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## THE NON-RATIFICATION OF MIXED AGREEMENTS: LEGAL CONSEQUENCES AND SOLUTIONS

GUILLAUME VAN DER LOO AND RAMSES A. WESSEL\*

### Abstract

*The 2016 referendum in the Netherlands on the EU-Ukraine Association Agreement and the Walloon objection in Belgium to sign CETA triggered the question of the consequences of the non-ratification of mixed agreements that are (to be) concluded between the EU, its Member States and one or more third parties. This non-ratification would lead to so-called “incomplete” mixed agreements. The present article discusses the legal problems connected to incomplete agreements and points to the differences between bilateral and multilateral agreements. Now that mixity seems to have become more common – due to the wider scope of Free Trade Agreements – and EU citizens and their parliaments become more outspoken with respect to the content of these agreements, it seems just a matter of time before we are faced with problems of non-ratification. The unclear division of external competences between the EU and its Member States makes it difficult to offer clear-cut solutions. Overall, however, it does not seem advisable to rely on ex post facto solutions for non-ratification problems; we may have to find ways to allow potential problems to be on the negotiation table at an earlier stage.*

### 1. Introduction

The 2016 referendum in the Netherlands on the EU-Ukraine Association Agreement<sup>1</sup> triggered the question of the consequences of a possible Dutch

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1. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (O.J. 2014, L 161/3). The referendum was the first that was organized on the basis of the new Dutch Advisory Referendum Act, which allows for a non-binding advice of the population on acts that have already been approved by Parliament. The turnout was low (32%) but just enough to render the result valid. Of that 32%, 61.1% of the voters indicated being against the approval act: a small minority of the total electorate in the Netherlands and, indeed, a very small fraction of the combined electorates in the other EU Member States and Ukraine. See further Van der Loo, “The Dutch referendum on the

non-ratification of that agreement. Subsequently, in October 2016, the EU and Canada were confronted with a situation in which one of the Belgian regions, Wallonia, threatened to block not the ratification, but even the signing of an international agreement, CETA,<sup>2</sup> the trade agreement between the EU, its Member States and Canada. Similar situations may arise in the case of other planned international agreements. This contribution is not about the question of whether referendums are fit to be used in relation to international agreements that have been negotiated over a period of many years and *de facto* become subject to the preferences of perhaps a very small fraction of the population in the EU and the involved third country/countries. Nor is it about the question to what extent sub-national authorities should be able to play a role in international relations. Rather, it aims to answer a new and somewhat practical legal question: what are the legal consequences if one of the EU Member States is unable or unwilling to sign or ratify an agreement that was negotiated between the EU, its Member States and one or more third parties?

The question flows from the fact that these cases deal with so-called mixed agreements: agreements to which both the EU and its Member States are a party. These mixed agreements can be bilateral (EU/Member State and third party) or multilateral (the EU, its Member States and usually many other States are all individual parties to the agreement).<sup>3</sup> In the case of bilateral agreements, the EU and its Member States are presented as one party despite the need for all of them to sign and ratify the agreement. Entry into force depends on both the EU and the Member States having ratified the agreement, and they remain responsible on the basis of their respective competences. In the case of multilateral mixed agreements, the EU and its Member States are more clearly parties in their own right, despite the fact that also in these cases third States often request clarity as to the division of competences.<sup>4</sup>

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 within

EU-Ukraine Association Agreement: What’s next?”, (2017) *Netherlands Yearbook of International Law 2016*, (forthcoming).

2. The Comprehensive Economic and Trade Agreement (CETA) was finally signed at the EU-Canada Summit on 30 Oct. 2016 (O.J. 2017, L 11/23).

3. See more generally on mixed agreements, 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 Hillion and Koutrakos (Eds.), *Mixed Agreements in EU Law Revisited – The EU and its Member States in the World* (Hart Publishing, 2010).

4. Delgado Casteleiro, “EU declarations of competence to multilateral agreements: A useful reference base?”, (2012) *EFA Rev.*, 491–510.

exclusive Union competences and partly within Member State competences,<sup>5</sup> it is *optional* if it covers an area of shared competences (whether or not together with areas falling within exclusive EU competences).<sup>6</sup> In the case of the latter, the choice between a mixed agreement or an EU-only agreement is a matter for the discretion of the Council.<sup>7</sup> If an agreement covers exclusive Union competences only, mixity is *excluded*. In this 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.<sup>8</sup>

At the same time, 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 who has competence to conclude an agreement.<sup>9</sup> As openly phrased by EU Trade Commissioner Cecilia Malmström in relation to CETA: "From a strict legal standpoint, the Commission considers this agreement to fall within exclusive EU competence. However, the political situation in the Council is clear, and we understand the need for proposing it as a 'mixed' agreement, in order to allow for a speedy signature."<sup>10</sup> Usually, the Commission's pragmatism results in the opposite view: as the ratification process of mixed agreements can easily

5. As A.G. Kokott famously mentioned in her Opinion in Case C-13/07, *Commission v. Council* (removed from the register) individual provisions falling within the competences of Member States, however secondary, "infect" the agreement as a whole and trigger mixity (i.e. the so-called "Pastis doctrine") EU:C:2009:190, para 121. However, this argument was never explicitly recognized by the Court.

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

7. Opinion of A.G. Wahl, in Opinion 3/15, EU:C:2016:657, paras. 111–120; Opinion of A.G. Sharpston in Opinion 2/15, *EU–Singapore Free Trade Agreement* (pending), EU:C:2016:992 paras. 73–75.

8. On the difference between *a priori* exclusivity and supervening exclusivity, see Dashwood, "Mixity in the era of the Treaty of Lisbon", in Hillion and Koutrakos, op. cit. *supra* note 3, pp. 351–366; Rosas, "EU external relations: exclusive competence revisited", (2015) *Fordham International Law Journal*, 1073–1096; and De Baere, "EU external action", in Barnard and Peers (Eds.) *European Union Law* (OUP, 2014), pp. 704–750.

9. Opinions 1/94 of 15 Nov. 1994, EU:C:1994:384, para 107, and 1/08 of 30 Nov. 2009, EU:C:2009:739, para 127.

10. Commission – Press release "European Commission proposes signature and conclusion of EU–Canada trade deal", <europa.eu/rapid/press-release\_IP-16-2371\_en.htm>.

take years (and indeed runs the risk of being slowed-down by national parliamentary objections or referendums), “EU-only” agreements are the preferred option when and where possible. 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,<sup>11</sup> and increases their presence and visibility during the process of concluding the agreement and on the international stage.

However, mixity also has a positive side. 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 the EU to go ahead with ambitious agreements without getting stuck in endless competence battles. As observed by Advocate General 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”.<sup>12</sup> Therefore, mixity is not always the result of a strict legal review of the Union’s competences, but is often a political decision. 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.”<sup>13</sup>

However, in other cases the Member States may want to avoid mixity, for example when a swift ratification is deemed required. For political reasons, mixity was also avoided for the conclusion of the EU-Kosovo Association Agreement (AA). Although AAs are traditionally mixed, the EU-Kosovo AA was concluded as an EU-only agreement because several Member States wanted to avoid a *de facto* recognition of Kosovo through their national ratification procedure of the agreement.<sup>14</sup>

While the popular view may be that the EU is increasingly taking over international relations from its Member States,<sup>15</sup> mixed agreements seem to be here to stay. Since the entry into force of the Lisbon Treaty, we found 31

11. Art. 218(8) TFEU.

12. Opinion of A.G. Sharpston in Case C-240/09 *Lesoochranárske zoskupenie*, EU:C:2010:436, para 56.

13. Maresceau, “A typology of mixed bilateral agreements”, in Hillion and Koutrakos op. cit. *supra* note 3, pp. 11–29 at 16.

14. Van Elsuwege, “The Stabilisation and Association Agreement between the EU and Kosovo: An example of legal creativity”, 2017 *forthcoming*.

15. See more extensively on this question: Wessel, “Can the European Union replace its Member States in international affairs? An international law perspective”, in Govaere, Lannon, et al. (Eds.), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers, 2013), pp. 129–147.

international agreements that were signed as mixed agreements.<sup>16</sup> Mixed agreements still cover a wide range of policy areas, including those that primarily fall within the EU's exclusive competences. Just as in the pre-Lisbon era, all broad framework agreements, such as Association Agreements or Partnership and Cooperation Agreements (PCAs) are mixed.<sup>17</sup> Paradoxically, despite the broadening of the Common Commercial Policy (CCP) in Lisbon Treaty,<sup>18</sup> also all post-Lisbon Free Trade Agreements (FTAs) have been signed as mixed agreements.<sup>19</sup> Moreover, in Opinion 2/15 Advocate General Sharpston came to the conclusion that also the EU-Singapore FTA needs to be concluded by the EU and the Member States acting jointly, because the agreement covers several provisions falling within shared competences, and even one falling within the exclusive competences of the Member States.<sup>20</sup> If the Court were to follow this reasoning, the future of similar envisaged ambitious EU FTAs, such as TTIP or the EU-Japan FTA, also looks mixed. In addition, several sectoral agreements, for example in the area of aviation and environment, were concluded by the Union and the Member States jointly.<sup>21</sup> Perhaps ironically, an area which is not at all characterized by mixity is the Common Foreign, Security and Defence Policy; CFSP and CSDP agreements are exclusively concluded by the Union.<sup>22</sup>

16. Authors' own calculation on the basis of a combined reading of the EU Treaties Office Database <ec.europa.eu/world/agreements/default.home.do> and the Council's database of agreements <www.consilium.europa.eu/en/documents-publications/treaties-agreements/>.

17. See e.g. the EU-Georgia AA (O.J. 2014, L 261/4), the EU-New Zealand Partnership Agreement on Relations and Cooperation (O.J. 2016, L 321/3) and the EU-Mongolia Framework Agreement on Partnership and Cooperation (O.J. 2012, L 134/4).

18. See quite extensively Bungenberg and Herrmann (Eds.), *Common Commercial Policy after Lisbon* (Springer, 2013).

19. This is the case for both "stand-alone" FTAs (e.g. CETA, cited *supra* note 2, and the EU-Korea FTA, O.J. 2011, L 127/6) and FTAs included in broader (association) agreements (e.g. the Deep and Comprehensive FTAs included in the Association Agreements concluded with Georgia (cited *supra* note 17), Ukraine (cited *supra* note 1) and Moldova (O.J. 2014, L 260/4)). A notable exception is the FTA included in the EU-Kosovo AA (on this point, see Van Elsuwege, *op. cit. supra* note 14).

20. See Opinion A.G. Sharpston, in Opinion 2/15, *EU-Singapore Free Trade Agreement*. The provisions where, according to the A.G., the EU shares its competence with the Member States are mentioned in para 562 of the Opinion. The provision of the FTA concerning the termination of bilateral investment agreements concluded between the Member States and Singapore falls, according to the A.G., within Member State competences (para 563).

21. See e.g. the EU-Jordan Euro-Mediterranean Aviation Agreement (O.J. 2012, L 334/3); and the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (O.J. 2013, L 46/4).

22. See recently also Wessel, "Lex Imperfecta: Law and integration in European Foreign and Security Policy", (2016) *European Papers: A Journal on Law and Integration*, No. 2, 439–468.

Irrespective of the EU's own global ambitions – as for instance reflected in Article 3(5) and 21 TEU – Member States have thus proven to be indispensable parties to many of the international legal relationships the Union entered into. Despite the extension of EU exclusivity in the area of Common Commercial Policy,<sup>23</sup> the post-Lisbon external relations regime remains unclear as far as the exact competence division is concerned, leaving the Court of Justice of the European Union to decide on the line of demarcation between EU and Member State external competences.<sup>24</sup>

Given that the non-ratification of mixed agreements is not part of the daily practice of the EU and its Member States, one could rightfully question the practical relevance of the issues raised by the present contribution. At the same time, these are questions that become more and more relevant now that Member States (but perhaps above all their citizens) show an increasing awareness of the impact of international agreements and openly consider not ratifying certain agreements. While, on the one hand mixity may be an attractive option as it serves as a convenient political escape from the “jungle of external competences”,<sup>25</sup> the non-ratification by one or several Member State(s) would trigger several complex legal questions.

The consequences of non-ratification of a mixed agreement, in particular bilateral mixed agreements, are hardly covered in the existing literature<sup>26</sup> or the case law of the Court of Justice.<sup>27</sup> Therefore the aim of the present contribution is to clarify a number of legal questions related to the non-ratification of mixed agreements. In particular, the practice and legal challenges for the conclusion of *incomplete* mixed agreements will be analysed.<sup>28</sup> These would be mixed agreements concluded by the Union and

23. Art. 207 TFEU extended the scope of the CCP as to encompass not only trade in goods but also trade in services, commercial aspects of intellectual property and foreign direct investment. See further Bungenberg and Herrmann, *op. cit. supra* note 18.

24. See e.g. Case C-414/11, *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v. DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, EU:C:2013:520; Opinion 3/15, *Marrakesh Treaty related to the question of EU exclusive competence in the area of copyrights of published works for persons with reading disabilities*, EU:C:2017:114 and Opinion 2/15, *EU-Singapore Free Trade Agreement* (pending).

25. Klamert, *op. cit. supra* note 6, at 184.

26. For notable exceptions, see Dolmans, *Problems of Mixed Agreements* (Asser Institute, 1985); Heliskoski, *op. cit. supra* note 3; and Kleimann and Kübek, “The signing, provisional application, and conclusion of trade and investment agreements in the EU. The case of CETA and Opinion 2/15” (2016), *EUI Working Papers* 2016/58.

27. Opinion of A.G. Sharpston in Opinion 2/15.

28. The term “incomplete” mixed agreements was introduced by Schermers, “A typology of mixed agreements”, in O’Keeffe and Schermers (Eds.), *Mixed Agreements* (Kluwer Law, 1983), p. 26. Also Rosas discusses this concept (Rosas, “The European Union and mixed agreements”, in Dashwood and Hillion (Eds.), *The General Law of EC External Relations* (Sweet & Maxwell, 2000), pp. 203–204). Hix uses the term “imperfect” mixed agreements to

several, but not all, Member States. After the ratification by the Union and the other Member States, such “incomplete” mixed agreements would fully enter into force in the territory of the ratifying Member States (i.e. covering both the Union and Member States’ competences of the agreement). In this scenario, Member State(s) that did not ratify the agreement would (only) be bound by the areas of the agreement falling within the competences of the Union pursuant to Article 216(2) TFEU. Whereas the conclusion of such incomplete mixed agreements seems an attractive option in case a single Member State would refuse to ratify a mixed agreement, it will be illustrated that several key features of mixed agreements complicate such a scenario, in particular in the case of bilateral mixed agreements.

This article will first analyse the legal implications of non-ratification by one, or several, Member States for the conclusion of the agreement (2) and the practice of incomplete mixed agreements (3). Then, the legal hurdles for the conclusion of such incomplete mixed agreements are discussed (4), focusing on ratification coordination between the EU and the Member States (4.1) and the lack of a clear delimitation of competences between these parties (4.2). Thereafter, the implications of such a non-ratification on the provisional application of mixed agreements is explored (5). Finally, some alternative solutions are formulated that could contribute to overcoming the legal deadlock of non-ratification by a Member State (6).

## 2. Legal consequences of non-ratification for the conclusion of mixed agreements

Even in the case of bilateral mixed agreements, both the Union and its Member States are contracting parties.<sup>29</sup> When such an agreement is negotiated, each of the parties will have to act within the boundaries of their own competences.<sup>30</sup> 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”.<sup>31</sup> 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

describe this phenomenon (Hix, “Mixed agreements in the field of Judicial Cooperation in Civil Matters: Treaty-making and legal effects” in Martenczuk and Van Thiel (Eds.) *Justice, Liberty, Security: New Challenges for EU External Relations* (Brussels University Press, 2008), pp. 211–256).

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

30. Case 28/12, *Commission v. Council*, EU:C:2015:282, para 47.

31. See e.g. CETA.



competences, on the one hand, and [the third country], on the other”.<sup>32</sup> 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.<sup>33</sup> Usually the Council decision on the signature (and provisional application) of the agreement authorizes the President of the Council to designate the person(s) empowered to sign the agreement on behalf of the Union, whereas the different national constitutional procedures prescribe who will sign the agreement for their respective Member State. In order to enter into force, the specific procedures included in the agreements, need to be fulfilled.<sup>34</sup>

Non-ratification of a multilateral mixed agreement by one (or several) Member States is as such not always problematic because most agreements can enter into force once a number of signatory States have ratified the agreement.<sup>35</sup> Therefore, the agreement can enter into force, including for the EU, without the participation of several Member States, leading to what we referred to above as an “incomplete” multilateral mixed agreement. These agreements become less “incomplete” when Member States join at a later stage, something that is occasionally expressly allowed for in the Council Decision concluding the agreement.<sup>36</sup> The situation for bilateral mixed agreements is more complex as these include an entry into force-clause stating that the agreement can only enter into force after all “the Parties” have deposited their respective instrument of ratification or approval.<sup>37</sup> Thus, if one Member State refused to ratify an agreement, the treaty bond would appear to

32. E.g. Art. 55 EU-New Zealand Agreement on Relations and Cooperation (O.J. 2016, L 304/1); Art. 34 EU-Canada Strategic Partnership Agreement (O.J. 2016, L 329/45) and Art. 482 of the EU-Ukraine AA.

33. Art. 12(1) Vienna Convention on the Law of Treaties (VCLT).

34. Art. 14(1) VCLT.

35. E.g., the Paris Agreement adopted under the United Nations Framework Convention on Climate Change enters into force when at least 55 Parties to the Convention, accounting in total for at least an estimated 55 % of the total global greenhouse gas emissions, have deposited their instruments of ratification, acceptance, approval or accession (Art. 21(1)) (O.J. 2016, L 282/4). After the EU’s ratification in October 2016 both thresholds were crossed so that the agreement could enter into force on 4 Nov. 2016.

36. In 2012 the EU acceded to the Treaty of Amity and Cooperation (TAC) in Southeast Asia and the European External Action Service (EEAS) confirmed in a 2006 Council Declaration that the EU’s accession to the TAC in relation to CFSP areas was “without prejudice to Member States’ right to accede to the TAC, and to act independently in relation to the same areas, save where they are required to comply with a Joint Action or Common Position adopted under the TEU.” Referred to in Miller, “EU External Agreements: EU and UK procedures”, *House of Commons Briefing Paper*, No CBP 7192, 28 March 2016.

37. Art. 486(2) Ukraine AA; Art. 15.10 Korea FTA (cited *supra* note 19); Art. 138 EU-Serbia AA (O.J. 2013, L 278/16). In most cases the General Secretariat of the Council is the Depository of the Agreement. Other agreements require that the Parties notify each other of the completion of their respective legal procedures (e.g. Art. 58(1) EU-New Zealand Partnership Agreement on Relations and Cooperation, cited *supra* note 32).

remain incomplete,<sup>38</sup> and the agreement cannot enter into force. It has to be noted that if a Member State has decided that it will not ratify an agreement, it needs to notify this to the other party in conformity with the procedures of the agreement.<sup>39</sup> Thus, the mere rejection of a mixed agreement by a national parliament or referendum in a Member State has no legal implications beyond the domestic legal order as long as there is no notification of the non-ratification.

Significantly, the refusal of a single Member State to ratify a bilateral mixed agreement implies that the agreement cannot enter into force for the EU and the remaining Member States, even in the case when they all have completed their respective ratification procedures (together with the third State). However, in practice the EU only ratifies mixed bilateral agreements after all the Member States have done so (cf. below). This would mean that a Member State can block the EU from exercising its competences, even with regard to those areas of mixed agreements falling within exclusive Union competences.<sup>40</sup> We would maintain that the principle of exclusivity, as enshrined in Article 2(1) TFEU, precludes Member States from vetoing the application of those areas of a mixed agreement that fall within EU exclusive powers.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> Therefore, the ratification procedure of the Member States can only cover the elements of the agreement falling within their competences, i.e. provisions falling within exclusive Member State competences or within shared competences that are not exercised by the Union or which did not become exclusive through the *ERTA* doctrine. The Council decision concluding the agreement for the Union can only cover the elements falling within Union competences.

Although Member States remain free after their signature to ratify those provisions of the agreements falling within their own competences, this freedom is not absolute. Under international law, Member States are obliged not to defeat the object and purpose of the agreement (Art. 18(a) VCLT) and,

38. Heliskoski, op. cit. *supra* note 3, at 92.

39. 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.

40. Heliskoski, op. cit. *supra* note 3, 92–95.

41. On this point, see also Kleimann and Kübek, op. cit. *supra*, note 26, at 23.

42. Case C-28/12, *Commission v. Council*, para 47.

43. A.G. Sharpston, Opinion in Opinion 2/15, para 568.

according to EU law, they are bound by the duty of sincere cooperation expressed in Article 4(3) TEU.<sup>44</sup> 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.<sup>45</sup> The Court even explicitly recognized this principle with regard to the ratification of mixed agreements.<sup>46</sup> Moreover, the Court 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”<sup>47</sup>

With regard to mixed agreements, the Court has indeed established specific procedural obligations that stem from the duty of cooperation. 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.<sup>48</sup> 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.<sup>49</sup> 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”,<sup>50</sup> this principle cannot be stretched so as to oblige Member States to ratify a mixed agreement. If this were 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.<sup>51</sup>

44. See e.g. Hillion, “Mixity and coherence in EU external relations: The significance of the duty of cooperation”, in Hillion and Koutrakos, op. cit. *supra* note 3, pp. 87–115; as well as Klamert, op. cit. *supra* note 6.

45. See, *inter alia*, Opinions 1/94 of 15 Nov. 1994, EU:C:1994:384, para 108, and 2/00 of 6 Dec. 2001, EU:C:2001:664, para 18; and Case C-246/07, *Commission v. Sweden*, EU:C:2010:203, para 73, and Case C-28/12, *Commission v. Council*, para 54.

46. Opinion 2/91, *ILO Convention 170*, EU:C:1993:106, para 38. Ironically, ILO Convention 170 (at issue in Opinion 2/91) has been ratified by 7 EU Member States only.

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

48. Case C-459/03, *Commission v. Ireland (MOX Plant)*, EU:C:2006:345, para 179.

49. C. Hillion, op. cit. *supra* note 44, at p. 101.

50. Opinion of A.G. Mengozzi, Case C-28/12, *Commission v. Council*, EU:C:2015:43, para 63.

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

Member States are parties to the agreement as sovereign States, “not as a mere appendage of the European Union”.<sup>52</sup> However, the duty of cooperation can be read as an obligation to initiate the national ratification procedure (e.g. parliamentary approval procedure), but without influencing the outcome of this procedure. It can even be interpreted as including a “best efforts” obligation to try to ratify the agreement, in particular after the agreement has been signed. Such a best efforts obligation could perhaps stem not only from Article 18(a) Vienna Convention on the Law of Treaties (VCLT), but also from the fact that on several occasions during the negotiation process, but before its signature, Member States have the possibility to express their concerns or objections with regard to (parts of) the envisaged agreement (e.g. when authorizing the opening of the negotiations and during the adoption of the negotiating directives; in the specific Council committee monitoring and assisting the negotiator (e.g. the Trade Policy Committee); and when adopting the Council decision signing the agreement). However, it is true that only in the exceptional cases listed in Article 218(8) TFEU requiring unanimity in the Council, can a Member State block this process.

In the context of the duty of cooperation, it has also been argued that the reason and interest of a Member State to delay or refuse the ratification of a mixed agreement is decisive.<sup>53</sup> While, in general, the national interest does not form an argument to escape EU obligations, Klamert argues that Article 4(3) TEU only excuses a Member State for delaying or withholding ratification “if the Member State has good reasons to do so”.<sup>54</sup> We see this as a somewhat tricky exception and it would certainly not apply, as recognized by that author, if a Member State delayed ratification to, for instance, extract commercial concessions from a third country. Also the area of competence covered by the specific reason to delay or refuse the ratification could be relevant. In line with our analysis above, Advocate General Sharpston argued that if a Member State refused 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.<sup>55</sup>

It has been noted that a Member State’s refusal to ratify an agreement can also block the Union’s ratification of the agreement. As discussed below, traditionally the Union only ratifies the agreement (i.e. by adopting the

52. A.G. Sharpston, Opinion in Opinion 2/15, para 77.

53. Klamert also argues that the stronger and more specific the interest of the Union in the expeditious entry into force of an agreement is, the stronger the obligation on the Member States to ratify (op. cit. *supra* note 6).

54. *Ibid.*, p. 202.

55. A.G. Sharpston, Opinion in Opinion 2/15, para 568.

Council decision concluding the agreement) after all the Member States have done so. If in the process of the national ratification procedures a Member State decides not to ratify the agreement, for example due to the outcome of parliamentary procedures or a referendum, that Member State can also “veto” the Union’s ratification if the mixed agreement requires a unanimous vote in the Council.<sup>56</sup> For instance, in the light of the outcome of the referendum on the EU-Ukraine Association Agreement, the Dutch Government can, in addition to not ratifying the agreement for the Kingdom of the Netherlands, also block the Council decision for the conclusion of the Agreement.

Thus, if a Member State 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 within Union competences. Such a move could be considered as a breach of the duty of sincere cooperation because the Member State would preclude the Union from exercising its competences. “Incomplete” bilateral mixed agreements provide a way out of this legal deadlock,<sup>57</sup> as they allow the Union and the other Member States that have ratified the agreement to go ahead. However, as noted above, currently this is possible for multilateral agreements only, as bilateral mixed agreements require that all the Parties ratify the agreement.

### 3. The practice of incomplete mixed agreements

As a rule, the European Union only ratifies a bilateral mixed agreement once the Member States have done so, which makes examples of incomplete *bilateral* mixed agreements hard to find.<sup>58</sup> There are, however, examples of mixed agreements that required a very long ratification period or the conclusion of which was jeopardized by a single Member State that wanted to

56. The Council decides with QMV, unless the agreement falls under one of the exceptions mentioned in Art. 218(8) TFEU (e.g. Association Agreements or agreements covering a field for which unanimity is required for the adoption of a Union act), or if the Council deviates from the Commission proposal (Art. 293 TFEU). See also the unanimity requirement in Art. 207(4) TFEU.

57. Heliskoski, *op. cit. supra* note 3, at 95 and 130–133; Dolmans, *op. cit. supra* note 26, at 64; Kleimann and Kübek, *op. cit. supra* note 26, at 27.

58. 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 second commitment period of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (O.J. 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).

extract some last-minute concessions.<sup>59</sup> Nevertheless, several cases of “incomplete” *multilateral* mixed agreements exist. Numerous multilateral mixed agreements have been concluded by the Union (or before that, the Community) prior to a conclusion by all the Member States. Several of them were even never ratified by some Member States, because these States have the intention to remain outside the agreement indefinitely.<sup>60</sup> Yet, these Member States never notified the depositary of the agreement or the other contracting Parties, leaving the ratification procedure incomplete. Other agreements are temporarily incomplete because the non-participating Member States still have the intention to conclude the agreement, but were for various reasons not yet able to do so. For example, the EU ratified the UN Convention Against Transnational Organized Crime, although the Council decision concluding the agreement recognized that several Member States still need to ratify the agreement.<sup>61</sup> Or more recently, on 4 October 2016 the EU adopted the decision on the conclusion of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (hereinafter “the Paris Agreement”).<sup>62</sup> A few days later, on 7 October, the EU deposited its instrument of ratification with the Secretary-General of the UN together with only seven EU Member States.<sup>63</sup> The other Member States still need to deposit their instrument of ratification once they have completed their national procedures.

In addition, there is a situation in which even bilateral mixed agreements may become “incomplete”. This risk in particular emerges after the accession of new EU Member States. After joining the EU, the new Member States need to accede to the set of existing EU mixed agreements (either concluded or only signed) through accession protocols.<sup>64</sup> Such accession protocols are in themselves mixed agreements. Therefore, mixed agreements remain “incomplete” as long as a new EU Member State does not join the agreement.

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 Rosas in “The Future of Mixity”, in Hillion and Koutrakos, op. cit. *supra* note 3). 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 (O.J. 2002, L 84/43).

60. Dolmans noted that an agreement can only be considered incomplete if one or more of the “interested” Member States don’t take part, i.e. when the Union’s ratification would have consequences for a Member State that did itself not ratify the agreement (op. cit. *supra* note 26, at 64).

61. Recital 4 of Council Decision 2004/579/EC on the conclusion of the UN Convention Against Transnational Organized Crime (O.J. 2004, L 161/69).

62. Council Decision 2016/1841 on the conclusion of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (O.J. 2016, L 282/1).

63. See *supra* note 35.

64. See e.g. Art. 6 Act of Accession with the Republic of Croatia (O.J. 2012, L 112/6).

However, in order to mitigate the temporary gap between the day of EU accession and participation to the EU's mixed agreements, the acts of accession provide for a simplified procedure: they empower the Council to conclude, on behalf of the Member States, such accession protocols to the existing mixed agreements.<sup>65</sup> This reduces the ratification burdens on the EU's side.<sup>66</sup> Moreover, the acts of accession also oblige the new Member States "as from the date of accession, and pending the entry into force of the necessary protocols" to apply the provisions of the mixed agreement concluded before their accession to the agreement.<sup>67</sup> Several mixed agreements also include specific provisions stating that any new Member State of the EU will accede to the agreement from the date of its accession to the EU by means of a clause to that effect in the act of accession to the EU. If the act of accession does not provide for the automatic accession of the new Member State to this agreement, the Member State concerned needs to accede to the agreement by depositing an act of accession to this agreement.<sup>68</sup>

Finally, both bilateral and multilateral mixed agreements can become incomplete at a later stage, in particular if Member States withdraw from an agreement (something of which we have not been able to find an example). While this may not be an obvious scenario (in particular in a bilateral context), these days it is no longer completely theoretical that, for instance, a change of government leads to different priorities in a Member State. Furthermore, something that looks like "complete incompleteness", at least in relation to bilateral agreements, can be foreseen if a Member State decides to leave the Union. However, it is important to underline that in this situation it would be a political rather than a legal problem, as the former Member State has become a third State, so that the agreement would legally not be incomplete. If the withdrawing Member State wants to remain a party to a mixed agreement, a legal instrument (for instance a protocol) would be required stating that the withdrawing Member State takes over the rights and obligations it previously had under the agreement as an EU Member State and that it joins the agreement as a third party. In all likelihood, this would trigger negotiations to accommodate unforeseen practical problems. Obviously, such a legal instrument would need to be ratified by the EU, its 27 Member States, the third

65. See e.g. Art. 6(2) of the Act of Accession of Croatia (*Ibid.*). A similar provision can be found in Art. 6(2) of the Act of Accession of Bulgaria and Romania (O.J. 2005, L 157).

66. Czuczai, "Mixity in practice: Some problems and their (real or possible) solutions", in Hillion and Koutrakos, *op. cit. supra* note 3, pp. 229–248 at 238.

67. Art. 6(4) Act of Accession Bulgaria and Romania and Art. 6(3) Act of Accession Croatia. Art. 6(6) of the 2003 Act of Accession of the ten new Member States even explicitly listed several mixed agreements (O.J. 2003, L 236/33).

68. Art. 30.10(5) CETA.

party and the withdrawing Member State.<sup>69</sup> Furthermore, this would change the nature of a bilateral agreement to a multilateral agreement.

#### 4. Legal hurdles for incomplete mixed agreements

Apart from possibly being precluded by procedural rules enshrined in bilateral mixed agreements (requiring the ratification of all the contracting parties), “incomplete mixity” is also complicated by two key features of mixed agreements. The first relates to the lack of clear rules on who should ratify the mixed agreements and when. Is the Union required to wait until all the Member States have done so? Or can the EU already move forward and ratify the agreement regardless of the Member States’ national ratification procedures? The second issue relates to the absence of a clear delimitation of competences between the Union and Member States. Both issues are discussed below.

##### 4.1. Ratification coordination

Non-ratification by one or several Member States of a bilateral mixed agreement is complicated by the fact that the Treaties do not establish rules on how to negotiate and conclude such agreements.<sup>70</sup> The concept of mixed agreements is even absent in the post-Lisbon regime and – with the exception of the accession of the EU to the ECHR – Article 218 TFEU does not even acknowledge the possibility for the Union to conclude agreements jointly with the Member States.<sup>71</sup> Thus, primary law does not specify how the Union and its Member States should coordinate their ratification procedure, or what to do in case of non-ratification of a Member State. It is unclear whether, with regard to bilateral mixed agreements, the Union is required to deposit its ratification after all the Member States have done so (thus excluding incomplete mixity), or whether the EU and the Member States should notify their ratification simultaneously. 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

69. On this point, see Van der Loo and Blockmans, “The impact of Brexit on the EU’s International Agreements”, *CEPS Commentary*, 15 July 2016; as well as Łazowski and Wessel, “The external dimension of withdrawal from the European Union”, (2017) *Revue des Affaires Européennes* (forthcoming).

70. On this point, see Dolmas, *op. cit. supra* note 26, at 60.

71. The Nice version of the Treaty only provided for mixity in Art. 133(6) EC.



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.

Obviously, the coordination of the ratification procedure between the EU and the Member States is also of interest to the other contracting parties, as they can only be sure that the EU and the Member States will be able to respect their commitments if they both ratify the agreement. It has been argued that, for legal certainty, both the Union and its Member States need to deposit the instruments of ratification as far as possible jointly, so that the agreement can enter into force for the EU and all of its Member States at the same time.<sup>72</sup> Therefore, with regard to bilaterally structured mixed agreements (such as most Association Agreements and Partnership and Cooperation Agreements), a practice has been developed on the basis of which the Union ratifies those agreements only after all the Member States have done so; this is despite the absence of this requirement in the Council decisions approving the signing or conclusion of these agreements.<sup>73</sup> In very exceptional cases only, the EU (i.e. the Council) encourages the Member States through the Council decision to ratify the agreement by a specific date.<sup>74</sup> This way the EU avoids incomplete mixity. However, as mentioned above, this practice also implies that a Member State can block the Union’s ratification of the agreement, which goes against the allocation of the EU’s external competences. This also explains why the Union still refrained from ratifying the EU-Ukraine Association Agreement. Only after the Netherlands’ deposit of its instrument of ratification (the last Member State that still has to do so), will the Union adopt the Council decision concluding the agreement.<sup>75</sup>

As mentioned above, the situation is rather different for multilateral mixed agreements, as incomplete mixity is not unusual in this category. However, the Union nevertheless 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 rapidly as possible and to (try to) deposit their instrument of

72. Czuczai, *op. cit. supra* note 66, at 233.

73. Yet, see the above-mentioned Agreement between the European Union and its Member States, and Iceland, in relation to the Kyoto Protocol (see *supra* note 58).

74. E.g., the preamble of the Council decision concluding the EU-Iceland Agreement mentioned in the previous note states that in order to pursue the rapid entry into force of the Doha Amendment, before the United Nations climate conference in Paris at the end of 2015, “the Union, the Member States and Iceland should endeavour to ratify both the Doha Amendment and the Agreement not later than the third quarter of 2015” (Council Decision (EU) 2015/1340, O.J. 2015, L 207/15).

75. See on this particular situation Van der Loo (*op. cit. supra* note 1) as well as Wessel, “The EU solution to deal with the Dutch referendum result on the EU-Ukraine Association Agreement”, (2016), *European Papers, European Forum*, 22 Dec. 2016, 1–5.

ratification simultaneously with the Union.<sup>76</sup> Other Council decisions just encourage the Member States to deposit their instruments of ratification “as soon as possible”, without envisaging a simultaneous deposit.<sup>77</sup> Some Council decisions even include a binding or indicative deadline before which the Member States need to ratify.<sup>78</sup> However, Member States are reluctant to accept legal obligations to deposit their instrument of ratification at a particular time or in a certain manner. To impose such a time limit would however not affect the division of competences, as it only requires Member States to exercise their competences in such a way as not to undermine the Union’s exercise of its own competence – i.e. in line with the duty of sincere cooperation. If a Member State “misses” such a deadline because it refuses to initiate its national ratification procedure (e.g. parliamentary approval procedure), the Commission could start an infringement procedure against that Member State on the basis of Article 258 TFEU if there is a precise and binding deadline enshrined in the Council decision. However, an infringement procedure would not be an option to challenge a negative outcome of this ratification procedure, because the Member State in question would merely have exercised its sovereign rights.<sup>79</sup> Therefore, there are only few examples of a successful simultaneous ratification by the EU and its Member States<sup>80</sup> and “incomplete” mixed multilateral agreements have become a common practice in EU external relations.<sup>81</sup> Significantly, several multilateral

76. For such examples in the Post-Lisbon era, see recital 5 of the Council Decision 2014/283/EU on the conclusion of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (O.J. 2014, L 150/231). Also the recent Council Decision concluding the Paris Agreement 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” (see *supra* note 62). Significantly, both the Council and the European Council called on the EU and the Member States to ratify the agreement “as soon as possible” and “to endeavour to take the necessary steps with a view to deposit collectively their ratification instruments with the UN Secretary General” (Council statement on the ratification of the Paris Agreement, Press Release 360/12, 20 June 2016 and European Council conclusions of 17 and 18 March 2016). For more examples before the Treaty of Lisbon, see Heliskoski, *op. cit. supra* note 3, at 93 and Hix, *op. cit. supra* note 28, at 225.

77. See e.g. recital 8 of the Council Decision 2013/86/EU on the conclusion of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (O.J. 2013, L 46/1).

78. Hix, *op. cit. supra* note 28, at 241.

79. Czuczai, *op. cit. supra* note 66, at 244.

80. For examples, see Heliskoski, *op. cit. supra* note 3, p. 94.

81. On several occasions the Union suggested that the missing ratifications of several Member States were not problematic because the Council’s approval of the agreement in question provided a sufficient legal basis for the Union to ratify on behalf of the Member States. For examples and critique on this practice, see Olson, “Mixity from the outside: The perspective of a treaty partner”, in Hillion and Koutrakos, *op. cit. supra* note 3, at p. 346.

agreements preclude or complicate the possibility of “incomplete mixity” because they require that an “international organization” or “customs union” can only ratify the agreement once some, or all, of its Member States have ratified it.<sup>82</sup> These “subordination clauses” are problematic as the Union “becomes the prisoner of its Member States: the latter are in a position to block the [Union’s] entry into the agreement”.<sup>83</sup>

#### 4.2. *The lack of a delimitation of competences*

Another key feature of mixed agreements complicating their “incomplete” existence is that these agreements do not specify which elements of the agreements fall within Union competences and which fall within the competences of the Member States. As noted in the introduction, instead of first trying to solve endless difficult internal competence questions among EU institutions or among EU institutions and Member States, mixity allows the Union (together with the Member State) to go ahead with the agreement and ignore (or at least delay) an exact delimitation of competences.<sup>84</sup> Neither the mixed agreements themselves, nor the relevant Council decisions define or list which elements from the agreement fall within Union competences, or which fall within Member States competences (and are thus the source of the mixed nature of the agreement).<sup>85</sup> A few Council decisions only refer to the participation of Member States in the agreement alongside the Union,<sup>86</sup> or explain in general terms that the agreement is only concluded insofar as the agreement’s provisions fall within Union competences.<sup>87</sup> However, the

82. See e.g. Art. 3(1) Annex IX of the United Nations Convention on the Law of the Sea (UNCLOS) (O.J. 1998, L 179/3).

83. Heliskoski, *op. cit. supra* note 3, at 134.

84. Maresceau, *op. cit. supra* note 13, at 12.

85. It has to be noted that the explanatory memorandum of the Commission proposal of a Council decision for the signing and/or conclusion of a mixed agreement sometimes gives an indication of the provisions which the Commission considers as not falling within Union competences, and thus lead to mixity. See e.g. 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).

86. E.g., 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.”

87. 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

decisions concerned – or the text of the mixed agreements – do not provide a clear-cut demarcation between the competences of the Union and the Member States. 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 *ERTA* effect, codified in the third paragraph of Article 3(2) TFEU, incorporates a dynamic element, as every time the Union adopts an internal measure, the Member States broaden the Union's exclusive competences with regard to that issue. 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.<sup>88</sup> It is therefore better for the Union to avoid a clear delimitation of competences as this would “freeze” the Union's competences.<sup>89</sup>

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 competence adopted by the Union in the context of the conclusion of multilateral mixed agreements. The lack of division of competences in the mixed formula can create situations of uncertainty for third parties. They mainly wish to know who (i.e. the EU or the Member States) will have the competence (e.g. voting rights, ensuring compliance, and responsibility for a breach of the agreement) over which provisions of the agreement. To accommodate these concerns, a practice has been developed by the Union to adopt declarations of competence when concluding multilateral mixed agreements. These declarations 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.<sup>90</sup> They are actually required by participation clauses included in most multilateral agreements. These clauses spell out the conditions under which international organizations or Regional Economic Integration Organizations (REIO) such as the EU can participate in the agreement.<sup>91</sup> Participation clauses often include an obligation to declare the

which falls within the competence of the European Community” (O.J. 1994, L 336). For a more recent example, see Council Decisions 2008/801/EC on the conclusion of the United Nations Convention against Corruption (O.J. 2008, L 287).

88. Ruling 1/78, EU:C:1978:202, para 35.

89. Dolmans, *op. cit. supra* note 26, at 52.

90. For a detailed analysis, see Delgado Casteleiro, *op. cit. supra* note 4.

91. The most recent declaration of competences was adopted for the conclusion of the Paris Agreement (O.J. 2016, L 282/4). For a list of declarations of competences adopted by the EU in the context of the conclusion of mixed multilateral agreements, see the EU Treaties Office Database: <[ec.europa.eu/world/agreements/default.home.do](http://ec.europa.eu/world/agreements/default.home.do)>.

extent of the competence when both the REIO and at least one of its Members are parties to the agreement.<sup>92</sup>

However, although the ECJ increasingly relies on declarations of competence when interpreting mixed agreements<sup>93</sup> or unravelling the EU's external competences,<sup>94</sup> they are widely criticized.<sup>95</sup> 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<sup>96</sup> and said to "suffer from a lack of clarity and elegance".<sup>97</sup> They fail to clarify when the EU has competence, but often instead create more uncertainty.<sup>98</sup>

The second aspect of mixed agreements which gives an indication on the delimitation of competences is the scope of the provisional application of mixed agreements. Again, however, this picture is far from perfect. The provisional application of mixed agreements, further discussed below, can only cover the elements of the agreement falling within Union competences (exclusive or shared), unless the Member States declare that they will also provisionally apply those elements falling within their competences.<sup>99</sup> Several mixed agreements even allow only the Union and the third party to provisionally apply the agreement, excluding this possibility for the Member

92. See e.g. Art. 5.1 Annex IX UNCLOS, cited *supra* note 82.

93. Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* (LZ), EU:C:2011:125; Case C-459/03, *Commission v. Ireland (MOX Plant)*.

94. E.g. Case C-246/07 *Commission v. Sweden* (PFOS) Case C-29/99, *Commission v. Council* (Convention on Nuclear Safety), EU:C:2002:734; Case C-94/03, *Commission v. Council* (Rotterdam Convention), EU:C:2006:2; and Opinion 2/00 (*Cartagena Protocol*), EU:C:2001:664.

95. De Witte, "Too much constitutional law in the European Union's foreign relations?", in Cremona and De Witte (Eds.) *EU Foreign Relations Law – Constitutional Fundamentals* (Hart, 2008), 3–15, at 15; Olson, *op. cit. supra* note 81, at 335; Rosas, "Exclusive, shared and national competences in the context of EU external relations: Do such distinctions matter?", in Govaere, Lannon, et al. *op. cit. supra* note 15, at p. 30.

96. E.g., 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, O.J. 1998, L 179/1).

97. Opinion of A.G. Maduro in Case C-459/03 (*MOX Plant*), EU:C:2006:42, para 36.

98. Delgado Casteleiro, *op. cit. supra* note 4.

99. However, the Member States' provisional application cannot be approved in the same act as concerning the Union's provisional application. The Court annulled in Case 28/12, *Commission v. Council* such a hybrid decision (i.e. a decision on signature and provisional application adopted by both the Council and the Representatives of the Governments and of the Member States meeting within the Council) because, *inter alia*, this is not compatible with the principles of institutional balance (Art. 13(2) TEU) and the procedural rules for the conclusion of an agreement (Art. 218 TFEU).

States.<sup>100</sup> Be that as it may, this does not mean that the provisions listed in the Council decision for signature and provisional application give a complete overview of the elements of the agreement falling within Union competences. A practise 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.<sup>101</sup> Another option which has been used by the EU to alleviate the negative effect of mixity, is to sign and formally conclude a separate agreement (often called an “Interim Agreement”) incorporating the trade-related elements of the agreement.<sup>102</sup> These trade-related elements indeed squarely fall within the EU’s exclusive competences. At the same time, these agreements include several other provisions falling within Union competences, but which are for political reasons not provisionally applied.<sup>103</sup> The scope of the provisional application of bilateral mixed agreements broadened over the years, often going beyond trade-related elements into areas ranging from economic cooperation, political dialogue to even CFSP.<sup>104</sup> 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

100. See e.g. Art. 58(2) of the EU-New Zealand Partnership Agreement on Relations and Cooperation (O.J. 2016, L 304/1); and Art. 86(3) of the EU-Cuba Political Dialogue and Cooperation Agreement (O.J. 2016, L 337/1). 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” (agreements cited *supra* note 32).

101. E.g., 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) (O.J. 2012, L 346/1). The provisional application of the EU-Chile AA covers in addition to trade-related provisions also institutional provisions (O.J. 2002, L 352/1).

102. Such “Interim Agreements on trade and trade-related matters” were for example concluded for the Stabilization and Association Agreements (SAAs) concluded with the Western Balkan countries, the Euro-Mediterranean Association Agreements (EMAAs) and the Partnership and Cooperation Agreements (PCAs) with the post-Soviet countries, e.g. SAA Serbia (O.J. 2010, L 28/1); EMAA Lebanon (O.J. 2002, L 262/2) and PCA Russia (O.J. 1995, L 247/2). On this issue, see Flaesch-Mougin and Bosse-Platière, “L’application provisoire des accords de l’Union européenne”, in Govaere, Lannon, et al., op. cit. *supra* note 15, 293–323.

103. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A New Legal Instrument for EU Integration without membership* (Brill/Nijhoff, 2016) at p. 123.

104. See e.g. 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 the comments of Van der Loo, *ibid.*). 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, O.J. 2016, L 304/1) and the Enhanced Partnership and Cooperation Agreement with Kazakhstan (Council Decision 2016/123/EU, O.J. 2016, 29/1).

provisionally apply “to the extent that they cover matters falling within the Union’s competence, including matters falling within the Union’s competence to define and implement a common foreign and security policy”.<sup>105</sup> Several Council decisions even explicitly state that “the provisional application of parts of the Agreement does not prejudice the allocation of competences between the Union and its Member States in accordance with the Treaties”.<sup>106</sup> It is thus clear that the scope of the provisional application of mixed agreements provides little insight into the division of competences between the EU and its Member States. Moreover, the Council is not always consistent in defining the scope of provisional application as it has already provisionally applied provisions in the context of several recent mixed FTAs, although it argues at the same time in the proceedings in Opinion 2/15, *EU-Singapore Free Trade Agreement*, that these provisions fall within the competences of the Member States.<sup>107</sup> Finally, some Council decisions simply state that “elements falling within the competences of the [Union]” will be provisionally applied, without indicating which provision this concerns,<sup>108</sup> and some mixed agreements are even provisionally applied in their entirety.<sup>109</sup>

The lack of a clear demarcation of competences in mixed agreements has been criticized.<sup>110</sup> It is argued that this leads to the Union’s autonomy being undermined as conditions are being created allowing Member States to

105. See e.g. the Council decisions mentioned in the previous note.

106. See e.g. Council Decision 2016/2232/EU on the signing on the EU-Cuba Political Dialogue and Cooperation Agreement (O.J. 2016, L 337/1). A similar formulation can also be found in Council Decision 2017/38 on the provisional application of CETA (O.J. 2017, L 11/1080). 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 prejudice the allocation of competences between the EU and the Member States. On the various statements, see Van der Loo, “CETA’s signature: 38 statements, a joint interpretative instrument and an uncertain future”, *CEPS Commentary*, 31 Oct. 2016.

107. Kleimann and Kübek, *op. cit. supra* note 26, 17. These authors give the example of portfolio investment, which is included in the scope of provisional application of the EU-Korea FTA. However, the Council avoided the provisional application of the provisions on investment protection and portfolio investment in CETA in anticipation of Opinion 2/15.

108. Council Decision 2016/1850/EU on the signature and provisional application of the stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part (O.J. 2016, L 287/3).

109. See e.g. Council Decision 2013/40/EU on the signing and provisional application of the EU-Korea Framework Agreement. The Council Decision on the Cuba Political Dialogue and Cooperation Agreement provisionally applies the agreement “in whole” (see *supra* note 106). It can be argued that this can only mean that the provisional application covers elements falling within Member States’ competences, or the agreement is mixed despite the fact that it does not cover Member States’ competences.

110. Heliskoski, *op. cit. supra* note 3, at 98.

interfere with (exclusive) Union competences (cf. above). Therefore, it is in the EU's interest to define the division of competences under a mixed agreement as clearly as possible, while respecting the dynamic nature of these competences.<sup>111</sup> Although this difficult exercise would perhaps render mixity a less attractive option, it would improve transparency and legal certainty in the Member States' domestic ratification procedures. Whereas, in principle, these national procedures only need to ratify those parts of the agreement that fall within the competences of the Member States, the different national ratification or approval acts do not specify which elements of the agreement they cover. At best, some preparatory documents (e.g. reports of parliamentary committees) refer to some provisions that fall within exclusive Member State competences (and thus trigger mixity), but without providing an overall demarcation of competences.<sup>112</sup>

It is difficult for national parliaments to properly exercise their constitutional role in the national ratification process (all Member States with the exception of the UK require parliamentary approval),<sup>113</sup> if they have no clear idea which provisions of the agreement they need to consider for approval. Therefore, in practice, national parliaments consider the entire scope of mixed agreements instead of only those provisions that fall outside the Union's competences. This was also clearly illustrated by the Dutch referendum on the EU-Ukraine Association Agreement. Whereas the pre-referendum campaign revolved around the question whether or not to approve the Association Agreement, the subject of the referendum was actually the national approval act which would allow for ratification of the Member States' elements of the Association Agreement for the Kingdom of the Netherlands.<sup>114</sup> Because this approval act also did not specify

111. Dolmans, *op. cit. supra* note 26, at 52.

112. See e.g. "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 Art. 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 within Member States' competences, and thus triggers mixity. Some national parliamentary approval procedures of mixed agreements struggle with such a lack of competence demarcation and ask for specifications or more detailed information with regard to the Union's competences for the conclusion of the agreement (UK Parliament, European Scrutiny Committee, Twenty-Fourth Report, DFID (36339), Committee's conclusions on the Economic Partnership Agreement with the West African region, 3 Dec. 2014).

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

114. Staatsblad van het Koninkrijk der Nederlanden, Jaargang 2015 (315), "Wet van 8 juli 2015, houdende goedkeuring van de op 27 juni 2014 te Brussel tot stand gekomen



which parts of the Association Agreement it covered,<sup>115</sup> from a strict legal point of view, the Dutch citizens could not know what they were voting for. Therefore, Kuijper argues that also the national approval acts should include a disclaimer stating that this legal instrument only approves those elements of the agreement falling within the competences of the Member States,<sup>116</sup> similar to the EU practice in some Council decisions.<sup>117</sup> According to Kuijper such a vague phrase leaves room for some difference of judgement about where the frontier between exclusive EU competences and Member State competences exactly lies, while nevertheless indicating the intention to respect this border. He rightfully notes that this would make the non-ratification by a Member State less dramatic, since the partner State would know that the Union would be able to implement a large part of the agreement, as long as the Union has concluded the agreement. Whereas such a vague delimitation of competences would indeed facilitate incomplete mixity, the procedural provision in bilateral mixed agreements would still need to be modified in the sense that not all the Parties need to ratify the agreement before they can enter into force.

## 5. Provisional application

The non-ratification by one or several Member States of a mixed agreement also raises questions as to the impact of such a scenario on the provisional application of those agreements. As discussed above, in order to circumvent the long ratification procedure of mixed agreements, a part of the agreement falling within Union competences is usually provisionally applied. A legal basis for the provisional application of international agreements concluded by the EU was included in the Amsterdam Treaty (now Art. 218(5) TFEU). It reflects Article 25 VCLT, according to which a treaty may provide for such

Associatieovereenkomst tussen de Europese Unie en de Europese Gemeenschap voor Atoomenergie en haar lidstaten, enerzijds, en Oekraïne, anderzijds”.

115. 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 (Tweede Kamer, vergaderjaar 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 Feb. 2016 and “Kamerbrief verzoek toelichting bevoegdheidsverdeling EU associatieakkoord Oekraïne”, DIE-0710/2016, 7 Oct. 2016).

116. Kuijper, “Post-CETA: How we got there and how to go on”, ACELG Blog, 28 Oct. 2016, <[acelg.blogactiv.eu/2016/10/28/post-ceta-how-we-got-there-and-how-to-go-on-by-pie-ter-jan-kuijper/](http://acelg.blogactiv.eu/2016/10/28/post-ceta-how-we-got-there-and-how-to-go-on-by-pie-ter-jan-kuijper/)>

117. See note 87 *supra*.

provisional application or the negotiating States may agree to it. As we have seen, 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”.<sup>118</sup> For the EU this requires a Council decision, adopted by the Council on the basis of a Commission proposal.<sup>119</sup> The Council decides with QMV, unless the agreement falls under one of the exceptions mentioned in Article 218(8) TFEU or if the Council deviates from the Commission proposal.<sup>120</sup> The provisional application is usually approved by the Council decision upon signing the agreement. This means that a single Member State cannot block the provisional application of a mixed agreement, unless the agreement falls under one of the aforementioned situations requiring unanimity. However, in the case of mixed agreements, a single Member State can nevertheless block the provisional application of Union competences, even if QMV is required for the Council’s decision for signature and provisional application of that agreement by the Union. The Member State can be overruled in the Council, but by refusing to sign the agreement, it can *de facto* also veto the provisional application of parts of the agreement falling within Union competences, because this can only take place after the signature of the parties. This scenario almost took place when the Belgian federal government was first unable to sign CETA after the Walloon “*non*”. This again could, similar to the situation of the conclusion of mixed agreements (cf. above), encroach upon the duty of sincere cooperation, as the Member State would block the Union from exercising its competences (i.e. provisionally applying those parts of a mixed agreement falling within Union competences). However, as affirmed above, it seems unlikely that the duty of cooperation can be interpreted in such a way that it would oblige the Member States to sign the agreement.

The situation is even more complex if a Member State refuses to ratify an agreement after it is signed and the provisional application has been initiated. One can claim that, as long as not all the parties have ratified the agreement, 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. However, the provisional application of (parts of) an agreement provides less legal certainty compared to the full entry into force of the agreement, especially for

118. However, not all recent bilateral mixed agreements provide for provisional application. See e.g. the Framework Agreement on Comprehensive Partnership and Cooperation with Vietnam; and the Framework Agreement on Partnership and Cooperation with the Philippines (O.J. 2012, L 134/3) and Mongolia (O.J. 2012, L 134/4).

119. Art. 218(5) TFEU.

120. Art. 293 TFEU.

the third country, because the provisional application can in several cases be terminated immediately, contrary to the termination clauses of (mixed) agreements which require a notice of six months or more. However, several mixed agreements do include a specific procedure for the termination of the provisional application, including a notice comparable to the one foreseen in the respective termination clause.<sup>121</sup>

The situation would change if a Member State were to deposit a notification that it will not ratify the agreement. As argued above, considering the “entry into force clauses” of 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 decision 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”.<sup>122</sup> Therefore, the failure of the ratification procedure would require the termination of the provisional application.<sup>123</sup> 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 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”.<sup>124</sup>

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. 30.7(3)(c)) but also add that this needs to take place “in accordance with EU procedures”.<sup>125</sup> Also the

121. See e.g. the clauses mentioned in the last paragraph of this section (see text to note 130 *infra*).

122. See e.g. the Council decisions cited *supra* note 104 with regard the EU-New Zealand Partnership Agreement on Relations and Cooperation and the EU-Kazakhstan Enhanced PCA.

123. Although not a mixed agreement, this was what happened with the so-called SWIFT agreement banking data transfers to the USA when it became clear that ratification was not possible due to a negative vote in the European Parliament. See also Santos Vara, “Transatlantic counterterrorism cooperation agreements on the transfer of personal data: A test for democratic accountability in the EU”, in Fahey and Curtin (Eds.), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (Cambridge University Press, 2014), pp. 256–288 at 271.

124. These different statements were included in the *Official Journal* (O.J. 2017, L11/9).

125. *Ibid.*

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 Article 30.7(3)(c).<sup>126</sup>

While one might argue that Member States are not encroaching upon EU competences if they, either collectively or individually, decide on the termination of a provisional application in a field covered by Member State competences, the fact remains that 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). As the Court has recognized in *Commission v. Council (US Air Transport Agreement)*, “no competence is granted to the Member States for the adoption of such a decision”.<sup>127</sup> 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.<sup>128</sup>

Thus, only the Union (and not one or more Member States) 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, it is not entirely clear what the appropriate procedure would be. Not all mixed agreements include a specific procedure for the termination of the provisional application.<sup>129</sup> Those agreements that do 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.<sup>130</sup> Article 218 TFEU does not provide procedural rules for the Union’s termination of the provisional application of an international agreement. However, it can be argued that the same procedure should be followed as for the adoption of the provisional application (i.e. Art. 218(5) TFEU), requiring a qualified majority,

126. Bundesverfassungsgericht, Applications for a Preliminary Injunction in the “CETA” Proceedings Unsuccessful, Press Release No. 71/2016 of 13 Oct. 2016.

127. Case C-28/12, *Commission v. Council*, para 44.

128. *Ibid.*, para 55.

129. E.g. the EU-New Zealand Partnership Agreement on Relations and Cooperation (O.J. 2016, L 321/3), as well as the Partnership and Cooperation Agreement with Iraq (O.J. 2012, L 204/20). However, the provisional application of these agreements can be terminated pursuant to Art. 25(2) VCLT.

130. E.g., in the case of the Ukraine AA, the termination of the provisional application shall take place six months after receipt of the notification (Art. 486(7)) and in the case of CETA the termination shall take effect on the first day of the second month following that notification (Art. 30.7(3)(c)). Cf. also Art. 281(10) of the Enhanced PCA with Kazakhstan (O.J. 2016, L 29/1).

and in several cases even unanimity (Art. 218(8) TFEU), within the Council.<sup>131</sup> Therefore, a single Member State cannot terminate the provisional application of a mixed agreement.

## 6. Alternative solutions

The above sections reveal the complexities surrounding “incomplete mixity”. The clauses on entry into force of the existing bilateral mixed agreements preclude incomplete mixity and it remains difficult (and perhaps even undesirable) to define the exact division of competences. The present section aims to assess a number of alternative solutions to overcome possible deadlocks.

### 6.1. “Unsigning” an agreement

While not excluded by the law of treaties,<sup>132</sup> the “consent to be bound” to the type of international agreements referred to in this contribution is usually not expressed through the signing of the agreement, but through ratification. As we have seen, usually, agreements enter into force once all (in the case of bilateral mixed agreements) or a number of the signatory States (in the case of large multilateral agreements) have ratified the agreements. This implies that legal obligations upon signature are usually limited to the general rule laid down in Article 18 VCLT “to refrain from acts which would defeat the object and purpose of a treaty”. However, when the entry into force of an international agreement is “unduly delayed”, a State may have good arguments to ignore (parts of) this obligation. In any case, it is clear that before the “consent to be bound” has been expressed, a State is not a party to the agreement.

As we have seen, the problem may be that non-ratification by one of the signatory States may block the entry into force of the agreement. Obviously, in some cases “unsigning” an agreement would solve matters, but this is not the case when (as with bilateral mixed agreements) the entry into force is dependent on all parties, including the EU and *all* its Member States. The best moment for a Member State to raise objections would of course be before negotiations (and include these in the Council’s negotiating mandate for the Commission), or during the negotiations in the specific Council Committee

131. Kuijper however argues that provisional application can be terminated by either party without further notice and without giving reason on the basis of Art. 25(2) VCLT (see Kuijper *op. cit. supra* note 113).

132. See Arts. 11 and 12 VLCT.

that monitors the EU's negotiator. After negotiations have been concluded, the agreed text is usually "initialled" by the parties. Under international law, initialling confirms that both parties agree that the wording contained in the document initialled is the wording they agreed. Initialling does not imply consent to subsequent signature or ratification.<sup>133</sup> While, as a rule, the Council and the European Parliament are informed as soon as the agreement is initialled and are provided with the text (at the latest when the Commission adopts the Commission proposal for signing the agreement), a Council decision is not required prior to the initialling. A Member State also has the possibility to raise issues in the Council at the moment of the adoption of the Council decision allowing the EU to sign the agreement. However, only in the limited number of situations where unanimity is required in the Council for the signing and conclusion of the agreement<sup>134</sup> is a Member State able to veto the agreement.

## 6.2. *Opt-outs*

Opt-outs (or in fact "reservations" in treaty law parlance), either in the text of the agreement or in a separate Protocol, can provide Member States with a solution to claim exceptions for parts of the obligations that it cannot or would not like to be bound by.<sup>135</sup> Yet, when the option of reservations is not mentioned by the agreement and the absence of a reservation may be assumed to have been part of the "consent to be bound" of other parties, it becomes difficult to raise it at a later stage.<sup>136</sup> The reason for this is clear: other parties and their Parliaments have approved (and possibly already ratified) the agreement on the basis of the idea that the rules would count for everyone who had not raised objections prior to the conclusion of the agreement. This is exactly the reason why opt-outs and other deviations from general rules are usually part of the negotiations and end up as parts of the end-result. This also explains why the UK/Ireland and Denmark's opt-outs from provisions (and implementing measures) of a mixed agreement falling under the AFSJ (pursuant to, respectively, Protocol 21 and 22 to the Lisbon Treaty) is

133. Cf. Art. 10 VLCT.

134. See note 56 *supra*.

135. Compare Art. 20 VLCT. Well-known examples are the Protocols annexed to the EU Treaties, allowing certain Member States not to take part in specific parts of the Treaties, such as Protocol No. 21 on The Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice.

136. Art. 20(2) VLCT: "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

generally addressed not only in the respective Council decision, but also in the preamble of the agreement.<sup>137</sup>

A possible way out is offered by Article 20(4) VLCT, but only if the above situation does not apply: parties may accept a later reservation once it is not considered to have formed an essential part of the own considerations to ratify the agreement. It is important to underline that *statements* made by Council members during the conclusion of an agreement are valid only as unilateral interpretations of certain elements in the agreement. They cannot give a binding interpretation to an international agreement, nor do they constitute binding EU acts. While these interpretations may be helpful for the other parties to understand how a particular EU Member State views a certain provision, and they could even be used by the Court in a contextual sense, they will never be able to set aside the agreed text of an agreement, unless it “was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty” (Art. 31(2)(b) VCLT).

Translated to the Dutch situation in relation to the EU-Ukraine AA, a Dutch exception could have been accepted once the other parties agreed that the full participation of the Netherlands had not been a condition for their own ratification of the agreement. This will hardly be the case in relation to EU agreements which have been negotiated on the basis of a mandate by the Council and which are meant to be signed and ratified by all. In other words: one may assume that each and every Parliament approves, and each government ratifies, the agreement on the assumption that exactly the same rights and obligations will be valid for all other parties. In short – irrespective of any substantive problems related to the fact that not all parties will have the same obligations – acceptance of *ex post facto* opt-outs would run counter to complex legal issues.

### 6.3. *Declarations*

Apart from opt-outs, “Declarations” may be attached to the text upon conclusion. In contrast to Protocols, these Declarations do not change the legal regime as such, but merely provide an (individual or joint) interpretation of certain provisions. In many cases (see the Declarations annexed to the

137. These countries remain however bound by these provisions as separate contracting Parties (and not as part of the EU), but not to EU-internal measures implementing these provisions (see e.g. the preamble of the EU-Canada Strategic Partnership Agreement (cited *supra* note 32). In the case of the EU-Ukraine Association Agreement, a “split” legal basis was adopted for the non-discrimination provision of legally employed third country nationals, which allowed the UK to opt-out for the application of this provision pursuant to Protocol 21. For a critique on this issue, Van der Loo, *op. cit. supra* note 103, p. 169.

TEU) they hardly do more than stating the obvious and often they are (merely) meant to underline elements that are believed to facilitate the domestic ratification. Declarations are “legally binding” only in the sense that they provide an interpretation; they can never set aside the provisions in an agreement. For example, in order to accommodate the concerns of the Walloon Government and other CETA opponents, the Union and Canada adopted a “Joint Interpretative Instrument”.<sup>138</sup> This document specifies how several provisions of CETA should be interpreted, but it does not alter the text of the agreement. However, because it was agreed jointly with Canada, this document recognizes that it provides “in the sense of Article 31 VCLT, a clear and unambiguous statement of what Canada and the EU and its Member States agreed in a number of CETA provisions.”<sup>139</sup> In addition, several Member States and institutions unilaterally adopted 38 statements that were annexed to the Council minutes.<sup>140</sup> However, as noted above, because these statements were adopted unilaterally, they cannot provide a binding interpretation pursuant to Article 31 (2)(b) VCLT.

#### 6.4. *Decisions of the Heads of State or Government meeting within the European Council*

Quite surprisingly for many, the EU/Dutch solution to prevent a possible non-ratification by the Netherlands of the EU-Ukraine AA, was not the adoption of a Protocol or Declaration, but a “Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council”.<sup>141</sup> This Decision is to take effect once the Netherlands

138. Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (O.J. 2017, L 11/3).

139. In the context of CETA’s signature, also the Council Legal Service adopted a statement to the Council minutes in which it recognized that, by virtue of Art. 31(2)(b) VCLT, the Joint Interpretative Instrument “constitutes a document of reference that will have to be made use of if any issue arises in the implementation of CETA regarding the interpretation of its terms. To this effect, it has legal force and a binding character” (see *supra* note 124).

140. Van der Loo, “CETA’s signature: 38 statements, a joint interpretative instrument and an uncertain future”, *CEPS Commentary*, 31 Oct. 2016.

141. Decision of the Heads of State or Government of the 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, annexed to the European Council Conclusions on Ukraine, 15 Dec. 2016. See also Van Elsuwege, “Towards a Solution for the Ratification Conundrum of the EU-Ukraine Association Agreement?”, *Verfassungsblog*, 16 Dec. 2016 <[verfassungsblog.de/towards-a-solution-for-the-ratification-conundrum-of-the-eu-ukraine-association-agreement/](http://verfassungsblog.de/towards-a-solution-for-the-ratification-conundrum-of-the-eu-ukraine-association-agreement/)>; as well as Van der Loo (op. cit. *supra* note 1) and Wessel (op. cit. *supra* note 75).



has ratified the Agreement and the European Union has concluded it. Decisions like these are taken in the framework of the European Council, and not by the European Council itself. Like framework decisions taken by the (regular) Council, they are believed not to need a legal basis in EU law, as the (European) Council meeting is merely a pragmatic venue to allow the States to conclude an agreement. Usually, they are needed once decisions cannot (solely) be taken by the institutions, so that Member States in their capacity as “States” need to step in.<sup>142</sup> Indeed, not being an EU decision, the “Decision” thus adopted seems to be nothing less than an international agreement.<sup>143</sup> This is confirmed by the fact that: “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”.<sup>144</sup> Hence, where the Dutch Government repeatedly informed the public that it aimed for a “legally binding declaration”, they ended up with something that seems nothing short of an additional international agreement; although the Court’s case law on this point is not conclusive.<sup>145</sup> Obviously, once the Decision is indeed in fact an international agreement, this raises a number of additional questions, in particular as to the competence of the Member States to conclude an international agreement in an area that is already covered by EU law. One could argue that the *ERTA* effect kicks in here, rendering the instrument invalid. While it goes beyond the scope of the present contribution to analyse this in more detail, it is clear that the solution is far from winning the beauty contest.

Furthermore, one may argue that a solution like this should be discussed with all parties to an agreement – in this case the EU-Ukraine AA – who would then have a possibility to find out whether the content of the presumably

142. As noted by the Council’s legal service, this is not the first time that this instrument is used in a case like this. See e.g. the Decisions of the Heads of State or Government, meeting within the European Council, taken in December 1992 and in June 2009 to address certain problems raised by the Government of a Member State following a referendum in that State or decisions taken by common agreement of the representatives of the Member States, including at the level of Heads of State or Government, in December 1992, October 1993 and December 2003 on the location of the seats of a number of EU institutions and bodies, in the context of Art. 341 TFEU. Opinion of the legal counsel, Brussels, 12 Dec. 2016 (OR. en), EUCO 37/16, LIMITE, JUR 602.

143. *Ibid.*, opinion of the legal counsel: “With regard to its legal nature and effects, the draft Decision of the Heads of State or Government should, in the present case as well as in previous instances, be regarded – although it does not require the accomplishment of the formalities generally needed for self-standing agreements – as an instrument of international law, by which the EU Member States agree on how they understand and will apply, within their competences, certain provisions of an act by which they are otherwise all bound.”

144. As set out in the European Council Conclusions on Ukraine, 15 Dec. 2016.

145. See in particular Case C-28/12, *Commission v. Council*, paras. 15–17.

new agreement affects the earlier approval by the parties.<sup>146</sup> In this particular case, the “Decision” seems to have solved this dilemma in two ways. First of all, it (at least) claims to be “in full conformity with the EU-Ukraine Association Agreement and the EU treaties”. Secondly, in a more substantive sense, the five points merely repeat what is or is not in the treaty, thus making it a legally less relevant document. Obviously, the Decision could not have contained elements that would contradict the EU-Ukraine AA or EU law in general; which puts the “legally binding” nature of the Decision somewhat in perspective. Not being a reservation, it is “merely” a document in which the Heads of State and Government of the EU States that are a party to the AA lay down an agreed interpretation. The Council’s legal service formulated the legally binding nature as follows:

“It has nevertheless legal force in order to exclude, as among the Member States of the EU, certain interpretations that could be given to the language of the agreement and certain forms of action that could be considered on its basis. In case the EU Court of Justice would have to interpret the provisions of the association agreement in the future, the draft Decision could also be used in its reasoning to assess the intentions of the EU Member States as to the scope of the commitments undertaken when becoming parties.”<sup>147</sup>

Obviously, this joint interpretation by the EU State parties does not necessarily bind the two other parties, the EU and Ukraine. In that sense it can (only) be seen as a self-binding common understanding which is hard to deny at a later stage (and, politically, that was most probably the objective). Therefore, this “Decision” differs from the Joint Interpretative Instrument adopted by the EU and Canada in the context of the conclusion of CETA, which, as explained above, can be considered as a binding instrument pursuant to Article 31(2) VLCT. At the same time, one-sided interpretations may make it more difficult for the other parties to implement the agreement and at least in the EU Member State context could trigger the principle of sincere cooperation.

Are “Decisions” like these generally a good solution to deal with the non-ratification of mixed agreements by certain Member States? The answer should probably be “no”. In the Dutch case, it prevented a non-ratification; an actual non-ratification would have implied that the AA could not enter into force. In that situation, a renegotiation would have been the only option as the

146. Cf. also the view of the Council’s legal counsel: “unless Ukraine declares that it accepts the Decision, its provisions cannot constitute an interpretative instrument binding on Ukraine by virtue of Art. 31(2)(b) of the Vienna Convention on the Law of Treaties”. See Opinion of the legal counsel cited *supra* note 142.

147. *Ibid.*

agreement itself would need to be adapted. In relation to mixed agreements, the division of competences between the EU and its Member States needs to be respected and the Court equally has made clear that (Member) States may not take decisions in the framework of the Council if these would ignore (procedural) rules of EU law (e.g. related to the conclusion of international agreements).<sup>148</sup> Furthermore, the fact that only a number of parties to an Agreement get together to prepare a (“binding”) view on what they see as the interpretation of a number of key elements in the Agreement, after most parties and their Parliaments have already approved the Agreement, should not become a habit in EU practice.<sup>149</sup>

## 7. Conclusion

The aim of this contribution was to shed more light on situations in which EU Member States are unable or unwilling to ratify mixed agreements, as well as on the legal consequences of those situations. While practice so far does not offer examples of “incomplete” bilateral mixed agreements, both the Dutch struggle to ratify the EU-Ukraine Association Agreement and the Belgian problems to sign CETA revealed that it is only a matter of time before we will be confronted with this problem.

Whereas difficulties are less prominent in the case of multilateral mixed agreements, “incomplete mixity” is indeed problematic in a bilateral context. We noted several problems. First of all, so far bilateral mixed agreements have required that all parties (hence, the EU, the Member States and the third party) need to ratify the agreement before it can enter into force. To overcome this problem, parties could agree not to include this rule and allow for a limited number of EU Member States not to become a party, or to join in at a later stage. Whereas a full participation of all Member States could be phrased as an end-goal, certain Member States could be given more time, for instance for domestic constitutional reasons. In certain cases “incomplete” mixed agreements should perhaps not be fully excluded, in particular when a Member States does not agree with certain (key) policies in the agreement (and which are not covered by the EU’s exclusive competences). Obviously, this situation should be avoided as it runs counter to the legal as well as political aspects of consistency that are so central in the EU’s external relations.

148. See Case C-28/12, *Commission v. Council*.

149. In fact, after the EU-UK deal on options for UK membership after a remain vote in the Brexit referendum, and the EU-Turkey deal on refugees, there seems to be a new tendency to let political solutions prevail over sound legal options.

In many cases, Member States will not object to the agreement in its entirety, but only to certain elements. While ideally these potential objections should be raised during the negotiation phase (in which case they may perhaps be tackled through an opt-out or a Declaration), the duration of the negotiation and concluding process may have allowed for a change of government and/or parliament in the meantime, or – indeed – a referendum with an unexpected result. This leads to a situation in which the parties are to solve the issue after the text has already been agreed upon and, perhaps, a number of parties have already signed or even concluded the agreement. We have pointed to different solutions (including the exchange of an additional instrument on the basis of Art. 13 VLCT and a Decision taken by the Heads of State and Government in the Framework of the European Council), but it would be better if the possibility of non-ratification were part of the text of the agreement and solutions to overcome potential signing or ratification problems were already addressed during the negotiation phase. This would imply that for future agreements, the specific entry into force clauses would perhaps be tweaked so as to allow for incomplete mixity, for a limited period or perhaps even structurally, depending on the topic. Issues not falling within EU competences would in this situation not be applied in certain Member States. This would in any case avoid the “constitutional deadlock” that the exercise of a Member State’s right not to ratify a mixed agreement would block the Union from exercising its exclusive competences.

The question remains whether this is an attractive option for third parties, given their general demand to secure that someone on the EU/Member States side is always accountable for all parts of the agreement (cf. the preference for detailed declarations of competence). But one may even wonder whether the option is attractive for Member States, since avoiding a delimitation of competences (or securing Member States involvement in EU matters) may have been part of the reason why mixity was opted for in the first place. At the same time, we should not forget that even in a case of non-ratification, Member States would remain bound by the “EU parts” of the agreement on the basis of Union law (Art. 216(2) TFEU).

The second and related main problem we drew attention to is the lack of a clear delimitation of competences. As we have seen, even in relation to the provisional application of mixed agreements, the EU and its Member States have not been able or willing to clearly demarcate their field of competence. In this situation it is difficult to see incomplete mixed agreements as a solution. After all, to which parts exactly would a Member State not be bound? And, given the increasing inter-linkage between the different EU external relations post-Lisbon, it is perhaps not even desirable to seek for too strict lines of demarcation. An option would be to allow for incomplete mixity on the basis

of a Council decision that approves the agreement “for those areas of the agreement falling within Union competences”, but which avoids a clear-cut demarcation of competences. Also the national approval acts should indicate that they only ratify those parts of the agreement not covered by Union competences. Whereas such a solution would still avoid competence battles and would respect the dynamic nature of the Union’s external competences, it would create legal uncertainty for all parties involved.

Overall, the conclusion on the basis of our analysis is that the Union and its Member States should prevent having to find *ex post facto* solutions for non-ratification problems. Indeed, mixity is here to stay and the same seems to hold true for the awareness by national parliaments and European citizens that international agreements may affect their daily lives (for good and sometimes for bad). The current *Zeitgeist* seems to dictate an involvement of the national parliaments and European citizens from the outset, since only giving them a voice on the result of negotiations may lead to problems at a far too late stage. While referendums on negotiation mandates are perhaps not the best solution, it would make sense to start thinking about a wider, perhaps informal, involvement of national parliaments on the objectives of the negotiations before the negotiating directives are adopted by the Council, in particular if these deal with a (presumably) mixed agreement. Together with the European Parliament, these national parliaments would then be provided with a possibility to debate the various aspects of new agreements and signal potential problems at an earlier stage.