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REPORTS

The Draft EU–MERCOSUR Agreement Drawing the Dividing Line Between Policy Cooperation and Trade

Nicolas de Sadeleer

Full professor UCLouvain, Saint-Louis, Jean Monnet Chair, Brussels, Belgium
Email: desadeleer.nicolas@gmail.com

The aim of this note is to shed some light on the "agreement in principle" concluded on 6 December in the light of the division of competences between the different EU institutions and the Member States. Whilst classification as an "agreement in principle" might initially appear to be primarily procedural in nature, the implications of its conclusion by the EU go beyond merely procedural issues. In effect, it touches on sensitive issues concerning the institutional balance between the European Commission, the Council of Ministers, the European Parliament and the Member States both within current negotiations and also in relation to the conclusion of a treaty with the MERCOSUR states. The possibility of splitting the trade limb from the political limb of a forthcoming association agreement is also addressed.

Keywords: trade agreement in principle; MERCOSUR; EU common commercial policy; Association Agreement; Allocation of powers between the EU and the Member States

1. After 25 years of negotiations, the draft EU–MERCOSUR Agreement is once again in the eye of the storm. On 6 December 2024, Commission President von der Leyen, together with the heads of state and government of the MERCOSUR States, triumphally announced in Montevideo the conclusion of an "agreement in principle" that would constitute "a truly historic turning point" in negotiations between the two trading blocs. Reactions in Europe were mixed. Why such haste? Why take the Member States by surprise? Reactions in Europe were mixed. Critics point out that the European Commission took advantage of a period of political fragility in France – the biggest obstacle to the agreement – using its moment of distraction as an opportunity to assert the EU's right of initiative.[1]

Does the 6 December 2024 announcement constitute a real step forward in the negotiations? Is the long-awaited agreement now finally within reach? Is this an association agreement or a purely trade agreement? Or does it conceal a hidden agenda that seeks to replace an inter-regional framework association agreement with a genuine trade agreement falling within the EU's exclusive remit?[2] How can we cast light on these various issues?

The aim of this note is to shed some light on the "agreement in principle" concluded on 6 December in the light of the division of competences between the different EU

[1] B Arrighini, "Why the Rush? Building Political Support for the EU Mercosur Agreement" (Brussels, Egmont, 25 March 2025).

[2] Art 3(1) e) TEU and Art 207 TFEU.

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institutions and the Member States. Whilst classification as an "agreement in principle" might initially appear to be primarily procedural in nature, the implications of its conclusion by the EU go beyond merely procedural issues. In effect, it touches on sensitive issues concerning the institutional balance between the European Commission, the Council of Ministers, the European Parliament and the Member States both within current negotiations and in relation to the conclusion of a treaty with the MERCOSUR states. The possibility of splitting the trade limb from the political limb of a forthcoming association agreement is also addressed.

As we know, the institutional balance within the EU when negotiating and concluding international treaties is complex and multifaceted. It has therefore always been a tall order to specify exactly the division of competence between the EU and the Member States with respect to the negotiation and conclusion of international treaties. In fact, the relatively simple free trade agreements of the 1960s–1970s have been replaced over the years by new types of association agreement, some of which have rather convoluted names, such as "cooperation agreement,"[3] "partnership agreement,"[4] and "neighbourhood agreement,"[5] and contain obligations extending far beyond trade in goods and services.[6] What is more, from the 1990s onwards, the EU successfully promoted a new generation of free trade agreements (FTAs) reaching considerably further than purely trade-related matters. Following the fleshing out of the objective of sustainable development[7] as well as the principles of integrating environmental, health, consumer,[8] and worker protection concerns,[9] the chapters on trade and sustainable development (TSD) soon triggered major controversies, with civil society criticising the EU for the vague nature of the respective provisions. In particular, the CETA chapters on labour, environment and consumer protection have attracted fierce criticism. Despite the broadening of the EU's exclusive competences that led recently to the conclusion of several FTAs, mixed agreements are still widely used, in particular within the context of broader political cooperation frameworks.[10]

As a matter of fact, the division of competences between the EU and the Member States in this area tends to involve not so much a separation but rather an intermingling of powers, in particular where the political cooperation envisioned with third States is intertwined with trade considerations. The 2024 EU–MERCOSUR 'agreement in principle' thus raises an acute problem as regards the division of competences between the EU and the Member States.

Against this background, it is important to focus on the institutional aspects of EU–MERCOSUR negotiations. Consequently, this note will not seek to carry out an in-depth

[3] Council Decision 1999/127/CE of 25 January 1999 concerning the conclusion of the Framework Cooperation Agreement leading ultimately to the establishment of a political and economic association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part [2012] Official Journal L 42/46.

[4] Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part [2012] Official Journal L 42/46.

[5] Art 8 TEU.

[6] P Adam et al, *Commentaire J. Mégret. L'Union européenne comme acteur international* (Brussels, IEE 2015) n 324, p 157.

[7] Art 3(3) and (5) and 21(2) TEU. See N de Sadeleer, "Sustainable Development in EU Law. Still a Long Way to Go" (2015) 6(1) Jindal Global Law Review 39–60.

[8] Art 11, 168(1) TFUE, 169 TFEU; Art 35 37, and 38 of the Charter of Fundamental Rights of the EU.

[9] I Damjanovic and N de Sadeleer, "Labour Standards in International Trade Agreements: A Rule of Law Perspective' in N de Sadeleer and I Damjanovic (eds), *Special issue. The Evolving Nature of the Rule of Law in International Economic Law* (Cambridge, EJRR 2024) n 15, pp 551–71.

[10] M Cremona, "U External Relations: Unity and Conferral of Powers" in L Azoulai (ed), *The Question of Competence in the European Union* (Oxford, Oxford University Press 2014) at pp 77–8.

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analysis of the negotiation process as a whole and deal with all of its outcomes. However, before addressing institutional issues (5 to 10), it is necessary to take stock of the political and economic aspects of a treaty between MERCOSUR and the EU (2) and also to retrace the history of the negotiations (3). Association agreements, which are at the heart of all the issues at stake here, call for a few words of explanation (4). Particular attention will be given to the choice of the correct legal basis given its considerable practical and institutional importance.[11]

2. The emergence of new trading powers such as China, the protectionist ambitions of the United States, and the dependence of a decarbonised, circular and digital economy on raw materials extracted outside Europe are all eroding the commercial supremacy of the European Union.[12] As was seen during the Covid-19 pandemic, complex value chains have heightened the EU's economic model vulnerability.[13] In order to avoid a sharp decline, the EU must continue to open up to the world, whether through its fledgling diplomacy or by concluding FTAs.[14]

Instead of using economic coercion, the EU prefers to use the attractiveness of its single market to secure bilateral deals on market access. Against this backdrop, the conclusion of an ambitious agreement with MERCOSUR, a regional economic organisation that brings together four Latin American States (Argentina, Brazil, Uruguay and Paraguay), appears to offer a lifeline. An agreement of this nature would appear to be essential, as it will cover roughly 25 per cent of the world GDP and a market of 709 million inhabitants. It is particularly timely given the practical impossibility of revamping WTO law, with the Doha Round having long since stalled. Because of its dual regional dimension, a plurilateral agreement of this type stands out from the plethora of new-generation bilateral FTAs that the EU has concluded over the last decade with South Korea, Singapore, Vietnam, Ecuador-Columbia, Canada and Japan. Furthermore, the creation of one of the largest free trade areas in the world[15] should rekindle the dynamism of European companies eager to conquer South American markets that have been sheltered from the forces of globalisation for too long. The reduction in customs duties should also boost trade between the two economic blocs.[16] Above all, an association agreement would enable two continents with a shared history to forge closer political and economic ties in a world plagued with uncertainty. There is, of course, a cloud to this silver lining. Where the social and environmental standards of the MERCOSUR states are less protective than those in the EU, EU businesses are likely to be exposed to unfair competition and job losses. Moreover, European farmers fear being swamped by cheap foodstuff from the MERCOSUR countries.[17] The Member States who already trade a lot with the MERCOSUR countries are not likely to gain significantly from a trade agreement.[18] Finally, the increase in trade that would result

[11] Case C-370/07 Commission/Council EU:C:2009:590, para 47.

[12] M Draghi, *The Future of European Competitiveness* (Brussels, European Commission 2024) at p 36 and 51.

[13] E Letta, *Much More than a Market. Speed, Security, Solidarity* (Brussels, April 2024) at p 61, 133–6.

[14] B Arrighini, supra, note 1.

[15] The EUMETA will be the first large-scale FTA of the MERCOSUR.

[16] The EUMETA will remove over 90 per cent of tariffs on goods exchanged between the two blocs.

[17] Under the EUMETA, the EU will remove 82 per cent of its tariffs on agricultural goods. European Commission, "EU–Mercosur Trade Agreement: Better Export Opportunities for European Farmers and Food Producers, Fact Sheet" (Brussels 2019). https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158059.pdf.

[18] LSE, "Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur" (2020); European Parliament, INTA Committee, *Trade Aspects of the EU–Mercosur Association Agreement* (Brussels 2021) at p 12.

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from such an agreement could compromise the EU's objectives in terms of reducing greenhouse gas emissions.[19]

3. It is of importance to retrace the history of EU–MERCOSUR negotiations in order to understand what is at stake in the ongoing decision-making process. Nonetheless, it is not easy to trace back the somewhat circuitous path taken by EU and MERCOSUR negotiators since 1999. Indeed, the trajectory has been anything but linear.

In December 1995, the Interregional Framework Cooperation Agreement (IFCA) between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part was signed in Madrid.[20] Alongside scientific, technological and economic cooperation schemes (investment, transport, environment), a whole series of other areas of cooperation were envisaged at the time, including information and education, culture and combatting drug trafficking. Finally, an institutional framework was put in place.

The IFCA has thus been governing the EU–MERCOSUR relations since then. Under the terms of the IFCA, negotiating directives for the conclusion of an Interregional Association Agreement (hereinafter, "the Association Agreement") between the EU and MERCOSUR were adopted by the Council of the EU on 17 September 1999.[21] The envisaged Association Agreement was meant to be founded, on the one hand, on a trade limb and, on the other, on a policy limb dedicated to political dialogue and cooperation. Indeed, Council negotiating directives stressed that "the parties will develop the existing framework agreement into a political and economic association agreement between the parties, as part of the strategy to strengthen European policy in Latin America."

The trade limb was negotiated by DG TRADE of the European Commission. It will come as no surprise that the negotiations have been fraught with pitfalls. Negotiations were suspended in 2004 due to fundamental disagreements. They were relaunched at the EU–Latin America summit held in Madrid in 2010. Finally, internal political changes (appointment of a pro-liberal government in Argentina in 2015) and the geopolitical weakening of the EU convinced the parties to work on a draft EU–MERCOSUR Trade Agreement (EUMETA) on 29 June 2019.[22] In a nutshell, like other FTAs concluded by the EU, the EUMETA is intended to operate as the trade limb of a forthcoming Association Agreement. It includes provisions on, among others, trade in goods and services, the right of establishment, public procurement, competition law, subsidies, state-owned enterprises, intellectual property rights, a trade and sustainable development (TSD) chapter, as well as dispute settlement, which can also be found in the other new generation FTAs concluded by the EU. Several national and regional parliaments have opposed the signature of the 2019 EUMETA.[23] For example, critics took the view that its TSD chapter

[19] R Verheyen and G Winter, "The Compatibility of the Draft EU–Mercosur FTA with EU and International Climate Protection Law" (2024) 58 (6) JWT 963–88; Ch Eckes and P Krajewski, "How Sustainable is the EU-Mercosur Agreement?", Legal Analysis for Climate Action Network (CAN) Europe (Amsterdam, University of Amsterdam 2025).

[20] Council Decision (EC) 1999/279 [2012] Official Journal L 112/65.

[21] Art 218 TFEU does not lay down specific rules for the negotiation of association agreements. In practice, the Member States entrust the European Commission with the task of negotiating on their behalf the agreement to be concluded in the form of a mixed agreement.

[22] J Harrison and S Paulini, "Reinventing Trade, Environment and Development Interlinkages: Lessons from the EU–Mercosur Association Agreement" (2024) Journal of International Economic Law 4.

[23] See M Bracke, "How Splitting the EU–Mercosur Agreement Could Give the Commission Legal and Political Headaches" (EU Law Live, 16 January 2025).

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was toothless on the account that disputes had to be settled by a panel of experts that could only make recommendations. In 2020 the European Parliament stressed that the EU–MERCOSUR Agreement could not be ratified "as it stands."[24]

On the other hand, the policy limb of the Association Agreement was negotiated by the European External Action Service (EEAS). It was completed on 18 June 2020 with the conclusion of a Political Dialogue and Cooperation Agreement.[25] This second limb of a forthcoming association agreement (the political dialogue and cooperation pilar) includes a swath of provisions on the protection of human rights, cybercrime, migration, tax issues, money laundering, transnational organised crime, etc.

From a legal point of view, the EU–MERCOSUR association agreement has not yet been concluded, let alone signed. Its two limbs envisaged in 1999 have so far only been the object of separate political agreements "in principle," which have not involved the Member States in any way. In its resolution of 16 February 2023, the European Parliament reiterated that the bilateral agreement with MERCOSUR should be concluded, "provided that pre-ratification commitments on climate change, deforestation and other concerns are satisfactory."[26]

To assuage the criticism levelled at the EUMETA, further negotiations took place between March 2023 and December 2024. In negotiating a joint interpretative instrument, the parties aimed to improve, among other things,[27] the TSD chapter of the EUMETA, in particular with respect to controversial issues such as climate change and deforestation. Accordingly, the Paris Agreement became a key element of the TSD. The new annex also includes commitments on women's empowerment, sustainable supply chains, indigenous peoples, ILO commitments, and cooperation regarding deforestation. Although, the adoption of such a joint interpretative instrument – which has not yet been published – has become common practice in the field of FTAs,[28] it is not intended as a self-standing treaty but rather as an interpretative statement, which cannot create new obligations.[29]

4. These clarifications on the background to negotiations allow us to make two observations on the agreement in principle of 6 December 2024.

Firstly, no draft EUMETA was signed on 6 December, even as a stand-alone agreement, as it is up to the Council of Ministers, acting on a proposal from the negotiator, to adopt the decision authorising the signing of the agreement[30] and, where appropriate, its provisional application before its entry into force.[31] Indeed, the Council has not yet given the European Commission the go-ahead to sign the agreement.

Secondly, the facts of the matter appear to be unchanged, as the twenty-seven foreign trade ministers remain deeply divided over the very nature of the upgraded 2019 draft

[24] Resolution of 7 October 2020 on the implementation of the common commercial policy.

[25] https://www.eeas.europa.eu/eeas/eu-mercosur-association-agreement-conclusion-negotiations-political-dialogue-and-cooperation_en.

[26] European Parliament resolution of 16 February 2023 on an EU strategy to boost industrial competitiveness, trade and quality jobs (2023/2513(RSP)), point N: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0053_EN.html.

[27] See the upgraded EU–MERCOSUR agreement – what is new compared to the 2019 agreement. <file:///Users/desadeleer/Downloads/2024%20EU-Mercosur%20summary.pdf>.

[28] See Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States [2017] Official Journal L 11/3.

[29] S Paulini, *Legal Analysis of the Leaked EU–MERCOSUR Joint Instrument* (Brussels, June 2023).

[30] In virtue of Article 13(2) TEU, first sentence in conjunction with Article 218(2) and (5) TFEU, the Council is the only institution empowered to authorise the signing and provisional application of international agreements by the EU.

[31] Mixity does not preclude a provisional application, in virtue of Article 218(5) TFEU of the agreement that has not been concluded by all national parliaments.

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EUMETA. Due to opposition to the EUMETA from several Member States, the European Commission has been considering splitting it in two separate agreements.[32] On the one hand, the European Commission, supported by several Member States, notably Germany and Spain, regards the EUMETA "in principle" as a "stand-alone" FTA as it relates exclusively to trade.[33] Accordingly, it falls under the exclusive competence of the EU. Moreover, the fact that the EUMETA "in principle" overlaps with several policies that are subject to shared competence (transport, sustainable development, etc.) does not call into question the EU's exclusive common commercial policy (CCP) competence.[34] Needless to say, the EU has undeniable clout because it can exclusively conduct a commercial policy,[35] which includes the negotiation and conclusion of trade agreements.[36] The recourse to exclusive competence is likely to preclude the adoption of an association agreement that is favourable to the Member States. Indeed, as the EUMETA is not mixed, national parliaments will have no say in the matter. Unlike the trade agreement between the EU and Canada (CETA), which has been provisionally applicable since 21 September 2017,[37] the entry into force of a purely commercial agreement would not be long in coming.

On the other side of the fence, several Member States, notably France and Poland, are fiercely opposed to the adoption of the EUMETA as a stand-alone EU agreement on the grounds that it should be ratified as part of a broader association agreement by the national (and even regional as far as Belgium is concerned) parliaments of the twenty-seven Member States.[38]

To sum up, if the "agreement in principle" of 6 December 2024 falls within the EU's exclusive CCP competence on the grounds that it is genuinely related to trade, then France and Poland risk being outvoted in the Council, which could adopt it by a qualified majority.[39] On the other hand, if it falls within the scope of a broader association agreement, as MERCOSUR and the EU envisaged in the 1999 IFCA and in the 1999 Council's mandate, any Member State could veto its signature and conclusion.

5. To understand the positions adopted by France and Poland, it is necessary to recall the nature, scope and procedural specificities of accession agreements.

Their world is one of considerable complexity in terms of objectives, obligations, and institutions.[40] As policy objectives are increasingly entangled with economic considerations, their underlying objectives have changed over time. The legal basis for concluding these agreements with third countries (Article 217 TEU) lies between Articles 216 (conclusion of international agreements) and 218 TFEU (procedural requirements). Based on a triptych (political dialogue, cooperation and trade), association agreements aim

[32] See M Bracke, supra, note 23.

[33] In the EU–Chile negotiations, the Commission endorsed a similar approach, which led to the conclusion of an *interim* Free Trade Agreement.

[34] Opinion 2/15 [2017] EU:C:2017:376.

[35] Art 3(1) (e) TFEU.

[36] Art 207 (1) TFEU.

[37] Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] Official Journal L 11/1080.

[38] However, Art 218 TFEU does not provide for Member States to intervene at any time in the procedure for the EU's negotiation or conclusion of international agreements. See Opinion of AG Sharpston in Case C-114/1, *Commission* v *Council* [2014] EU:C:2014:224, para 174; Opinion of AG Mengozzi in in Case C-28/12, *Commission* v *Council* [2015] EU:C:2015:43, para 48.

[39] Art 207(2) TFEU.

[40] P Craig, *Lisbon Treaty* (Oxford, Oxford University Press 2010) p 403.

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at establishing close and lasting links between the EU and the third country.[41] Accordingly, they are global in nature.[42]

The founding treaties never specified their material scope, Article 217 TFEU being particularly concise. In its judgment in *United Kingdom v Council*, the CJEU held that Article 217 TEU confers on the Union a general power 'to guarantee commitments towards third countries in all the fields covered by the TFEU'.[43] Furthermore, association agreements include a substantial institutional framework, adapted to the purpose and content of the agreement. This institutional framework contributes to political dialogue at several levels.[44] From a procedural point of view, the conclusion of an association agreement has its own particularities. In terms of voting procedures, the Council must act unanimously.[45] What is more, in order to overcome the limits inherent of the principle of conferral of powers, association agreements are deemed to be mixed. This implies that they must be concluded in two stages. Once the Member States have notified the Union that their internal constitutional formalities have been completed by ratifying the association agreement, the Council will complete the process by adopting a decision concluding the agreement. This complex process is slowing down the entry into force of the association agreement. In addition, there is always a risk that not all members will ratify the agreement. Consequently, two transitional legal mechanisms have been provided for. First, the Union has used the technique of the interim agreement, which incorporates the trade provisions of the association agreement that fall under its exclusive competence.[46] We shall see later that this practice allows the Union to supplement the association agreement with additional sectoral protocols based on a legal basis other than Article 207 TFEU. Second, Article 218(5) TFEU empowers the Council to adopt a decision authorising the agreement provisional application, without having to wait for the ratification procedures.

6. The crux of the problem lies specifically in the mandate given in 1999 to the European Commission by the Council of Ministers. This mandate is governed by Article 218 TFEU, a key treaty provision, which deserves to be considered briefly in greater detail.

Article 218 TFEU is designed to govern the procedure for negotiating and concluding international agreements between the EU and third countries or international organisations. This provision establishes a single, unified procedure for the EU's negotiation and conclusion of such agreements.[47] It specifies the detailed arrangements for the conduct of those various stages and the role and respective powers of the different institutions involved in the negotiation and conclusion of agreements by the EU.[48] Furthermore, this procedure is intended to be applied to all agreements negotiated and concluded by the EU, irrespective of their nature and content.[49]

[41] See, for example, the preamble to the EEC–Chile Association Agreement.

[42] K Aloupi et al, *Les accords internationaux de l'Union européenne* (Brussels, IEE 2019) n° 344, p 242.

[43] Case C-81/13 *United Kingdom/Council* 2014 EU:C:2014:2449, para 61.

[44] K Aloupi et al, *supra*, note 42, n 331–44, pp 236–42.

[45] Therefore, it is on an equal footing with Art 218(8) procedure that applies to the conclusion of the agreement on the accession of the EU to the European Convention for the Protection of Human Rights.

[46] See, for instance, Council Decision 2007/855/EC of 15 October 2007 concerning the signing and conclusion of the Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Montenegro, of the other part [2007] Official Journal L 345/1.

[47] For a general overview, see J Wouter, D Coppens and B De Meester, "The EU's External Relations after the Lisbon Treaty" in S Griller and J Zillller (eds), *The Treaty of Lisbon* (Berlin, Springer 2009) pp 143–209; K Leenaerts and P Van Nuffel, *EU Law* (3rd ed, London, Sweet and Maxwell 2011) pp 1025–39.

[48] Opinion AG Mengozzi, supra, note 38, para 45.

[49] Ibid, para 44.

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In brief, there are two phases in the procedure for concluding international agreements: the negotiation phase, in which the role of the European Commission is predominant, and the conclusion phase, which involves both the EU Council of Ministers and the European Parliament.

Initially, the Council is the institution empowered to authorise the opening of negotiations, to adopt negotiating directives, to authorise signature and ultimately to conclude EU agreements.[50] In defining the essential parameters for negotiations, the mandate granted by the Council to the negotiator – in this case the European Commission – explicitly or implicitly determines the negotiator's room for manoeuvre. As they are represented by the European Commission, which negotiates for them the draft trade agreement with third countries, the twenty-seven Member States are supposed to speak only with one voice through the Commission. In order to prevent the negotiator from ploughing its own furrow, it must report to a committee established by the Council of Ministers – in trade matters this is the Trade Policy Committee[51] – and to the European Parliament. Although the European Parliament cannot take part in the negotiations, it must approve the agreement.[52] By virtue of its power of approval, rather than negotiation, the Parliament must be kept "immediately and fully" informed of progress made by the negotiators in the same way as the Council Trade Policy Committee. By ensuring that it is regularly informed of the results of negotiations,[53] the Parliament can influence their course by apprising the Commission of the conditions under which it will ultimately grant its approval.[54] Accordingly, the Parliament plays a key role in the external policy.

Once the negotiations are finalised, the agreement must first be signed, on the EU side, by the European Commission (the negotiator) with the prior authorisation of the Council, and then approved by the European Parliament and finally concluded or ratified by the Council.[55] Hence, whatever the area covered by the agreement (CCP, political cooperation, association) the European Parliament consent is required. Accordingly, this institution may withhold its consent until the negotiators comply with its requests.

The scenario becomes more complicated when the agreement is classified as mixed (which is the case of association agreements), meaning that it covers competences shared between the EU and the twenty-seven Member States.[56] Where the subject-matter of the draft agreement is deemed to be mixed, close cooperation is required between the Member States and the EU institutions.[57] Furthermore, for the mixed agreement to enter into force, each national parliament must ratify it, which can be an extremely long-winded process.[58]

As far as procedural requirements are concerned, Article 218(8) TFEU lays down similar voting procedures in the Council for the signature, the conclusion of international agreements ("throughout the procedure") as well as for the adoption of corresponding

[50] Ibid, para 46.

[51] Art 207 (3), 3rd indent TFEU.

[52] Art 207 (3), 3rd indent TFEU and Art 218(6), subparagraph 1 (a), subparagraph 2 (b) TFEU.

[53] Art 218(10) TFEU that obliges the Council to consult the European Parliament is an "expression of the democratic principles on which the European Union is founded." See Case C-658/11 *European Parliament/Council* [2014] EU:C:2014:2025, para 81.

[54] P Didier et al, *Commentaire Mégret. Politique commerciale commune* (Brussels, IEE 2014), p 77.

[55] Art 218(6) a) i) grants the European Parliament a power of approval of association agreements.

[56] See A Rosas, "Mixed Union-Mixed Agreements" in M Koskenniemi (ed), *International Law Aspects of the EU* (Den Hague, Kluwer Law International Law 1998), p 125; M Maresceau, "Typology of Mixed Agreements" in C Hilon and P Koutrakos (eds), *Mixed Agreements Revisited* (Oxford, Oxford University Press 2010).

[57] K Leenaerts and P Van Nuffel, EU Law, *supra*, note 47, at p 1036.

[58] See Opinion of AG Kokott in Case C-13/07, *Commission v Council* [2009] para 72. By way of illustration, in 2016, the Dutch electors have overwhelmingly rejected the EU–Urkaine Association Agreement, in a rebuke to their government.

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internal rules.[59] The default position is that the Council acts by qualified majority and, by way of exception, unanimously as in the case of association agreements (Article 218(8) TFEU). This brings us back to the original question. Will the Council's decisions on signature and then on conclusion have to be adopted by qualified majority, on the grounds that the EUMETA falls within the scope of the CCP (Article 207 TFEU),[60] or unanimously by the Council because it forms part of a more global political cooperation framework (Article 218(8) TFEU)? The choice between these two alternatives will have far-reaching consequences.

First, the decision-making process set out in Article 218(8) TFEU, which provides for unanimous voting by the members of the Council for association agreements, was introduced to give the Member States a veto right.

Second, in case of a stand-alone trade agreement, national parliaments do not play any role whereas they called on to ratify association agreements on the grounds that they are mixed.

7. Let us now turn to the 1999 mandate. Since the start of negotiations, the EUMETA has been embedded in a forthcoming EU–MERCOSUR Association Agreement (EUMAA).

The 1999 IFCA Cooperation Agreement was intended to serve as a springboard for the negotiation of a more ambitious treaty. Indeed, in IFCA's preamble, the parties reaffirmed their desire to achieve a "final objective," namely "an interregional association of a political and economic nature,"[61] which should in principle result in the conclusion of an association agreement. The legal bases for the Council decision concluding the 1999 IFCA (CCP (Article 113 of the EC Treaty) as well as development cooperation (Article 130 Y of the EC Treaty) confirm that the more detailed negotiations would not be limited to the trade limb alone. The final objective[62] was ambitious, to say the least. In accordance with IFCA, the 1999 Council Negotiating Directives clearly mandated the European Commission to negotiate a single association agreement, which should be "balanced and comprehensive."[63] On 22 May 2018, the scope of these rather broad negotiations was confirmed by the Council of Ministers.

The analogy here is with other association agreements that include trade-related aspects. By way of illustration, the EU and Georgia signed an Association Agreement in June 2014 and it entered into force in July 2016.[64] This Association establishes a Deep and Comprehensive Free Trade Area (DCFTA) that includes chapters on, among others, national treatment and market access for goods, trade remedies, technical barriers to trade, sanitary and phytosanitary measures, establishment, as well as trade in services and electronic commerce. Like the political chapters, these trade chapters were adopted unanimously by the Council.

To sum up, the willingness of the parties to establish in 1999 a regional association of both "political and economic" nature as well as the negotiations guidelines issued by the

[59] For instance, if the agreement relates to an area for which the special legislative procedure is required when adopting internal rules or is an association agreement, the Council must decide unanimously. Otherwise, it rules by qualified majority.

[60] M Krajewski, "The Reform of the CCP" in A Bondi, P Eeckhout and S Ripley (eds), *EU Law after Lisbon* (Oxford, Oxford University Press 2012) p 306.

[61] IFCA, Preamble, 9th recital.

[62] IFCA, Art 2(1) and 4.

[63] M Bracke is also of the view that the negotiating mandate did not envisage two separate agreements. Accordingly, any "deviation from this plan should be based on a new Council mandate" (*supra* note 22).

[64] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] Official Journal L 261/4.

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Council has significant consequences in that the TFEU provides that "for association agreements," the Council shall act unanimously.[65]

8. At this stage, the procedural approach that the European Commission intends to follow is still unclear. Nonetheless, one might expect that the Commission will propose to the Council the adoption of the EUMTA as an interim agreement and at a later stage to include the economic limb into a broader association agreement. However, this option to split the association agreement in order to fast-track the conclusion of the trade agreement has never been clearly envisaged by the Council.

It follows from the context of Article 218 TFEU, as well as from the wording and broad logic of that provision – and, in particular, from its objective of establishing a general system and procedural rules for the negotiation and conclusion of international agreements by the EU[66] – that the Commission cannot depart from the procedures laid down in that provision. Indeed, pursuant to Article 13(2) TEU, "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures." An error in the choice of the relevant decision-making procedure is liable to deprive the Member States of their right to exert their influence over the actual content of the treaty or to oppose its adoption.[67] Assuming that the trade aspects are intrinsically linked to the political aspects, as was envisioned by the parties in the 1999 IFCA and in the 1999 mandate to the Council, the European Commission cannot sign a treaty without having being authorised by the Council, which must decide unanimously. In the same vein, the Commission is not empowered to submit to the Council two separate agreements under two different policies, when the Council has unambiguously chosen as a sole option the conclusion of an association agreement. The 1999 negotiating directives cannot be interpreted in a way to circumvent the possible opposition of several Member States and provide the possibility of a *de facto* splitting. Any other outcome would entail a major shift in the institutional balance within the procedure for concluding international agreements by the EU, which would be at odds with Article 13(2) TEU and Article 218(5), (8) and (10) TFEU.

As a result, the Council could well refuse to sign the EUMETA should the European Commission propose it. The Council could invoke the failure to comply with its negotiating directives, even if a majority of its members favour the conclusion of such an EU "stand-alone" agreement.

9. How can the EU break this deadlock? The following arrangements provide *food for thought.*

On the one hand, trade-related sectoral agreements to an association agreement can be concluded by means of a Council decision based on Article 217 TFEU insofar as these sectoral agreements are linked to the main agreement. By means of a single decision, the Council would thus decide on the conclusion of the association agreement and the ancillary sectoral agreements without it being necessary to base its decision on different legal bases. In fact, the "association" legal basis necessarily covers all the matters covered

[65] Art 218(8) TFEU. See Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] Official Journal L 161/3.

[66] Opinion AG Mengozzi, *supra*, note 38, para 47.

[67] See Case 45/86, *Commission* v *Council* [1987] ECR 1493; Case C-62/88, *Greece* v *Council* [1990] ECR I-1527.

by the main "association" agreement and the ancillary "trade-related" agreements.[68] However, it is unlikely that the European Commission will propose such an arrangement.

On the other hand, it is also possible to adopt sectoral agreements several years after the establishment of the association, intended to supplement the initial association agreement. Accordingly, ad hoc measures that modify, extend or further develop an already existing association must be based on Article 207 TFEU.[69] These sectoral agreements may be concluded on a separate legal basis, such as Article 207 TFEU. By way of illustration, the protocols instituting a dispute settlement mechanism relating to the commercial aspects of the Euro-Mediterranean association agreement were all adopted on the basis of Article 207 TFEU.[70] By the same token, the Council is entitled, on the basis of an association agreement concluded pursuant to Article 217 TFEU, to adopt a measure provided that that measure relates to a specific area of EU competence and is also founded on the legal basis corresponding, in the light in particular of its aim and content, to that area.[71] This means that the EU–MERCOSUR agreement had to be adopted unanimously by the Council and ratified by all the Member States.

Last, Trade, Development and Cooperation Agreement have been concluded by the Council on former Article 310 TCE, the legal basis to conclude association agreements (replaced by Article 217 TFEU). In such a case, the creation of the free trade area covering a wide range of issues, including political dialogue, justified the mixed nature of the agreement. Consequently, the EU–South Africa Trade, Development and Cooperation Agreement was not adapted on the CCP legal basis.[72] In contrast, the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part has been adopted by the Council on the basis of the EU competences in the fields of transport, development cooperation and foreign trade.[73]

10. As we have shown above, if unanimity is required, it is sufficient for one Member State to veto the EUMETA.

A Member State may thus refer the matter to the CJEU for an opinion in accordance with Article 218(11) TFEU. Such a request for an opinion on the EU–MERCOSUR Agreement would be made, as a preventive measure, prior to its conclusion. The CJEU can be requested to issue such an opinion given that "the envisaged agreement is known, even though there are a number of alternatives still open and differences of opinion on the drafting of the texts concerned."[74] Belgium was the first Member State to use this procedure in September 2017 when it requested the Court's opinion on the compatibility of the "investor–State dispute settlement" chapter of the CETA with the constitutional foundations of EU law.[75] In the event of a negative opinion, the Commission would have to seek and obtain a new

[68] See, for instance, Council Decision 98/150/EC ECSC Euratom concluding Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Lithuania, of the other part [1998] L 51/1. Two protocols of this association agreement concerned trade.

[69] Opinion AG Kokott in Case C-81/13 *United Kingdom v Council* 2014 EU:C:2014:2114, para 89.

[70] K Aloupi et al, *supra*, note 42, n 300, p 220.

[71] Case C-81/13 *United Kingdom/Council* [2014] EU:C:2014:2449, para 62.

[72] Council Decision 2004/441/EC of 26 April 2004 concerning the conclusion of the Trade, Development and Cooperation Agreement between the European Community and its Member States, on the one part, and the Republic of South Africa, on the other part [2004] Official Journal L 127/109.

[73] Council Decision 2000/658/EC of 28 September 2000 concerning the conclusion of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part [2000] Official Journal L 276/44.

[74] See, to that effect, Opinion 1/78 [1979] ECR 2871, para 34.

[75] Opinion 1/17 [2019] EU:C:2019:341.

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negotiating mandate from the Council. In a worst-case scenario, a Member State could request the CJEU to annul the contested decision as regards not only signature by the EU but also provisional application by the EU on the grounds that the procedure followed in adopting the contested decision was in breach of Article 218 TFEU.

11. There are many institutional obstacles to the signing and conclusion of one or more treaties with MERCOSUR. It might thus be a long row to hoe to determine the center of gravity of such treaties. It is regrettable that the European Commission has not been more transparent about the institutional issues at stake, even though it has been able to make several breakthroughs in trade negotiations in recent months.

With the outbreak of the tariff escalation in March 2025, the Union and Member States are considering endorsing a broader economic approach, aware that whatever happens, the US will no longer be the major trading partner it once was. Indeed, given that the US now accounts for 13 per cent of world trade, there are opportunities for the EU to take advantage of the remaining 87 per cent. In recent weeks, the President of the European Commission has been travelling the world, from India to Uzbekistan, investigating the possibility to conclude new free trade agreements. Against this backdrop, national opposition to an agreement with MERCOSUR is becoming less virulent. Austria is beginning to change its tune on this issue. France will no doubt realise that it will have to soften its stance, especially as the conclusion of this agreement is crucial for Germany.

While the conclusion of an agreement with MERCOSUR is essential for the positioning of the EU as a global leader and a major trade partner, it must nonetheless be achieved in accordance with the principle of institutional balance and loyal cooperation. Last but not least, how can the EU assert itself as a global trade player while at the same time attenuating the effects of the trade agreements it concludes with third countries on its economy, its consumers and its environment? There is no doubt that concluding a much broader association agreement with MERCOSUR would be the way forward.

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