertain to the Union's external action in the area of the intergovernmental Common Foreign and Security Policy which is dominated by the European Council and the Council, while the Commission and the European Parliament are supporting actors at best.<sup>10</sup> The TFEU bases pertain to the Union's external action with regard to all the other EU policies which are structured in the form of supranational integration (such as the Common Commercial Policy, development cooperation and the environment), where the Commission has the initiative and the European Parliament has become a co-decision-maker alongside the Council.<sup>11</sup> Article 40 TEU erects an impermeable wall of separation between the intergovernmental CFSP and supranational integration while Article 275(2) TFEU specifically grants the Court of Justice of the EU jurisdiction to monitor compliance with Article 40 TEU.<sup>12</sup> This is to prevent both a creeping supranationalisation of the CFSP and a creeping intergovernmentalisation of the other Union policies.

## II. The Problem of Suitable Decision-Making Procedures

Apart from the availability of EU competences, the Union's ability to act effectively depends to a large extent on suitable decision-making procedures. Any procedure which requires unanimity of the (European) Council is problematic because it gives every single Member State the possibility of blocking or even blackmailing all the others. Since the unanimity rule pervades the CFSP,<sup>13</sup> the EU has not yet shed the image of being an economic giant but a political dwarf on the global stage. In the CFSP area, the Union has largely been unable to establish itself as a veritable global power. The mission of Article 3(5), 21 TEU thus remains for the most part unaccomplished.<sup>14</sup> Allegedly, the unwillingness of the United Kingdom to advance the political

8 Articles 3(6), 5(1) and (2) TEU.

9 The TEU and the TFEU, see Article 1(3) TEU.

10 Articles 22, 26, 28, 30, 36 TEU.

11 Article 17(2) TEU; Articles 289, 294 TFEU.

12 This is an exception to the general exclusion of judicial review of CFSP acts pursuant to Article 275(1) TFEU. See CJEU, case C-263/14, *European Parliament v. Council*, EU:C:2016:435.

13 Article 24(1) subparagraph 2 sentence 2, Articles 31(1) and 42(4) TEU. See also the exceptions in Article 31(2)-(4) TEU which have not played any role except for proving the rule.

14 For a detailed critique of the CFSP decision-making procedure see *Giegerich, Wege zu einer vertieften Gemeinsamen Außen- und Sicherheitspolitik: Reparatur von Defiziten als "kleine Lösung"*, in: Kadelbach (ed.), *Die Europäische Union am Scheideweg: mehr oder weniger Europa?*, 2015, pp. 135 et seq.

integration of the EU<sup>15</sup> has been an important factor in preventing the establishment of a truly effective CFSP. If so, the impending BREXIT will remove that impediment. On the other hand, the political clout of the EU-27 vis-à-vis the wider world will at the same time be considerably diminished by the absence of the British expertise and influence.

In his State of the Union Address to the European Parliament on 13 September 2017, Commission President *Juncker* made the following statement:

“I want our Union to become a stronger global actor. In order to have more weight in the world, we must be able to take foreign policy decisions quicker. This is why I want Member States to look at which foreign policy decisions could be moved from unanimity to qualified majority voting. The Treaty already provides for this, if all Member States agree to do it. We need qualified majority decisions in foreign policy if we are to work efficiently.”<sup>16</sup>

With regard to the policies in the area of supranational integration, the decision-making procedure is much more suitable for effective action because it mostly allows the Council to adopt decisions by a qualified majority.<sup>17</sup> This also applies to decisions concerning external action in those policy areas, such as foreign commerce.<sup>18</sup> Unfortunately, the opportunities offered by the supranational part of the Union’s external action with its effective decision-making procedure have not been wholeheartedly seized.

### C. The Lack of Political Will to Make Effective Use of Available Instruments

#### I. The Conspiracy of the Member States to Preserve Their Sovereign Presence

The reason why the aforementioned opportunities have not been seized is a lack of political will to make use of available EU instruments to the fullest possible extent and thereby turn the Union into an effective global actor. The culprits can easily be identified – they are the Member States whose representatives in the Council conspire to superordinate individual national interests over common Union interests. By jealously preserving their individual presence as sovereign States on the international scene, Member States are preventing the Union from becoming a strong global actor. They have failed to turn the EU into the sole vehicle of European foreign relations even in areas where its conferred (exclusive or shared) powers would be sufficient and the objectives of the envisaged external action cannot be sufficiently achieved by the

15 See *Giegerich*, How to Reconcile the Forces of Enlargement and Consolidation in “an Ever Closer Union”, in: *Giegerich/Schmitt/Zeitmann* (eds.), *Flexibility in the EU and Beyond*, 2017, pp. 17 and 50 et seq.

16 President Jean-Claude Juncker’s State of the Union Address 2017, SPEECH/17/3165 of 13/9/2017. The Commission President referred to Article 31(3) TEU.

17 As defined in Article 16(4) and (5) TEU in conjunction with the Protocol on transitional provisions.

18 Article 207 TFEU.

Member States but can be better achieved at Union level.<sup>19</sup> In the area of shared competences, the Council too often refuses to adopt majority decisions on the basis of Commission proposals for exercising EU external powers because it wants Member States to exercise their external powers instead of the Union.

This Member State conspiracy deprives the European integration project of much of its added value not only with regard to the Common Foreign and Security Policy, but also with regard to the common commercial policy and the association policy – all areas where the European whole is obviously more than the sum of its national parts. With regard to these policy areas, the truth is particularly easy

“to understand that when Europe is weak, her individual countries will be weak. If Europe is strong, her Member States are strong. Only by being united together, can we realise our own sovereignty – be truly free – in the wider world.”<sup>20</sup>

And yet, in accordance with the aforementioned conspiracy, trade agreements are in practice still concluded in the form of mixed agreements even though the Treaty of Lisbon has greatly extended exclusive EU competences with regard to the common commercial policy.<sup>21</sup> The same holds true with regard to association agreements.<sup>22</sup> Member States have continued to insist on participating in trade agreements alongside the Union, in particular the new generation agreements which go beyond the traditional reduction or removal of tariff and non-tariff barriers to trade in goods and services and also contain provisions on the protection of intellectual property, investment (including ISDS), public procurement etc. Again, the same applies to the new generation of association agreements.

## II. The Evitable Mixity of the Free Trade Agreement with Singapore

### 1. The Dispute between the Commission and the Council on Mixity

With regard to the fully negotiated “new generation” Free Trade Agreement between the European Union and the Republic of Singapore (EUSFTA),<sup>23</sup> there was a dispute between the Commission and Council as to whether it should be concluded as a sole EU agreement without the participation of the Member States (this was the position of the Commission) or as a mixed agreement (this was the position of the Council). The Commission requested an opinion from the Court of Justice of the EU pursuant to Article 218(11) TFEU in order to settle the matter once and for all. While the Commission (supported by the European Parliament) argued that the EU even had exclusive competence to conclude the entire agreement, it also asked the Court as a

19 According to the principle of subsidiarity – Article 5(3) TEU.

20 Speech by the President of the European Council, *Donald Tusk*, to Speakers of EU Parliaments in Rome on 17/3/2017, [www.consilium.europa.eu/en/press/press-releases/2017/03/17-tusk-speech-conference-eu-parliaments-rome/](http://www.consilium.europa.eu/en/press/press-releases/2017/03/17-tusk-speech-conference-eu-parliaments-rome/) (15/9/2017).

21 Article 207(1) in conjunction with Article 3(1)(e) TFEU.

22 Article 217 TFEU.

23 Text available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (15/9/2017).

precaution which provisions fell within the Union's shared competence and whether there was any provision of the agreement that fell within the exclusive competence of the Member States.<sup>24</sup> The Council (supported by 25 Member States) argued that EUSFTA had the characteristics of a mixed agreement because it contained provisions falling within the shared competences as well as others falling within the exclusive competences of the Member States.

## 2. The Opinion of the Advocate General of 21 December 2016

In her opinion of 21 December 2016, Advocate General *Sharpston* found that except for one single article within the exclusive competence of the Member States, EUSFTA was covered by either exclusive or at least shared Union competences.<sup>25</sup> She concluded "that, as it stands, the EUSFTA can be concluded only by the European Union and the Member States acting jointly."<sup>26</sup> The Advocate General in other words argued for the obligatory mixity of EUSFTA. Nobody would dispute the following statements in her opinion:

"565. A ratification process involving all the Member States alongside the European Union is of necessity likely to be both cumbersome and complex. It may also involve the risk that the outcome of lengthy negotiations may be blocked by a few Member States or even by a single Member State. That might undermine the efficiency of EU external action and have negative consequences for the European Union's relations with the third State(s) concerned.

566. However, the need for unity and rapidity of EU external action and the difficulties which might arise if the European Union and the Member States have to participate jointly in the conclusion and implementation of an international agreement cannot affect the question who has competence to conclude it. That question is to be resolved exclusively on the basis of the Treaties [...]."

In regard to the EUSFTA provisions within the shared competences of the Union and the Member States, the aforementioned question can, on the basis of the Treaties, easily be answered in favour of the unity and rapidity of EU external action. For the Advocate General herself correctly observed (in agreement with the Council)

"that whether the European Union or the Member States exercise external competence to conclude a particular international agreement in an area of shared competence is 'a political choice'".<sup>27</sup>

This confirms that it is the lack of political will on the part of the Council (i.e. the Member States) and not legal constraints which impedes the Union's easy and effective exercise of its existing external powers. The mixity of EU agreements is usually facultative and not obligatory, obligatory mixity arising only if such agreements cover

24 Opinion 2/15: Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU, OJ C 363 of 3/11/2015, p. 18.

25 Opinion of AG *Sharpston* to CJEU, opinion procedure 2/15, *Singapore*, EU:C:2016:992.

26 Ibid., para. 564.

27 Ibid., para. 74 and also para. 295.

areas within exclusive Member State competences.<sup>28</sup> The only legal reason for the Advocate General to deduce the obligatory mixity of EUSFTA was her assumption that it included one provision within the exclusive competence of the Member States.

The political discretion usually involved when mixed agreements are concluded was most clearly elaborated by Advocate General *Wahl* in his opinion of 8 September 2016 in the opinion procedure 3/15 concerning the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled:<sup>29</sup>

“119. [...] The choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence (or of parallel competence), is generally a matter for the discretion of the EU legislature.

120. That decision, as it is predominantly political in nature, may be subject to only limited judicial review. The Court has consistently held that the EU legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. It concluded from this that the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.

121. That may be the case, for example, where a decision to conclude a mixed agreement might, because of the urgency of the situation and the time required for the 28 ratification procedures at national level, seriously risk compromising the objective pursued, or cause the Union to breach the principle *pacta sunt servanda*.

122. Conversely, a mixed agreement would be required, generally, where an international agreement concerns coexistent competences: that is, it includes a part which falls under the exclusive competence of the Union and a part which falls under the exclusive competence of the Member States, without any of those parts being ancillary to the other. [...]”<sup>30</sup>

### 3. The Opinion of the CJEU of 16 May 2017

In the view of the CJEU (Full Court), most provisions of the EUSFTA fall within the exclusive competence of the EU and the few others fall within a competence shared between the Union and the Member States.<sup>31</sup> In contrast to the Advocate General, the CJEU did not identify a single provision within exclusive Member State competence. The Court indeed determined that the investor-state dispute settlement (ISDS) regime in EUSFTA,

28 See *Ankersmit*, Opinion 2/15 and the future of mixity and ISDS, European Law Blog of 18/5/2017.

29 Opinion of AG *Wahl* to CJEU, opinion procedure 3/15, *Marrakesh Treaty*, EU:C:2016:657. The CJEU ultimately determined that the conclusion of the Marrakesh Treaty falls within the exclusive competence of the EU, see CJEU, opinion 3/15, *Marrakesh Treaty*, EU:C:2017:114.

30 Footnotes omitted.

31 CJEU, opinion 2/15, *Singapore*, EU:C:2017:376.



“which removes disputes from the jurisdiction of the courts of the Member States [...] cannot [...] be established without the Member States’ consent.”<sup>32</sup>

However, the Court did not assign ISDS to the exclusive competences of Member States but instead expressly stated that the pertinent section of EUSFTA

“falls not within the exclusive competence of the European Union, but within a competence shared between the European Union and the Member States.”<sup>33</sup>

The CJEU therefore does not determine in the tenor (operative part) of its opinion that the EUSFTA can be concluded only by the European Union and the Member States acting jointly. It simply states in the reasons whenever it finds that an EUSFTA provision falls within a competence shared by the EU and the Member States that the relevant section of the “envisaged agreement cannot be approved by the European Union alone.”<sup>34</sup> This appropriately refers to the fact that the exercise of shared treaty-making competences by the EU depends on the approval of a qualified majority of Member State representatives in the Council and thus on Member States’ political will.<sup>35</sup> It would be an overinterpretation of the aforementioned passage to assume that the CJEU intended to require mixity whenever provisions of the envisaged agreement fall within shared competences, doing away with facultative mixity and leaving only obligatory mixity.<sup>36</sup>

The Member States have so far insisted on concluding a mixed agreement in all cases of facultative mixity, so that in practice, if not in law, mixity is obligatory where shared competences are involved. This has provoked suggestions that in the future the EU should conclude separate (EU only) free trade agreements and mixed investment agreements, thus ensuring that the former can enter into force more quickly.<sup>37</sup>

### **III. CETA’s Mixity Meets Belgium’s Overfederalisation and the German Federal Constitutional Court’s Overassertiveness**

#### **1. Obstruction by the Regional Parliament of Wallonia**

The craze for mixed trade agreements has also led to the embarrassing manoeuvres concerning the Comprehensive Economic and Trade Agreement (CETA) with Canada,<sup>38</sup> in which the regional parliament of Wallonia, representing only 3.6 million people (ca. 0.7 % of the EU population), almost hamstringed the entire Union and threatened to turn it from a trade giant into a dwarf – there too! That would have been a

32 Ibid., para. 292.

33 Ibid., para. 293. See also *Roberts*, A Turning of the Tide against ISDS?, EJIL: Talk! of 19/5/2017.

34 CJEU, opinion 2/15, *Singapore*, EU:C:2017:376, paras. 244 and 304.

35 Article 207(4) TFEU.

36 But see *Ankersmit*, (fn. 28).

37 See *Gáspár-Szilágyi*, Opinion 2/15: Maybe it is time for the EU to conclude separate trade and investment agreements, European Law Blog of 20/6/2017.

38 OJ L 11 of 14/1/2017, p. 23.

political disaster not least because the CETA is linked with the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part that is intended “to further enhance and elevate their relationship and their international cooperation”.<sup>39</sup>

While federal constitutions usually confer the foreign relations power, including the power to conclude trade agreements, on the federation,<sup>40</sup> the Belgian Constitution gives the regions a veto over the conclusion of trade agreements by Belgium. This dysfunctional constitutional arrangement turned the EU into a hostage of Belgian politics and the Wallonian regional parliament into the linchpin of the European anti-free-trade movement. It seems questionable whether that agreement is compatible with Belgium’s obligation of sincere cooperation under Article 4(3) TEU.

Opposition in Europe against CETA had been vocal primarily because it was seen as a blueprint for the Transatlantic Trade and Investment Partnership (TTIP) which the EU was concurrently negotiating with the USA. TTIP and CETA have wrongly been portrayed as neoliberal frontal assault on European social and environmental regulation as well as services of general economic interest in the sense of Article 14 TFEU in favour of multinational enterprises. In order to clarify matters and prevent popular misunderstandings in regard to the legal consequences of CETA, the parties made a Joint Interpretative Instrument at the time of signature.<sup>41</sup> However, this was not enough to convince the regional parliament of Wallonia. Because of the Wallonian resistance, the Belgian government was for some time prevented from signing the CETA which – in contrast to the original intention of the European Commission – had been given the form of a mixed agreement on the insistence of the Member States.<sup>42</sup> The solemn signing ceremony with the Canadian Prime Minister planned on 20 October 2016 therefore had to be postponed and Canada seemed temporarily intent on cancelling the entire project.

Only after difficult negotiations involving all the EU Member States a compromise was found and CETA (as well as the Strategic Partnership Agreement) could ultimately be signed a week later on 30 October 2016.<sup>43</sup> For the EU, CETA was signed by the President of the European Council, the Presidency of the Council and the President of the European Commission. The signature for the Kingdom of Belgium expressly also binds the French Community, the Flemish Community, the German-speaking Community, the Wallonian Region, the Flemish Region and the Brussels-Capital Region. On 28 October, the Council adopted Decision (EU) 2017/38 on the

39 Available at <http://data.consilium.europa.eu/doc/document/ST-5368-2016-REV-2/en/pdf> (15/9/2017).

40 See Giegerich, Foreign Relations Law, in: Wolfrum, (fn. 1), paras. 39–44. See, e.g., Article 32 of the German Basic Law.

41 OJ L 11 of 14/1/2017, p. 3. See Article 31(2)(a) of the Vienna Convention on the Law of Treaties of 23/5/1969, UNTS vol. 1155, p. 331.

42 In view of the CJEU opinion on EUSFTA, CETA probably also falls entirely within either the exclusive or the shared competences of the Union. Thus, Member States’ insistence on mixity is again the result of political choice and not legal necessity.

43 See [www.theguardian.com/world/2016/oct/27/belgium-reaches-deal-with-wallonia-over-eu-canada-trade-agreement](http://www.theguardian.com/world/2016/oct/27/belgium-reaches-deal-with-wallonia-over-eu-canada-trade-agreement) (15/9/2017).

provisional application of those parts of CETA by the Union which fall within EU competences.<sup>44</sup>

The aforementioned compromise is embodied in a “Statement by the Kingdom of Belgium on the conditions attached to full powers, on the part of the Federal State and the federated entities, for the signing of CETA” that was entered in the Council minutes and attached to the Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union 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.<sup>45</sup> The Belgian statement begins with the clarification that it was not unlikely that at least one of the six Belgian federated entities (three language communities and three regions) would permanently and definitely decide not to ratify CETA. In this event, the Belgian Federal Government would notify the Council that Belgium was permanently and definitely unable to ratify CETA. Since CETA can enter into force only after the ratification of all the Parties, including all the Member States,<sup>46</sup> such a notification would spell doom for that agreement.<sup>47</sup>

The Belgian statement also includes the announcement that Belgium would ask the CJEU for an opinion pursuant to Article 218(11) TFEU on the compatibility of CETA’s investment protection and dispute resolution provisions with the European Treaties.<sup>48</sup> That substantive question was expressly not the subject of the opinion 2/15 of the CJEU with regard to the correspondent provisions of EUSFTA.<sup>49</sup> Belgium moreover declares that

“[u]nless their respective parliaments decide otherwise, the Walloon Region, the French Community, the German-speaking Community, the French-speaking Community Commission and the Brussels-Capital Region do not intend to ratify CETA on the basis of the system for resolving disputes between investors and Parties set out in Chapter 8 of CETA, as it stands on the day on which CETA is signed.”

The intra-Belgian opposition to ISDS has obviously not been attenuated by the entirely new permanent and two-tier investment court system envisaged in CETA that is to take the place of the ad hoc arbitral tribunals of the past.<sup>50</sup>

44 OJ L 11 of 14/1/2017, p. 1080.

45 OJ L 11 of 14/1/2017, pp. 1 and 21. For the original intra-Belgian agreement see [www.rtb.be/info/belgique/detail\\_voici-le-texte-de-l-accord-intra-belge-sur-le-ceta?id=9441568](http://www.rtb.be/info/belgique/detail_voici-le-texte-de-l-accord-intra-belge-sur-le-ceta?id=9441568) (15/9/2017).

46 Article 30.7(2) read together with the Preamble of CETA.

47 If that happens, the provisional application of CETA will also be terminated, see the pertinent statement from the Council, entered into the Council minutes, OJ L 11 of 14/1/2017, pp. 11 and 15.

48 The Belgian request pursuant to Article 218(11) TFEU will soon be submitted to the CJEU, see [www.lesoir.be/1504521/article/actualite/belgique/politique/2017-05-16/ceta-belgique-saisira-cour-justice-l-ue-avant-l-ete](http://www.lesoir.be/1504521/article/actualite/belgique/politique/2017-05-16/ceta-belgique-saisira-cour-justice-l-ue-avant-l-ete) (15/9/2017). See also opinion of AG Wathelet to CJEU, case C-284/16, *Slovak Republic v. Achmea BV*, EU:C:2017:699.

49 CJEU, opinion 2/15, *Singapore*, EU:C:2017:376, para. 30.

50 Article 8.27 et seq. CETA.

## 2. Attempts to Derail CETA in the German Federal Constitutional Court

The craze for mixed trade agreements has opened the door for other veto players on the national level, including the German Federal Constitutional Court (FCC) and perhaps also the German Federal Council (the second parliamentary chamber). It has not yet been definitely determined whether the German law authorising CETA ratification by Germany that is required pursuant to Article 59(2) sentence 1 of the Basic Law (i.e. the German constitution) can only be passed with the consent of the Federal Council. The FCC, however, has already been and still is actively involved in the CETA saga: Nearly 200,000 constitutional complaints have been filed against CETA,<sup>51</sup> together with applications for an interim injunction prohibiting the German federal government from consenting to decisions by the Council of the EU concerning signature and provisional application of CETA by the Union. The FCC dismissed the applications for an interim injunction, but with a certain proviso concerning the provisional application:<sup>52</sup> The federal government would have to ensure that the provisional application extended only to those parts of CETA which were undoubtedly within Union competences and, if that could not be realized, that it retained the power to terminate the provisional application pursuant to Article 30.7(3)(c) CETA.

The FCC realized that this interpretation of Article 30.7(3)(c) CETA, according to which individual Member States could terminate the provisional application, that was advocated by the federal government, was not cogent. Therefore the court ordered the federal government to declare its view on the interpretation of Article 30.7(3)(c) CETA in a manner relevant from the standpoint of public international law and notify it to the other contracting parties.<sup>53</sup> In fulfilment of this order, Germany (together with Austria) declared in the Council

“that as Parties to CETA they can exercise their rights which derive from Article 30.7(3)(c) of CETA. The necessary steps will be taken in accordance with EU procedures.”<sup>54</sup>

The German Permanent Representative at the EU also transmitted the German declaration in writing to the Secretary-General of the Council of the EU and the Permanent Representative of Canada at the EU.

It is of course beyond the power of an individual Member State to terminate the provisional application of CETA provisions by the EU that fall within Union competences, which is based on a Council decision in accordance with Article 218(5)

51 In addition, one parliamentary party filed an application asserting that the German federal government had violated the constitutional competences of the Federal Diet (i.e. the first chamber of the German parliament).

52 FCC, judgment of 13/10/2016 – 2 BvR 1368/16 et al., available in German at [www.bverfg.de/e/rs20161013\\_2bvr136816.html](http://www.bverfg.de/e/rs20161013_2bvr136816.html) (15/9/2017).

53 Ibid., para. 72.

54 The declaration was entered into the Council minutes, OJ L 11 of 14/1/2017, p. 15.

TFEU.<sup>55</sup> A Member State can do no more than ask the Commission to propose to the Council a new decision that would abrogate the earlier Council decision on provisional application whereupon the Union could terminate the provisional application by written notice to Canada on the basis of Article 30.7(3)(c) CETA. These are the “EU procedures” mentioned in the German declaration. Any unilateral German declaration as to the termination of the provisional application of CETA by the EU would have no legal effects whatsoever in international law or EU law.

Many complainants criticized the federal government for not properly fulfilling the FCC’s proviso and therefore applied for a further interim injunction. Their application was dismissed by the FCC.<sup>56</sup> The principal proceedings are, however, still pending and will cast a shadow over the CETA ratification process both in Germany and at EU level. The complainants primarily argue that the signing, provisional application and conclusion of CETA would violate their fundamental rights deriving from Article 38(1) in conjunction with Article 79(3) and Article 20(1) and (2) Basic Law and that the requirements for the exercise of ultra vires and identity control by the FCC were met. They particularly challenge the compatibility of the decision-making powers of the investment and appellate tribunal as well as the CETA Joint Committee with the fundamental principles of democracy and the rule of law set forth in the Basic Law. According to the settled case law of the FCC, every German entitled to vote in federal parliamentary elections can initiate the review of any EU act by the FCC as to whether it is either ultra vires or disregards the constitutional identity of Germany, as embodied in the unalterable fundamental principles of the Basic Law.<sup>57</sup>

## IV. The Association Agreement with Ukraine

### 1. The Traditional Mixity of Association Agreements

Association agreements have traditionally been concluded in the form of mixed agreements. This practice dates back to the times of the European Economic Community which had no foreign relations power in the proper sense, but was already empowered

“to conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.”<sup>58</sup>

55 *Krajewski*, Spielstand nach dem CETA-Beschluss: 2:2, und Karlsruhe behält das letzte Wort, *VerfBlog* of 13/10/2016; *Nowrot/Tietje*, CETA an der Leine des Bundesverfassungsgerichts: Zum schmalen Grat zwischen Ultra-vires-Kontrolle und Ultra-vires-Handeln, *EuR* 2017, pp. 137, 153.

56 FCC, Order of 7/12/2016 – 2 BvR 1444/16.

57 FCC, judgment of 30/6/2009 – 2 BvE 2/08 et al., BVerfGE 123, 267, English translation under [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html) (15/9/2017); FCC, judgment of 21/6/2016 – 2 BvR 2728/13 et al., English translation under [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621\\_2bvr272813en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html) (15/9/2017).

58 Article 238 EEC-Treaty.

Even at that time, it may well have been wrong to assume that the provisions on political cooperation with the third country typically contained in an association agreement went beyond the scope of the Common Market established by the EEC Treaty and could therefore not be stipulated by the EEC alone. Yet, the practice opted for mixity from early on.

This traditional mixity of association agreements has been carried over to the current EU which is empowered to establish associations with third states by Article 217 TFEU, in spite of the fact that the Union has long been expressly empowered to conclude agreements even in areas covered by the Common Foreign and Security Policy.<sup>59</sup> Article 8 TEU and Article 209(2) TFEU have meanwhile conferred additional treaty-making powers to the EU with regard to different kinds of associations. The CJEU has never been given the opportunity to clarify the true extent of the Union's power to establish associations in the opinion procedure pursuant to Article 218(11) TFEU because the Commission put up with the Council's insistence on mixity.<sup>60</sup>

From a legal point of view, association agreements, just like free trade agreements, could at least today easily be concluded by the EU alone. With regard to both types of agreements, it is the lack of political will of the Member States which prevents the Union from establishing itself as an effective global player. As a matter of fact, one important difference remains between trade agreements and association agreements. Whereas the conclusion by the EU of the former requires a Council decision adopted by a qualified majority in most cases,<sup>61</sup> an association agreement can only be concluded upon a unanimous Council decision.<sup>62</sup> While this would give every Member State veto power over association agreements, even if they were concluded in the form of sole-EU agreements, there still is an important difference as compared to mixed agreements: Mixed agreements which require positive ratification decisions on the national level bring numerous further national forces into play so that their entry into force becomes much more difficult. This was made obvious by the problems the Association Agreement with Ukraine ran into during the ratification process in the Netherlands.

## 2. Dutch Populists Put Mixity to the Test at the Expense of Ukraine

The mixity of association agreements had never posed problems until the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, came up for signature.<sup>63</sup> The signing of this agreement, having been negotiated from 2007 until 2012, had originally been scheduled for 29 November 2013. Shortly before, Ukrainian President *Janukovich* announced that he would not sign the agreement for

59 Article 37 TEU.

60 See *Mögele*, in: Streinz (ed.), EUV/AEUV, 2nd ed. 2012, Article 217 AEUV, para. 17 et seq., who criticizes the restrictive interpretation of Article 217 TFEU on which the practice of mixity is based.

61 Article 207(4) TFEU.

62 Article 218(8)(2) TFEU.

63 OJ L 161 of 29/5/2014, p. 3.

the time being. This surprising about-face was due to political and economic pressure by the Russian Federation that wanted the Ukraine to become a member of the Eurasian Economic Union which it was establishing as a competitor with the EU for regional influence in the area of the former Soviet Union. President *Janukovich's* about-face was the last straw triggering the Euromaidan protests in Kiev which led to his deposition and flight to Russia in February 2014.

Also in February 2014, the Russian military took control of the Krim which thereupon seceded from Ukraine and acceded to the Russian Federation in a move that was considered as a forcible annexation and has accordingly not been recognized by most States.<sup>64</sup> In March and April 2014, pro-Russian separatists, with Russian military support, took control of major parts of the Eastern Ukrainian districts of Donetsk and Luhansk. The ensuing mixed international and non-international armed conflict has continued ever since. One particularly tragic event was the downing of a civilian Malaysia Airlines aircraft (MH 17) on its way from Amsterdam to Kuala Lumpur on 17 July 2014, apparently by separatists using an anti-aircraft missile provided by Russia, killing all 298 persons aboard (more than two thirds of them were Dutch nationals).<sup>65</sup> The cease-fire negotiated in Minsk in 2015<sup>66</sup> and supervised by the OSCE has remained fragile. The EU has reacted to these events by imposing sanctions on Russia as well as on natural and juridical persons considered as responsible for the violation of Ukrainian rights.<sup>67</sup>

The new Ukrainian government agreed to sign the political provisions of the Association Agreement in advance. Accordingly, the signing took place at an EU-Ukraine summit on 21 March 2014.<sup>68</sup> These parts of the Agreement were made provisionally applicable (effective since 1 November 2014).<sup>69</sup> The signatories confirmed their commitment to proceed with the signature and conclusion of the other parts of the Agreement which constituted, together with the signed parts, a single instrument.<sup>70</sup> The signing of the remaining parts of the Agreement took place on 27 June 2014 and their provisional application became effective on 1 January 2016.<sup>71</sup>

This background information makes it clear that the Ukraine has had to pay dearly for the decision to establish close economic and political relations with the EU, and

64 See the UN General Assembly Resolution 68/262 of 27/3/2014 (100:11 votes with 58 abstentions). See also UN General Assembly Resolution 71/205 of 19/12/2016 (70:26 votes with 77 abstentions); and ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism etc. (Ukraine v. Russian Federation)*, Order of 19/4/2017 (indication of provisional measures).

65 See UN Security Council Resolution 2166 (2014) of 21/6/2014. On the results of a Dutch-led international investigation into the incident see [www.nytimes.com/2016/09/29/world/asia/malaysia-air-flight-mh17-russia-ukraine-missile.html?\\_r=0](http://www.nytimes.com/2016/09/29/world/asia/malaysia-air-flight-mh17-russia-ukraine-missile.html?_r=0) (15/9/2017).

66 See UN Security Council Resolution 2202 (2015) of 17/2/2015.

67 See [https://eeas.europa.eu/headquarters/headquarters-homepage/4081/eu-ukraine-relations-factsheet\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/4081/eu-ukraine-relations-factsheet_en) (15/9/2017). See also CJEU, case C-72/15, *Rosneft*, EU:C:2017:236.

68 For the text of the Association Agreement, see OJ L 161 of 29/5/2014, p. 3.

69 Article 4 of the Council Decision 2014/295/EU of 17/3/2014, OJ L 161 of 29/5/2014, p. 1.

70 See the Final Act of the Summit, *ibid.*, p. 2130.

71 Council Decision 2014/668/EU of 23/6/2014, OJ L 278 of 22/8/2014, p. 1, as amended by Council Decision 2014/691/EU of 29/9/2014, OJ L 289 of 3/10/2014, p. 1.



almost 200 Dutch passengers on flight MH 17 were killed, all as a result of a Russian military aggression against Ukraine in reaction to its sovereign decision for a pro-EU policy. These sacrifices had all but been in vain because of the unnecessary mixity of the Association Agreement. In what would have been a monstrous irony of history, the whole project was nearly foiled by a populist campaign in the Netherlands that had played into Russian hands. In 2015, the Dutch Advisory Referendum Act had entered into force. It permits 300.000 voters to request a referendum on newly adopted laws and treaties. If such an act is rejected by a majority of voters in the referendum (which will be valid if the voter turnout reaches at least 30 %), the parliament is required to make a new decision. It can either repeal the act or confirm it in spite of popular opposition, so that the referendum is only consultative.

The Approval Act passed by the Dutch Parliament in 2015 as a condition for the ratification of the Association Agreement by the Netherlands was the first to be made subject to such a consultative referendum by several EU-sceptic NGOs. Their main goal was to weaken the EU.<sup>72</sup> The referendum took place on 6 April 2016. With a voter turnout of roughly 32 %, the Approval Act was rejected by 61 % of the votes cast (amounting to less than 20 % of the Dutch electorate or ca. 0.6 % of the EU population).<sup>73</sup> Although not legally binding, the outcome of the referendum could not be ignored politically by the Dutch government. As the referendum only concerned the Approval Act necessary for the ratification of the Association Agreement by the Netherlands, it does not prevent the Dutch representative in the Council from voting for the decision to conclude the Agreement on behalf of the EU.<sup>74</sup> Without ratification by the Netherlands, however, the Association Agreement cannot enter into force<sup>75</sup> and the desire of the parties “to strengthen and widen relations in an ambitious and innovative way”<sup>76</sup> will remain unfulfilled. It took until the end of 2016 to find a way out of this difficult situation.<sup>77</sup>

### 3. Interpretative Decision by the Heads of State or Government Provides Way Out

In the context of the European Council meeting of 15 December 2016, a solution was ultimately agreed on which consists of two parts – a passage in the European Council Conclusions<sup>78</sup> and an annexed Decision of the Heads of State or Government of the

72 *Brkan/Hoogenboom*, The Dutch referendum on the EU/Ukraine association agreement: What will the impact be?, EU Law Analysis of 14/4/2016.

73 See [https://en.wikipedia.org/wiki/Dutch\\_Ukraine%E2%80%93European\\_Union\\_Association\\_Agreement\\_referendum,\\_2016](https://en.wikipedia.org/wiki/Dutch_Ukraine%E2%80%93European_Union_Association_Agreement_referendum,_2016) (15/9/2017).

74 Pursuant to Article 218(8)(2) TFEU, the Council decision to conclude an association agreement must be adopted unanimously.

75 Article 486(2) of the Agreement.

76 See the first preambular paragraph of the Association Agreement.

77 On the different options, see *Van der Loo*, The Dutch Referendum on the EU-Ukraine Association Agreement: Legal options for navigating a tricky and awkward situation, CEPS Commentary of 8/4/2016.

78 European Council meeting (15 December 2016) – Conclusions, EUCO 34/16, paras. 23–24.



28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part.<sup>79</sup> The two relevant paragraphs of the European Council Conclusions read as follows:

“23. After having carefully noted the outcome of the Dutch referendum on 6 April 2016 on the bill approving the Association Agreement and the concerns expressed prior to the referendum as conveyed by the Dutch Prime Minister, the European Council takes note of a Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council (Annex), which addresses these concerns in full conformity with the Association Agreement and the EU treaties.

24. The European Council notes that the Decision set out in the Annex is legally binding on the 28 Member States of the European Union, and may be amended or repealed only by common accord of their Heads of State or Government. It will take effect once the Kingdom of the Netherlands has ratified the agreement and the Union has concluded it. Should this not be the case, the Decision will cease to exist.”

These are the main aspects of the Decision of the 28 Heads of State or Government which expresses their common understanding with regard to the Association Agreement in order to address the concerns of the Dutch opponents: The Agreement does not confer on nor promise to Ukraine the status of candidate for EU accession. It does not contain security guarantees for Ukraine. It does not grant Ukrainian citizens the right of entry into or residence or work in the EU. It does not oblige Member States to provide additional financial support to Ukraine. The fight against corruption is central to enhancing the relationship between the Parties. The Decision claims to be “in full conformity with the EU-Ukraine Association Agreement and the EU treaties”. It amounts to an instrument of international law in which some of the parties of the Association Agreement lay down an agreed interpretation of that Agreement.<sup>80</sup>

This solution in the form of a clarifying interpretative instrument is reminiscent of the solutions found when the Danish electorate had rejected the Treaty of Maastricht in 1992 and the Irish electorate the Treaty of Lisbon in 2008. On these occasions, however, it was the European Council that adopted the interpretative instrument, in each case paving the way for a second referendum with a positive outcome.<sup>81</sup> By way of contrast, the interpretative instrument concerning the EU-Ukraine Association Agreement was adopted by the Heads of State or Government of the Member States outside the institutional framework proper of the EU. In this respect, the solution is reminiscent of the abortive attempt by the EU and Member States to avert the Brexit.

<sup>79</sup> Ibid.

<sup>80</sup> See *Wessel*, *The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement*, *European Papers*, Vol. 1, 2016, No 3, pp. 1305-1309. *Wessel* quotes from a leaked document of the European Council’s Legal Counsel.

<sup>81</sup> European Council in Edinburgh (11 and 12 December 1992) – Conclusions of the Presidency, part B: Denmark and the Treaty on European Union; Brussels European Council (11 and 12 December 2008) – Presidency Conclusions, part I.

There, the Heads of State or Government, meeting within the European Council, agreed on a decision concerning a new settlement for the UK within the EU, referred to in and annexed to the Conclusions of the European Council of 19 February 2016.<sup>82</sup> In the UK context, the Member States had to be involved in their capacity as masters of the European Treaties, because the decision concerned the interpretation of these Treaties. In the EU-Ukraine Association Agreement context, the Dutch problem concerned the Member States' parts of the mixed Association Agreement. It was apparently assumed that only the Member States could solve interpretative questions in this regard.

On the basis of that solution found on the sidelines of the European Council meeting of 15 December 2016, the Dutch Parliament has meanwhile reaffirmed its Approval Act, paving the way for ratification of the Association Agreement by the Netherlands and thereupon also the EU.

#### 4. The Two Council Decisions on the Conclusion of the Association Agreement with Ukraine

On 11 July 2017, the Council adopted two decisions on the conclusion of the Association Agreement with Ukraine on behalf of the Union. They were adopted unanimously after obtaining the consent of the European Parliament, pursuant to Article 218(6)(a) and Article 218(8)(2) TFEU. Council Decision (EU) 2017/1247 is based on Article 217 TFEU and approves all of that Agreement with the exception of Article 17, relating to the treatment of third-country nationals legally employed as workers in the territory of the other party.<sup>83</sup> Council Decision (EU) 2017/1248 is based on Article 79(2)(b) TFEU and approves Article 17 of that Agreement.<sup>84</sup>

Why two Council decisions? They were necessary because of another peculiarity of Union law that also reduces the EU's international standing and influence. Article 17 of the Association Agreement falls within the scope of Title V of Part Three of the TFEU on the Area of Freedom, Security and Justice. In this regard, Protocol 21 on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and TFEU, relieves these two Member States of taking part in the adoption of measures based on Title V of Part Three of the TFEU. The same holds true for Denmark under Protocol 22 on the position of Denmark, also annexed to the TEU and TFEU.

Accordingly, Denmark, Ireland and the United Kingdom did not take part in the adoption of Council Decision (EU) 2017/1248 and are not bound by it or subject to its application. This means that Article 17 of the Association Agreement does not bind those three Member States as part of Union law (Article 216(2) TFEU) but only as

82 European Council meeting (18 and 19 February 2016) – Conclusions, EUCO 1/16. See further *Giegerich*, (fn. 15), pp. 17, 50 et seq.

83 OJ L 181 of 12/7/2017, p. 1.

84 OJ L 181 of 12/7/2017, p. 4.

part of public international law due to the mixity of that Agreement. As a matter of fact, the last preambular paragraph of the Association Agreement clarifies that issue:

“CONFIRMING that the provisions of this Agreement that fall within the scope of Part III, Title V of the Treaty on the Functioning of the European Union bind the United Kingdom and Ireland as separate Contracting Parties, and not as part of the European Union. [...] The same applies to Denmark [...]”<sup>85</sup>

Moreover, both Council Decisions contain an identically worded provision to the effect that the Association Agreement “shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals.”<sup>86</sup> Such provisions are now routinely included in Council decisions pursuant to Article 218(6) TFEU. They are intended to prevent judicial enforcement of provisions of international agreements concluded by the EU, making it easier for the Union to violate the rule *pacta sunt servanda* and get away with it.

The Association Agreement with Ukraine entered into force on 1 September 2017.<sup>87</sup>

## V. False Constitutional Arguments in Favour of Mixity: Democracy and Subsidiarity

### 1. European Integration as a Democratic Absurdity?

Member States’ continued insistence on the mixity of trade or association agreements which could be concluded by the EU alone because all their provisions fall within the Union’s exclusive or shared competences (facultative mixity) is sometimes justified by constitutional arguments, pointing in particular to the principle of democracy. Are mixed agreements really more democratic than sole-EU agreements because their conclusion requires ratification by all the national parliaments? An affirmative answer to this question implies that national solutions (or international solutions freely agreed on ad hoc by all the Member States) are more democratic than EU solutions, which leads into a nationalist and Eurosceptic trap. It reduces European integration to democratic absurdity, based on the assumption that true democracy is only possible within a nation state, so that the only democratic procedure to solve problems of an international scale allegedly consists of the conclusion of an agreement by all the states concerned. According to this logic, the principle of democracy requires a rule of unanimity in all international matters or, in other words, a veto right of each individual state – as it is indeed guaranteed in the case of mixed agreements.

This line of argument overlooks two important interrelated aspects: The low problem-solving capacity of the individual European states, in particular with regard to foreign trade and investment and associations, and the undemocratic character of granting each of them a veto over matters of common concern that they can only

<sup>85</sup> OJ 2014 L 161 of 29/5/2014, p. 6.

<sup>86</sup> Article 5 of Decision (EU) 1247/2017 and Article 3 of Decision (EU) 1248/2017.

<sup>87</sup> OJ L 193 of 25/7/2017, p. 1.

effectively deal with together. On a global scale, the EU Member States range from micro to medium-size states. Acting individually, they obviously cannot accomplish much, in particular in the area of trade and association policy. Accordingly, the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission recently declared:

“Unity is both a necessity and our free choice. Taken individually, we would be side-lined by global dynamics. Standing together is our best chance to influence them, and to defend our common interests and values.”<sup>88</sup>

If “unity” and “standing together” is a necessity in particular with regard to trade and associations, it should not be thwarted by a dysfunctional decision-making procedure which places those matters of European concern at the mercy of individual Member States or even their subunits. The principle of democracy, as it is embodied in the Treaties and the constitutions of the Member States, does not require the nonsensical. Rather, democratic requirements are fully met if the decision by the EU to conclude an agreement is made by a qualified majority of the Council and majority of the European Parliament. That follows from Article 10 TEU according to which the functioning of the Union is founded on representative democracy, as embodies in the European Parliament and the Council.

## 2. The Principle of Subsidiarity in the Context of International Agreements of the EU

The Treaties are indeed based on the assumption that the democratic legitimacy of decisions is inversely proportional to the level of government where these are made: The closer to the citizen decision are taken, the more legitimate they are because the more potential influence the individual citizen has on them. The Preamble of the TEU therefore underlines that in the Union – whose functioning is founded on representative democracy (Article 10 TEU) – decisions are to be taken “as closely as possible to the citizen in accordance with the principle of subsidiarity”.<sup>89</sup> This is confirmed by Article 10(3) sentence 2 TEU. The principle of subsidiarity (a variety of the principle of democracy in multilevel systems of government) is defined in Article 5(3) TEU as follows:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

88 The Rome Declaration of 25/3/2017, [www.consilium.europa.eu/press-releases-pdf/2017/3/47244656633\\_en.pdf](http://www.consilium.europa.eu/press-releases-pdf/2017/3/47244656633_en.pdf) (15/9/2017).

89 Preamble of the TEU, para. 13.

Where the Treaties confer an exclusive competence on the Union, as in regard of the common commercial policy,<sup>90</sup> they determine that the EU is the only appropriate decision-making level and this determination cannot be challenged by considerations of subsidiarity or democracy. Where the Treaties confer on the Union competences shared with the Member States, the principle of subsidiarity prevents the Union from exercising its competences unless the objective of the intended action cannot be sufficiently achieved by the Member State and be better achieved at Union level.<sup>91</sup> With regard to external action, however, these two conditions will be fulfilled in most cases because only by joining forces under the flag of the EU, the Member States will have a chance of influencing global dynamics, defending their interests and promoting their common values. In particular, as a Union they have a much better chance of concluding favourable trade agreements and effective association agreements.

The troubles caused by the mixity of CETA and the EU-Ukraine Association Agreement have clearly demonstrated how important it is that the Union speaks with one voice internationally. If it fails to ensure ratification of treaties after many years of negotiations because of dysfunctional internal decision-making procedures, it will gamble away its credibility as a treaty partner and global actor. As the aforementioned troubles have shown, the objectives of the shared competences parts of CETA and the EU-Ukraine Association Agreement cannot be sufficiently achieved by the Member States. Thus, the principle of subsidiarity does not require mixity in either of these two instances.

### **3. The Principle of Democracy: Majority Rule, not Minority Veto**

A cross-check with the principle of democracy confirms that result. It is obviously undemocratic that a regional parliament representing less than one per cent of the citizens of the Union has a veto over the trade agreements of the EU. It is just as undemocratic that less than 20 % of the Dutch electorate, also constituting less than one per cent of the citizens of the Union, have a veto over an association agreement of the EU which is an important instrument of political and economic stabilization in our immediate neighbourhood. If democracy means majority rule, it means above all that the majority must be able to rule without being vetoed by very small minorities. Otherwise the respective regime will reduce itself to absurdity and discredit the democratic form of government as such.

This does not call in question the wisdom of efforts to find a compromise agreeable to all and the consensus method as the preferable method of decision-making. It only underlines the imperative of having a default rule which enables the majority to overcome unreasonable resistance by the minority, thereby also promoting the willingness to compromise by all parties. But unanimous decision-making, requiring the positive

<sup>90</sup> Article 3(1)(e) TFEU.

<sup>91</sup> See also the Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

consent of all the Member States for a decision to be taken, is inherently undemocratic because it entrenches the rule of the minority.

#### 4. Ensuring Democratic Decisions at EU Level with regard to International Agreements

Democratic decision-making with regard to trade and association agreements of the EU must be and is in fact ensured at Union level. In both cases, the decision to conclude the agreements is taken jointly by the Council and the European Parliament.<sup>92</sup> The provisional application of international agreements by the EU which are subject to the consent of the European Parliament is made conditional on prior parliamentary approval. Thus, the provisional application of most parts of both CETA and the EU-Canada Strategic Partnership Agreement by the EU began on 1 April 2017, after having been approved by the European Parliament on 15 February 2017.<sup>93</sup> With regard to trade agreements, the Council usually acts by a qualified majority.<sup>94</sup> With regard to association agreements, however, Article 218(8)(2) TFEU requires unanimity in the Council.

According to Article 10(1), (2) TEU, the Union system of representative democracy rests on two pillars: The European Parliament, in which citizens are directly represented, and the Council,<sup>95</sup> in which Member States are represented by their governments, themselves democratically accountable to their national parliaments. Member States can regulate the parliamentary accountability of their representatives in the Council, for instance in the form of parliamentary authority to give them instructions.<sup>96</sup> This gives national parliaments an indirect part in EU decision-making processes and enhances the democratic legitimacy of Council decisions.<sup>97</sup>

A further avenue of enhancing the democratic legitimacy of the Union's international agreements is the citizens' initiative pursuant to Article 11(4) TEU and Article 24(1) TFEU.<sup>98</sup> According to a recent judgment of the General Court concerning

92 See Article 218(6)(a)(v) read together with Article 207(2) TFEU with regard to trade agreements and Article 218(6)(a)(i) TFEU with regard to association agreements.

93 See [www.europarl.europa.eu/news/en/press-room/20170209IPR61728/ceta-meps-back-eu-canada-trade-agreement](http://www.europarl.europa.eu/news/en/press-room/20170209IPR61728/ceta-meps-back-eu-canada-trade-agreement) (15/9/2017).

94 Article 207(4) TFEU read together with Article 16(4) and (5) TEU, Article 3 of the Protocol (No. 36) on Transitional Provisions, the Protocol (No. 9) on the Decision of the Council relating to the Implementation of Article 16(4) TEU and Council Decision 2009/857/EC of 13/12/2007, OJ L 314 of 1/12/2009, p. 73.

95 The European Council is not mentioned here because it plays no role in the conclusion of international agreements by the EU.

96 See, e.g., the German *Integrationsverantwortungsgesetz* (Law on Integration Responsibility) of 22/9/2009, BGBl. 2009 I, 3022.

97 See also Article 12 TEU and the Protocol (No. 1) on the Role of National Parliaments in the EU.

98 See also Regulation (EU) No. 211/2011 of 16/2/2011 on the citizens' initiative, OJ L 65 of 11/3/2011, p. 1, consolidated version available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011R0211-20150728&qid=1495708486772&from=EN> (15/9/2017).

the “Stop TTIP” initiative, citizens of the Union can also submit a proposal to the European Commission which aims at ceasing international negotiations and preventing the conclusion of an international agreement such as CETA or TTIP.<sup>99</sup>

#### **D. Conclusion: The Interdependence Trap of Multilevel Government Should not Side-Line the EU as a Global Actor**

Unfortunately, nationalism and anti-EU sentiment are currently growing in many if not all EU Member States. We will probably see more political manoeuvres of the Wallonian and Dutch kind in the future, in an effort to torpedo EU external action. If we are unable to overcome the craze for mixity where the Treaties do not require it, the Union will be made internationally irrelevant. Mixed agreements should therefore only be concluded when inevitable. And they are only inevitable if essential provisions, whose inclusion in the agreements is absolutely necessary, regulate issues which are within the exclusive competence of the Member States, provided that those provisions are not only ancillary to the parts of the agreement falling within the Union’s competences.<sup>100</sup> In all other cases, the Union should use its exclusive and shared competences to conclude such agreements alone. The principles of subsidiarity and democracy do not stand in the way. This means that today, both trade agreements and association agreements can be concluded in the form of sole-EU agreements. Even if there were non-ancillary provisions within the exclusive competence of the Member States, it would usually be possible to cut them out of the EU agreement and place them in a separate companion agreement. While the former can be concluded as a sole-EU agreement, only the latter will have to be ratified by the Member States. That would make the EU agreement independent of national political obstacles.

The deviating longstanding practice of turning too many treaties of the EU into mixed agreements has obviously led us into the interdependence trap of multilevel government.<sup>101</sup> Their desire to increase the input legitimacy of decisions on the Union’s international agreements by involving the Member State parliaments has seduced mixity advocates to neglect the EU’s output legitimacy. No matter how high the input legitimacy of a governmental system, if its output legitimacy is zero, the overall legitimacy will also tend towards zero. Being caught in the interdependence trap inevitably reduces the output of the Union. If the EU is unable to deliver added value, the output legitimacy as well as the overall legitimacy of the integration project will be lost in the eyes of the citizens of the Union. Such a development, which some

99 GC, case T-754/14, *Efler and others v. European Commission*, EU:T:2017:323. Karatzia, New Developments in the context of the European Citizens’ Initiative: General Court rules on ‘Stop TTIP’, EU Law Analysis of 18/5/2017.

100 Opinion of AG Wahl to CJEU, opinion procedure 3/15, *Marrakesh Treaty*, EU:C:2016:657 and above under C.II.2.

101 The interdependence trap was initially described and analysed by Scharpf, *Die Politikverflechtungs-Falle: Europäische Integration und deutscher Föderalismus im Vergleich*, Politische Vierteljahresschrift 26 (1985), p. 323 et seq., for the German multilevel system of government and later transferred to the EU system.

Eurosceptic circles may be aiming at, would certainly serve neither the interests of the Union nor of its Member States and citizens. Recent events in the wider world should teach us a lesson in how necessary European unity is both inwards and outwards.

In their capacity as masters of the Treaties, the Member States have charged the EU with an ambitious mission in the wider world. They have also equipped the EU with the exclusive and shared competences necessary to become an effective global actor in all policy areas but the Common Foreign and Security Policy. In particular, this holds true for trade and association agreements. They have moreover guaranteed the democratic legitimacy and effectiveness of the EU decision-making procedures concerning the conclusion of such agreements, except for the unanimity requirement when the Council decides on association agreements. Yet, in their capacity as implementers of the Treaties, the Member States have failed to make wise and proper use of the instruments of their own making. Some Member States have introduced dysfunctional internal decision-making procedures which are likely to prevent the EU from becoming an effective global actor because they give veto powers to political minorities.

In answer to the question posed in the title of this paper, the Member States have not yet permitted the EU to become the effective global actor corresponding to their own intentions proclaimed in the Treaties. Instead, they jealously and desperately try to maintain their own international presence although they know and actually concede that individually they are side-lined by global dynamics and have no chance to defend their common interests and values.<sup>102</sup> However, the international influence which they deny the Union does not accrue to them. Rather, both the Union and Member States definitely lose it to other global actors. Do the Member States want us all to be the losers of the global power game?

102 See the Rome Declaration of 25/3/2017, (fn. 88).