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Statement as to whether or not the planned FTA between the EU, Peru and Colombia must be concluded as a so-called mixed agreement.

1. The significance and conclusion of mixed agreements

Mixed agreements are conventions based on international law, which on the European side, must be signed by the European Union and its Member States.[1] Examples of such agreements are association and cooperation agreements, but also multi-lateral ones such as the WTO Agreement and various goods agreements. Mixed agreements present challenges to the EU and its Member States in terms of practical policy coordination and the way in which the EU presents itself to the rest of the world.[2] Yet they also enable the EU and its Member States to work together in accordance with the internal division of competences to achieve foreign policy goals without having to artificially split international agreements.[3] Mixed agreements are therefore an expression of the particularly federal dimension of European external relations.[4]

Mixed agreements need the consent of the EU and its 27 Member States, and this consent must be provided in accordance with the respective constitutional requirements. In the case of Germany, this means that the Bundestag has to approve the agreement in accordance with Article 59, paragraph 2, sentence 1 of the Basic Law. At the European level, the approval of the European Parliament is needed in accordance with Article 218, paragraph 6, sub-paragraph 2a of the Treaty on the Functioning of the European Union (TFEU).

2. The prerequisites of mixed agreements

A mixed agreement is obligatory if it covers areas that do not belong to the exclusive competences of

1 ECJ. *Opinion* 2/91 (ILO Convention), Vol. 1993, I- 1061 No. 12.

2 Rosas. Mixed Union – Mixed Agreements. In: Koskenniemi. ed. 1998. *International Law Aspects of the European Union.* pp.125-148.

3 Sattler. 2007. *Gemischte Abkommen und gemischte Mitgliedschaften der EG und ihrer Mitgliedsstaaten.* p.72.

4 Weiler. 1999. *The Constitution of Europe.* p.130.

the EU, but fall within the national responsibilities of the Member States.[5] In accordance with the principle of conferral, the EU is only deemed responsible if, and to the extent that, responsibility has been conferred to it by the Treaty on European Union (TEU) and the TFEU. All other responsibilities remain with the Member States (Article 4, paragraph 1 of the TEU). To determine whether an agreement must be concluded as a mixed agreement, the content of the agreement must be analysed against the background of EU competences. In the practice of politics many international agreements have been concluded as mixed agreements without first clarifying whether this is actually required by law, the aim being to reduce EU-internal divergences.[6]

Of relevance to the EU-Peru-Colombia FTA is the question of whether the responsibility of Member States for only a small part of the agreement necessitates its conclusion as a mixed agreement. It is important here to stress the strict formal distribution of competences in a multilevel system of governance, which can neither be undermined nor circumvented. As for the – in this respect – comparable question of unanimity versus majority voting in the Council, it has been established that an agreement including just one provision requiring a unanimous decision, can only be adopted after being unanimously accepted by the Council. Within the workings of the EU this is graphically referred to as the 'Pastis principle'. This alludes to the phenomenon that just one drop of Pastis is enough to colour an entire glass. Pascal Lamy, the former trade commissioner, used this principle to describe voting relations in the Council: "Under the Pastis principle, a little drop of unanimity can taint the entire glass of qualified majority voting water".[7]

If this rule is valid for decision-making in the Council, it must certainly apply to the responsibility of concluding international agreements. In keeping with the same metaphor: one drop of unanimity in a contract that also concerns the responsibilities of Member States is enough to colour it in its entirety. In such cases the entire contract must be concluded as a mixed agreement. This is not because of the topic covered by the agreement, but is instead due to the provisions and parts which constitute the entire agreement.

3. How this applies to the free trade agreement between the European Union, and Peru and Colombia

The trade agreement between the EU and Peru and Colombia in its existing form aims primarily to liberalise trade between the parties and to establish a free trade area (Articles 3 and 4 of the draft agreement). Such an agreement would then fall within the exclusive competences of the EU: since the Lisbon Treaty the EU has been exclusively responsible for all areas of trade policy covered by the agreement (Article 207, paragraph 1 of the TFEU). Even if individual sections of the agreement exceed provisions of WTO law (WTO Plus), it is still possible to class them under the rubric of common trade policy.

Despite this the draft FTA includes two provisions which do not fall within the scope of common trade policy. These are Articles 1 and 2 of the agreement. According to Article 1, respect for democratic principles and fundamental human rights is an essential element of the agreement, and underpins bilateral relations. This raises the question of whether the EU possesses the competence for this. Article 21, paragraph 2b of the TEU enables the EU to establish measures that promote democracy and the rule

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5 Nettesheim. Kompetenzen. In: Bogdandy and Bast. eds. 2009. *Europäisches Verfassungsrech*t. p.432.

6 Eeckhout. 2004. *External Relations of the European Union*. p.198.

7 Lamy, P. 2002. *The Convention and trade policy: concrete steps to enhance the EU's international profile*. [online] Available at:
<http://ec.europa.eu/archives/commission_1999_2004/lamy/speeches_articles/spla146_en.htm>

of law. Article 37 of the TEU confers the EU the power to conclude international treaties in the area of common external and security policy. In this respect, this would argue for competence on the part of the EU. However, Article 1 of the draft FTA also refers to the Political Dialogue and Cooperation Agreement between the Andean Community and its Member States of the one side, and the European Community and its Member States on the other. This was concluded as a mixed agreement. Depending on the content of the cooperation agreement, this could also be something that necessitates the conclusion of the FTA as a mixed agreement.

Under Article 2 of the draft FTA, the parties agree to work together on disarmament and the non-proliferation of weapons of mass destruction. This also includes the implementation of existing obligations under international disarmament and non-proliferation treaties and agreements. There should be no doubt that the EU lacks the competence for this. Although Article 21, paragraph 2c of the TEU provides for a general competence concerning the promotion of international security, this could hardly be interpreted as referring to the specific area of disarmament and non-proliferation. In contrast to Peru and Colombia and numerous EU Member States, the EU itself is not party to an international agreement on the non-proliferation of weapons of mass destruction, such as the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) or the agreement on the prohibition of biological weapons (BWC). The EU itself is therefore unable to fulfil the obligations set out in Article 2. If the EU alone were party to this treaty, Peru and Colombia would be left without an opposite party with corresponding obligations under Article 2.

In can therefore be concluded that the existing draft of the FTA is a mixed agreement, meaning it must be agreed upon by both the EU and its Member States.

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