



ARTICLES

SPECIAL SECTION – THE NEW FRONTIERS OF EU ADMINISTRATIVE LAW: IS THERE AN ACCOUNTABILITY GAP IN EU EXTERNAL RELATIONS?

THE EXTERNAL ADMINISTRATIVE LAYER OF EU LAW-MAKING: INTERNATIONAL DECISIONS IN EU LAW AND THE CASE OF CETA

JOANA MENDES*

TABLE OF CONTENTS: I. The international regulation of public goods: legal challenges. – II. International decisions by CETA bodies. – III. Decisions of international bodies: a source of EU law. – IV. The external administrative layer of EU law. – IV.1. Interpretative effects: validating EU law. – IV.2. Authoritative international decisions. – IV.3. A next step for interpretative effects? – IV.4. Validating, but not invalidating EU law. – V. Strong in substance, weak in procedure. – VI. The EU Treaty procedure. – VII. The CETA bodies making EU law.

ABSTRACT: The legal status of binding and non-binding international decisions adopted by global regulatory bodies in EU law, their authority (as acknowledged in the case law of the CJEU) and legal effects allow one to characterise them as the external administrative layer of EU law-making. Mega-regional agreements, of which the Comprehensive Economic and Trade Agreement (CETA) is an instance, have the potential to expand this tier of law. This *Article* maps the substantive legal effects of international decisions in EU law as expounded by the CJEU, arguing that the case law the Court developed is transposable to future decisions of CETA bodies. Furthermore, it contrasts their possible substantive impact in EU law with the weaknesses of procedural controls over the exercise of public authority by those bodies.

KEYWORDS: global regulatory regimes – international decisions – public authority – non-binding acts – procedures – CETA.

* Professor of Comparative Administrative Law, University of Luxembourg, joana.mendes@uni.lu.

I. THE INTERNATIONAL REGULATION OF PUBLIC GOODS: LEGAL CHALLENGES

The negotiations of the Transatlantic Trade and Investment Partnership (TTIP)¹ and the ratification of the Comprehensive Economic and Trade Agreement (CETA)² provoked heated academic and public discussions throughout 2016. While largely focused on investor-state dispute settlement, they placed the spotlight on an important reality in the practice of EU external relations. Decisions adopted at the international level define substantive aspects of domestic law (including EU regulation concerning the provision of public goods, such as health and the safety of pharmaceuticals, chemicals, food products, environmental protection and financial stability).³ Whether adopted by international bodies set up to implement international agreements binding on the EU – as is now the case of CETA⁴ – or adopted outside the framework of an international agreement in informal regulatory fora (composed of EU administrative bodies and other global actors), international decisions may have important substantive legal effects. As the Court of Justice has explicitly acknowledged, even non-binding decisions of an international body “are capable of decisively influencing the content of [EU] legislation” and, thereby, may have a “direct impact on the European Union’s *acquis*”.⁵

¹ Initiated by EU directives ST 11103/13 for the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US, unanimously adopted by the Council on 14 June 2013 and declassified and made public by the Council on 9 October 2014 (for the current state of negotiation see trade.ec.europa.eu).

² Council document n°10973/16, “Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part”, dated 14th September 2016.

³ The term “decisions” is adopted here in a broad sense, to refer to acts that can have legal effects in the sense of Art. 218, para. 9, TFEU, as established in Court of Justice, judgment of 7 October 2014, case C-399/12, *Federal Republic of Germany v. Council of the European Union* [GC], irrespective of the scope of their addressees. Unless otherwise specified, it encompasses formally non-binding acts, such as guidelines, recommendations, best practices, standards. It does not include decisions of a judicial or a dispute settlement body, given their specific procedure and function as resulting from a dispute arbitrated by an impartial body (on these, see P.-J. KUIJPER, J. WOUTERS, F. HOFFMEISTER, G. DE BAERE, T. RAMOPOULOS, *The Law of EU External Relations*, Oxford: Oxford University Press, 2015, pp. 721-726).

⁴ At the time of the writing, the European Parliament had given its consent to the conclusion of the agreement (European Parliament Legislative Resolution of 15 February 2017 on the Draft Council Decision on the Conclusion 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 (10975/2016 – C8-0438/2016 – 2016/0205(NLE)) and the Canadian Senate had approved the implementing act required under national law, available at www.parl.ca, thus triggering the possible provisional application of the agreement under Article 30.7, para. 3, CETA. The text of the agreement is available at data.consilium.europa.eu.

⁵ *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 63 and 64. At stake in this case were recommendations of a body set up by an international agreement to which the EU is not a party (21 Member States are) but in which it is a “guest” in the terms of that body’s internal rules and whose meetings the Commission attends (*Federal Republic of Germany v. Council of the European Union* [GC], cit., para. 5).

International regulation of public goods is a reality that global markets cannot do without. Yet, it is also a reality that reinforces the law-making role of executive and administrative bodies while at the same time posing important challenges to law's ability to constrain their authority.⁶ By now, a plethora of bilateral and multilateral conventions set up regulatory regimes and bodies that adopt decisions, resolutions, recommendations, guidelines, best practices in a variety of policy fields. Mega-regional agreements, due to their scope and aims, give a distinct significance to this phenomenon and emphasise its legal challenges.⁷ As the name of the first mega-regional agreement approved by the European Parliament indicates, these are "comprehensive economic and trade" agreements touching virtually every relevant economic sector. Established between two parties that already apply feeble tariff barriers to bilateral trade – the EU and its Member States and Canada (the Parties) – CETA aims mainly at: eliminating non-tariff barriers; ensuring better access to public procurement; protecting investment, intellectual property (including pharmaceutical patents) and geographical indications; warranting that food safety, animal and plant health regulations do not create unjustified barriers to trade; facilitating the provision of services (including financial and telecommunication services); recognising professional qualifications; protecting the security and integrity of both Parties' financial systems as insurance and banking services are provided cross-border; regulating the maritime transport market; ensuring cooperation between their respective competition authorities; safeguarding conservation and sustainable management of forests and fisheries; preventing either side from ignoring or lowering environmental and labour standards to boost trade.⁸ CETA, in addition, establishes a set of committees whose function is to implement the agreement. Some of these committees have the capacity to adapt to evolving realities the substantive commitments that the Parties assumed when signing and ratifying the agreement, in a way that enables the agreement to continue fulfilling its purposes.

Addressing the international regulation of public goods from the perspective of the EU, this *Article* characterises the ensuing international decisions as the external adminis-

⁶ Specifically on this argument, see, J. MENDES: *Rule of Law and Participation: A Normative Analysis of Internationalised Rulemaking as Composite Procedures?*, in *International Journal of Constitutional Law*, 2014, p. 370 *et seq.*; *Participation in a New Regulatory Paradigm: Collaboration and Constraint in TTIP's Regulatory Cooperation*, in *ILJ/NYU Working Paper MegaReg Series 2016/5*.

⁷ On mega-regional trade agreements, see R.T. BULL, N.A. MAHBOUBI, R.B. STEWART, J.B. WIENER, *New approaches to international regulatory cooperation: the challenge of TTIP, TPP and mega-regional trade agreements*, in *Law and Contemporary Problems*, 2015, p. 1 *et seq.* On the constitutional challenges that they pose, see E.-U. PETERSMANN, *Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?*, in *Journal of European International Economic Law*, 2015, p. 579 *et seq.*

⁸ Art. 30.10, para. 4, CETA. Analysing the changes in EU trade policy and the new generation of trade agreements, and thus placing CETA in its broader context, see A.S. SERRANO, *From External Policy to Free Trade: The EU-Singapore Free Trade Agreement* in P. EECKHOUT, M. LOPEZ-ESCUADERO (eds), *The European Union's external action in times of crisis*, Oxford: Hart Publishing, 2016, pp. 483-507, in particular pp. 487-491.

trative layer of EU law, given their legal status, authority and substantive legal effects in EU law. In addition, it points out the disconnect between these effects and the weak procedural rules that frame their adoption. It focuses on decisions by CETA bodies: because of the scope of this agreement, these have the potential to expand the external administrative layer of EU law. While it is at present not possible to assess the substantive effects of these decisions – at the time of writing the agreement is only being provisionally applied – the authority the CJEU has thus far attributed to, and the effects it has recognised regarding, international decisions could apply to those future decisions. In fact, the reasons that have led the CJEU to tease out the legal effects of decisions of international bodies, while at the same time justifying their authority in EU law, are arguably transposable to the future decisions of CETA bodies. Section II starts by highlighting the instances in which CETA bodies can adopt international decisions and recommendations to implement the agreement, even if acknowledging that formal decision-making is a small portion of their regulatory activity. Section III explains the formal legal status of decisions of international bodies in EU law. In doing so, it also considers decisions adopted to implement multilateral agreements, given the relevance of the respective case law for this discussion. Section IV examines the substantive effects and authority of international decisions through the lens of the case law of the Court of Justice.⁹ Section V returns to CETA and points out the procedural weaknesses of implementing decision-making as established by this agreement, which contrast with the status, authority and substantive legal effects of international decisions in EU law. Section VI examines the role of Art. 218, para. 9, TFEU in addressing the normative concerns raised by these procedural weaknesses. Section VII concludes arguing that, while CETA bodies can in practice make EU law, their authority in adopting such decisions may be virtually unrestrained.

II. INTERNATIONAL DECISIONS BY CETA BODIES

The interactions between international and EU regulatory bodies are multifaceted and often do not fit in the vertical scheme by which decisions adopted by international bodies are incorporated in domestic legal orders.¹⁰ By focusing on this type of interaction, the *Article* leaves in the shadow a multitude of softer, but not less influential, forms of public action that may equally influence the EU legal order. With regard to regulatory cooperation in the framework of mega-regional agreements, for instance, it has been pointed out that decisions, whether formal or informal, are possibly the least likely out-

⁹ Authority is understood here in the sense proposed by Armin von Bogdandy and others as the ability to affect the freedom of others in pursuance of a public interest (see, most recently, A. VON BOGDANDY, M. GOLDMANN, I. VENZKE, *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, in *European Journal of International Law*, 2017, p. 115 et seq.).

¹⁰ R.B. STEWART, *The Global Regulatory Challenge to U.S. Administrative Law*, in *NYU Journal of International Law and Politics*, 2005, p. 703.

come of the activities performed under an international agreement.¹¹ Indeed, regulatory cooperation under CETA entails a whole range of procedural obligations of the Parties regarding the “development, review and methodological aspects” of their regulatory measures.¹² Engaging in regulatory cooperation may mean only discussing regulatory reform, “lessons learned”, “exchange experiences”, mutually consulting on regulatory developments, sharing information, examining and comparing assumptions and methodologies of data analysis or post-implementation reviews.¹³ The list of regulatory cooperation activities shows the multitude of tasks involved in regulation that extend to international regulation and structure decision-making in ways that are often outside of the lawyers’ radar.

As important as it may be to analyse that transatlantic structure of regulation, it should not detract from the more conventional legal powers that may be involved in implementing international agreements, in particular – given their wide scope – in the case of mega-regional agreements. As specified in CETA, regulatory cooperation also entails examining the opportunities to achieve regulatory convergence (“minimise unnecessary divergences”) via, *inter alia*, “achieving a harmonised, equivalent or compatible solution” or “considering mutual recognition in specific cases”.¹⁴ To the extent that regulatory cooperation may ultimately lead to formal recommendations, these will be adopted either by the CETA Joint Committee (hereinafter, Joint Committee), possibly by suggestion of the Regulatory Cooperation Forum;¹⁵ or directly by the Regulatory Cooperation Forum, a specialized committee to which the Joint Committee may delegate its powers.¹⁶ Other CETA specialized committees have decision-making powers: the Joint

¹¹ R.T. BULL, N.A. MAHBOUBI, R.B. STEWART, J.B. WIENER, *New Approaches to International Regulatory Cooperation*, cit., pp. 10-12.

¹² Art. 21.1, CETA.

¹³ *Ibid.*, Art. 21.4.

¹⁴ *Ibid.*, Art. 21.4, let. g), ii) and iii).

¹⁵ *Ibid.*, Arts 21.6, para. 4, let. c), and 26.2, para. 6. The Regulatory Cooperation Forum needs to report to the Joint Committee “as appropriate” and “on the results and consultations from each meeting”. The chapter on regulatory cooperation does not give the Forum the power to decide or issue recommendations (Art. 21.6, and see also Art. 26.2, let. h)). The Joint Committee, on the contrary, may take decisions “in respect of all matters when this Agreement so provides” (Art. 26.3, para. 1) and “make appropriate recommendations” (Art. 26.3, para. 2). From the combination of these provisions, it results that decisions are most likely not permissible regarding regulatory cooperation (following Art. 26.3, para. 1, that power would need to be specified in the Agreement). Art. 26.2, para. 4, raises a doubt in this respect: it enables specialised committees to propose draft decisions for adoption by the Joint Committee, but presumably only where the latter’s power to take decisions is specified in the Treaty (see e.g. Arts 2.13, para. 2, and 8.10, para. 3, the regulatory cooperation chapter does not have similar provisions).

¹⁶ *Ibid.*, Art. 26.1, para. 5, let. a), which mentions the delegation of “responsibilities”. If the interpretation in the footnote 15 holds, the Joint Committee could only delegate the power to adopt recommendations as it would not have the power to adopt decisions in the field of regulatory cooperation. It is noteworthy that despite the reference in an official information site that the Regulatory Cooperation Forum does not have formal decision-making powers (Ministère de l’Économie, *Accord économique et commercial*

Management Committee for Sanitary and Phytosanitary Measures may decide to amend the annexes to the chapter on Sanitary and Phytosanitary; the Committee on Services and Investment may develop recommendations regarding a possible revision of the obligation to provide fair and equitable treatment, submit them to the Joint Committee for decision; it may make recommendations on the interpretation of CETA (that may eventually be binding via a decision of the Joint Committee) and recommendations on the functioning of the Appellate Tribunal; the Financial Services Committee has the power to adopt decisions and is involved in the arbitration of financial disputes; and the Committee on Geographical Indications may recommend that the Joint Committee add or remove geographical indications from the respective CETA Annex.¹⁷ Moreover, any decisions by the Joint Committee will be followed up by the CETA contact points, who monitor and ensure the continuity of the work of the CETA bodies.¹⁸

There are relatively few indications regarding the composition of these bodies. The Joint Committee comprises “representatives” of the EU (including of its Member States, given that this is a mixed agreement) and of Canada, being chaired by the Canadian Minister for International Trade and the Commission’s Trade commissioner.¹⁹ Specialised committees mostly gather regulatory representatives from each party; when they meet, “all the competent authorities for each issue on the agenda” must be represented to ensure an “adequate level of expertise”.²⁰ This means that the EU agencies, together with their Canadian and EU Member States counterparts, are likely to be involved in these specialised committees. For example, the Regulatory Cooperation Forum is composed of “relevant officials” of each Party, who by mutual consent may invite “other interested parties to participate” in their meetings; its chairs will be representatives of the Canadian government and of the Commission.²¹

The Joint Committee has a considerably broad mandate, within the scope of which it “shall” take decisions, when the agreement so provides, and may adopt recommendations.²² That mandate includes: the duty to consider “*any matter of interest* related to an *area covered by [CETA]*”; the possibility to “study the development of trade between the Parties and consider ways to further enhance trade relations between the Parties”; the

global (AECG – en anglais CETA: Comprehensive Economic and Trade Agreement) entre l’Union européenne et le Canada – Questions & réponses, 28 January 2015, www.tresor.economie.gouv.fr, this may change by a decision of the Joint Committee, which, in addition to delegation, has the power to “change or undertake the tasks assigned to a specialised committee” – Art. 26.1, para. 5, let. g), CETA).

¹⁷ Respectively, Art. 5.14, para. 2, let. d); Arts 8.10, para. 3, 8.28, para. 88, and 8.31, para. 3; Arts 13.18, para. 2, 13.18, para. 3, let. c), and 13.21, para. 3, (among other norms in this last provision); Art. 20.22, para. 1, all CETA.

¹⁸ *Ibid.*, Art. 26.5, para. 2, let. c).

¹⁹ *Ibid.*, Art. 26.1, para. 1.

²⁰ *Ibid.*, Art. 26.2, para. 5.

²¹ *Ibid.*, Art. 21.6, para. 3.

²² *Ibid.*, Arts 26.1, para. 4, let. e), and 26.3, paras 1 and 2.

interpretation of CETA provisions, which has binding effects to the tribunals that it establishes; the ability to “make recommendations suitable for promoting the expansion of trade and investment as envisaged in [the agreement]”, and to take on any “other action in the exercise of its functions as decided by the Parties”.²³ While the functions of the specialised committees vary (they are specified in their respective chapters), they work under the supervision of the Joint Committee and are subject to reporting obligations.²⁴ There are no provisions regarding the accountability of the Joint Committee, which one assumes is subject only to the domestic constitutional rules applicable to the representatives of each Party.

The extensive powers that CETA bodies are given – as exemplified in the observations above – beg an analysis of the legal status, authority and possible legal effects of the decisions that the Joint Committee, and, where applicable, the CETA specialised committees (possibly also under delegation from the Joint Committee) may adopt when making CETA the living agreement that it is intended to be. These will be decisions of international bodies set up by an international agreement to which the EU is party and are, as such, an integral part of EU law, in the terms analysed next.

III. DECISIONS OF INTERNATIONAL BODIES: A SOURCE OF EU LAW

In the late 1980s and early 1990s, the CJEU had the opportunity to clarify the legal status of decisions of international bodies in EU law.²⁵ Since then, established case law determines that, if those decisions are directly connected to an international agreement which is part of EU law, they are – as much as the agreements from which they emanate – an integral part of the EU legal system.²⁶ This norm was first formulated with regard to binding decisions of Association Councils acting under Association Agreements of the EU (*S. Z. Sevince v. Staatssecretaris van Justitie*), quite a distant reality from the world of international standards.²⁷ Nevertheless, the CJEU extended this same norm to decisions of other international bodies set up under international agreements concluded by the EU with third countries.

²³ *Ibid.*, Arts 26.1, para. 4, let. f), and 26.1, para. 5, let. d), e), f) and i) (emphasis added).

²⁴ *Ibid.*, Art. 26.1, para. 4, let. b). For the functions of the regulatory cooperation forum, see Art. 21.6, para. 2. In fact, the only specification regarding accountability of the Regulatory Cooperation Forum is its duty to report to the Joint Committee (Art. 21.6, para. 4, let. c)).

²⁵ This part adapts and develops the analysis in J. MENDES, *EU Law and Global Regulatory Regimes: Hollowing Out Procedural Standards?*, in *International Journal of Constitutional Law*, 2012, pp. 992-995.

²⁶ Court of Justice: judgment of 14 November 1989, case 30/88, *Greece v. Commission*, para. 13; judgment of 20 September 1990, case 192/89, *S. Z. Sevince v. Staatssecretaris van Justitie*, paras 8-9; judgment of 21 January 1993, case C-188/91, *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, para. 17.

²⁷ In the case of *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., a Turkish national challenged the refusal of the Dutch State Secretary of Justice to grant him a residence permit on the grounds that such refusal violated a decision of the Association Council acting under the Association Agreement with Turkey.

In *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, the CJEU assessed the status in the EU legal order of a recommendation adopted by a Joint Committee under a multilateral agreement concluded by the then European Economic Community (EEC). The Joint Committee had been entrusted with the implementation of this agreement. The recommendation defined rules concerning the sealing of goods in transit between the parties to the Convention. The German authorities had applied that recommendation in a decision that Shell contested in a national court, questioning whether the recommendation was part of the EU legal order. The CJEU held that non-binding decisions stemming from the application of international agreements that form an integral part of the EU legal system are also part of EU law.²⁸ As a result, even if those decisions do not confer enforceable rights upon individuals, national courts “are nevertheless obliged to take them into consideration in order to resolve disputes submitted to them, especially when [...] they are of relevance in interpreting the provisions” of those agreements.²⁹

While the legal status of decisions of international bodies in EU law has remained relatively under-developed both in case law and in academic discussion,³⁰ *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* confirms that this layer of international post-treaty regulation is part of EU law irrespective of the binding character of the decisions. The justification for this incorporation reveals also (in part) the reasons that, according to the Court, ground the authority of those decisions. In the CJEU’s analysis, there is a direct link between the decision and the respective agreement (“*unmittelbaren Zusammenhang*” in the original wording of the CJEU in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*): the decision emanates from a body established under an agreement concluded by the EU, and its function is the implementation of that agreement.³¹ AG Van Gerven, relying on previous CJEU judgments, underlined that “the act is placed ‘within the institutional framework’ of the agreement and ‘gives effect to it’” (i.e. to its objectives) – these are crucial factors to determine a “close connection” (“*nauwe samen-*

²⁸ *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., para. 17.

²⁹ *Ibid.*, para. 18.

³⁰ By contrast to the large literature on the effects of international agreements in EU law, there are relatively few accounts of the effects of international decisions: see B. MARTENCZUK, *Decisions of Bodies Established by International Agreements and the Community Legal Order*, in V. KRONENBERGER (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, The Hague: TMC Asser Press, 2001, p. 141 (noting too the marginal attention given to this topic); N. LAVRANOS, *Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States*, Groningen: Europa Law Publishing, 2004, ch. 3; P.J. KUIJPER, *Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal rules in European Community Law*, in J. WOUTERS, A. NOLLKAEMPER, E. DE WET (eds), *The Europeanisation of International Law*, The Hague: TMC Asser Press, 2008, pp. 96-102; R.A. WESSEL, S. BLOCKMANS, *The legal status and influence of decisions of international organisations and other bodies in the European Union*, in P. EECKHOUT, M. LOPEZ-ESCUADERO (eds), *The European Union’s external action in times of crisis*, cit., pp. 223-248; focusing on procedural matters, see J. MENDES, *EU Law and Global Regulatory Regimes*, cit. On the case law, see section IV below.

³¹ *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., para. 17.

hang") between the agreement and the decision.³² By signing the agreement, the EU agreed to entrust decision-making powers to bodies created by the agreement with the purpose of giving effect to the latter.³³ The consent of the EU (and of the other contracting parties) when concluding the international agreement thus grounds the authority of the decisions emanating from the bodies implementing that agreement. According to this reasoning, the binding or non-binding nature of the decision is irrelevant in determining whether or not it is a part of the EU legal order.³⁴

Consent is a formal justification. This is particularly evident regarding decisions of international bodies set up by multilateral agreements, as was the case in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*. In these cases, the EU participates in the decision-making process in a different position from the one it has in the context of bilateral agreements and the international decisions by which it is bound may be adopted against the will of the EU.³⁵ This is quite a different reality from decision-making within Association Councils that implement Association Agreements, where the CJEU first established the correspondence between the legal status and effects of international decisions in EU law and that of the underlying agreement. Here, the EU is virtually "the master of the preparation of decisions to be taken".³⁶ In the case of CETA, the fact that its Joint Committee adopts decisions and recommendations by mutual consent may bridge the gap between the original consent – given at the time of the conclusion of the agreement – and the reality of decision-making of a body whose function is primarily to "further [the] general aims [of the agreement]", *inter alia* by adapting it to evolving realities.³⁷ But even the decisions of bodies implementing bilateral agreements may be hard to pin-down to the consent of the Parties to the agreement. Institutional practice and the need to react to shifting realities may substantively bring decision-making away from the original intentions of the drafters of the agreement. Formal as it may be, the case law is clear: by concluding the agreement, the EU consented to the mandate of the bodies thereby estab-

³² Opinion of AG Van Gerven delivered on 15 October 1992, case C-188/91, *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, para. 10.

³³ See also P. GILSDORF, *Les Organes Institués par des Accords Communautaires: Effets Juridiques de Leurs Décisions*, in *Revue du Marché Commun*, 1992, p. 332.

³⁴ Opinion of AG Van Gerven, *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., para. 10.

³⁵ The agreement at stake in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* was the Convention on a Common Transit Procedure, concluded on 20 May 1987 between the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden, the Swiss Confederation and the European Economic Community. See also P. GILSDORF, *Les Organes Institués par des Accords Communautaires*, cit., p. 332.

³⁶ P.J. KUIJPER, *Customary International Law*, cit., p. 101.

³⁷ Arts 26.1, para. 4, let. a), and 26.3, para. 3, CETA. Of the specialised committees, CETA only specifies mutual consent for the adoption of decisions of the Financial Services Committee (Art. 13.18, para. 2). The other committees may define in their rules of procedure another decision-making rule, except for their agenda and meeting schedule, for which CETA determines adoption by mutual consent (Art. 26.2, para. 4).

lished and it is, as a result, bound by such decisions. The section below will show that this is only one among other justifications that the Court has given for the authority of international decision in the EU and that, arguably, reinforce this authority.

IV. THE EXTERNAL ADMINISTRATIVE LAYER OF EU LAW

Despite the status of international decisions as a source of EU law, most judgments of the CJEU where such decisions feature pertain to the validity or interpretation of EU legal acts that incorporate them and not to the decisions themselves.³⁸ Their formal legal status – as an integral part of EU law – appears to have been overshadowed by the multiple instances in which “dynamic references” incorporate them into EU legislation.³⁹ Their legal status notwithstanding, this incorporation appears to be the main way by which international decisions produce substantive legal effects.

EU legislation may include explicit references to those decisions; irrespective of a legislative requirement, international decisions may be incorporated into EU non-legislative acts; or they may be given legal effects by the regulatory action of EU agencies that might follow those decisions or give them a presumption of compliance with EU rules.⁴⁰ By virtue of their incorporation into EU law, international decisions acquire a legal force they did not have at the time of their adoption. The case law analysed below will illustrate their possible substantive effects in EU law. As mentioned above, while existing case law refers to decisions of international bodies established under international agreements different from CETA, the substantive effects mapped here may, in the future, be attributed also to CETA bodies’ decisions, for the reasons that will be explained below.

³⁸ See further N. LAVRANOS, *Decisions of international organizations*, cit., pp. 56-57. *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., was a case where the Court ruled on the decision itself and it triggered a long litigation on Decision 1/80 of the Association Council established under the EEC-Turkey Association Agreement. In Court of Justice, judgment of 7 April 2016, case C-556/14 P, *Holcim (Romania) SA v. Commission*, the General Court did not appear to exclude the possibility to rule on the decision at stake, or at least that “it could be relied on before the Court” (para. 131; this point is arguably not excluded by the Court of Justice’s observation on appeal, where it underlined that the General Court had rejected the applicant’s pleas on other grounds).

³⁹ Opinion of AG Cruz Villalón delivered on 29 April 2014, case C-399/12, *Federal Republic of Germany v. Council*, para. 85.

⁴⁰ The case law analysed below provides examples of the first two instances. An example of the third is the international guidelines on the quality, safety and efficacy of pharmaceutical products used by the European Medicines Agency to assess the applications for the authorization of medicines and that the agency considers to reflect “the best or most appropriate way to fulfil an obligation laid down in the [Union] pharmaceutical legislation” (European Medicines Agency (EMA), *Procedure for European Union Guidelines and Related Documents within the Pharmaceutical Legislative Framework*, London, 18 March 2009, Doc.Ref. EMEA/P/24143/2004 REV. 1 corr (hereinafter, “EMA Procedural Guidelines”), pp. 4 and 5, paras 2.1 and 2.2.

IV.1. INTERPRETATIVE EFFECTS: VALIDATING EU LAW

International decisions may be a source of interpretation of an EU legal act. In *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, the Court made it clear that national courts should use international decisions in interpreting the provisions of the “parent” agreement.⁴¹ That they can also have interpretative effects regarding EU legislation was shown, more recently, in the *Philip Morris Brands SARL et al.* judgment, where the Court was called upon to assess the validity of the Revision of the Tobacco Products Directive (hereinafter, Tobacco Products Directive).⁴² Philip Morris and British American Tobacco challenged, on the grounds of incorrect use of Art. 114 TFEU (amongst other pleas), the legality of the Tobacco Products Directive’s prohibition on placing onto the market tobacco products with a characterising flavour. The guidelines adopted by the Conference of the Parties to the World Health Organisation Framework Convention on Tobacco Control (FCTC) – to which the Tobacco Products Directive refers – were an important element of the applicable legal framework and served as an anchor to the CJEU’s judgment that the Tobacco Products Directive was valid.⁴³ Those guidelines recommend the removal or restriction of the use of ingredients that increase the palatability of tobacco, without distinction. This was the CJEU’s argument in holding that the legislator “could properly” subject all characterising flavours to the same rules.⁴⁴

Having established the reasonableness of the norm, the CJEU still needed to determine whether the legislator had made proper use of Art. 114 TFEU. For this purpose, divergences between the regulatory systems of Member States on the regulation of those flavours either need to exist or may be envisaged. Disparities did exist at the time of the adoption of the Tobacco Products Directive, the CJEU found on the basis of its recitals. The CJEU went further: absent EU harmonisation, future national measures would lead to more disparate rules. The argument was the existence of international guidelines. Since these recommend the prohibition or restriction of the use of characterising flavours, thereby affording a “broad discretion” to the Contracting Parties, “it is foreseeable, with a sufficient degree of probability, that in the absence of measures at EU level,

⁴¹ *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., para. 18. See also Court of Justice, judgment of 19 November 1998, case C-162/97, *Criminal proceedings against Gunnar Nilsson Per Olov Hagegren and Solweig Arrborn*, para. 49.

⁴² Court of Justice, judgment of 4 May 2016, case C-547/14, *Philip Morris Brands SARL et al.* For the Directive see Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2011/37/EC.

⁴³ See Art. 1 of Directive 2014/40/EU.

⁴⁴ *Philip Morris Brands SARL et al.*, cit., paras 108-110 and 114-115.

the relevant national rules could develop in divergent ways".⁴⁵ The CJEU could then conclude that the object of the marketing prohibition was – somewhat paradoxically (if one relies only on internal market considerations) – the facilitation of the smooth functioning of the internal market.⁴⁶

In this two-fold way, the guidelines of the Conference of the Parties became, through interpretation of the Tobacco Products Directive, a legal argument to support the validity of an EU harmonisation measure. They enabled the CJEU to ascertain the reasonableness of the legislator's choice to prohibit the use of all characterising flavours – since such a general prohibition was set out in the recommendations; and, as part of the applicable legal framework, they allowed the CJEU to establish the likelihood that future national measures would create disparities in the internal market. Irrespective of the soundness of the EU legislator's choice to prohibit those ingredients, it is noteworthy that – as an interpretative tool – those guidelines were indirectly invoked against the parties that challenged the validity of the Tobacco Products Directive.

IV.2. AUTHORITATIVE INTERNATIONAL DECISIONS

The guidelines at stake are not binding, as the Court of Justice recalled. Nevertheless, four arguments led the CJEU to conclude that the FCTC guidelines are, nevertheless, authoritative and "intended to have a decisive influence" on the Tobacco Products Directive's rules.⁴⁷ First, the FCTC specifies that the guidelines of the Conference of the Parties are meant "to assist the Contracting Parties in implementing the binding provisions of that convention".⁴⁸ The authority of the guidelines therefore stems from the regulatory powers conferred upon the Conference of the Parties and from the purpose of those powers. In this case, one could see in this argument a concretisation of the consent rationale, as it results from *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*. But this is not the only justification for their authority. The Court's additional (second) argument was that the guidelines are based on the best available scientific evidence and on "the experience of the Parties to the FCTC".⁴⁹ Moreover, and thirdly, they have been adopted by consensus, including by the EU and by its Member States.⁵⁰ Finally,

⁴⁵ *Philip Morris Brands SARL et al.*, cit., paras 118-120 (emphasis added). The need to adapt EU law to the guidelines was also invoked in para. 99 to support the claim that disparities were likely to occur regarding the packaging and labelling of tobacco products.

⁴⁶ *Ibid.*, paras 116-117.

⁴⁷ *Ibid.*, para. 113.

⁴⁸ *Ibid.*, para. 111.

⁴⁹ *Ibid.*, para. 112.

⁵⁰ *Ibid.* Whether this feature will be present in other cases will largely depend on the respective constitutive agreements.

the EU legislature made an “express decision to take those recommendations into account” in the Tobacco Products Directive, as its recitals confirm.⁵¹

Although this reasoning was developed in the framework of a multilateral agreement, the same arguments could arguably also be invoked regarding future decisions (including recommendations) of CETA bodies. The type of international agreement at stake does not seem to be an obstacle to extend these arguments to decisions with analogous characteristics, beyond the case of *Philip Morris Brands SARL et al.* The same applies to the formal role of the EU in the decision-making processes of international bodies. In the *Federal Republic of Germany v. Council of the European Union* case the CJEU grounded the ability of non-binding decisions to produce legal effects (for the purposes of Art. 281, para. 9, TFEU) on some of the same arguments, although in that instance the EU was not a party to the underlying agreement.⁵² The Court grounded those decisions’ authority on their purpose, as established in the international agreement, combined with the competence this agreement attributed to *Federal Republic of Germany v. Council of the European Union*,⁵³ and on the fact that the EU legislator incorporated those recommendations in EU law.⁵⁴

Three of the four arguments the CJEU used in the *Philip Morris Brands SARL et al.* case would apply to decisions and recommendations of the CETA bodies: their mandate and the purpose of their decisions, i.e. achieving the objectives of the agreement; the fact that, at least judging from their composition, they should gather the relevant expertise; and their adoption by mutual consent. The latter is only required for decisions and recommendations of the Joint Committee and of the Financial Committee, but it is not excluded that specialised committees specify the same requirement in their rules of procedure.⁵⁵ The argument of expertise is stronger in the case of decisions of the specialised committees than in the case of acts of the Joint Committee, given the combined requirements that all competent authorities for each issue on the agenda be represented and that each issue be discussed “at the adequate level of expertise”.⁵⁶

Whether or not EU legislation will contain “dynamic references” to the acts of these bodies cannot, of course, be established at this point, but it is not an unlikely scenario given that those references are common in EU legislation and stem from the international obligations of the EU. While incorporation may be a strong basis to ascertain that

⁵¹ *Ibid.*, para. 113.

⁵² Court of Justice, judgment of 7 October 2014, case C-399/12, *Federal Republic of Germany v. Council of the European Union* [GC].

⁵³ In this case, one cannot read these arguments through the prism of consent, as the EU is not a party to the agreement (*Federal Republic of Germany v. Council of the European Union* [GC], cit., para. 52, see also para. 5; the Commission’s participation in the meetings of the International Organisation of Vine and Wine’s bodies cannot be considered a surrogate to consent of the parties).

⁵⁴ *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 59, 60 and 61.

⁵⁵ See footnote 39.

⁵⁶ Art. 26.2, para. 5, CETA.

the substantive effects of international decisions were intended by the EU (including by its legislator), neither *Philip Morris Brands SARL et al.* nor *Federal Republic of Germany v. Council of the European Union* make it a necessary, or sole, condition of the authority of international decisions in EU law.

IV.3. A NEXT STEP FOR INTERPRETATIVE EFFECTS?

One of the reasons for attributing authority to international decisions – technical competence – was again invoked in a more recent judgment of the CJEU. The case regarded the validity of a Commission regulation provision that sets at 65 the age beyond which pilots of commercial aircrafts can no longer exercise this function; specifically, it concerned this norm's compatibility with the Charter prohibition of discrimination on grounds of age (Art. 21, para. 1, of the Charter of Fundamental Rights of the European Union). One of the questions at stake was whether this limitation on the prohibition of discrimination – intended to ensure air traffic safety – is necessary, under a proportionality test. The CJEU recalled that the EU institutions have broad discretion when setting a precise age limit beyond which one may presume the deterioration of physical capacities, because of the complex medical assessments and uncertainty involved. Nevertheless, the choices based on those assessments must be grounded on objective criteria and need to respect fundamental rights. This point was clearer in the Advocate General's opinion, which the Court followed.⁵⁷ With a view to determining whether this specific choice was based on objective criteria, AG Bobek resorted to the international standards of the International Civil Aviation Organisation (ICAO), to which both the enabling regulation and the Commission regulation referred in their recitals.

According to the Advocate General, international standards generally “may be considered to *form a crucial element* of such objective criteria”;⁵⁸ the standards specifically applicable to this case are “a valuable element in the assessment of proportionality” of the norm at stake.⁵⁹ Why? The reasoning is as follows:

“As they are based on *extensive professional debate and expertise*, they lay solid ground for the justification of the age limit, acting as *objective and reasonable references* for decision-makers. [...] They demonstrate the *consensus and good practice in a technical field* which is international by nature”.⁶⁰

⁵⁷ Court of Justice, judgment of 5 July 2017, case C-190/16, *WernerFries v. Lufthansa CityLine GmbH*, paras 59-63; Opinion of AG Bobek delivered on 21 March 2017, case C-190/16, *WernerFries v. Lufthansa City-Line GmbH*, paras 51-52.

⁵⁸ Opinion of AG Bobek, *WernerFries v. Lufthansa CityLine GmbH*, cit., para. 52 (emphasis added).

⁵⁹ *Ibid.*, para. 56 (emphasis added).

⁶⁰ *Ibid.*, para. 56 (emphasis added). See, too, judgment in *WernerFries v. Lufthansa CityLine GmbH*, cit., para. 63.

The CJEU followed this opinion, holding that international standards are an important element in assessing the objectivity – and, thereby, the necessity – of a choice of the EU institutions that restricts a fundamental right. The Court further decided (equally following the Advocate General’s opinion) that the legislature was not required to make an individual examination of the physical and mental capabilities of each holder of a pilot’s licence after the age beyond which it could objectively presume the deterioration of those capabilities. A general risk assessment embedded in international rules combined with progressive aged-based limitations – the legislature’s choice in this case – could reasonably replace such an individual examination. This choice was “firmly rooted in the relevant international rules, which are themselves based on the current state of expertise in that field”.⁶¹

In one point, the Advocate General went farther than the CJEU in his assessment of the legal weight of international rules. Specifically regarding the choice to set the age limit at 65, he considered that “to call such a standard into question would require rather a robust case supported by strong evidence, which has not been presented in this case”.⁶² In this line of reasoning, international rules would have an additional substantive effect: they would raise the standard of proof to contest the validity of an EU law provision which incorporates them. What makes these standards authoritative – their technical quality that reveals consensus and good practice in a technical field – would give them the ability to set evidentiary standards. While the CJEU has not explicitly endorsed this consequence, it has hitherto shown a virtually unconditional reliance on the technical quality of international standards.⁶³ Their presumed technical quality – common to both the *Werner Fries v. Lufthansa CityLine GmbH* and the *Philip Morris Brands SARL et al.* judgments – reinforces the substantive effects that the case law gradually spells out. Even if they do not explicitly raise the standard of proof in validity cases, at least the EU norms that incorporate those standards appear to be impervious to substantive legality challenges, insofar as technical and scientific assessments are concerned.

IV.4. VALIDATING, BUT NOT INVALIDATING EU LAW

While international decisions may, as interpretative tools, support the validity of EU legislative and non-legislative acts – enabling the Court to establish the correct use of a legal basis, the reasonableness of the legislator’s choice and the necessity of a restriction

⁶¹ *WernerFries v. Lufthansa CityLine GmbH*, cit., para. 65 and Opinion of AG Bobek, *WernerFries v. Lufthansa CityLine GmbH*, cit., paras 60-61.

⁶² Opinion of AG Bobek, *WernerFries v. Lufthansa CityLine GmbH*, cit., para. 58.

⁶³ The grounds to ascertain that quality may be feeble. In *Philip Morris Brands SARL et al.*, cit., para. 112, the Court established that the recommendations were based on the best available scientific evidence and expertise of the Parties on the basis of the text of the guidelines themselves. In doing so, it arguably took the text at face value (see the guidelines to which the Court referred: World Health Organization, *Partial Guidelines for Implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control*, in *FCTC*, 2012, www.who.int).

upon a fundamental right – they do not seem to ground a claim of invalidity of an EU measure. This was at least the case in *Holcim (Romania) SA v. Commission*.⁶⁴ At stake was the legality of the Commission's refusal to disclose, for confidentiality reasons, the localisation of greenhouse gas emission allowances allegedly stolen from a Romanian company (Holcim). The applicant invoked, amongst other pleas, the illegality of the applicable Commission's regulation, arguing that it was incompatible with the annex of a decision of the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), acting as the meeting of the parties to the Kyoto Protocol.⁶⁵ The General Court examined the decision and rejected the applicant's claim that the information listed therein should be characterised as non-confidential.⁶⁶

The General Court did not exclude *a priori* the possibility that the provision of EU law at stake would be considered invalid for breach of an international decision. On the contrary, it engaged in the merits of the applicant's argument and, in doing so, interpreted the relevant provisions of the international decision. The fact that the applicable EU legislation, including the Commission regulation at stake, implements the Kyoto Protocol and contains various references to decisions adopted pursuant to the UNFCCC or the Kyoto Protocol was recalled by the CJEU when establishing the background to the dispute, but this was not a relevant consideration either in the applicant's pleas or in the CJEU's reasoning.⁶⁷

Unlike the cases examined above, there was a reference (albeit brief) to the legal status of the decision in the EU legal order. Replying to the applicant's plea of illegality, the Commission contended that the annex of the international decision is not part of the EU legal order because "it has not been approved by the Union".⁶⁸ It appears that the Commission tried to contradict the *S. Z. Sevince v. Staatssecretaris van Justitie* precedent (extended in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* to multilateral agreements), suggesting that a prior Union approval is required before decisions adopted by international bodies (established by international agreements of which the Union is party) become an integral part of EU law.⁶⁹ The General Court did not react directly to this claim, although it appeared to contradict it: "even if [the annex to the international decision] forms part of the [EU] legal order and may be relied on before the Court", the applicant's plea was rejected on other grounds. In the Court's view, the in-

⁶⁴ *Holcim (Romania) SA v. Commission*, cit.

⁶⁵ General Assembly, United Nations Framework Convention on Climate Change of 20 January 1994, A/RES/48/189.

⁶⁶ *Holcim (Romania) SA v. Commission*, cit., paras 132-135.

⁶⁷ *Ibid.*, paras 6-7.

⁶⁸ *Ibid.*, para. 130.

⁶⁹ This cannot be an indirect reference to Art. 218, para. 9, TFEU (on this norm, see *infra*, section V), since nothing in this provision requires the approval of the international decision by the Union, only the definition by the Council of the position to be negotiated on the Union's behalf. Invoking such a dualistic system with regard to international decisions, as suggested by the Commission, see B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., p. 162.

ternational decision at stake did not apply to EU emission allowances, but to Kyoto units. While related (they both express a certain quantity of carbon dioxide equivalent for transaction purposes), the General Court held that they are different realities (they have a different nature, purpose and addressees) and, therefore, the respective confidentiality rules are equally distinct. For this reason – but not because of the inability of an international decision to ground the invalidity of an EU measure – the General Court concluded that the applicant could not argue that the EU regulation infringed the international decision in this case.⁷⁰

The ambiguity of both the General Court's statement regarding the legal status of the decision in EU law and of the Commission's argument that incorporation required an EU act of approval persisted in the judgment on appeal.⁷¹ The CJEU said nothing directly regarding the status of the international decision in EU law (more precisely, of its annex) – it framed the question as a matter of establishing what the General Court had or had not accepted. The Court of Justice held that the General Court “did not accept” that the annex to the international decision is part of the EU legal order (rebutting the applicant's claim), but rather rejected its plea on other grounds.⁷² Following *S. Z. Sevince v. Staatssecretaris van Justitie* and *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* (which neither Court explicitly mentions in this case), the decision at stake is undoubtedly part of EU law, since the European Union has approved the Kyoto Protocol (itself then an integral part of the EU legal order since its entry into force).⁷³ The CJEU does not seem to deny the applicability of *S. Z. Sevince v. Staatssecretaris van Justitie* and *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* to this case. As it simply pointed out that the General Court decided the case on other grounds, it – again – did not entertain the question of whether the international decision could have been a ground to establish the illegality of the Commission's refusal.⁷⁴ Even if the Commission's plea at first instance could have been an attempt to revise the *S. Z. Sevince v. Staatssecretaris van Justitie* and *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* case law (or at least to limit its scope of application) – seeking the recognition of a duality system in which an international decision is only incorporated into EU law if previ-

⁷⁰ *Holcim (Romania) SA v. Commission*, cit., paras 9 and 138-146.

⁷¹ The ambiguity is perhaps more evident in the French version of the text: “[à] supposer même que l'annexe à la décision 13/CMP.1 fasse partie de l'ordre juridique de l'Union et soit invocable devant le Tribunal” (*Holcim (Romania) SA v. Commission*, cit., para. 131).

⁷² *Holcim (Romania) SA v. Commission*, cit., para. 61. See *supra*, section II.

⁷³ Court of Justice, judgment of 21 December 2011, case C-366/10, *Air Transport Association of America et al. v. Secretary of State for Energy and Climate Change*, para. 73. In this case, the Court also held that the nature and broad logic of the Kyoto Protocol prevent it from being relied upon in the context of a preliminary reference procedure to contest the validity of an EU act (paras 73-78). The Court of Justice invoked the procedures for the implementation of the Kyoto Protocol, as established therein, and the flexibility awarded to the Parties to the implementation of their commitments to conclude that “the parties to the protocol may comply with their obligations in the manner and at the speed upon which they agree”.

⁷⁴ I am grateful to Marise Cremona for a discussion on this point.

ously approved by the EU – this was clearly not the route either CJEU took in *Holcim (Romania) SA v. Commission*.

It is by returning to *S. Z. Sevince v. Staatssecretaris van Justitie* and *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* (the latter insofar as it extends the former rule to multi-lateral agreements) that one may indicate the conditions under which an international decision that is part of EU law could serve as a basis to invalidate EU law. According to established case law regarding international agreements, the validity of an act of the EU may be affected if it is incompatible with international norms, as long as the following conditions are fulfilled: the EU is bound by those rules; the nature and the broad logic of the agreement do not preclude direct effect; and the provisions relied upon are unconditional and sufficiently precise.⁷⁵ Following *S. Z. Sevince v. Staatssecretaris van Justitie*, arguably the same conditions could be extended to provisions of international decisions.⁷⁶ Once it is established that the international decision binds the EU, the nature and purpose of the agreement – against which the decisions adopted for the agreement's implementation must be assessed – and the scheme of the decisions that implement it will determine whether direct effect is precluded. The ability of individuals to base claims regarding the validity of EU legal acts on provisions of international decisions binding on the EU will depend on this assessment (and on whether those provisions are unconditional and sufficiently precise).⁷⁷

The agreement and the implementing decision are different legal acts. The exclusion of direct effect of provisions of the agreement may not necessarily imply the exclusion of direct effect of provisions of the decisions of its bodies. In fact, the Court has held that the nature and structure of an agreement whose provisions do not have direct effect (inter alia because their legal effects presuppose the adoption of implementation decisions by bodies set up by the agreement) may confirm the direct effect of

⁷⁵ See, *inter alia*, Court of Justice: judgment of 26 October 1982, case 104/81, *Hauptzollamt Mainz v. C.A. Kupfberg & Cie KG a.A.*, paras 22 and 23; judgment of 3 June 2008, case C-308/06, *The Queen, on the application of International Association of Independent Tankers Owners (Intertanko) et al. v. Secretary of State for Transport*, paras 43-45 and *Air Transport Association of America et al. v. Secretary of State for Energy and Climate Change*, cit., paras 51-54. On these conditions, see, e.g., P. ECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, pp. 331-355.

⁷⁶ *S. Z. Sevince v Staatssecretaris van Justitie*, cit., paras 14-15. It is noteworthy that the particularity of decisions of Association Councils in the context of Association Agreements (see P.J. KUIJPER, *Customary International Law*, cit.) has not prevented the transposition of that case law to a very different context (in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit.). The specificity of the *S. Z. Sevince v Staatssecretaris van Justitie* case may raise doubts regarding the ability to transpose that case law to other cases, as the Commission appeared to have hinted at in *Holcim (Romania) SA v. Commission*. However, to the author's knowledge, no subsequent case has restricted the scope of application of the *S. Z. Sevince v Staatssecretaris van Justitie* rule.

⁷⁷ This reasoning follows the Opinion of AG Darmon delivered on 15 May 1990, case C-192/89, *S. Z. Sevince v. Staatssecretaris van Justitie*, paras 12, 19 and 33.

provisions of the implementing decisions.⁷⁸ Yet, this case law referred to agreements that did not contain a clause excluding direct effect. Only in the absence of such clauses does the CJEU engage in the interpretation of the provisions of an international agreement to determine whether they can have direct effect.⁷⁹ The question then is whether such a clause of an international agreement may also preclude the direct effect of the decisions that implement it. In CETA, the choice of the Parties concerning direct effect could hardly be clearer: “nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties”.⁸⁰ The sweeping terms of this clause may defeat an argument that the scheme of the decision may enable a conclusion of direct effect when the provisions of agreement itself cannot have that effect, if, as defended by AG Darmon in *S. Z. Sevince v. Staatssecretaris van Justitie*, the purpose and nature of these decisions should be assessed against the underlying agreement.⁸¹

Nevertheless, the preclusion of a right of judicial action against the legal acts of the Parties – that could ground the invalidity of EU law for breaching international decisions – does not prevent the production of substantive legal effects via interpretation of EU law provisions, as the examples examined above show.⁸² Since those decisions are binding on the EU, the EU Courts should interpret EU law in conformity with those decisions, in line with the EU’s international law obligations.⁸³

⁷⁸ Court of Justice, judgment of 30 September 1987, *Demirel and Stadt Schwäbisch Gmünd*, paras 21 to 24 and *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., paras 19 and 20. I am grateful to Marise Cremona for pointing this out.

⁷⁹ *Hauptzollamt Mainz v C.A. Kupfberg & Cie KG a.A.*, cit., para. 17.

⁸⁰ See too B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., p. 160. Art. 30.6, para. 1, CETA. Para. 2 adds: “A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement”. For a strong normative repudiation of clauses excluding direct effect in trade agreements, see E.-U. PETERSMANN, *Transformative Transatlantic Free Trade Agreements*, cit.

⁸¹ Opinion of AG Darmon, *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., para. 12.

⁸² Sub-sections IV.1. and IV.3. See also *The Queen, on the application of International Association of Independent Tankers Owners (Intertanko) et al. v. Secretary of State for Transport*, cit., para. 52, referring to an international agreement.

⁸³ See, e.g. Court of Justice, judgment of 18 March 2014, case C-363/12, *Z v. A Government Department and The Board of management of a community School* [GC], para. 75, albeit referring to consistent interpretation of EU acts with international agreements. Arguably, the principle of consistent interpretation applies irrespective of whether the EU act being interpreted was adopted to implement the international decision (P. ECKHOUT, *EU External Relations Law*, cit., pp. 356-357).

V. STRONG IN SUBSTANCE, WEAK IN PROCEDURE

The CJEU have not merely acknowledged the ability of decisions of international bodies to have a “direct impact on the European Union’s acquis”,⁸⁴ an impact that is intended and effected either through legislative incorporation or via the consent given to international agreements setting up decision-making bodies. The CJEU have furthermore justified their authority and have reinforced it by spelling out the substantive effects that those decisions may produce. Nevertheless, they remain oblivious to the procedural legitimacy of such decisions. This is not to say that it should be the role of the CJEU to filter the reception of international decisions according to procedural legitimacy standards accepted in the EU. The constitutional grounds exist.⁸⁵ Yet, there are also significant hurdles to the CJEU’ jurisdiction to review international decisions. They can interpret them to avoid divergent interpretations that could hinder the uniform application of EU law.⁸⁶ But these are not legal acts of the “institutions, bodies, offices or agencies of the Union” over whose validity the Court could rule.⁸⁷ For the same reason, reviewing their compliance with the procedures established in the underlying agreement is also, in principle, excluded. One could argue that if a decision of an international body is part of EU law because of its direct connection to the agreement, its validity depends on two conditions: the body that adopted it has the required powers under that agreement

⁸⁴ *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 63-64.

⁸⁵ J. MENDES, *EU Law and Global Regulatory Regimes*, cit., pp. 1016-1017.

⁸⁶ *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., paras 10-11; *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., para. 19 (where, however there is no reference to the functional or other justification of jurisdiction); see also *Holcim (Romania) SA v. Commission*, cit., paras 132-137 and 144, simply interpreting the provisions of an international decision.

⁸⁷ General Court, judgment of 22 July 2005, case T-376/04, *Polyelectrolyte Producers Group v. Council of the European Union and Commission of the European Communities*, para. 31. In this case, the General Court considered (in a judgment upheld on appeal) that the case law according to which the Court may rule on the validity of the internal act whereby the EU concludes an international agreement (not on the validity of the agreement itself – Court of Justice, judgment of 9 August 1994, case C-327/91, *French Republic v. Commission of the European Communities*, paras 13-17) could not apply in the same terms to an act establishing the EU position regarding a decision of an international body (*ibid.*, para. 35; see too Court of Justice, judgment of 8 December 2006, case C-368/05, *Polyelectrolyte Producers Group v. Council of the European Union and Commission of the European Communities*, paras 50 and 55). In the case of international decisions, unlike international agreements, there is no EU act “concluding” an external act, on whose validity the Court could rule (I am grateful to Marise Cremona for a discussion on this issue). The act that may be subject to a validity challenge is the prior Council decision establishing the position of the EU (Art. 218, para. 9, TFEU), the equivalent of which in *Polyelectrolyte Producers Group* the Court held was lacking the requisite direct and individual concern. In the case of legislative incorporation, the EU act that applies the international decision can be challenged. It should be noted that an act of incorporation is not a necessary condition of the validity (and authority) of international decisions in EU law (see sub-section IV.2.; for a contrary view, see B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., pp. 158-162, assuming that, contrary to institutional practice, a decision pursuant Art. 218, para. 9, TFEU should precede incorporation).

and the decision complied with the procedures established therein.⁸⁸ The former condition is covered by the *S. Z. Sevince v. Staatssecretaris van Justitie* case law. Assessing the latter (i.e. whether the decision complies with the procedures defined in the agreement) seems to be outside the remit of the Court, insofar as it would amount to reviewing acts of non-EU bodies, even if, *de iure condendo*, this should be a condition defining the status of international decisions in EU law.⁸⁹ Although the CJEU has on more than one occasion adopted an extensive interpretation of these Treaty requirements of a reviewable act – and, therefore, of its jurisdiction – to the author's knowledge, it has never ruled directly on the validity of an international decision.⁹⁰

At the same time, there is an important procedural disconnect. Regardless of the substantive effects that these decisions end up acquiring by effect of their reception into EU law, their procedures are fundamentally a matter of the regulatory regimes established under international law.⁹¹ These may suit the nature those decisions have at the international level (often, non-binding guidance reflecting or defining regulatory best practices in technical fields, adopted at the discretion of regulators meeting in international fora with few procedural constraints). Nevertheless, they fall short of procedural rules that would be warranted to ensure the impartiality, transparency, the protection

⁸⁸ B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., p. 157.

⁸⁹ The views of those authors that uphold the ability of the CJEU to rule on the validity of international decisions are based on defensible normative views, but, arguably, do not reflect the current status of EU law (see P. EECKHOUT, *EU External Relations Law*, cit., pp. 291, 275-276; similarly, K. LENAERTS, D. ARTS, I. MASELIS, *Procedural Law of the European Union*, London: Sweet & Maxwell, 2006, p. 354, cautiously setting out "an impression" that the Court also has jurisdiction to review validity matters). See, however, Opinion of AG Van Gerven, *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., paras 11 and 17, stating that the Court has jurisdiction to give preliminary rulings on the interpretation and validity of international decisions. Admittedly, in *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., the Court linked its jurisdiction to give preliminary rulings over international decisions to its jurisdiction to give preliminary rulings over international agreements, without distinguishing questions of interpretation from questions of validity, in line with Art. 267, para. 1, let. b), TFEU (see paras 10-11). Nevertheless, at stake was a matter of interpretation (in the judgment in *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg*, cit., it is clearer that the jurisdiction is restricted to matters of interpretation – paras 18-19; see too Court of Justice, judgment of 27 October 2016, case C-613/14, *James Elliott Construction Limited v. Irish Asphalt Limited*, paras 34-35, justifying jurisdiction of the CJEU to interpret acts of private standardisation bodies with the need to avoid divergent interpretations in the Member States, in line with *S. Z. Sevince v. Staatssecretaris van Justitie*, cit., para. 11).

⁹⁰ In Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [GC], the Court stressed that it was reviewing the EU act implementing the UN Security Council measure, not the measure itself (paras 286-287) and asserted that the jurisdiction over international agreements, with a view to preserving the constitutional principles of the EU, covers the EU implementing act but not the agreement itself (para. 285). It is well known that UN Security Council measures are not decisions adopted by an international body set up by an international agreement. Yet, arguably, the same reasoning would apply to these cases.

⁹¹ J. MENDES: *EU Law and Global Regulatory Regimes*, cit.; *Rule of Law and Participation*, cit.

of rights and legally protected interests of decisions that “decisively [influence]” the content of EU law and, even possibly, the standards of proof in judicial disputes involving individuals (even if only indirectly, given their presumed technical quality).⁹²

The procedural weakness of the rules guiding the adoption of decisions of international bodies will be illustrated here by an analysis of the relevant CETA provisions. As stated, the decisions and recommendations of Joint Committee or of its specialised committees will be international decisions that are part of EU law and may have substantive effects analogous to those examined above. Following *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* and *Federal Republic of Germany v. Council of the European Union*, the non-binding nature of its recommendations does not prevent them from producing legal effects in a way similar to binding decisions. CETA contains no provision regarding the procedure for the adoption of decisions or recommendations by its Joint Committee (the Committee itself will likely define them in its rules of procedure).⁹³ It merely specifies that decisions and recommendations are adopted by “mutual consent”,⁹⁴ a quality that will contribute to reinforcing their authority in EU law, as the cases of *Philip Morris Brands SARL et al.* and *WernerFries v. Lufthansa CityLine GmbH* illustrated. In addition, the agreement is cautious regarding the protection of confidential information (i.e. information considered as such by either Party) that the Parties may submit to the Joint Committee (or to any of the other committees).⁹⁵ These are the only specifications regarding decision-making by the Joint Committee.

Insofar as the specialised committees may have the power to adopt decisions and recommendations, they are bound by the rules of the chapters that establish them and by the rules of procedure that they may set for themselves.⁹⁶ A cursory look at the specialised committees indicates that either no binding procedural rules structure their decision-making or there are only a few specifications regarding, for instance, the regularity of their meetings.⁹⁷ They may establish working groups, whose procedural rules, one assumes, might be specified in rules of procedure. The picture that emerges is clearly one where a concern for procedural constraints over the powers of those committees – those that could ground objective controls or facilitate the protection of rights and legal interests – is virtually non-existent. In the case of the Regulatory Cooperation Forum (the body that, among other tasks, may examine opportunities for harmonisation and

⁹² *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 63-64; Opinion AG Bobek, *Werner Fries v. Lufthansa CityLine GmbH*, cit., examined above.

⁹³ See Chapter 26 on “Administrative and Institutional Provisions” and Art. 26.1, para. 2, and para. 4, let. d), CETA.

⁹⁴ *Ibid.*, Art. 26.3, para. 3.

⁹⁵ *Ibid.*, Art. 26.4.

⁹⁶ As noted above, they may also acquire by delegation of the Joint Committee the power to adopt decisions.

⁹⁷ Art. 5.14, paras 4-9, CETA.

mutual recognition), the only procedural specification regarding its activities is its ability to consult private entities:

*“In order to gain non-governmental perspectives on matters that relate to the implementation of this Chapter, each Party or the Parties may consult, as appropriate, with stakeholders and interested parties, including representatives from academia, think-tanks, non-governmental organisations, businesses, consumer and other organisations. These consultations may be conducted by any means the Party or Parties deem appropriate”.*⁹⁸

Consultations have a very specific and explicit function: they are a source through which the Regulatory Cooperation Forum may identify “regulatory policy issues of mutual interest” that ground its activities.⁹⁹ Consultation in this form is not a guarantee that ensures the due and transparent consideration of the various legally protected interests that the activities of the Regulatory Cooperation Forum may affect, possibly via recommendations or, indirectly, via decisions of the Joint Committee (if the Regulatory Cooperation Forum refers a matter to it).¹⁰⁰ The choices on who to consult, when, and how are fully in the hands of the Regulatory Cooperation Forum and of the Parties’ executives. In the absence of procedural rules, they decide the details of consultation based on their regulatory preferences and needs. This feature and the lack of any further control mechanisms – such as the duty to provide feedback on the input received and to make it transparent – prevent consultations from being a means to structure or constrain the authority that this body has been granted by CETA.¹⁰¹

This lack of concern for procedurally binding the authority of the CETA bodies is in contrast to the agreement’s specifications regarding the requirements to which domestic administrative procedures should adhere. While CETA bodies may adopt decisions (in the instances defined in the text of the agreement) and recommendations without being bound by virtually any procedural rules – except those that they may impose on themselves – CETA specifies that the Parties, in their respective domestic regulation processes, are bound by duties of transparency. They must, in particular:

*“ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or made available in such a manner as to enable interested persons and the other Party to become acquainted with them”.*¹⁰²

⁹⁸ *Ibid.*, Art. 21.8 (emphasis added).

⁹⁹ *Ibid.*, Art. 21.6, para. 2, let. a).

¹⁰⁰ On the different meanings of participation in the context of regulatory cooperation (analysing TTIP), see J. MENDES, *Participation in a New Regulatory Paradigm*, cit., section 4, p. 12 *et seq.*

¹⁰¹ *Ibid.*

¹⁰² Art. 27.1, para. 1, CETA.

This duty entails “to the extent possible” publication of legislative or regulatory proposals and “a reasonable opportunity to comment” on those proposals by interested persons and the other Party.¹⁰³ Furthermore, the Parties must “administer a measure of general application affecting matters covered by this Agreement in a consistent, *impartial* and *reasonable* manner”.¹⁰⁴ For this purpose, “laws, regulations, procedures and administrative rulings of general application” that relate to CETA matters and that apply to “a particular person, good or service” of the other Party should, “whenever possible”, require notice to be given to, and enable the participation by, the person of the other Party who is “directly affected”.¹⁰⁵ CETA equally requires that both parties have suitable domestic mechanisms of review and appeal that are impartial, independent and follow fair procedures.¹⁰⁶

These specifications regarding domestic procedures, means of review and appeal are a logical consequence of the very purposes of CETA: the establishment of a free trade area (Art. 1.4 CETA) in which measures that could restrict market access and trade between the Parties are progressively eliminated and regulatory convergence should be pursued. The agreement seeks to address thereby the impact that domestic regulations and procedures may have over trade and investment. Fair and transparent domestic processes – in any area covered by such a comprehensive economic agreement – are an important means of reaching the agreement’s goals. As EU integration shows, the establishment of free market areas requires opening not only domestic markets but also domestic law-making procedures to interested persons from other parties.

Be that as it may, CETA’s ultimate purpose hardly justifies that the institutional bodies that it created to achieve its goals are subject to virtually no procedural rules that could structure their authority and bind them to the same normative standards that CETA requires from domestic processes: impartiality, transparency, fairness and reasonableness. These can be important standards to ensure the principles set out in Art. 21, para. 1, TEU. As was shown above, decisions by CETA’s bodies – even if only recommendations – may produce substantive legal effects. They potentially impact the rights and legally protected interests of natural and legal persons of both Parties as well as of third parties. The formulation “stakeholders and interested parties” that may provide “non-governmental perspectives on matters that relate to the implementation” of CETA (Art. 21.8 CETA, albeit referring only to the chapter on regulatory cooperation) is broad enough to encompass holders of legally protected interests, as enshrined in both legal systems, and third parties legally affected by the measures adopted by the CETA bodies. But the agreement mostly leaves to the institutional practice of these bureaucratic bod-

¹⁰³ *Ibid.*, Art. 27.1, para. 2.

¹⁰⁴ *Ibid.*, Art. 27.3 (emphasis added). See too Arts 13.11, 15.11, para. 2, 19.17, para. 6, 23.5.

¹⁰⁵ *Ibid.*, Art. 27.3, let. a) and b).

¹⁰⁶ *Ibid.*, Art. 27.4. Art. 6.10, para. 3, demands that, in the field of customs, each Party provides for an administrative level of appeal or review “before requiring a person to seek redress at a more formal or judicial level”.

ies whether and how legally protected interests should be considered and balanced in their decision-making procedures, and hence, how the public interests that the agreement serves should be pursued.

VI. THE EU TREATY PROCEDURE

While the international decision-making procedure is a matter of the regulatory regimes established under international law, the TFEU envisages an internal EU procedure for the establishment of the positions to be taken “on the Union’s behalf” when those bodies acts’ have legal effects.¹⁰⁷ Since *Federal Republic of Germany v. Council of the European Union*, these encompass non-binding acts that “are capable of decisively influencing the content of [EU law]”, given their purpose, the competence the agreement delegates to their authors, and their incorporation into EU legal acts.¹⁰⁸ It is for the Council, on a proposal from the Commission (or from the High Representative of the Union for Foreign Affairs and Security Policy), to adopt the Union’s position. The TFEU thus acknowledges the existence of the external administrative layer of EU law. Nevertheless, this procedure arguably does little to alleviate normative concerns regarding the impartiality, transparency, fairness and reasonableness of international decisions that are authoritative in EU law. It is a very thin filter by which to address the weaknesses of the procedural constraints (or lack thereof) in international decision-making.

Despite its external function, establishing the Union’s negotiating position in the decision-making of international bodies has mostly inter-institutional implications, as confirmed by the case law.¹⁰⁹ What is now Art. 218, para. 9, TFEU was introduced by the

¹⁰⁷ This provision covers also the suspension of the application of an agreement. It does not apply to “acts supplementing or amending the institutional framework of the agreement”.

¹⁰⁸ *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 63-64 (see also paras 59-61; contrary to the Opinion of the AG Cruz Villalón, *Federal Republic of Germany v. Council of the European Union*, cit., paras 84-99). The Organisation of Vine and Wine (hereafter *OIV*) also established that Art. 218, para. 9, TFEU is not limited to acts of bodies established by agreements of which the EU is a party.

¹⁰⁹ Court of Justice: judgment of 1 October 2009 case C-370/07, *Commission of the European Communities v. Council of the European Union*; judgment of 18 December 2014, case C-81/13, *United Kingdom of Great Britain and Northern Ireland v. Council of European Union* [GC], para. 66 (regarding the majority necessary to adopt that the Council’s decision); judgment of 6 October 2015, case C-73/14, *Commission of the European Communities v. Council of the European Union* [GC], paras 63-67 (excluding from its scope the submission of statements in the framework of international judicial procedures); case C-600/14, *Germany v. Council*, pending (where the Court is asked to rule on the correct application of Art. 218, para. 9, TFEU in case of an international decision that amends the international agreement and on the Union’s competence to use Art 218, para. 9); *Federal Republic of Germany v. Council of the European Union* [GC], cit. (extending the scope of the provision to non-binding acts as acts with legal effects and establishing that the EU does not need to be a party to the agreement to trigger the application of Art. 218, para. 9, TFEU). It has also implications to the relationships between the Member States and the EU, when the Union is not a party to the agreement and its position is expressed via the Member States, or when issues of competence are at stake (as in *Germany v. Council*, cit.).

Treaty of Amsterdam to allow the Union to “speak with one voice” and defend its interests more effectively in international bodies, by avoiding the involvement of the European Parliament (under the assent or consultation procedures) that hindered the desired effectiveness.¹¹⁰ Until recently at least, the EU institutions did not apply this provision in a consistent way, with the Commission dodging it in the field of commercial policy to avoid upsetting the common ways of working in international practice, and the Council seeking to eschew competence issues that could hinder negotiations in other areas.¹¹¹ Recent litigation appears to confirm that Art. 218, para. 9, TFEU acquired a new life after the Lisbon Treaty.¹¹²

As a tool to better equip the EU when conducting negotiations in international bodies, this procedure is a means of favouring the EU’s diplomatic efforts in these settings, framing and serving the Union interest in the context of those international fora, as it will be conveyed by the representatives of the EU institutions and regulators within the scope of their mandate. The ability of the Council’s positions to bind the EU representatives and impact the final decision of the international body will depend, respectively, on the vagueness or specificity of the decision it adopts and on the negotiating leverage of the EU representatives. At the end of the day, international decision-making may very well remain largely in the hands of regulators.

Nevertheless, positions adopted under Art. 218, para. 9, TFEU introduce one control: as acts of the Council, they need to respect EU law and are subject to judicial review. On a different level, it is not excluded that the formal intervention of the Council may lead to deliberations that may favour the consideration of the impact that those decisions may have on legally protected interests. Be that as it may, this procedure cannot remedy the fact that decisions of expert committees and executive representatives – having potentially important political and legal implications – are adopted in international fora, subject to

¹¹⁰ Opinion of AG Sharpston delivered on 16 July 2015, case C-73/14, *Council v. Commission*, para. 72 and footnote 22. A cursory reading of Art. 218 TFEU could convey that the European Parliament should be informed also of this step, given the schematic position of Art. 218, para. 10, TFEU (see J. MENDES, *EU Law and Global Regulatory Regimes*, cit., p. 1017). However, the history and purpose of the provision deny this interpretation (see too *United Kingdom of Great Britain and Northern Ireland v. Council of European Union* [GC], cit., para. 66, explicitly excluding the Parliament; and Opinion of AG Kokott delivered on 17 July 2014, case C-81/13, *United Kingdom of Great Britain and Northern Ireland v. Council of European Union*, footnote 63, stressing that Art. 218, para. 9, TFEU is a “separate, simplified procedure [...] regulated differently from the conventional procedure for the conclusion of international agreements” – emphasis in the original). See too B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., pp. 153-154, on the pre-Lisbon (pre-Nice) situation, indicating that despite the formal rights of the Parliament in some cases, the risks for the effective EU participation in international decision-making led the Council to design specific procedures for the adoption of EU positions.

¹¹¹ P.-J. KUIJPER, J. WOUTERS, F. HOFFMEISTER, G. DE BAERE, T. RAMOPOULOS, *The Law of EU External Relations*, cit., p. 86.

¹¹² *Ibid.* See also references in footnote 103. A search in eur-lex.europa.eu indicates that the vast majority of Council decisions of this type was adopted since 2010.

virtually no procedural or apparent political control (except those applicable under the domestic legal orders of the parties). And, still, they may constitute a significant part of EU law, determining and conditioning choices made by the EU legislator.

The authority and substantive effects of international decisions that allow one to characterise them as the external administrative layer of EU law justify, at least, the extension of the right of the European Parliament to be informed as determined in Art. 218, para. 10, TFEU, to also cover this aspect of the EU external action. This role of the European Parliament need not be the minimal involvement that would result from merely passively receiving information. It should place the European Parliament in the position to understand the policy implications of the decisions that it then incorporates into EU legislative acts (if not to exercise its right of democratic scrutiny).¹¹³ Despite the tensions between this claim and the original purpose of Art. 281, para. 9, TFEU – i.e. ensure the effectiveness of international negotiations and, thereby, avoid the involvement of the Parliament – the argument is especially compelling in the instances where the Parliament has stronger rights of participation in the negotiation of international agreements.¹¹⁴

VII. THE CETA BODIES MAKING EU LAW

Binding or not, the authority international decisions have in EU law stems from the original consent given by the parties to the agreement when defining the mandate of the authors of those decisions; from the expertise that they embody and their presumed technical quality; from the consensus established among professionals (whether regulators or private persons); and from their legislative incorporation into EU law. The decisions of CETA bodies are likely to fulfil most of these characteristics and, as such, to have substantive legal effects similar to those that the CJEU has expounded regarding the decisions of other international bodies that – as future CETA bodies' decisions – are an integral part of EU law, be it by force of the *S. Z. Sevince v. Staatssecretaris van Justitie* case law or by legisla-

¹¹³ The origins and purpose of Art. 218, para. 9, TFEU pointed out above may hinder an analogy with the *Mauritius and Tanzania* cases (Court of Justice: judgment of 24 June 2014, case C-658/11, *European Parliament v. Council* [GC], paras 81-86; judgment of 14 June 2016, case C-263/14, *European Parliament v. Council* [GC], paras 68-73) and are in tension with the argument made here. On the scope of Art. 218, para. 10, TFEU, see R. PASSOS, *The External Powers of the European Parliament*, in P. EECKHOUT, M. LOPEZ-ESCUDERO (eds), *The European Union's external action in times of crisis*, cit., pp. 125-128, suggesting (albeit briefly) that the Parliament's future involvement in the implementation of international agreements could be envisaged in an inter-institutional agreement.

¹¹⁴ Art. 218, para. 6, let. a) and b), TFEU. Referring to the pre-Lisbon (and pre-Nice) situation, Martenczuk argued that, if the Council would set up specific procedures for the adoption of the EU position, the Parliament should also assent to these procedures in the instances where the assent procedure applied for the conclusion of the agreement (B. MARTENCZUK, *Decisions of Bodies Established by International Agreements*, cit., p. 154). On the role of the European Parliament in the field of financial services, see M.S. BARR, G.P. MILLER, *Global Administrative Law: The View from Basel*, in *European Journal of International Law*, 2006, p. 15 *et seq.*, pp. 36 and 37.

tive incorporation. They may ground the validity of EU legislative and non-legislative acts and may be indirectly invoked against the parties that contest the legality of these acts for alleged incompatibility with EU law. In fact, as in *Philip Morris Brands SARL et al.* and in *WernerFries v. Lufthansa CityLine GmbH*, international decisions may be an interpretative tool that ascertains the reasonableness and the necessity of the legislature's choices – including where these restrict fundamental rights – not least because of their presumed technical quality as expressing the current state of expertise in complex technical fields. Because of the legal status, authority and substantive effects of those decisions in EU law, one may characterise them as the external administrative layer of EU law, which CETA is likely to expand. At the same time, significant constraints encumber the ability to challenge the legality of an EU act for breach of an international decision: lack of direct effect might preclude the right of judicial action. In the case of CETA, the sweeping terms of the clause precluding direct effect (Art. 30.6 CETA) arguably leave little room to attribute direct effect to the decisions implementing the agreement.

While CETA bodies' decisions (as decisions of international bodies binding on the EU) may shield the validity of EU acts against illegality claims, there are important procedural weaknesses in the way they are adopted. As far as the agreement is concerned, there are virtually no procedural constraints that would bind CETA bodies' decision-making to the standards of impartiality, transparency, fairness and reasonableness that it imposes on domestic procedures. A judicial role in eventually process-perfecting institutional practices appears to be excluded. There are, at least, significant obstacles to judicial review of the legality of international decisions before CJEU: validity questions are in principle outside their jurisdiction and there might not be a subsequent EU act of transposition (akin to the concluding act of international agreements). Appellants are left with the possibility to challenge the Council decision establishing the Union's position (Art. 218, para. 9, TFEU), whose ability to bind the EU representatives and impact the final international decision may vary.

Given the substantive strength and procedural weaknesses of international decisions, a clause that protects the Parties' right to regulate, similar to that inserted in CETA, while important as a matter of principle, hardly shields the "direct impact" that those decisions may have in EU law, which remains "direct" even where supported by legislative incorporation.¹¹⁵ Legislative incorporation may be voluntary, but the authority of these decisions places a high threshold on the EU legislator, should it ever decide, for example, to oppose "dynamic references" inserted by the Commission in a legislative proposal. In the case of CETA, neither the EU nor Canada are obliged to change their regulations and, of course, their representatives may not agree on common decisions or recommendations regarding aspects covered by CETA. None of this precludes

¹¹⁵ *Federal Republic of Germany v. Council of the European Union* [GC], cit., paras 61 and 64. Arts. 21.2, para. 4, let. c), 21.2, para. 6, and Art. 21.5 CETA.

the conclusion that, when functioning smoothly, CETA's institutional structure allows Canadian and EU executive bodies as well as Member State regulatory authorities to take decisions on public goods with potential effects on rights and legally protected interests with very weak procedural and judicial controls.

Those decisions can condition (whether enhancing or limiting) the rights and duties that citizens and legal persons enjoy on both sides of the Atlantic. They can define, or at least impact (whether raising or lowering), the level of protection that public goods (environment, health, financial stability, consumer protection) are subject to under domestic regulation. It is hardly justifiable – unless one is willing to accept a regression of law in the name of executive expertise – that they can be adopted without suitable procedural constraints that could structure the authority that executives exercise in the extensive areas of internationalised regulation, in an analogous way to those that apply domestically: i.e., to ensure both the objective legality of their actions and the subjective protection of those that they legally affect. The challenge is, of course, how to design those constraints in a way that preserves the ability of decision makers to pursue public interests that cannot be protected domestically, while ensuring that they are legally and politically accountable for their actions.

