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## Member States and EU agreements:

# Is it really national parliaments that are standing in the way of EU strategic autonomy?

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## Abstract

*In voicing their ambition for a 'stronger Europe in the world' the European Commission has indicated to strive for 'Open Strategic Autonomy'. One of the obstacles in trying to achieve this capability to assert itself as a global actor, is that individual Member States can often block EU actions. This undermines the EU's ability to act as one, hindering the realisation of strategic autonomy.*

*This paper focuses on one specific illustration of this, namely the fact that EU action may be blocked by any single of the 36 legislatures in the EU Member States through their de facto veto right on 'mixed' agreements. These are international agreements that covering areas of EU competence as well as of the competence of Member States.*

*The concept of mixity is addressed in this paper by discussing how this has come about and how it is decided that agreements cannot be EU-only. It will also highlight the political and legal motivations that prompt Member States to insist on mixity in international agreements. Additionally, this paper presents cases where comprehensive agreements were not subject to ratification by each Member State for pragmatic reasons.*

*Lastly, this paper offers some thoughts on to how to address the dilemma of wanting to enable the EU to act strategically while, at the same time, duly involve national parliaments as representatives of stakeholders and citizens.*

## Introduction

'Open Strategic Autonomy' (OSA) is the new keyword meant to characterise the EU's vision of a stronger Europe in the world. Based upon the concept of 'Strategic Autonomy' first suggested in the EU's Global Strategy of 2016, the European Commission defines this 'open strategic autonomy' as 'the EU's ability to make its own choices and shape the world around it through leadership and engagement, reflecting its strategic interests and values'.[1]

Strategic autonomy has become a *fil d'Ariane* in different contexts. In the field of defence policy, it means building autonomous capacities. In the economic and other spheres, it means striving for lower levels of reliance on others. It focuses on critical supplies and has been given an increased sense of purpose by the Covid-19 crisis and the growing assertiveness of China, now dubbed a 'systemic rival'.

In order to achieve this strategic autonomy, the EU needs to be able to use its foreign policy instruments, such as international agreements, more effectively. EU strategic documents and political statements in recent years lament that the EU often 'collectively punches below its weight' and needs to (get its) act together. According to EU High Representative Borrell, the EU must '"deliver as one" to "succeed as one".[2]

Yet the ability to act 'as one' is weakened by the fact that many actions may in practice be blocked by one single Member State, which may, moreover, be motivated by interests that are hardly related to the main issue concerned.

The most obvious illustration of this is the Common Foreign and Security Policy (CFSP). In spite of the lobbying of the European Commission to allow for the adoption of decisions by qualified majority voting,[3] unanimity remains the rule when the Council decides on CFSP issues, which sometimes drastically reduces the ability of the EU to act. This was, once again, demonstrated painfully by the EU's inability to swiftly apply sanctions to Belarus after the falsifying of the election outcomes and brutal crackdown of the Lukashenko regime on peaceful protesters in 2020.[4]

A second case, which is the focus of this Paper, is that EU action may be blocked by any one voice among national and even regional legislatures through their right to refuse to ratify international agreements when these take the form of 'mixed agreements'; that is, agreements that are held to cover both areas under that come under EU competence and areas of Member State competence. These agreements have to be ratified by both the European Parliament and 36 legislative bodies[5] in the Member States.

This has most notoriously been the case of the Comprehensive Economic and Trade Agreement (CETA) that entered into force provisionally between the EU and Canada in September 2017. Belgian ratification was delayed after one of the five regional parliaments in Belgium that have to ratify agreements (that of Wallonia) initially rejected the deal in October 2016. The CETA saga again attracted attention when the Cypriot parliament rejected the agreement on 31 July 2020, partly because of concerns about protection of Halloumi cheese.[6]

The question here is not that there is now greater public debate and involvement on the part of national legislatures. The issues at stake are very real concerns for citizens. The Commission has explicitly encouraged greater oversight by national parliaments through their national governments. However, as international agreements increasingly risk being capsised by local agendas, there has been growing concern that the predictability and credibility of the EU as a global actor will suffer. Moreover, this direct role of national parliaments raises important legal and institutional issues. It may 'create a "constitutional deadlock": if a national parliament chooses to exercise its sovereign right not to ratify a mixed agreement, by the same token, it de facto blocks the Union from exercising its competences'.[7]

The political issues become all the more acute in cases of 'facultative mixity', in which the adoption of a mixed agreement is the result of a political choice by the Council.[8] Whenever an agreement is adopted as a mixed agreement, the role of the European Parliament is reduced to that of one among many chambers that have to ratify. This also has the side effect of (partially) renationalising issues that are otherwise well suited for debate in the European public sphere.[9]

This Paper aims to explain the background to this situation and to offer some thoughts as to how to address this tension between the quest for more efficiently unified action and the need to involve national parliaments as well as stakeholders and citizens.

The first section considers why EU international agreements have become the subject of more politicized internal debates in the Member States.

The second part reviews 'mixity'. Why do Member States, in their individual capacity, have to be part of EU agreements at all? Why do national parliaments have to ratify these agreements?

The third section reviews the experience so far with mixed agreements, looking at both trade and

association agreements. It points out that in almost all cases it is not national parliaments that have been the issue but the national governments.

By way of conclusion, the Paper addresses a number of key questions for the future. It asks whether mixed agreements still make sense at all. The real question is whether there is a political will among the Member States to allow agreements to be adopted by the EU alone, and thus let the EU adopt international agreements with the kind of predictability and credibility that is required to play a stronger and more autonomous role in the world.

## 1 Why have EU international agreements become politicised in Member States?

International agreements between the EU and third countries have been a standard instrument in the EU´s external relations toolbox for a long time. However, it is only relatively recently that the wider public has started to notice them. This is partly because there have been a series of dramatic episodes: the trade and cooperation agreement with the UK, signed literally in the last second to avoid UK-EU trade relations falling off a cliff on 1 January 2021; an investment agreement with China a few days before Joe Biden brought the US back on the global scene; the failed Transatlantic Trade and Investment Agreement (TTIP) with the US, which collapsed under the fierce opposition of both public opinion within the EU and Donald Trump (albeit for very different reasons); a Comprehensive Economic and Trade Agreement with Canada temporarily derailed by a region comprising 0.7% of the EU's population; the Association Agreement with Ukraine, a strategic flagship project, almost wrecked by aggressive rhetoric of Vladimir Putin and Dutch right-wing populists.

However, there are genuine grounds for public concern and debate. Free Trade Agreements, for example, tend these days to go far beyond tariffs and quotas, and also touch on the ability of the EU and its Member States to define their own rules, norms and standards. They therefore can have a direct impact on the life of the 450 million citizens of the Union, as they might compel EU and national regulators to adapt the rules governing the internal market (including such sensitive issues as food safety standards and the protection of consumers), with limited involvement of elected politicians.

This creates a conflict of interests, as these measures are de facto technical barriers to trade. For some of the EU's trading partners, these restrictions are seen less as measures to protect public health and the environment, and more as a measure to shield national producers from foreign competitors.[10] Whether such measures are above all protectionist, or whether they are genuinely intended to protect citizens or consumers, is not a binary question: in most cases they are both. Weighting the respective advantages against the disadvantages thus becomes a genuinely political debate, and the involvement of the wider public in this debate should be welcome – provided that the debate is not hijacked by other issues unrelated to the agreements themselves.

There are four reasons that may explain a bigger public interest in the EU's international agreements.

### *1) The focus of the agreements*

In the first 50 years of its existence, the agreements signed by the EU (or EEC/EC) were either of a narrow technical nature, or related to the application of rules set up by multilateral bodies.[11] As such, they raised little interest outside the rather narrow circle of direct stakeholders. Until a decade or so ago, the EU had little appetite for concluding bilateral free trade agreements,

since it considered that the World Trade Organisation (WTO) should be the default forum for trade liberalization. Bilateral agreements should be avoided since they had the potential of undermining the multilateral effort. For the EU, this had the benefit of allowing it to keep out of the firing line of activists, who saw free trade mainly as a plot by profit-seeking capitalists oblivious to the environment and workers' rights. The ire of these activists was therefore largely focused on the WTO.[12] It was only with its 2006 *Global Europe* Communication that the EU – against the background of a perpetuating stagnation in multilateral trade talks – admitted the option of 'going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation'.[13] From this moment on, the EU actively pursued FTAs with partners sharing its desire to bring down barriers to international trade.

*2) The scope of the agreements*

After half a century of trade liberalization under the auspices of the GATT/WTO, tariffs on industrialised goods were no longer the main concern of the EU, as they had already reached historic lows - if not across the globe, then at least among the EU's main trading partners. The focus of the EU thus shifted towards the biggest remaining obstacle to trade: diverging technical rules, norms and standards which created de facto barriers to trade. In the 'new generation' of trade agreements, the EU therefore actively seeks to promote a regulatory component, aimed at approximation of the legislative and regulatory framework of the partners. This ambition to tackle the 'behind-the-border' issues is reflected in the titles of many of these agreements (Deep and Comprehensive Free Trade Agreements or DCFTAs).

*3) More assertive partners*

Until recently, most partners with which the EU had concluded FTAs were no match in terms of size or economic clout for the EU.[14] One fundamental rule in trade policy is 'size matters', suggesting that it is the biggest trading blocks that can write the rules of international trade and export their norms and standards. These big trading powers are the 'norm makers', whereas the smaller partners are the 'norm takers' or consumers of rules made by others. Therefore, when agreements with smaller (or weaker) partners stipulate the approximation of rules, both sides understand that it is the smaller or weaker partner that has to align its rules to those of the EU, and not the other way round. In this, the EU's agreements are a convenient way for the EU to export its norms and values abroad. This has been helped by the fact that the EU was widely seen as a benign power, more concerned about exporting its values[15] than defending its narrow economic interests. Thus, the burden of adapting its internal regulatory framework to the wishes of the partner country exclusively fell on the EU's contractual partners, which is one of the reasons why this did not elicit much attention among the wider public within the Union. If concerns were raised by stakeholders in the partner countries, these were either ignored or brushed aside, pointing to the economic benefits of eased access to the EUs market.

It was only in 2013, when the EU attempted to conclude a free trade agreement with the US (TTIP), that public awareness rose within the EU about the potential regulatory fallout of a trade agreement with a partner that refused to be a 'norm taker'. For the US, it was clear that the EU had not only to take, but also to give: they expected the EU to lower barriers to existing markets, such as phytosanitary requirements that were seen as discriminatory towards US farmers.[16] However, this immediately triggered rather violent reactions among some parts of civils society (in particular in Germany and Austria) seeing an attempt of 'big business' to undermine, for the sake of maximising profits, the EU's 'right to regulate'. This would lead to a race to the bottom and threaten the high European food safety standards. Indeed it was with the start of the TTIP

negotiations in 2013 that Europeans realised for the first time that 'regulatory compliance' was not only about the EU exporting rules to (and producing results in) third countries: it could also compel the Union to adjust its internal rules to accommodate the preferences of the other contractual party – something that was seen by many as deeply undemocratic.

*4) The empowerment of the European Parliament*

Traditionally, states have considered trade policy as the prerogative of the executive, with limited involvement of the legislature. This was reflected at the level of the EC/EU, which in the past excluded the Common Commercial Policy from the scrutiny of the European Parliament. However, this situation changed drastically in 2009, when the Lisbon Treaty came into force. The European Parliament now acquired the right to give consent (in other words, a veto right) to every trade agreement. The European Parliament intended to make full use of this right, not only as a matter of principle, but also in full awareness of the potential impact of the new generation of (comprehensive) FTAs on its constituents, the 450 million citizens of the EU. The European Parliament thus saw its veto on trade agreements as a means to sharpen their profile as defenders of the interests of the EU citizens. They first made use of this veto right in 2012 when they vetoed the Anti-Counterfeiting Trade Agreement (ACTA), arguing that the agreement would jeopardise citizen' liberties.[17] Although the European Parliament cannot intervene and steer the negotiations directly, it can take position (through a resolution) and indicate that the Parliament will not be able to give consent to the agreement if certain provisions are, or are not, included: a barely disguised threat that if the outcome of the negotiations do not sufficiently reflect its views, the whole agreement will be vetoed.[18]

Together, four developments led to increased attention of the general public and brought EU (trade) agreements into the public space – and the European Parliament certainly has a huge merit in this. Being directly elected by the citizens of the Union, the European Parliament rightly considers itself the defender of their interests. However, the link between MEPs and their constituents is generally weaker than the link that binds national MPs to their voters. Most MEPs[19] are elected through a system of closed-list proportional representation that does not allow voters to give preferences to specific candidates on the party list (party-centred system).[20] As they are less in thrall to local constituencies asking them to defend narrow sectoral or regional interests, MEPs can afford to adopt a more value-driven approach, for example by insisting on respect for human rights and the rule of law in partner countries rather than on market access. Also, the Parliament has a turf to defend: being one of the two legislative bodies in the EU, the EP is a rule maker, loathe to of see the regulatory framework it has shaped being altered through the backdoor by international agreements, in which the role of the EP is limited.

Yet the EP was hardly the only actor with a renewed interest in trade agreements. Especially after the double crisis of 2007-2012 (global economic and financial crisis followed in 2010 by the Euro crisis), EU Member States increasingly felt compelled to show that they were the first line of defence for their citizens against the forces of globalisation. Hence, both the Parliament and Member States entered a competition into who did best in defending the interest of the citizens: Member States at a national level, or the EP at the European level.

## 2. National parliaments and EU international agreements: a question of competence

At this point, it is useful to recall the respective roles of the EU institutions and the Member States in concluding international agreements. The legal basis for such agreements is stipulated in the

Treaties.[21] The procedure is, in most cases,[22] very similar: the Commission negotiates with the partner state on the basis of negotiating directives ('mandate') drafted by the Commission and endorsed by the Council. After the conclusion of the negotiations, the agreement will be signed by the Council (and, in the case of trade and association agreements, also by the Commission) and ratified by the European Parliament ('consent').

### *Mixed or not mixed, that is the question*

It has been a regular source of contention over the years to decide whether an agreement should be signed solely on behalf of the EU ('EU-only'), or on behalf of the Union and its Member States (a 'mixed' agreement).

Not mentioned in the Treaties, mixed agreements have been used systematically as a stopgap by the EU. Whereas the European Communities had, from the very beginning, enjoyed an explicit legal personality that allowed the EC as such to conclude international agreement, the Maastricht Treaty failed to do the same thing for the EU in 1992. Since the European Community was, until 2009, part of the EU, this created an awkward situation which was addressed by signing a mixed EC/Member States agreement. This could cover all areas of EU competence (and even those outside of it!) and be labeled an EU agreement. It would also make it possible for the EU to adopt broad and comprehensive agreements that would allow it to use trade as a leverage for pursuing other more political objectives (i.e. security and migration). However, what appeared to be a pragmatic solution came with a price: having up to 28 Member States co-signing a treaty would mean that the internal procedures of the individual Member State for signing such agreements would have to be respected. This almost invariably means ratification by national parliaments, giving de facto every Member State a veto right over any agreement.

In principle, this legal stopgap should have disappeared with the Lisbon Treaty: why does the EU need the Member States if the EU can sign on its own behalf ? However, looking at the major agreements that the EU had concluded after 2009, not much had had changed: even free trade agreements continued to be signed as mixed agreements (for example, the 2011 EU-Korea agreement or the 2012 EU-Andean FTA with Columbia, Ecuador and Peru).

Nevertheless, in 2015 the EU signed its first comprehensive agreement without the Member States. The Stabilisation and Association Agreement with Kosovo, a broad agreement reaching far beyond the scope of trade and also including elements of the Common and Foreign Security Policy, was EU-only, with Federica Mogherini as High Representative/Vice-President signing on behalf of both the Council (as HR) and the Commission (as VP). Hence the question: why does the EU still make ample use of mixed agreements?

### *Who decides about mixity?*

It is generally the Council that takes the decision to go for either an EU-only or a mixed agreement, and only at the end of the negotiations, when the scope of the agreement becomes clear.  It is widely acknowledged that, after the entry into force of the Lisbon Treaty, the EU can conclude international agreements without the Member States if it has exclusive competences in that area. However, the delineation between exclusive competences and shared competences has been a recurring subject of dispute between the Member States and the Commission for more than 50 years.[23] As a rule, Member States have an interest in insisting on mixity, as this gives them political control over the agreement. It amounts to a national veto right even if the agreement also covers areas such as trade that are decided by qualified majority in the Council. There are two ways in which the Council can push for a modification of a Commission's proposal

in order to introduce mixity. First, if the Commission's proposal does not obtain the qualified majority needed for adoption in Council, the procedure for adoption can remain blocked. In this case, the Commission may be obliged to negotiate with the Council and submit a modified proposal in order to resume the procedure. Second, the Council can impose mixity by unanimously introducing a subject in the agreement (or the scope of a mandate) which is clearly outside EU competence. If the Commission believes that the provisions falls under the (exclusive) competences of the EU, it can bring a case to the Court of Justice in order to annul the modified act adopted by the Council.[24]

Yet to look only at the competences when it comes to deciding on the nature of the agreement would be misleading. In fact, there is nothing that prevents the Member States from allowing the Union to sign an 'EU-only' agreement, since they can mandate the Commission (or another negotiator) to negotiate, and the Council to sign, on behalf of the EU also in areas of shared and supporting competences,[25] and even under the intergovernmental CFSP, provided that the Council gives this mandate by unanimity.[26] There are a number of CFSP agreements signed as EU-only agreements, and even broad agreements covering multiple areas of shared competences (such as the Kosovo SAA and the EU-UK TCA) have been signed by the EU without its Member States.

## 3. Experience with mixed agreements

Where mixity was chosen in the past, this often came with a high price to pay. TTIP with the US has failed, after a number of Member States disavowed it. CETA with Canada has experienced long delays[27] due to the unwillingness of some Member States to ratify it. The Dutch referendum on the Deep and Comprehensive Free Trade Agreement with Ukraine, initiated by a Dutch right wing populist group and motivated by grievances that were completely unrelated to the agreement itself, inflicted damage both upon the Dutch government and upon the EU's credibility as a geopolitical actor. The chances for ratification of the agreement with Mercosur and the China Comprehensive Agreement on Investment by Member States are slim.

So why did the EU opt for the mixed agreements in these cases? The answer depends on the agreement. For some partners, as for the countries that fall under the European Neighborhood Policy, the EU strives to conclude so-called DCFTAs (Deep and Comprehensive Free Trade Agreements) that are part of bigger, political agreements or Association Agreements. In these agreements, the EU uses trade as leverage to nudge partner countries towards political reforms: the carrot (access to the EU's market) is available only in combination with political and economic reforms. This mirrors the approach that the EU took at the beginning of the century towards the countries of Central and Eastern Europe that were to become EU members between 2004 and 2013. But whereas, under its enlargement policy, trade was just one carrot between others (the main one being accession to the EU), for the countries of the European Neighbourhood access to the EU's market is the main incentive that the EU can offer its partners and that can be linked with non-trade aspects such as for example security and migration. These issues, however, mostly do not fall under the EU's exclusive competence – hence, according to the Council, the need for mixity.

With industrialized countries like Japan, Canada and the UK, the situation is different, as the EU does not realistically seek to triggers reform in these countries. So why mixity in the case of Korea and Canada? In Korea, mixity was lobbied for by some of the Member States, as this helped them to insist on negotiation outcomes that would reflect their national preferences and

meet the expectations of specific national stakeholders.[28] This allowed those countries to wield the threat of a veto by their national parliaments if these specific demands were not met. In the case of Korea, in order to give a legal foundation to a politically desired outcome, Member States introduced a provision which was seen as being outside the sphere of EU competences: the inclusion of a protocol on cultural cooperation (a pure Member State competence) made mixity unescapable, at least in the view of the Council.

In the case of Canada, the issue was different. As with the failed TTIP or the Singapore agreement, the Commission had proposed to include provisions on investment protection in CETA. These provisions would give private investors the right to challenge certain decisions of the host country before a panel of arbitrators outside the judicial system of the host country in the event that they considered these decisions to be discriminatory. This system, previously known as the Investor-State Dispute Settlement mechanism (ISDS), had been used for decades by Member States to protect their investors in countries with poor credentials of treating foreign investors fairly.[29] With the Lisbon Treaty, competence for foreign investment passed from the Member States to the EU, and the EU had then tried to establish this system, later reformed and renamed as Investment Court System (ICS), as a global standard. Few investors would consider such a mechanism necessary in a country like Canada. Yet the rising share in trade of China (and other illiberal countries) comes with bigger influence over international trade rules: no longer just a norm taker, China becomes a norm maker. As China is generally not perceived as treating foreign investors fairly, the EU has a strong interest in establishing rules such rules as a global standards, as long as the EU is still in the position to do this. Any approach that would divide the EU's partners into trustworthy (no rules on investment protection needed) and non-trustworthy (rules on investment protection needed) would be difficult to sell to the latter.

### *Beyond deep trade: Association Agreements*

Association agreements involving reciprocal rights and obligations, common action and special procedure are specifically foreseen in the Treaty.[30] They are the main instrument of the EU's enlargement and neighbourhood policy. They are eminently political as they seek to export the EU's norms and values to its partners, using trade as a leverage. There is generally a core consisting of a trade agreement (DCFTA in the case of the European Neighbourhood policy) and a political part, covering issues ranging from political dialogue to security, migration, judicial cooperation and promotion of the rule of law. In this way, the EU can trigger political and economic reforms in its partner countries by using as incentives market access, visa facilitation/liberation, participation in EU programmes and financing assistance. This scope of the Association Agreements is recognised in the Treaty, which requires unanimity for their adoption.[31]

For the same reason, Association Agreements have traditionally been adopted as mixed agreements. Yet this is not written in stone: should the Member States wish, they could also let the EU sign an EU-only agreement not subject to national ratification by the Member States. They can do this by mandating the EU negotiator by unanimity and empowering the Council to ratify the agreement on their behalf. Why would they do this? – for reasons of pragmatism. Two good examples are the 2015 Kosovo Stabilisation and Association Agreement and the 2020 Trade and Cooperation Agreement with the UK.

### *The 2015 EU-Kosovo Stabilisation and Association Agreement*

This agreement includes CFSP issues, education, cultural and administrative cooperation, taxation, preventing and combating organised crime – all matters that would be difficult to claim as exclusive EU competences, and which are generally seen as a trigger for mixity.[32] Yet in the

case of Kosovo, it would have been politically and legally impossible to have the agreement ratified by all countries, given that five EU Member States had not recognised the unilateral declaration of independence of the former Serbian province in 2008. However, all Member States, including the 5 "refuseniks", recognised the need to engage with Kosovo, since it was seen as a potential exporter of instability in a rather fragile region – not to be left to its own devices and allowed to become again a lawless zone. For the same reason, the Council had a few years earlier given its unanimous approval to the creation of a mission under the Common Security and Defence Policy (CSDP), EULEX Kosovo (European Union Rule of Law Mission), the biggest civilian CSDP mission to date.[33] The question of whether the competences under this agreement were exclusive or shared had not been an obstacle, as the Member States adopted their mandate to negotiate and conclude the agreement by unanimity,[34] making sure to avoid all areas for which no legal base was to be found in the treaties.

### *The 2020 EU-UK Trade and Cooperation Agreement*

Despite its name, the TCA with the UK is, technically speaking, not a trade agreement but an association agreement, since its legal base is Article 217, rather than Article 207 of the Treaty on the Functioning of the European Union (TFEU). Nevertheless, it is an EU-only agreement. Article 217 requires unanimity. Unlike the Kosovo agreement, the TCA predominantly relates to trade. Investment protection is not covered, but it includes law enforcement and judicial cooperation in criminal matters, as well as provisions on human rights, climate change, disarmament and non-proliferation, which are all non-exclusive competences. However, the Member States have not considered this to be an obstacle to an EU-only agreement. The European Commission website on the TCA states that 'the Agreement with the UK can be concluded as an EU-only agreement since it covers only areas under Union competence, be it exclusive or shared with the Member States'.[35] As in the Kosovo agreement, it was pragmatism that pushed the actors involved towards an EU-only solution. The negotiations of the agreement were concluded in the second half of December 2020. With the involvement of 27 individual Member States, there would have been no possibility to have the agreement signed before the end of the transition period ending on 31 December 2020, which would have created major disruptions in EU-UK trade. In the longer term, the possibility of at least one Member State refusing to ratify the agreement because of bilateral issues would have significantly damaged the EU-UK relationship, something that both sides were keen to avoid.

### *The role of the national parliaments*

Mixity means a veto right for each of the 36 legislatures at national level that have to endorse an international agreement. In a worst-case scenario, this could lead to international agreements being held hostage by local grievances, making such agreements dysfunctional as foreign policy instruments. This pessimistic view is, however, not supported by reality. Even if national ratification of an agreement is a lengthy process that can take many years,[36] the effects are often limited. Generally, the most palpable benefits of such agreements are related to trade, and these provisions generally are provisionally applied after the signature of the agreement, pending ratification. So far, no EU agreement had been definitively blocked by a national assembly, unlike the European Parliament, which has definitively put an end to both ACTA and the SWIFT agreement. The EU-Ukraine agreement was not held up by a legislative assembly, but disrupted by a consultative referendum, so no parliament can be blamed in this case. Since this agreement covers CFSP and other exclusive Member State competences, it would have required unanimity anyway, posing the same dilemma for the government. In reality, any national assembly is likely to think twice before taking the political responsibility and reputational loss of wrecking an agreement after it has been signed by its own government. If the objective is to take a principled

stance and to cater to public concerns, the more elegant alternative is to cast a negative vote before the signing of the agreement, thus casting the political responsibility for its adoption entirely on the government.[37] However, it is convenient for national governments to point to a possible refusal by their national parliaments in order to insist on negotiating outcomes in line with national preferences.[38]

It can be noted that, where the role of the national parliaments in shaping EU decisions has been boosted, assemblies have so far made limited use of these possibilities. The Lisbon Treaty introduced a subsidiarity check, also dubbed the 'yellow/orange card procedure', giving national parliaments the opportunity to express their objections to legislative proposals if they consider that these proposals do not respect the principle of subsidiarity and infringe on the rights of the Member States.[39] However, since 2009 there have been only three cases in which the threshold of negative views was reached to issue a 'yellow card' of warning. Also, parliaments make very uneven use of the possibility of a 'political dialogue' with the Commission on legislative proposals. The subsidiarity check shows that giving a formal role to the national parliaments is hardly a major burden to the executive. Given the (missing) record of national parliaments in voting down EU international agreements and their general reluctance to get involved into the technical details of EU decision making, it would be misleading to cast the blame for failing EU agreements on the national parliaments. The source of the problem lies rather with the governments who insist on mixity before hiding behind their national assemblies when they are asked to take responsibility for controversial measures.

## Conclusions

The risk that EU international agreements become politicised and are used as proxies for internal political infighting is real and worrying. This tendency threatens to invalidate one of the EU's most significant foreign policy instruments. International agreements are an effective way for the EU to further its interests and values by combining sticks and carrots in one package:  for example, access to EU markets in exchange for respect for human rights and the rule of law.

However, pointing fingers at national parliaments would be barking up the wrong tree. It is natural that national ratification by 36 legislative bodies may delay the process, but it is also of limited effect, given that many relevant provisions can enter into force provisionally once the agreement is signed. The EU's recent approach of splitting agreements into EU-only trade parts and mixed political parts may have insulated trade from unpredictable ratification processes in 36 national legislatures. However, this approach also limits the opportunity of using trade as a leverage for achieving its geopolitical objectives.

The real question is therefore whether mixed agreements still make sense at all. From a legal point of view, the answer would have to be negative. Both the 2015 SAA with Kosovo and the 2020 TCA with the UK show that it is legally possible for the EU to have comprehensive agreements covering the whole range of competences (exclusive, shared, supporting) without the Member States as 27 individual parts to the agreement. In both cases, the Member States had no objections to empowering the EU to sign on their behalf in areas where the competences of the EU were strictly limited, from police cooperation and cooperation in criminal justice (TCA) to education, culture and the CFSP (SAA).

In the end, the question is not whether the agreement includes non-exclusive competences or not. The question is whether there is a political will among the Member States to allow the agreement to be adopted by the EU alone. Politically, it makes sense for a Member State to insist

on mixity, as it strengthens the negotiating position of individual states, with national parliaments being instrumentalised to achieve better negotiation outcomes ('If we do not get what we want, our Parliament will vote the agreement down.'). While this may play in favour of certain Member States with high stakes in specific sectors, it weakens the EU's position as a whole: if the EU's partners cannot be reasonably sure that what they negotiate will actually see the light, their motivation to invest time and political capital in such agreements will be much diminished.

The power to conclude international agreements is one of the main tools in the EU's toolbox. Yet it is not because you declare yourself a geopolitical power that the rest of the world will give you a front seat. The EU has to prove to its partners that it is a reliable and predictable partner, and it is the responsibility of the Member States to make that happen. Member States should not be able to hide behind national legislators or behind competences and the law. These are, as we have seen, not the problem and they should not be blamed. It is the choice of the governments that represent their countries in the Council to allow (or not) the Union to use highly effective EU-only agreements as a means of achieving strategic autonomy. The alternative would be an EU muddling along as a global NGO as in the old pre-Lisbon days – except that, in a world that has changed beyond recognition over the last decade, the Union would be reduced to irrelevance. But again, do not blame the national parliaments for this.

## Notes

[1] European Commission, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy.* COM(2021) 66 final Brussels, 18 February 2021 p.4.

[2] European Commission and High Representative, *Joint Communication to the European Parliament and the Council on strengthening the EU's contribution to rules-based multilateralism*, JOIN(2021) 3 final, 17 February 2021 pp. 10,2.

[3] Ibid. p.11.

[4] This was caused by a veto of Cyprus, unwilling to agree unless the EU moves to impose sanctions on Turkey over its drilling in the contested waters of the eastern Mediterranean. This veto was overcome only after two months, when in October 2020, the leaders agreed on a stern warning to Turkey that it could face punitive measures if it continues the undersea drilling work.

[5] Around half of all Member States have bicameral Parliaments. Of all Member States, Malta is the only one which does not require its Parliament to ratify international agreements.

[6] As of March 2021 the Cypriot government had not formally notified the EU, hoping to overturn the result after forthcoming elections.

[7] Van der Loo, G. (2018) 'Less is more? The role of national parliaments in the conclusion of mixed (trade) agreements', *CLEER PAPERS* Asser Institute 2018/1.

[8] Chamon, M. and Govaere, I. (eds.) (2020), *EU External Relations Post-Lisbon. The Law and Practice of Facultative Mixity.* (Leiden: Brill).

[9] Chamon, M. and Verellen, T. (2020), *Whittling Down the Collective Interest: CETA, Facultative Mixity, Democracy and Halloumi, VerfBlog*, 2020/8/07, https://verfassungsblog.de/whittling-down-the-collective-interest/.

[10] One of the most controversial subjects in the debate about a EU-US FTA (TTIP) was the issue of broilers treated with chlorinated water ("chlorinated chicken"), a standard practice in the US but banned in the EU. Curiously enough, there is no general ban at EU level on treating food products with chlorinated water, proven by the practice in some EU Member States of allowing the sale of pre-cut and pre-washed salad treated with chlorinated water (for which competitive pressure from US producers is inexistent).

[11] Examples of these are the Convention on the simplification of formalities in trade in goods (L 134, 22 May 1987/EEC); Convention between the European Community and the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) concerning aid to refugees in the countries of the Near East signed in 1982

[12] The WTO ministerial meeting meant to kick off the millennium round in Seattle in 1999 became known as the "battle of Seattle", after clashes between anti-globalists and Canadian anti-riot police.

[13] European Commission, Global Europe - Competing in the World, October 2006. http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf (emphasis added).

[14] Bradford, A. (2020), *The Brussels Effect: How the European Union Rules the World.* (OUP).

[15] These values are stipulated in Arts. 2 and 3(5) of the Treaty on the European Union: in particular the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

[16] The underlying problem is that there are two incompatible approaches towards food safety: the EU's precautionary approach, prescribing that only products proven to be safe could be given market access, against the US' 'scientific approach' that only products that are proven to be dangerous to consumers can be legally withheld from the market – a reversal of the burden of proof. This is complemented by the EU's Farm to Fork approach, stipulating strict controls along the entire production chain in order to guarantee the safety of the product, as opposed to the 'end-of-pipeline' approach of the US, where only the final product is tested for compliance. In both cases, the lesser regulatory burden gives a distinct advantage in terms of cost-effectiveness
to US farmers.

[17] European Parliament rejects ACTA, EP press release, 04.07.2012 https://www.europarl.europa.eu/news/en/press-room/20120703IPR48247/european-parliament-rejects-acta

[18] In 2015, the European Parliament adopted a resolution indicating that it would not be able to give consent to TTIP if the controversial Investor-State dispute settlement mechanism (ISDS) would be part of the agreement. After this the Commission abandoned ISDS, replacing it with a new mechanism (ISD) that would address the grievances of the European Parliament against the initial mechanism.

[19] This is, among others, the case in Germany, France, Spain, Poland, Romania, the Netherlands and Belgium, accounting for over 50% of all MEPs

[20] Høyland, B, Hobolt, S. and Hix, S. (2017), 'Career ambitions and legislative participation: the moderating effect of electoral institutions'. *British Journal of Political Science* 49(2): 491-512.
[21] Art. 207 TFEU for trade agreements and Arts. 216-218 TFEU for other agreements.
[22] One notable exception is the CFSP (Art. 218(3) TFEU)
[23] In 1971, the ECJ established with its landmark ERTA ruling the notion if implicit exclusive competences, which has resulted in extensive EU case law dealing with the application of this principle.
[24] Conconi, P. Herghelegiu, C. Puccio, L. (2021),'Trade Agreements: To Mix or not to Mix, That is the Question' *Journal of World Trade* 55(2): 231-260.
[25] The list of areas that fall under exclusive and shared competence is stipulated in art 3 and 4 of the Treaty on the Functioning of the European Union (TFEU). In addition, art. 6 lists the areas where the EU has competences to support, coordinate and supplement the actions of the Member State.
[26] In this respect, the CJEU opinion 2/2015 on the Singapore agreement created quite some confusion as it stated that, since the Court considered the protection of foreign investment as a mixed competence, the agreement could not be concluded by the EU alone – which would suggest that, in this case, Member States were not free to mandate the EU to act of their behalf, even this had been already common practice. The Court later clarified this issue in the COTIF case (C-600/14), specifying that their position was due to the fact that there was no possibility of the required majority being obtained within the Council. In other words, for the Court in COTIF, the use of mixity depends entirely on a political choice of the Council.
[27] At the time of writing (April 2021), 12 Member States had not yet ratified the 2016 CETA with Canada.
[28] This has been the case with the EU-Korea agreement, where France and Italy received specific concession shielding their manufacturers of small cars from Korean competitors
[29] Before becoming an EU competence in 2009, EU Member States had concluded around 1500 of such bilateral investment agreements. The oldest of these had been signed in 1959 between the Federal Republic of Germany
and Pakistan.
[30] Art. 217 TFEU, Art. 8 TEU.
[31] Art. 218(8) TFEU.
[32] In the 2011 EU-Korea agreement, the inclusion of a protocol on cultural cooperation was stated as the reason mixity.
[33] Set up in 2008, EULEX Kosovo comprised up to 2000 EU police, judges, prosecutors and customs officials with an executive mandate. In order to not allow the question of recognition divide the Member States, the Council had adopted the joint action establishing EULEX Kosovo just a couple of days prior to the unilateral declaration of independence in February 2008, in full coordination with both the UN and the Kosovo authorities. This allowed
the non-recognising countries to ignore the declaration of independence and consider the UN mandate as source of legitimacy (together with the Council Joint Action), whereas the recognising Member States could point to a mandate for an executive international presence enshrined in the Kosovo constitution.
[34] Unanimity in the Council does not mean that every member state has to vote in favour, but only that no Member State votes against. In the present case, anecdotal evidence has it that the representatives of the five non-recognising Member States left the room before the vote.
[35] https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532 (emphasis added).
[36] At the time of writing (April 2021), 12 Member States had not yet ratified the 2016 CETA with Canada.
[37] This is what the Wallonian Assembly did in the case of CETA. Another example is the negative vote on Mercosur by the Dutch tweede kamer (lower house) in June 2020, before the text of the agreement had been finalised
[38] De Bievre, D. (2018), 'The Paradox of Weakness in European Trade Policy: Contestation and Resilience in CETA and TTIP Negotiations', *The International Spectator 53(3): 70-85.*
[39] Lisbon Treaty. Protocol (No1) on the role of national Parliaments in the EU and Protocol (No2) on the application of the principles of subsidiarity and proportionality.