

Constitutional Limits to the Political Choice for Mixity

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I. Introduction

Given that mixity is one of the most characteristic features of the European Union's external action,¹ it is fitting to explore part of the constitutional framework that governs and structures the phenomenon in this volume. All the more so because mixity is mired in controversy, generally receiving a bad press from EU external relations scholars. As Weiler, himself more sympathetic to mixity, already noted in 1983 "it has been quite common to [...] regard mixed agreements as an obstacle and impediment to the process of European integration and thus to condemn them or at best to tolerate them as a necessary evil".² In constitutional terms, the phenomenon of mixity finds its origin in the specific allocation of competences in the EU legal order as informed by the principle of conferred powers. From the 1990s onwards and to ensure the manageability of mixity in practice, the Court of Justice has added the constitutional principle of sincere cooperation to the equation, identifying a duty of cooperation between the Member States and the EU institutions to ensure unity in the external representation of the Union and the Member States.³ The shift in ju-

* I would like to thank Gesa Kübek for remarks on an earlier draft. All errors or omissions remain mine.

- 1 Kadelbach and Eekhout note that the majority of the EU's agreements are mixed, while Cremona refers to the majority of important agreements. See S. Kadelbach, "Handlungsformen und Steuerungsressourcen in den EU-Außenbeziehungen", in A. Hatje, P.-C. Müller-Graf (eds), *Europäische Außenbeziehungen* (Baden-Baden: Nomos, 2014), 227; P. Eeckhout, *EU External Relations Law* (Oxford: Oxford University Press, 2011), 212; M. Cremona, "EU External Relations: Unity and Conferal of Powers", in L. Azoulai (ed), *The Question of Competence in the European Union* (Oxford: Oxford University Press, 2014), 78.
- 2 J. Weiler, "The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle", in D. O'Keefe, H. Schermers (eds), *Mixed Agreements* (Deventer: Kluwer, 1983), 37.
- 3 C. Hillion, "Mixity and Coherence in EU External Relations: The Significance of the 'Duty of Cooperation'", in C. Hillion, P. Koutrakos (eds), *Mixed Agreements Re-*

risprudential focus, henceforth emphasising pragmatic solutions on the exercise of shared or concurrent EU and Member States' competences has been criticised as pushing out the more fundamental question regarding the existence of (EU) competence.⁴ Although law scholars should not fool themselves into believing they hold any sway over the judges at the Court, it is interesting to note that the Court in a more recent case seems to have returned to the question of competence, this time through the principle of the autonomy of the EU legal order. The still developing framework governing (and restricting) mixity is then composed of the principles of conferral, loyalty and autonomy, with the precise rules flowing from these principles still to be determined.

II. *Mixity's Constitutional Foundations*

The European Union has been described as an open federation in light of the fact that both the Union and its constituent entities may engage, independently from each other, in international relations.⁵ The open character of the EU's federative Union thereby stands in stark contrast to the (more typical) statal federations where the federal principle is thrown overboard in external legal relations and the state acts as a unitary actor in relation to the outside world, as if it were not a federation at all.⁶ While the choice for an open federation is laudable in light of federalism's value of diversity, it evidently comes at a price of greater complexity (and the risk of undermining unity). An additional complicating factor for the EU is that the EU Treaties have conferred shared competences on the EU. As a result, the open EU federation requires constitutional mechanisms in order to determine, in specific cases, which level of government is to act externally and to what extent. Supervening exclusivity, codified by the Lisbon Treaty in Article 3, paragraph 2, of the Treaty on the Functioning of the European Union (TFEU), is one such mechanism originally worked out by the Court

visited: the EU and its Member States in the World (Oxford: Hart Publishing, 2010), 87-88.

4 M. Cremona, *supra* note 1, 74.

5 R. Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge: Cambridge University Press, 2014), 173.

6 J. Weiler, *supra* note 2, 37-38.

of Justice.⁷ Mixity is another, and was developed by the institutions and the Member States. While it has not been enshrined in EU primary law,⁸ the Court has explicitly sanctioned the practice in its established case law.⁹

Thus, the phenomenon of mixity, that is of agreements concluded by EU and all, or some, Member States with another entity (state or international organization) under international law,¹⁰ is typically explained by two legal considerations, which in turn are informed by the EU's principle of conferred powers.¹¹ First, mixity is a consequence of the limited scope of the EU's competences: when an international agreement which the EU would like to conclude deals with matters not wholly coming within the competences conferred on the EU, the involvement of the EU Member States in the agreement is legally required. Second, even if the matters dealt with in the international agreement do come under the EU's competences, the involvement of the EU Member States is only legally precluded if every single matter comes under the EU's exclusive competences.¹² If not, the EU may exercise some of its shared competences, in respect of

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- 7 Supervening exclusivity ruling out a role of the Member States (despite the EU being an open federation) explains why Weiler praised the federalist merits of mixity.
 - 8 Only the Euratom Treaty explicitly foresees mixity in Article 102. The Treaty of Nice added a reference to mixed agreements in Article 133, paragraph 6, EC but this was taken out of the Treaties again by the Lisbon Treaty. The latter then only hints at mixity for the conclusion of the EU's accession to the European Convention on Human Rights (in Article 218, paragraph 8, TFEU).
 - 9 See i.a. Opinion of the Court of 26 April 1977, 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, EU:C:1977:63, para 7; Opinion of the Court of 19 March 1993, 2/91, *Convention no. 170 of the International Labour Organization concerning safety in the use of chemicals at work*, EU:C:1993:106, paras 36-39; Judgment of 2 March 1994, *Parliament v Council*, C-316/91, EU:C:1994:76, para 26.
 - 10 S. Kadelbach, *supra* note 1, 227.
 - 11 See also P. Eeckhout, *supra* note 1, 213-214.
 - 12 Until the recent judgment of the Court in *Germany v Council* (see *infra* note 15) some Member States typically assumed that mixity is required whenever an agreement is not fully covered by EU exclusive competences. See also *infra* note 76. Still, this point of view was not limited to the Member States. Pre-Lisbon Neframi also remarks that agreements coming under shared EU competences cannot be concluded by the EU alone if the *ERTA* and Opinion 1/76 doctrines do not apply. See E. Neframi, *Les accords mixtes de la Communauté européenne : aspects communautaires et internationaux* (Bruxelles: Bruylant, 2007), 107-111. See also G. Garzón Clariana, "La mixité: le droit et les problèmes pratiques", in J. Bourgeois (ed), *La Communauté européenne et les accords mixtes* (Maastricht: Presses interuniversitaires européennes, 1997), 16. In addition, the Court sowed some confu-

which Article 2, paragraph 2, TFEU provides: “Member States shall exercise their competence to the extent that the Union has not exercised its competence”. Thus, as long as the EU refrains from exercising such shared competences, a question which is ultimately in the hands of the EU Council, there is scope for Member State action and, hence, mixity.

III. Constraining Compulsory Mixity

It follows from the above that a distinction should at least be made between compulsory and facultative mixity.¹³ Although the Court created some confusion on facultative mixity in Opinion 2/15 by finding that the EU could not conclude the Singapore Free Trade Agreement (EUSFTA) on its own given that some of its provisions came under the EU’s shared competences,¹⁴ it set the record straight in *Germany v Council* where Germany argued that the EU only has an external competence if it is exclusive.¹⁵ The Court firmly rejected this suggestion,¹⁶ and clarified its finding in Opinion 2/15 by noting that in that case it had taken into account the political context and had assumed that the required majority would not be

sion on this in its Opinion on the Singapore FTA but afterwards corrected itself in *Germany v Council*.

- 13 Different typologies of mixity have been proposed in the past. See H. Schermers, “A Typology of Mixed Agreements”, in D. O’Keeffe, H. Schermers (eds), *Mixed Agreements*, *supra* note 2, 23-33; A. Rosas, “The European Union and Mixed Agreements”, in A. Dashwood, C. Hillion (eds), *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000), 203-207; M. Maresceau, “A Typology of Mixed Bilateral Agreements”, in C. Hillion, P. Koutrakos (eds), *Mixed Agreements Revisited*, *supra* note 3, 11-29. The added value of these typologies has also been questioned, see P. Eeckhout, *supra* note 1, 213-214.
- 14 The Court found that some aspects of the FTA came under shared (rather than exclusive) EU competence and hence the agreement could not be concluded by the EU alone. See Opinion of 16 May 2017, 2/15, *EU- Singapore Free Trade Agreement*, EU:C:2017:376, paras 243-244, 282. This would imply that facultative mixity does not exist and that instead the EU can only conclude compulsory EU-only agreements (pursuant to exclusive EU competences) or compulsory mixed agreements.
- 15 See Judgment of 5 December 2017, *Germany v Council*, C-600/14, EU:C:2017:935, para 38.
- 16 *Id.*, paras 47-51.

found in the Council for the EU to exercise its shared competences on its own.¹⁷

In light of Weiler's statement, facultative mixity is often seen as an obstacle to European integration, while compulsory mixity is seen as a necessary evil. Going beyond mere value judgements, this contribution aims to address the question whether the constitutional principles identified earlier may in some way structure or limit the institutions' and Member States' choice for mixity in EU external action.

At first sight, there can only be a genuine choice for mixity in the case of facultative mixity. On the other hand, when part of an agreement relates to an exclusive national competence, mixity would seem inevitable (i.e. compulsory). This traditional view is captured by the "pastis metaphor"¹⁸ which Advocate General Kokott in the *Vietnam WTO Accession* case presented in the following way: "Individual aspects of an agreement for which the Community has no competence internally 'infect' the agreement as a whole and make it dependent on the common accord of the Member States. [...] Just as a little drop of pastis can turn a glass of water milky, individual provisions, however secondary, in an international agreement based on the first subparagraph of Article 133(5) EC can make it necessary to conclude a shared agreement".¹⁹ Such mixity, even if it is compulsory, may then in fact be a type of hidden facultative mixity, since Member States in the past have often insisted on the inclusion of such unnecessary "secondary" provisions to ensure that an envisaged agreement must (legally) be concluded as a mixed agreement.²⁰

17 *Id.*, para 68.

18 The pastis metaphor had earlier been coined by then Trade Commissioner Pascal Lamy in a slightly different context. Arguing for a generalization of qualified majority voting in EU Trade Policy during the Convention on the future of Europe, he noted: "The Treaty of Nice has been a step in the right direction, but too many pockets of unanimity survive. And under the Pastis principle, a little drop of unanimity can taint the entire glass of QMV water". See P. Lamy, *The Convention and Trade Policy: Concrete Steps to Enhance the EU's International Profile*, Speech, Brussels, 5 February 2002, p. 3.

19 Opinion of AG Kokott of 26 March 2009, *Commission v Council*, C-13/07, EU:C:2009:190, para 121.

20 The example of provisions on political dialogue is often cited in this regard. G. Garzón Clariana, *supra* note 12, 22. See G. De Baere, *Constitutional Principles of EU External Relations* (Oxford: Oxford University Press, 2008), 235-236. Post-Lisbon, clauses on political dialogue may be covered by the Common Foreign and Security Policy and do not require mixity anymore. Commenting on AG Sharp-

This traditional view should be juxtaposed with the view that would apply the absorption doctrine to provisions of an ancillary nature. Typically the absorption doctrine is applied horizontally when the EU institutions have to identify the legal basis for EU action. Pursuant to the established case law of the Court of Justice,²¹ the choice of legal basis is not left to the discretion of the legislature but must be based on objective factors, notably the aim and the content of the measure to be adopted. If a measure pursues different aims, one of which is the main objective while the other is merely ancillary, the main objective ‘absorbs’ the ancillary objective and the measure should be adopted solely pursuant to the legal basis corresponding to the main objective.²²

Can the absorption doctrine also be applied vertically to the effect that ancillary provisions which happen to come under (exclusive) national competences are absorbed by the provisions coming under EU competence? Recently, Advocate General Wahl seemed to suggest so in his Opinion on the Marrakesh Treaty when he observed, albeit in passing, that “a mixed agreement would be required, generally, where an international agreement concerns coexistent competences: that is, it includes a part which falls under the exclusive competence of the Union and a part which falls under the exclusive competence of the Member States, without any of those parts being ancillary to the other”.²³

In support of his (implied) assertion that compulsory mixity might be avoided by applying the absorption doctrine, Advocate General Wahl relied on Opinion 1/94 and *Portugal v Council*. In Opinion 1/94, the Com-

ston’s Opinion in 2/15 in which the termination of Member States’ existing investment Treaties was qualified as an exclusive national competence, Kleimann opined that such clauses are redundant in the EU’s new generation free trade agreements. Under this reasoning, their inclusion would also result in false mixity. See D. Kleimann, “Reading Opinion 2/15 : Standards of Analysis, the Court’s Discretion, and the Legal View of the Advocate General”, *EUI Working Papers*, no. 23 (2017), 22.

- 21 See *inter alia* the case law cited in Opinion of 6 December 2001, 2/00, *Cartagena Protocol*, EU:C:2001:664, para 23.
- 22 See A. De Walsche, “La procédure de conclusion des accords internationaux”, in J-V. Louis, M. Dony (eds), *Relations Extérieures* (Bruxelles: Editions de l’Université de Bruxelles, 2005), 81-82; M. Maresceau, *Bilateral Agreements Concluded by the European Community* (Den Haag: Martinus Nijhoff, 2006), 156-157.
- 23 Opinion of AG Wahl of 8 September 2016, Opinion 3/15, EU:C:2016:657, para 122. In the Council, several Member States had noted that the absorption doctrine could not be applied vertically. See Council doc. 8305/14 ADD 1, p. 3.

mission had argued that the TRIPS agreement (provisions harmonising intellectual property protection) could be brought under the trade notion of Article 113 EEC since earlier agreements concluded pursuant to Article 113 EEC contained provisions on intellectual property.²⁴ The Court dismissed this, noting that those provisions in earlier agreements were “extremely limited in scope”, while confirming that “the Community and its institutions are entitled to incorporate within external agreements otherwise falling within the ambit of Article 113 ancillary provisions for the organization of purely consultative procedures or clauses calling on the other party to raise the level of protection of intellectual property”.²⁵

A clearer application of the absorption doctrine could be found in *Portugal v Council*, where Portugal questioned the legal basis used to conclude a cooperation agreement with India. Relying on Opinion 1/94, Portugal argued that the legal bases related to trade policy and development policy could not be used to include a general provision on intellectual property protection in the agreement.²⁶ In this regard, the Court noted that the obligations assumed were very limited. The commitment to facilitate

24 Specifically, the EEC-USSR agreement on trade in textile products provided in Article 20: “As regards intellectual property, at the request of either Contracting Party, consultations shall be held [...] with a view to finding an equitable solution to problems relating to the protection of marks, designs or models of articles of apparel and textile products”. The interim agreements with Bulgaria, Czechoslovakia and Hungary provided (in Articles 37, 36 and 35) that those countries “shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide [...] a level of protection similar to that provided in the Community [...], including comparable means of enforcing such rights”. See the EEC-USSR agreement, OJ 1989 L 391/2; EEC-Bulgaria agreement, OJ 1993 L 323/2; EEC-Czechoslovakia agreement, OJ 1992 L 115/2; EEC-Hungary agreement, OJ 1992 L 116/2.

25 Opinion of 15 November 1994, 1/94, *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property*, EU:C:1994:384, paras 67-68.

26 The specific provision *in casu* was Article 10 of the Agreement, which provided that: “The Contracting Parties undertake to ensure as far as their laws, regulations and policies allow that suitable and effective protection is provided for intellectual property rights, including patents, trade or service marks, copyright and similar rights, geographical designations (including marks of origin), industrial designs and integrated circuit topographies, reinforcing this protection where desirable. They also undertake, wherever possible, to facilitate access to the data bases of intellectual property organizations”. See EEC-India Cooperation Agreement, OJ 1994 L 223, p. 24.

access to databases for instance “ha[d] only a very limited scope and [was] ancillary in nature”.²⁷ The Court therefore concluded that the scope of the resulting obligations was not as such to constitute objectives different from the general objective of development cooperation.²⁸ While the Court thereby undeniably applied the absorption doctrine it must be noted that, differently from what Advocate General Wahl seemed to imply, there was no exclusive national competence at issue. Instead, Portugal had argued that the EU did not have an exclusive competence pursuant to Articles 113 and 130y EEC²⁹ while the Council rightly noted that the lack of an exclusive EU competence did not mean that the EU lacked competence to conclude the agreement on its own.³⁰

In addition to the cases mentioned by Advocate General Wahl, Rosas has referred to Opinion 1/78 to argue that “the provisions relating to possible ‘coexistent’ Member States competences may be of such a limited relevance that they should be seen as ‘ancillary’ (subsidiary) to the essential objectives of the agreement. If this is the case, Member States participation would not be necessary – or, in cases of exclusive Community competence, even legally admissible”.³¹ Indeed, in Opinion 1/78, the Court confirmed that the conclusion of the agreement on natural rubber came within the EU’s exclusive competences on trade depending on how the

27 Judgment of 3 December 1996, *Portugal v Council*, C-268/94, EU:C:1996:461, para 75.

28 *Id.*, para 76.

29 See *id.*, para 69. This illustrates the typical (political) reasoning followed by the Member States to date: if an agreement does not wholly come under EU exclusive competences, mixity is presented as an automatic consequence. As Heliskoski notes, this is plainly erroneous even if AG Pergola seemed to concur with Portugal when he noted that when “the Community does not enjoy exclusive competence ..., matters have to be regulated by means of mixed agreements”. See Opinion of AG Pergola of 23 May 1996, *Portugal v Council*, C-268/94, EU:C:1996:207, para 41; J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague: Kluwer Law International, 2001), 42.

30 Note however that the Council only half-heartedly defended the possibility of the EU exercising shared competences on its own: “[The Council] considers that the Community had the power to conclude the Agreement without the participation of the Member States since the clause in the Agreement concerning intellectual property has only limited scope and involves substantial obligations only on the part of India”. See Judgment of 3 December 1996, *Portugal v Council*, C-268/94, EU:C:1996:461, para 71.

31 A. Rosas, *supra* note 13, 204.

mechanism set up by the agreement would be financed (by EU or Member States' funds). The Court took care to point out that from a substantive point of view the agreement in any case was covered by the current Article 207 TFEU. Other provisions in the agreement such as those on technological assistance and labour conditions on the other hand could not "modify the description of the agreement which must be assessed having regard to its essential objective rather than in terms of individual clauses of an altogether subsidiary or ancillary nature".³² According to Rosas, if such ancillary provisions nonetheless trigger mixity, one can speak, especially if exclusive EU competences are at issue, of false mixity.³³

The views of Advocate General Wahl seem difficult to square with those of Advocate General Kokott but it should be noted that Advocate General Kokott used her *pastis* metaphor when interpreting the very complex amendments made by the Nice Treaty to Article 133 EC and especially the relationship between the fifth and sixth paragraph of that Article. According to the Advocate General, "Article 133(6) EC is not an exception to the first subparagraph of Article 133(5) EC and, as such, to be interpreted narrowly At the same time, [Article 133(6) EC] counteracts a main-purpose test operating to the disadvantage of the areas of competence of the Member States".³⁴ Thus, despite having worded her *pastis* metaphor in general terms, Advocate General Kokott did not as such rule out a main-purpose test (and the resulting absorption doctrine) when deciding on the vertical delimitation of competences (rather than the horizontal cases in which it is typically applied).

To sum up, while the above case law tends to support applying the absorption doctrine in order to avoid a situation of facultative mixity, two key points must be addressed before transposing this finding to instances of compulsory mixity. First, apart from *Portugal v Council*, these cases involved the common trade policy, an *a priori* exclusive competence of the

32 Opinion of 4 October 1979, 1/78, *International Agreement on Natural Rubber*, EU:C:1979:224, para 56.

33 A. Rosas, *supra* note 13, p. 205. See also J. Heliskoski, *supra* note 29, 68. Similarly Gilsdorf criticized the Member States' insistence on mixed agreements when certain provisions are not covered by EU competence, ignoring the often ancillary nature of these provisions. See P. Gilsdorf, "Die Außenkompetenzen der EG im Wandel – Eine kritische Auseinandersetzung mit Praxis und Rechtsprechung", *Europarecht* 31, no. 2 (1996), 161.

34 Opinion of AG Kokott of 26 March 2009, *Commission v Council*, C-13/07, EU:C:2009:190, para 120.

EU.³⁵ Second, none of the cases actually involved the absorption of provisions coming under exclusive national competence.

In addition, the correct application of the absorption doctrine in general remains rather murky, as was further illustrated in the Opinion procedure on EUSFTA.³⁶ Advocate General Sharpston found that the Investor State Dispute Settlement (ISDS) mechanism's function was to make the enforcement of the EUSFTA more effective and opined that in line with the Court's case law,³⁷ "dispute settlement and mediation mechanisms are ancillary in nature, the allocation of competences between the European Union and the Member States for such mechanisms is necessarily the same as for the substantive provisions to which they relate. In other words, those mechanisms are not in themselves capable of altering the allocation of competences between the European Union and its Member States".³⁸ The Court on the other hand noted that the specific arrangement for ISDS in the EUSFTA was worked out in such a way that disputes brought for arbitration are removed from the jurisdiction of the national courts. Such a regime then "cannot be of a purely ancillary nature [...] and cannot, therefore, be established without the Member States' consent".³⁹ The Advocate General and the Court clearly disagreed on this point but the Court, unfortunately, is not particularly forthcoming on the precise reason why the mechanism's repercussions were too significant to be qualified as ancillary.⁴⁰ In addition, lack of EU competence resulting from the non-ancillary nature of the mechanism seems a *non sequitur*: if the provisions on ISDS

35 This is why Kaniel refers to cases such as Opinion 1/78 as cases involving an 'ancillary exclusive power'. See M. Kaniel, *The Exclusive Treaty-Making Power of the European Community up to the Period of the Single European Act* (The Hague: Kluwer Law International, 1996), 55-57.

36 In this regard, Kleimann has argued that for the purpose of determining the predominant and ancillary provisions of an act the Court should, as a matter of systemic coherence, apply the same 'objective factors amenable to judicial review' which it applies for determining an act's legal basis. See D. Kleimann, *supra* note 20, 12.

37 See Opinion of 16 May 2017, 2/15, *supra* note 14, para 276.

38 Opinion of AG Sharpston of 21 December 2016, Opinion 2/15, EU:C:2016:992, para 529.

39 Opinion of 16 May 2017, 2/15, *supra* note 14, para 292.

40 It may be noted that the Court did not explicitly find that the mechanism touches on an exclusive national competence. Thus, even if it noted that it would not deal with the FTA's compatibility with the Treaties (see para 30) the Court may also have felt that the mechanism could not be qualified as ancillary because of its

were too significant to be absorbed by the provisions on trade and transport the question should have become whether there might still be EU competence pursuant to another legal basis in the Treaties.

IV. *Facultative Mixity and its Critique*

Leaving the area of compulsory mixity behind and focusing on the EU's shared competences brings us to a second and perhaps more pressing issue. In cases of shared competence (or generally when an agreement is not completely covered by Article 3 TFEU), the EU institutions may opt not to make use of the EU's competences, leaving the legal space open for the Member States to be involved in the process.⁴¹ The situation in which a potential EU-only agreement is turned into a mixed agreement may be described as typical facultative mixity.⁴²

Given that mixity is perceived as hampering the effectiveness of EU external action,⁴³ the question arises of why the Member States would insist on being involved in the conclusion of such agreements in their own capacity as subjects of international law. This question has been well documented,⁴⁴ although nothing radically new has been added to the insights formulated in this regard by Ehlermann in 1983.⁴⁵ Today, the most important reason for the Member States' insistence on mixity, when it is not legally required, is, allegedly, their wish to remain 'visible' on the international stage.⁴⁶

repercussions on the preliminary ruling procedure, even if the FTA itself rules out the direct effect of its provisions.

41 See J. Heliskoski, *supra* note 29, 25.

42 See A. Rosas, *supra* note 13, 205-206. Klamert rightly remarks that facultative mixity is also at issue when a mixed agreement covers exclusive Member State and shared (EU and Member State) competences. See M. Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2014), 183-184. However, such facultative mixity will not be discussed in the present contribution.

43 C. Hillion, *supra* note 3, 90.

44 A. Dashwood, "Why Continue to Have Mixed Agreements at All?", in J. Bourgeois (ed), *La Communauté européenne et les accords mixtes*, *supra* note 12, 96-97.

45 C-D. Ehlermann, "Mixed Agreements: A List of Problems", in David O'Keefe & Henri Schermers (eds), *Mixed agreements*, *supra* note 2, 4-9.

46 R. Schütze, *supra* note 5, 203.

Recourse to mixity, both in cases of compulsory and facultative mixity, has been criticised in legal doctrine. Schütze for instance argues that it ought to be avoided and laments that the Court of Justice has given its judicial blessing to an uncontrolled resort to mixity.⁴⁷ Even an ardent supporter like Dashwood has conceded that the ‘inconveniences’ that are sometimes caused by mixed agreements should be minimised.⁴⁸ In this regard, he has proposed that where practicable, mixity should be avoided by excising dispensable elements from the agreement if these elements would trigger (compulsory) mixity and the Commission should convince the Member States (in areas of shared competence) that they do not lose anything by agreeing to conclude EU-only agreements.⁴⁹ Here Dashwood sees a role for the Commission in alleviating the Member States’ fears of a “reverse *ERTA*” doctrine. Under this doctrine, the exercise by the EU of external competences would pre-empt Member States’ acting in the field internally, rendering the competence an exclusive EU competence (thus reversing *ERTA*, where the exercise by the EU of an internal competence can result in the pre-emption of Member States acting externally).⁵⁰ However, even if the Commission would argue against a reverse *ERTA* doctrine,⁵¹ it should be noted that this issue is not really in the hands of the Commission in the first place. This may explain why the Member States

47 *Id.*, 204-205 (see especially footnote 140).

48 A. Dashwood, *supra* note 44, 93.

49 *Id.*, 97. Dashwood further proposed to introduce certain rules in primary law governing mixed agreements. It is open for debate however whether a Treaty change would be legally required. While this would seem to be the case for Dashwood’s proposal allowing the Council to unanimously adopt common positions in areas of exclusive Member States competence, it must be noted the Court in the *FAO* case implicitly accepted that the Council could represent and bind the Member States in their individual capacity. See P. Eeckhout, *supra* note 1, 246; C. Timmermans, “Organising Joint Participation of EC and Member States”, in A. Dashwood, C. Hillion (eds), *The General Law of EC External Relations*, *supra* note 13, 243-244.

50 M. Cremona, *supra* note 1, 70.

51 In its observations in Opinion 2/92, the Commission rejected a reversal of the *ERTA* doctrine but not a reversed *ERTA* doctrine when it noted: “the fact that the Member States retain certain internal powers cannot necessarily be relied upon for the purpose of conferring external powers on them”. See Opinion of 24 March 1995, 2/92, *Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment*, EU:C:1995:83.

introduced Article 207, paragraph 6, TFEU through the Lisbon Treaty.⁵² As Klamert notes, the Court itself has never ruled on whether an international agreement, concluded under shared EU competence, might constitute a ‘common rule’ in itself under the *ERTA* doctrine,⁵³ a question which would precede the question on whether there might be a reverse *ERTA* doctrine.

In contrast to Dashwood, Eeckhout argues that, given all the disadvantages associated with mixity, it is best avoided.⁵⁴ Eeckhout also foresees a role for the Court, arguing that “the requirement of the unity in the international representation of the EU demands pure EU agreements” in cases where the agreement is wholly covered by (non-exclusive) EU competences.⁵⁵ Eeckhout does not further develop this argument himself, but it would arguably require the Court to take a qualitative step via its case law. As noted above, the Court, reasoning from the constitutional principle of sincere cooperation, has developed a duty of cooperation between Member States and the EU based on “unity in the international representation of the EU” in order to “attenuate the plurality inherent to mixity”.⁵⁶ Pursuant to this case law, unity in the international representation of the EU imposes a number of obligations on the Member States so as to make mixity manageable. Eeckhout’s suggestion should then be seen as rather radical since the requirement of unity would be used to preclude any recourse to mixity instead of simply managing it.

Timmermans, also critical of mixity, has observed that the focus should be on the question “whether Community competence exists and what are the advantages of exercising it? If these advantages are obvious, Member

52 Article 207, paragraph 6, TFEU provides: “The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation”. On the different ways to interpret Article 207, paragraph 6, TFEU, see J.A. Bischoff, “Just a Little Bit of “Mixity”? The EU’s Role in the Field of International Investment Protection Law”, *Common Market Law Review* 48, no. 6 (2011), 1541-1543.

53 M. Klamert, *supra* note 42, 186.

54 P. Eeckhout, *supra* note 1, 264-265.

55 *Id.*, 265.

56 C. Hillion, *supra* note 3, 90.

States should act through the Community”.⁵⁷ Expounding on this, he notes that mixed agreements in areas coming under the EU’s parallel competences (see Article 4, paragraphs 3 and 4, TFEU) do not seem objectionable while a free choice for mixity in areas coming under shared competences (Article 4, paragraph 2, TFEU) does.⁵⁸ A rather cynical example (and probably not on Timmermans’ mind at the time) of a practical advantage to EU-only agreements may be found in the Association Agreement between the EU and Kosovo. Normally, the Stabilization and Association Agreements (SAAs) concluded between the EU and the ex-Yugoslav countries take the form of mixed agreements.⁵⁹ The SAA with Kosovo⁶⁰ however has been concluded as an EU-only agreement following a request from the five EU Member States that do not recognise Kosovo’s independence.⁶¹ The ‘advantage’ for these Member States of concluding an EU-only agreement is clear but the Council decision concluding the agreement makes it equally clear that this in no way changes the Member States’ general approach of insisting on mixity.⁶² Still, the other practical advantage

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- 57 C. Timmermans, “Organising Joint Participation of EC and Member States”, in A. Dashwood, C. Hillion (eds), *The General Law of EC External Relations*, supra note 13, 247.
- 58 C. Timmermans, “The Court of Justice and Mixed Agreements”, in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Caselaw* (The Hague: TMC Asser Press, 2013), 663.
- 59 See e.g. the Stabilisation and Association Agreement (SAA) with Bosnia and Herzegovina, OJ 2015 L 164, p. 2; SAA with the Republic of Serbia, OJ 2013 L 278, p. 16; SAA with the Republic of Montenegro, OJ 2010 L 108, p. 3.
- 60 SAA with Kosovo, OJ 2016 L 71, p. 3. Discussing this SAA and its EU-only nature, see P. Van Elsuwege, “Legal Creativity in EU External Relations: The Stabilisation and Association Agreement between the EU and Kosovo”, *European Foreign Affairs Review* 22, no. 3 (2017), 393-409.
- 61 The report of the UK House of Commons committee on European Scrutiny reveals that the other Member States (or at least the UK) agreed to this request on the condition that the unique nature of the agreement would be stressed so as to not set a precedent for future agreements. See point 27.22 of the Documents considered by the Committee on 21 July 2015.
- 62 Recital 5 of the Decision’s preamble provides: “This is an EU-only agreement. The commitments and cooperation to be entered into by the Union under this Agreement relate only to the areas covered by the EU acquis or existing Union policies. The signing and conclusion of this Agreement as an EU-only Agreement is without prejudice to the nature and scope of any similar agreements to be negotiated in the future. It is also without prejudice to the powers of the EU institutions conferred on them in the Treaties and the positions of EU institutions and Member States on competences”. See Council Decision 2016/342, OJ 2016 L 71, p. 1.

of realising a more swift ratification process is also obvious in the case of the Kosovo SAA. Where the time between signature and entry into force of the other SAAs ranged between 3 and 8 years,⁶³ the Kosovo SAA entered into force six months following its signature.⁶⁴

In short, the suggested ways of addressing the issue of facultative mixity range from the practical (focus on advantages of EU-only agreements),⁶⁵ over the political (the Commission should build trust) to the legal (the Court should step in). From a constitutional point of view, Eeckhout's suggestion, being tied to the principle of sincere cooperation, stands out as the most relevant avenue to explore.⁶⁶ Even if the practical and the political route may yield results, recourse to mixity would still be a purely political choice: Member States may be swayed by practical or political reasons to agree to make full use of the EU's shared competences (and thus to conclude an EU-only agreement) but they would not be legally prevented from insisting on mixity.

V. Constitutional Limits to Facultative Mixity

Given its non-obligatory nature, more ways ought to exist to limit facultative compared to compulsory mixity. One of the potential avenues has of course already been explored above: fully applying the absorption doctrine

63 The Serbia SAA was signed on 29/04/2008 and entered into force on 01/09/2013; the Bosnia and Herzegovina SAA was signed on 16/06/2008 and entered into force 01/06/2015; the Montenegro SAA was signed on 15/10/2007 and entered into force on 01/05/2010.

64 To be precise, the Kosovo SAA was signed on 01/10/2015 and entered into force on 01/04/2016.

65 It should be noted that Timmermans' argument could transcend the 'purely' practical and take on legal qualities. As Timmermans explains, the earlier case law of the Court (notably Opinion 1/76 and Ruling 1/78) could be read as confirming EU-only agreements as the default category of EU external action, resulting in a specific justification requirement for concluding a facultative mixed agreement. Yet, "this line of case law has not been further developed. As from Opinion 2/91, full emphasis falls on the quest for exclusivity". See C. Timmermans, *supra* note 58, 663-664. See also R. Schütze, *supra* note 5, 203-204.

66 This is not to say that it is the only relevant avenue to explore. Arguably, the role played by the Commission in the 'Community Method' also has a constitutional dimension but it is doubtful whether any clear limits or constraints could be deduced from it.

may result in ancillary provisions of an agreement that come under a shared EU competence being absorbed by the main provisions of that agreement. If the latter come under an exclusive EU competence, as with, for instance, the Free Trade Agreement with Korea,⁶⁷ the question as to the level (EU or Member State) at which competences will be exercised, does not arise and the agreement will be an EU-only one.⁶⁸

To explore further legal routes to limit recourse to facultative mixity, the different approaches of a number of Advocate Generals may again be juxtaposed. In addition to the Court's ruling in *US Air Transport Agreement*, the Opinions of Advocates General Sharpston, Wahl and Kokott already referred to above will assist us in our quest to identify a constitutional limit to mixity.

A. *Facultative Mixity as a Political Choice*

Undoubtedly Advocate General Sharpston has put forward the most conservative or traditional understanding of the 'triggering' of mixity in her Opinion on the EUSFTA.⁶⁹ Before coming to the questions posed by the Commission in this procedure, the Advocate General sets out the Lisbon

67 The agreement with Korea was concluded at the time as a mixed agreement because of the Protocol on cultural cooperation. See the Protocol on Cultural Cooperation, OJ 2011, L 127/1418. However, the greatest part of this protocol does not impose clear obligations on either of the parties. The only such obligations may be found in Article 5(4-5) of the Protocol which entitles co-produced audiovisual works of both parties to benefit from the other party's promotion schemes. It could have been argued that these provisions do not justify recourse to a mixed agreement and should have been absorbed by the agreement's main aim. However, following Opinion 2/15 a further argument for the (compulsory) mixity of the agreement may be found in the FTA's provisions on portfolio investment. Rather questionably, the Court in Opinion 2/15 found that a Treaty provision such as Article 63 TFEU cannot be affected in the *ERTA* sense and as a result, the provisions on portfolio investments came under a shared competence and could not be approved by the EU alone. See Opinion of 16 May 2017, 2/15, *supra* note 14, paras 233-244.

68 In the 1990s, Gilsdorf indeed criticised the tendency to conclude "trade *and*" agreements to justify mixity even if the non-trade provisions could be easily absorbed by the dominant trade provisions. See P. Gilsdorf, *supra* note 33, 162.

69 The Commission's observations in Opinion 2/92 exemplify how deeply entrenched this view is, even in the most supranationally oriented circles: discussing the competence for the EU's participation in the OECD's decision, the Commis-

framework on the existence and exercise of EU external competences. Discussing the situation in which there is no *a priori* or supervening exclusivity (under Article 3, paragraphs 1 and 2, TFEU) she notes that an EU external competence will only exist (abstraction made of the EU's supporting competences) when a shared competence under Article 4 TFEU can be linked to one of the cases described in Article 216, paragraph 1, TFEU. As to the exercise of such an external competence, the Advocate General remarks that the EU has a right of pre-emption but "[i]f the European Union does not choose to exercise that right, external competence — like internal competence — will remain with the Member States and it follows that they (and not the European Union) will be competent to negotiate, sign and conclude an international agreement whose subject matter falls within that area of shared competence".⁷⁰

Remarkably, Advocate General Sharpston then proceeded to qualify the EU legislature's discretion in exercising its competences externally, finding that the EU could not simply "assert external competence over any area of shared competence listed in Article 4 irrespective of whether it has chosen to exercise that right internally".⁷¹ The reasoning behind this assertion by the Advocate General is unclear⁷² but upholding it would impose a limit on autonomous EU external action. It is, furthermore, at odds with

sion advocated an application of the *ERTA* and Opinion 1/76 doctrines and further considered that "the Community legislature would have a discretion either to assume all the obligations arising within the framework of the OECD or to leave the Member States some latitude in matters not covered by Community legislation". See Opinion of 24 March 1995, 2/92, *supra* note 51, EU:C:1995:83, para 29.

70 Opinion of AG Sharpston of 21 December 2016, Opinion 2/15, *supra* note 38, para 73.

71 *Id.*, para 74.

72 Perhaps the confusion that a shared EU competence can only be exercised externally when it has already been exercised internally can be traced back to Opinion 1/94 in which the Court noted (as regards the competence to conclude the TRIPs): "The Community is certainly competent to harmonize national rules on those matters, ... But the fact remains that the Community institutions have not hitherto exercised their powers in the field of the 'enforcement of intellectual property rights' It follows that the Community and its Member States are jointly competent to conclude TRIPs". See Opinion of 15 November 1994, 1/94, *supra* note 25, paras 104-105. However, as was remarked by commentators at the time, the Court in that Opinion "did not explicitly answer the first question put to it by the Commission. That was to know whether the Community had, as such, the competence to conclude all parts of the WTO Agreement relating to GATS and TRIPs". See Editorial Comments, "The Aftermath of Opinion 1/94 or How to Ensure Unity of

the Council's argument that the decision on who exercises shared competences (the EU or the Member States) is a political choice, even though the Advocate General confirmed this argument in the very same paragraph.⁷³

While this political choice typically falls in favour of the Member States rather than the EU, it could in principle fall either way. According to the Advocate General, the detailed procedure of Article 218 TFEU, which is dominated by the Council, contains "the legal safeguards underpinning that political choice".⁷⁴ Thus, the Advocate General concludes that, for agreements covering areas of shared competences, "the Member States together (acting in their capacity as members of the Council) have the power to agree that the European Union shall act or to insist that they will continue to exercise individual external competence".⁷⁵

Following Advocate General Sharpston's reasoning, the Member States have an unfettered choice to make use or not of the EU's shared competences and the procedure under Article 218 TFEU is even read as a safeguard guaranteeing the political nature of that choice. Furthermore, the only limit to this political choice which can be read in Advocate General Sharpston's analysis is a limit favouring mixity, since she sees the EU barred from simply asserting its external competences if the EU has not first exercised its competences internally.

Representation for Joint Competences", *Common Market Law Review* 32, no. 2 (1995), 386. As a result, the Court concluded there was to be joint competence because it had already taken into account the fact that the Member States were not willing to let the EU exercise its competences to the fullest.

73 At face value, the AG's assertion also conflicts with the doctrine resulting from Opinion 1/76 (codified by the Lisbon Treaty in Article 216, paragraph 1, TFEU) as well as with the Court's finding in Opinion 2/91 in which it noted that the EU "enjoys an internal legislative competence in the area of social policy. Consequently, Convention No 170 ... falls within the Community's area of competence". See Opinion of 19 March 1993, 2/91, *Convention no. 170 of the International Labour Organization concerning safety in the use of chemicals at work*, EU:C:1993:106, para 17.

74 Opinion of AG Sharpston of 21 December 2016, Opinion 2/15, *supra* note 3, para 74.

75 *Id.*, para 75 (emphasis in original).

B. *Limits Flowing from Article 18 of the Vienna Convention on the Law of Treaties*

The analysis of Advocate General Wahl in the Opinion procedure on the Marrakesh Treaty stands in stark contrast to that of Advocate General Sharpston. After having determined the existence of EU competence and proposing Articles 19 and 207 TFEU as the joint legal basis for the decision concluding the Marrakesh Treaty, Advocate General Wahl elaborated on the nature of the EU's competence. Apparently, the Hungarian government argued that if the agreement came under shared competences it ought to be concluded as a mixed agreement.⁷⁶ The Advocate General rightly refuted this,⁷⁷ noting that even if Article 3, paragraph 2, TFEU were not applicable, this would not inevitably call for mixity. Instead, "The choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence (or of parallel competence), is generally a matter for the discretion of the EU legislature".⁷⁸ Advocate General Wahl thus confirmed the political nature of this decision, following the traditional understanding of facultative mixity. The novelty in the Advocate General's reasoning resides in what follows, since he argued that the decision is only predominantly, rather than wholly, political in nature and therefore subject to, albeit limited, judicial review. Qualifying this judicial review, the Advocate General clearly proposed to apply the Court's general marginal review test: "the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue".⁷⁹ Expounding on when the choice for mixity in cases of facultative mixity would be manifestly inappropriate, the Advocate General identified at least two scenarios. Recourse to mixity would thus be illegal if the agreement was concluded to tackle an urgent, pressing, issue. In such a case, having to wait for 29 ratification procedures to

76 Opinion of AG Wahl of 8 September 2016, Opinion 3/15, *supra* note 23, para 119. See also *supra* notes 12 and 29.

77 The Court later did so as well in *Germany v Council*, see Judgment of 5 December 2017, *supra* note 15.

78 Opinion of AG Wahl, *supra* note 23, para 119.

79 *Id.*, para 120. On this standard of review in general, see P. Gilliaux, "L'intensité du contrôle de la légalité par les juridictions communautaires", *Journal de droit européen* 17, no. 156 (2009), 43.

be completed might take so much time that realizing the agreement's objective would be put in jeopardy. Secondly, the same length of time might in some cases result in a breach by the EU of the principle of *pacta sunt servanda*.

The fact that the Advocate General ties these two scenarios to the settled case law of the Court on marginal review may indicate that those scenarios are just two illustrations from an open-ended list. Still even these two illustrations raise a number of questions. Firstly, the reliance on the principle of *pacta sunt servanda* may appear premature, since under Article 26 of the Vienna Convention on the Law of Treaties (VCLT) the principle only applies to treaties that have entered into force.⁸⁰ However, the problem identified by the AG is precisely that the entry into force would be forthcoming because of the cumbersome ratification procedures. Instead, the Advocate General seems to have had Article 18 VCLT in mind.⁸¹ Pursuant to Article 18(a) VCLT, a party "is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty". The threshold required is therefore rather high, as the party's conduct should effectively defeat the object and purpose of the agreement.⁸² More fundamentally, it appears that the first scenario (referring to the objective of the treaty) identified by Advocate General Wahl may therefore be subsumed under the second scenario, begging the question whether this is in fact the main (or only) scenario in which the standard for showing a manifest error of assessment would be met.

Regardless of these open questions, which the Advocate General did not elaborate upon and which the Court did not have to deal with either since it found, like the Advocate General, that the EU had exclusive competence, Advocate General Wahl undoubtedly suggested a legal check on

80 See A. Austen, "Pacta Sunt Servanda", in *Max Planck Encyclopedia of Public International Law*.

81 Confirming that Article 18 VCLT is binding on the EU, see Judgment of 22 January 1997, *Opel Austria v Council*, T-115/94, EU:T:1997:3, para 90.

82 See P. Palchetti, "Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?", in E. Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011), 27-28.

the ‘political choice’ for facultative mixity. It should nevertheless be noted that the limit suggested by Advocate General Wahl finds its origin in international public law rather than in EU constitutional law itself. In this regard, this legal route is fundamentally different from Eeckhout’s suggestion which relies on EU law.

C. Limits Flowing from the Union Interest and Unity in the EU’s International Representation

Advocate General Kokott in her Opinion on Vietnam’s accession to the WTO made a number of interesting observations, which could amount to another constitutional limit on mixity. The questions at issue in this case were whether the Council decision agreeing to Vietnam’s accession to the WTO should have been adopted based only on Article 133, paragraphs 1 and 5, EC as proposed by the Commission and whether Article 133, paragraph 5, EC (like Article 133, paragraph 1, EC) came under the EU’s exclusive competence as the Commission claimed. The Advocate General was sympathetic to the practical argument observing that “exclusive competence for the Community in the field of trade in services and the commercial aspects of intellectual property would be better suited for ensuring the effective representation of European interests at international level”⁸³ but ultimately found differently and noted, together with the Council, that under the Nice Treaty there was neither a priori nor supervening exclusivity for trade in services and the commercial aspects of intellectual property.

Following the traditional approach, the conclusion would be that the Member States in the Council are free to decide whether the EU or the Member States will exercise their shared powers. Here, the Advocate General disagreed, noting that “contrary to the view taken by the Council, it does not necessarily follow, from the mere fact that Article 133(5) EC does not provide for exclusive Community competence, that the Member States were automatically entitled to be involved alongside the Community in adopting the decision on Vietnam’s accession to the WTO”.⁸⁴ According to the Advocate General, the reason for this lay in the concurrent rather than parallel nature of the EU’s trade competence and also in a prac-

83 Opinion of AG Kokott of 26 March 2009, *Commission v Council*, C-13/07, EU:C:2009:190, para 63.

84 *Id.*, para 66.

tical argument since mixed action would make it more difficult “to represent effectively the interests of the Community and its Member States outwardly”.⁸⁵ Here, the Advocate General was careful to limit her finding to the EU’s trade policy: “Agreements to which the Member States as well as the Community are parties are consequently out of place in the common commercial policy. They should be permitted only where the Community on its own has no or insufficient power and therefore has to rely on the involvement of its Member States at international level”. Yet, it should be clear that the practical argument regarding the ‘effective outward representation of the EU and the Member States’ interests’ cannot *a priori* be limited to the EU’s Common Commercial Policy (CCP).⁸⁶

A further question, which is raised by the Advocate General’s proposition is whether invoking the effective representation of the EU’s interests is a purely practical argument or whether it may somehow be juridified.⁸⁷ In this regard it may be noted that the Court relied on the idea of Union (Community) interest in Opinion 1/75 in order to establish an exclusive EU competence⁸⁸ and in *Hermès* and *Dior*⁸⁹ in order to establish its jurisdiction to interpret mixed agreements. According to Cremona, the legal notion of Union interest finds its basis in Article 4, paragraph 3 of the Treaty on European Union (TEU) and functions as a bridge between the principle of primacy and the duty of cooperation. Thus, primacy puts substantive limits on the Member States’ competences, while the duty of co-

85 *Id.*, para 72. For further practical reasons, see *id.*, para 73.

86 Purely practically, the CCP might be a unique case, but from a legal perspective the real distinction would seem to lie in whether the EU exercises a shared or parallel competence, as also noted by AG Kokott. Under parallel competences, Member States would retain a right to act.

87 According to Ortino, the meta-principle of effectiveness underlies and informs most of the EU’s general principles, including the principle of sincere cooperation. See M. Ortino, “A Reading of the EU Constitutional Legal System through the Meta-Principle of Effectiveness”, *Cahiers de droit européen* 52, no. 1 (2016), 94-95.

88 Opinion of 11 November 1975, 1/75, EU:C:1975:145.

89 Judgment of 16 June 1998, *Hermès*, C-53/96, EU:C:1998:292; Judgment of 14 December 2000, *Parfums Christian Dior*, Joined Cases C-300/98 & C-392/98, EU:C:2000:688. For a discussion, see P. Koutrakos, “Interpretation of Mixed Agreements”, in C. Hillion, P. Koutrakos (eds), *Mixed Agreements Revisited*, *supra* note 3, 118-123.

operation imposes procedural requirements on the Member States.⁹⁰ As the *PFOS* case has shown,⁹¹ these procedural requirements may amount to a duty for the Member States to remain silent in international fora. Although *PFOS* has been criticised for blurring the boundary between exclusive and shared EU competences (imposing a duty to abstain on Member States in both cases),⁹² it could form a springboard for further developing the duty of cooperation. In essence, in *PFOS*, Sweden could not exercise its shared competence because of the existence of a Union position. Similarly, Advocate General Kokott proposed that Member States ought to refrain from exercising their shared competence, thereby leaving the legal space to the EU. As noted above in relation to Eeckhout's suggestion, the qualitative difference between the two scenarios would lie in the fact that *PFOS* was about exercising shared competence in the framework of a mixed agreement, whereas further pursuing AG Kokott's suggestion would result in preventing the conclusion of a mixed act in the first place.

The duty of cooperation would thus take (another) qualitative leap since its traditional function is to ensure the manageability of mixed agreements. As the Court explained in Opinion 1/08: "The requirement of unity in the international representation of the Community calls in addition for close cooperation between the Member States and the Community institutions in the process of negotiation and conclusion of [mixed] agreements".⁹³ A further development of the duty as sketched out above would take on a new function, since it would simply pre-empt mixity. In a reasoning that may be squared with Eeckhout's suggestion, the requirement of unity in the international representation of the Union would call for close cooperation whereby Member States are required to cooperate solely within the EU framework. Put differently, the qualitative leap would result in a (new)

90 M. Cremona, "Defending the Community Interest: the Duties of Cooperation and Compliance", in M. Cremona, B. de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart, 2008), 126-127.

91 Judgment of 20 April 2010, *Commission v Sweden*, C-246/07, EU:C:2010:203.

92 A. Delgado Casteleiro, J. Larik, "The Duty to Remain Silent: Limitless Loyalty in EU External Relations?", *European Law Review* 36, no. 4 (2011), 539.

93 Opinion of 30 November 2009, 1/08, *General Agreement on Trade in Services (GATS) – Schedules of Specific Commitments Concerning Market Access and Granting of National Treatment*, EU:C:2009:739, para 136.

positive obligation -the obligation to act solely through the EU- rather than a simple negative obligation.⁹⁴

Before such a positive obligation is put forward, a number of objections would have to be addressed. Firstly such a new obligation would immediately have to be qualified as it would otherwise result in a duty to resort to EU-only agreements in areas of shared (non-parallel) competences. This would be difficult to square with Article 2, paragraph 2, TFEU unless it is assumed that the latter does not apply to the EU's external relations.⁹⁵ However, Advocate General Kokott's attempt to distinguish the CCP and other EU policies shows how cumbersome it may be to show in practice how the EU interest (in a specific case) requires an EU-only agreement. Kokott herself juxtaposed the area of international trade with the area of international development cooperation. Supposedly, the effectiveness of the latter is not hampered if both the EU and its 28 Member States act concurrently. In addition, the Advocate General warned of the risk that individual Member States would (ab)use 'reinforced unanimity' in order to secure individual concessions, and that third countries might pressure individual EU Member States to acquire concessions from the EU as a whole. The latter situation may prove to be a slippery slope, since it applies in a lot of cases and cannot *a priori* be restricted to the area of the EU's CCP.⁹⁶ In any event, it would seem that, if contested before the Court, the Council's decision on whether to proceed with a mixed or an EU-only agreement can be subject to only marginal review by the Court, in line with the suggestions of Advocate General Wahl in his Opinion on the Marrakesh Treaty. A second objection would be that the Court has imposed the duty

94 In this regard, Neframi has noted: "the unity of external representation is an objective stemming from the obligation to assert the EU identity on the international sphere and falls under the loyalty obligation to abstain from any measure that could jeopardize its attainment. The negative obligation is indeed liable to conciliate the requirement of unity with the maintenance of national sovereignty and individual international action". See E. Neframi, "The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations", *Common Market Law Review* 47, no. 2 (2010), 355.

95 Since Article 2, paragraph 2, TFEU is formulated without any reservations it may be assumed that it applies generally. See also C. Timmermans, *supra* note 58, 661, see footnote 6.

96 A possibility here could be to introduce a presumption in favour of EU-only agreements, which the EU institutions and the Member States can rebut by demonstrating how the EU interest is not negatively affected by the conclusion of a mixed (rather than EU-only) agreement.

of cooperation to make mixity manageable, not to do away with it. Specifically, the Court has developed the duty of (close) cooperation to counter the Commission's argument that the implementation of mixed agreements would pose practical problems, finding that such problems "cannot modify the answer to the question of competence".⁹⁷ A counter-argument here would be that only the exercise, but not the existence, of Member States' competences would be affected.⁹⁸

D. Limits Flowing from the Autonomy of the EU Legal Order and the Institutional Balance

A final constitutional check on the choice for facultative mixity may be identified in the recent *US Air Transport Agreement* case. This case could be read as confirming the idea that upholding the EU's autonomy and the institutional balance required by the Treaties constrains the EU institutions and the Member States in their recourse to 'mixed' solutions. The conditional tense is important here since the Commission *in casu* did not challenge the mixed nature of the agreement itself,⁹⁹ only the Council's decision to adopt a single hybrid act (together with the Member States) on the provisional application (by both the EU and the Member States) of a mixed agreement.

In essence, the Commission's argument boiled down to the proposition that hybrid decisions are not foreseen under the Treaties and should therefore not be tolerated. Presented in such a way, the Commission's case looked rather problematic, since the agreement to which the contested de-

97 Opinion of 15 November 1994, 1/94, *supra* note 25, para 107; Opinion of 6 December 2001, 2/00, *supra* note 21, para 41; Opinion of 30 November 2009, 1/08, *supra* note 93, para 127.

98 In turn, an obvious criticism here would be that the distinction between the existence (unaffected) and exercise (affected) of a competence is purely theoretical. If a competence does not come with the concomitant power it is null. See V. Constantinesco, *Compétences et pouvoirs dans les Communautés européennes: contribution à l'étude de la nature juridique des communautés* (Paris: Librairie Générale de Droit et de Jurisprudence, 1974), 82-83.

99 See Opinion of AG Mengozzi of 29 January 2015, *Commission v Council*, C-28/12, EU:C:2015:43, para 38; Judgment of 28 April 2015, *Commission v Council*, C-28/12, EU:C:2015:282, para 46.

cision related was a mixed agreement and therefore a hybrid itself.¹⁰⁰ Before the Court, the Council also tried to bring this point home by arguing that the use of a hybrid act co-authored by the Member States “is entirely consistent with the mixed nature of the underlying agreements and with the fact that the Member States are in certain respects exercising their own competences. It is a permissible consequence of concluding mixed agreements with which it is in legal symmetry”.¹⁰¹ Tying its argument to the principle of sincere cooperation the Council also argued that the use of hybrid decisions is an expression of close cooperation between the EU and the Member States and of the requirement of unity in the EU’s external representation.¹⁰²

The Council’s argument was not without merit. After all, if the Court of Justice has found that the EU’s constitutional charter tolerates facultative mixed agreements, why would it be opposed to the logical consequence of mixity in an internal EU act? The key to understanding the Court’s ruling is provided by the Court itself in the opening statements to its findings, where it reminds us of its *Van Gend & Loos* ruling: “the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order”.¹⁰³ Rules from the international (or national) legal order(s) cannot simply be transposed to the new EU legal order since it is autonomous. This helps in understanding the error in the Council’s argument: a mixed agreement may indeed be hybrid, but comes into being, thrives and perishes in the international legal order; the contested hybrid decision however was an act internal to the autonomous EU legal order.¹⁰⁴

100 See also T. Verellen, “On Hybrid Decisions, Mixed Agreements and the Limits of the New Legal Order: *Commission v Council* (“US Air Transport Agreement”)”, *Common Market Law Review* 53, no. 3 (2016), 742.

101 Opinion of AG Mengozzi of 29 January 2015, *supra* note 99, para 28.

102 *Id.*, para 29.

103 Judgment of 28 April 2015, *Commission v Council*, *supra* note 99, para 39.

104 While the question of provisional application of international agreements is also governed by international law, notably Article 25 of the Vienna Convention on the Law of Treaties, it is in essence a question of domestic law. As Lefeber notes “Treaty limits to provisional application will often result from the limited powers of the representatives of the negotiating States to agree to the provisional application of a treaty. The powers of the competent organ, usually the government, to agree to a treaty on a provisional basis may be limited by national law”. See R. Lefeber, “Treaties, Provisional Application”, *Max Planck Encyclopedia of Public International Law*, May 2011, para 14.

The logic or permissibility (as referred to by the Council) of pursuing “hybridity” fails when one moves from the international to the EU legal order.

Crucially, it should be noted that the Court never expressed a view on whether hybrid decisions as such are tolerated in the EU legal order. Instead the Court referred to Article 218 TFEU and Article 13, paragraph 2, TEU, implying it is not really concerned with the hybrid nature of a decision but that it is instead simply interested in ensuring that whatever the EU institutions do, the “procedures, conditions and objectives” set out in the Treaties are respected.¹⁰⁵ This had not been the case since the contested decision was an act of both the Council and the Member States, while Article 218, paragraph 5, TFEU stipulates that only the Council may decide on the provisional application of an agreement. Second, a single procedure had been used to adopt, in essence, two distinct decisions, which are subject to two incompatible decision-making procedures. The Court concluded from this that Article 218, paragraph 8, TFEU had necessarily been infringed.

As noted, the mixed nature of the agreement itself was not at issue in *US Air Transport Agreement* and opinions diverge as to whether the Court’s ruling will hamper the management of mixed agreements in practice.¹⁰⁶ If it does, the ruling might make recourse to (facultative) mixed agreements less attractive and might thereby indirectly limit mixity. More important for our present enquiry is whether a party, such as the Commission, could rely on similar reasoning in order to challenge the decision to conclude a facultative mixed agreement rather than an EU-only agreement itself. Does the choice for inter-governmental action in cases where EU action is possible undermine the autonomy of EU law, specifically by undermining the prerogatives of the EU institutions (and hence institutional balance)?¹⁰⁷ In a different context, the Court did not support such a rea-

105 Of course, it could be argued that hybrid decisions *per se* infringe these “procedures, conditions and objectives” but the Court did not (have to) express a view on this point.

106 Compare the evaluation by T. Verellen, *supra* note 100, and A. P. van der Mei, “EU External Relations and Internal Inter-Institutional Conflicts – The Battlefield of Article 218 TFEU”, *Maastricht Journal of European and Comparative Law* 23, no. 6 (2016), 1056.

107 A further illustration may be seen in the Opinion of AG Wathelet in *Commission v Council*. The Council and Member States had referred to previous practice in relation to transport agreements to justify the presence of detailed procedural

soning in the *Pringle* case¹⁰⁸ but the argument may be revived in the light of *US Air Transport Agreement* and the general rise of inter-governmental decision-making in the (broader) EU-context.¹⁰⁹ Although not expressly writing in terms of the EU's autonomy or its institutional balance, in the 1990's Gilsdorf also observed that the Treaty provisions on the negotiation, conclusion and binding effect of agreements concluded by the EU are not only frustrated but also undermined by the involvement of Member States in their capacity as sovereign States.¹¹⁰ Especially when bilateral agreements are at issue,¹¹¹ facultative mixity may upset the EU's institutional balance because it complicates the EU institutions' decision-making

obligations in the Council's negotiating directives (adopted pursuant to Article 218, paragraph 4, TFEU) for an agreement with Australia. The AG stressed that the latter was to be concluded as an EU-only agreement whereas the earlier agreements had been mixed and consequently found that prior practice to be irrelevant. See Opinion of AG Wathelet of 17 March 2015, *Commission v Council*, C-425/13, EU:C:2015:174, para 152. The institutional balance argument for limiting mixity is clear here: if a qualitative difference between negotiating directives for mixed and EU-only agreements is accepted whereby the Commission is more restrained when it negotiates mixed agreements, the Council could be undermining the institutional balance when it insists on negotiating an envisaged agreement as a (facultative) mixed agreement rather than as an EU-only agreement.

- 108 See Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paras 67-68.
- 109 In relation to this, see the rise of the so called Union method used for addressing the eurocrisis (ESM, Fiscal Compact), the banking crisis (IGA), the unitary patent package (unified patent court), the migration crisis (EU-Turkey statement), etc. See J-V. Louis, "Les réponses à la crise", *Cahiers de droit européen* 47, no. 2 (2011), 355-356; Editorial Comments, *Common Market Law Review* 51, no. 1 (2014), 9; Editorial Comments, *Common Market Law Review* 54, no. 3 (2017), 689. On the new Union method in general, see T. Eijsbouts, J-H. Reestman, "Editorial: In search of the Union Method", *European Constitutional Law Review* 11, no. 3 (2015), 425-433.
- 110 P. Gilsdorf, *supra* note 33, 162.
- 111 Gilsdorf especially takes issue with bilateral (rather) than multilateral mixed agreements. This is because, as Van der Loo and Wessel explain "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 [...] In the case of multilateral mixed agreements, the EU and its Member States are more clearly parties in their own right". See G. Van der Loo, R. Wessel, "The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions", *Common Market Law Review* 54, no. 3 (2017), 736.

aspired by the Treaties, exposing it in an accentuated manner to the domestic policies of every single Member State.¹¹²

VI. Conclusion

The traditional and among practitioners still prevailing view is that the choice for mixity (in so far as mixity is not legally required) is a purely political one: Member States may and will insist on being involved as parties to the agreement whenever the agreement is not wholly covered by EU exclusive competences. That approach significantly hampers the EU in its external action, which begs the question whether the political choice for (facultative) mixity should not somehow be legally qualified and, if so, how this could be done, without imposing EU exclusivity. A number of suggestions to this end, drawing on EU constitutional and international law, made by both academics and Advocates General have been explored in this contribution. While some appear more promising (and legally sound) than others, the Court has yet to follow up on any of them.

To limit mixity, the Court could further clarify its absorption doctrine or rely on the international law principle of good faith. It could also further develop its established case law on the duty of cooperation to include a duty for the Member States to abstain from exercising their competences as fully-fledged subjects of international law in areas of shared competences. Alternatively the Court could derive such a duty from the requirement to uphold the autonomy of the EU legal order and to safeguard institutional balance. Although this could not be discussed in the present contribution, the case for the Court to do so only seems to be strengthened by a new surge of inter-governmentalism in the guise of the Union method that has begun to take hold of EU integration in recent years.

As has also been noted however, developing these constitutional (or other) limits to mixity cannot result in a wholesale ban on facultative mixity. Developing such legal limits therefore entails both clarifying the standard against which the Court may test the choice for mixity and determining the appropriate degree of judicial review.

112 P. Gilsdorf, *supra* note 33, 163.

