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1. THE (UNCERTAIN?) FUTURE OF FREE TRADE AGREEMENT BETWEEN SERBIA AND THE EURASIAN ECONOMIC UNION: A *SUI GENERIS* MIXED AGREEMENT

1. *Introduction: the Eurasian Economic Union as a de facto regional organization*

The Eurasian Economic Union EAEU is an international regional organization currently counting five member States (MS): Armenia, Belarus, Kazakhstan, Kyrgyzstan and the Russian Federation. When it came into existence it included only three of the now five MS, since Armenia and Kyrgyzstan joined the organization soon after the entry into force of its founding Treaty, the Treaty on the Eurasian Economic Union (hereinafter Treaty EAEU), concluded in Astana on 29 May 2014 and entered into force on 1 January 2015 (F. MARRELLA, P. I. BARBIROTTO, *L'Unione Economia Eurasiatica: una Rivoluzione Russa per il Commercio Internazionale?*, in *Diritto del commercio internazionale*, 2018, p. 277). The EAEU is *de facto* a regional organization, as opposed to the EU for instance, which is a closed regional *de jure* organization, including the geographical limitation criteria within its founding Treaty (Article 49, Treaty on European Union). The founding treaty of the EAEU states that it is an organization open for accession to *any* state sharing its objectives and principles (Article 108, Treaty EAEU), yet at the same time pursuing "regional economic integration" (Article 1, Treaty EAEU). The EAEU grants access to *any* State wishing to become a member of the EAEU according to its treaty, yet its current members all belong to the same region, to the same geographical area and share – except Armenia – geographical borders, hence making the EAEU a *de facto* regional organization due to the composition of its MS, but not *de jure*. Candidate members do not have to meet any geographical requirements in order to become MS of the EAEU according to the Treaty of the EAEU; this is different from the case of the European Union (EU) whose founding treaties expressly require that European States only may apply to become members of the Union.

Since its establishment, the EAEU has been joined only by the two already mentioned states, with no other additional member joining the organization. This should not be interpreted as a sign that the EAEU has been inactive in terms of policies of enlargement and promotion of relations with third states. The organization has concluded Free Trade Agreements (FTAs) with Vietnam, Iran, China, Serbia and Singapore, and it is currently working on FTAs with Egypt, India, Indonesia, Iran, Israel, United Arab Emirates and Mongolia (as reported by the website of the Eurasian Economic Commission). One of the most useful means that the organization has at its disposal to build relations with third states are indeed FTAs. Among these FTAs, the one concluded with Serbia on 25 October 2019 and entered into force on July 10, 2021 (Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Republic of Serbia, of the other part, hereinafter FTA EAEU-Serbia) is worth exploring. Serbia is currently involved in the accession process to the European Union. Indeed, it had applied for membership in 2009 and negotiations for the drafting of the SAA had begun back in 2005, then it finally become a candidate country in 2012.

The conflict in Ukraine is also jeopardising the relationships in the area. This short

contribution, part of a broader research, aims at delving into, after a short analysis of the agreement and its nature as a possible sui generis mixed agreement, the uncertain future of the FTA if and when Serbia joins the EU and possible incompatibilities with EU law especially with regard to the most favoured nation treatment clause. It is true that the EU founding treaties envisage the possibility of "saving" previously concluded agreements by new MS through the provisions of Article 351 TFEU, but at the same time the article includes a provision which does not allow MS to extend most favoured nation treatment (MFNT) to third countries. For the purposes of this article, the legal consequences of the ongoing conflict between Ukraine and Russian federation will not be object of analysis.

2. *The EAEU competence to conclude international agreements*

The EAEU has competence to concluded international agreements with third States. The legal basis can be found in Articles 7 and 33 of the Treaty on the Eurasian Economic Union. The first one concerns the International Activities of the EAEU and provides for the conclusion of international agreements with third parties (states, international organizations, and international integration association). The Supreme Eurasian Economic Council (SEEC), the highest body of the organization, composed by the Heads of State of the MS, supervises the conclusion of international agreements. It provides for the beginning of the procedure and of the negotiations, as well as the conclusion through decisions (Article 7, Treaty EAEU). At Article 33, under Section IX establishing the foreign trade policy of the EAEU, the legal basis for the conclusion of international trade agreements is provided, stating that: «Foreign trade policy shall be implemented through the conclusion by the Union, *independently or together* with the member States of international treaties» on matters corresponding to its competence (Article 33, Treaty EAEU, emphasis added).

Furthermore, the conclusion of international agreements with third countries is regulated in a separate agreement within the EAEU, the Agreement on international treaties of the Eurasian Economic Union with third states, international organizations or international integration associations. Article 10 of Part V of the Agreement states that the signing of agreements with third countries is based on a decision of the SEEC and that it is carried out by the EAEU and the MS as well. A different method of conclusion of international agreements is nevertheless possible only through a decision of the SEEC and if the Council deems it necessary. This wording seems to suggest that the conclusion of the agreement is, by default, a process that involves the MS as well, even if the EAEU has competence on the matters that are the subject matter of the agreement.

3. *A brief overview of the FTA concluded between Serbia and the EAEU*

In terms of foreign policy, Serbia is operating on a multi-level perspective, trying to hold solid relations both with the EU and with the EAEU. President Vucic claimed at the Astana Expo in 2017 that Serbia was trying to build a new image of itself both in the West and in the East, thus expressing the desire to deepen the relations with the EAEU. Serbia had already in place FTAs with Russia, Kazakhstan and Belarus, so with three out of the five EAEU MS. Entering an agreement with the organization meant broadening Serbia's access to the markets of those countries as well, especially focusing on the liberalization of cotton, cheese, tobacco, sugar, poultry, wine and automobiles (D. HAITAS, *An Overview of the Eurasian Economic Union and its Relationship with Serbia,* in *Zbornik Radova*, 2017, pp. 901-902).

In this context, the FTA between the EAEU and Serbia was negotiated and later concluded in 2019, but it only entered into force in 2021. It includes 33 Articles and 5 Annexes, which, as specified in Article 27, constitute an integral part of the Agreement and lay out the basis for the regulation of foreign trade between the EAEU, its Members and Serbia. Indeed, the EAEU and the MS have concluded the agreement separately within their respective areas of competence (Article 1,

FTA EAEU-Serbia). The Annexes regulate several aspects: goods exempted from the free trade regime established at Article 4 upon importation to Serbia from the MS of the EAEU (Annex 1), and *viceversa* (Annex 2); rules of origin (Annex 3); the determination of normal value in the anti-dumping investigations (Annex 4), and dispute settlement (Annex 5).

The objectives of the Treaty are clarified in Article 2, and they consist in: expanding and promoting free mutual trade as well as economic relations, with the goal of improving and accelerating economic development so as to achieve production and economic stability; promoting measures in order to guarantee the correct implementation of the Agreement (Article 2, FTA EAEU-Serbia). Under Article 3, in case of inconsistencies between GATT and the Agreement, the former shall prevail, in line with the principles which lay at the very basis of foreign trade in the EAEU. The Treaty recalls several principles of WTO law such as most favoured nation treatment (Article 5); the equivalent effect principle (Article 7), national treatment (Article 8); as well as principles relating to the transit of goods (Article 12) and intellectual property rights (Article 16). The treaty also includes a provision on anti-dumping and countervailing measures (Article 18) and one on electronic commerce, according to which the Parties decide to cooperate «for mutual benefit» in the area of electronic commerce (Article 25). Moreover, it establishes a duty of transparency and exchange of information, with a particular emphasis on rendering information available and accessible in the electronic form as well as a duty of notification (On the WTO see, inter alia: F. MARRELLA, *Diritto Internazionale del Commercio*, Padova, 2023; D. BETHLEHEM, D. MCRAE, R. NEUFELD, I. VAN DAMME, *The Oxford Handbook of International Trade Law*, Oxford, 2022; G. P. RUOTOLO, *Organizzazione Mondiale del Commercio e Ordinamento Comunitario nella giurisprudenza recente della Corte di Giustizia: un nodo ancora irrisolto*, in *Diritto del commercio internazionale*, 2000, pp. 329-354; E. BARONCINI, *La proposta europea di riforma dell'OMC*, 2021, in P. MANZINI, M. VELLANO (a cura di), *Unione europea 2020 – I dodici mesi che hanno segnato l'integrazione europea*, Milano, 2021, pp. 135-166).

The Treaty includes provisions on dispute settlement mechanisms. Article 28 establishes a Joint Committee tasked with: monitoring and examining all matters related to the application of the agreement; evaluating how to further develop trade relations; elaborating amendments to the treaty and submitting them to the Parties for consideration; carrying out any other activity assigned to it by the Parties. Moreover, to ensure and effective implementation of the Agreement, Article 29 introduces a mechanism of contact points. Under this provision, contact points must receive and respond to concerns and/or enquires from the Member States related to the implementation of the Agreement.

The dispute settlement mechanisms are further regulated by Article 23 and Annex 5 which consists of 21 Articles outlining the procedure to solve disputes. The scope of the provisions covers all those disputes concerning the application or interpretation of the agreement «whenever a Party considers that a measure of the other Party is inconsistent with an obligation under the provisions of this Agreement, or the other Party has failed to carry out its obligations under this Agreement» (Article 3, Annex 5, FTA EAEU-Serbia). In order to solve their dispute, Parties are required to «make every attempt» to solve it through consultations first (Article 5) and can at any time resort to good offices, mediation or conciliation (Article 6). If these means were to have a negative result, the preferential way to solve the dispute is through arbitration. Articles from 7 to 12 are dedicated to the request, composition and workings of the Arbitral Panel. The Annex provides also for means to deal with non-compliance with the Arbitral Award as well as a compliance review mechanism. The choice of an Arbitral Panel seems the only judicial means that the Parties to the Agreement have at their disposal to solve potential disputes. It is difficult to imagine that the International Court of Justice (ICJ) has competence over such an agreement, due to the fact that one of the Parties involved in possible future disputes is an international organization over which the ICJ has no competence. Moreover, since Serbia is not a member of the EAEU, a dispute cannot be filed with the Court of the Eurasian Economic Union since it has no competence over non-members.

Article 30 of the Agreement deals with termination. Although the Agreement is concluded for an indefinite time period, each of the parties can terminate it by notification to the other Parties

(Article 30).

4. *On the nature of Serbia's FTA: a sui generis mixed agreement?*

The FTA has been concluded by the EAEU and its Member States on the one part, and by Serbia on the other part. This wording resembles the one that is used in the context of External Agreements concluded by the European Union which include areas in which the EU does not have exclusive competences. These are referred to by the legal scholarship as *mixed agreements* (See, inter alia: M. CHAMON, *Constitutional Limits to the Political Choice for Mixity*, in E. NEFRAMI, M. GATTI (a cura di), *Constitutional Issues of EU External Relations Law*, Baden-Baden, 2018, pp. 137-166; E. NEFRAMI, *Mixed Agreements as a Source of European Union Law*, in E. CANNIZZARO, P. PALCHETTI, R. A. WESSEL (a cura di), *International Law as Law of the European Union*, Leiden, 2012, p. 325, R. ADAM, A. TIZZANO, *Manuale di Diritto dell'Unione Europea*, Torino, 2020, p. 808; A. PISAPIA, *Gli Accordi Misti nel quadro delle relazioni esterne dell'Unione Europea*, Torino, 2019, pp. 79-122; R. BARATTA, *Sugli Accordi Misti: spunti di prassi recente*, 2014, pp. 1-19) and are found for instance in the context of accession agreements between the EU and potential candidates. The involvement of MS in the process of drafting and conclusion of associations agreements, despite the wide competences of the EU in matters related to associations, seems to be justified on political grounds rather than strictly legal ones, due to the political will of States not to leave only to the EU relevant aspects of international relations and cooperation (R. ADAM, A. TIZZANO, *Manuale di,* cit., p. 808).

The Stabilization and Association Agreement which was concluded by Serbia and the EU for its accession is a mixed agreement, hence concluded by the EU, its MS and Serbia. The FTA between the EAEU and Serbia raises the question of whether the agreement is a case of *mixity* outside the EU and can be correctly identified as mixed agreement; and more precisely, whether the requirement of *mixity* stems from the division of competences in the EAEU or whether it derives from other, more structural, reasons.

Compared to the EU, it should be said that the complex and unique structure of the division of competences within the EU is peculiar of its experience and although the EAEU has heavily drawn from its European neighbour, this aspect still remains a peculiarity of the EU. *Mixity* can be a necessity or a political choice in the case of the European Union due to the allocation of competences between the organization and the MS, and to the principles of conferral and sincere cooperation (M. CHAMON, *Constitutional Limits,* cit., p. 137). It can be compulsory or facultative: it is compulsory when parts of an agreement deal with matters still under the national jurisdiction of the MS, hence concerning those areas where MS and EU exercise parallel or concurrent competences. In those cases, it is a legal requirement, a corollary of the principle of conferral, and the MS must necessarily be involved in the conclusion of the agreement. On the other hand, if parts of an agreement fall within areas of shared competence between the organization and the MS, then *mixity* is not legally required and becomes a matter of political choice (M. CHAMON, *Constitutional Limits,* cit., p. 137; P. EECKHOUT, *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford, 2004, pp. 194; E. NEFRAMI, *Mixed Agreements,* cit., p. 325; A. PISAPIA, *Gli Accordi Misti,* cit., p. 79-122; G. TESAURO, *Manuale di Diritto dell'Unione Europea*, Napoli, 2021, pp. 177-178; P. MENGOZZI, C. MORVIDUCCI, *Istituzioni di Diritto dell'Unione Europea*, Padova, 2018, pp. 386-409). The contribution of the European Court of Justice has been also fundamental to clarify aspects related to mixed agreements. In Opinion 1/76 of 1977, the European Court of Justice stated that where an agreement deals with matters of concurrent competence, then *mixity* is not optional, hence suggesting its non-facultative character (P. EECKHOUT, *External Relations*, cit., p. 194). The Court also addressed the status of mixed agreement within the EU legal order in *Commission v. Ireland* in 2006, stating that mixed agreements have the same status in the legal order as those agreements concluded by the EU alone, reinforced by the duty of cooperation of the MS and the EU in carrying out the agreements (CJEU, Judgment of the Court of 30 May 2006, Case C-459/03, *Commission of the European Communities v. Ireland*, ECLI:EU:C:2006:345, para. 48).

5. *On mixity in the EAEU*

In the case of the EAEU, it is necessary to consider the division of competences – if any – within the organization. The EAEU is first and foremost an economic organization, competent only in matters relating to trade. Furthermore, its structural characteristics do not allow the organization to take binding decisions without the involvement of the MS. If *mixity* is a necessity in some cases for the EU, and in others a matter of political choice as the agreement concerns areas of shared competence, the same cannot be conclusively stated for the EAEU. Within the EAEU institutional framework, MS retain much of their sovereign powers. This is well demonstrated by the fact that national laws of the MS still have primacy over EAEU law in case of conflict of laws, even if the decision is taken by the Supreme Eurasian Economic Council. The SEEC expresses the hierarchical structure of the organization and the prevalence of the MSs' interests over the ones of the EAEU. (E. VINOKUROV, *Introduction to the Eurasian Economic Union,* London, 2019, pp. 33-66).

As mentioned, the EAEU has concluded other free trade agreements with third states, such as the one with Vietnam for instance, which falls under the definition of FTA+, where the '+' means that it deals with investment matters as well. Hence, it exceeds the areas of competence of the EAEU, and this seems to justify the involvement of the MS in the conclusion of the agreement. In this case, *mixity* would be justified because investment and trade in services are areas in which MS still retain national sovereign powers, as much as it is the case for compulsory *mixity* in the EU. Indeed, Vinokurov has pointed out that «the Union lacks supranational jurisdiction in the coordination of trading in services and making investments under agreements with third parties» (*ivi,* p. 51). Therefore, the agreement concluded by the EAEU with Vietnam also concerned areas in which the regional organization did not have "exclusive" (borrowing the terminology from the EU experience) competence and hence the ratification by the MS was indeed needed. The FTA with Serbia does not fall under FTA+ though, since the Agreement is not concerned with investment nor trade in services, hence it does not exceed the expressed competences of the EAEU.

It could be argued that the *mixity* requirement for the EAEU concerns competences as well, but not for the same *rationale* of the EU. The EAEU must involve the MS in the conclusion of the agreement not because it is concluding an agreement exceeding its areas of competence, but because the MS must be involved due to the structure of the EAEU and its limited capacity to bind MS without their consent. In both the case of the EU and of the EAEU, *mixity* is not provided for within the treaties. If in the context of the EU *mixity* was deduced as being a corollary of the principle of conferral, the same cannot be stated for the EAEU. The treaty states that the EAEU can conclude *jointly or independently* with its MS international agreements, as per Article 7 EAEU Treaty, hence suggesting the possibility for the EAEU to conclude Union-only agreements. This does not seem to have been the case so far, hinting at the fact that concluding agreements in the mixed form could be a political choice, which is always made due to the structure and idea behind the EAEU, and not a legal requirement. Indeed, there is no compulsory *mixity* in the case of the EAEU: *mixity* is always facultative, but the organization, or better, its MS, have decided to conclude such agreements in the mixed form.

Indeed, even if the treaties leave the choice to the EAEU institutions to decide, so far, the EAEU (and specifically the SEEC) has opted for involving the MS in the conclusion of the agreements. The *rationale* behind this decision is not to be looked for in the founding treaties, but rather in political reasons. The EAEU has been created to promote economic development and cooperation in the region, but the spectre of the former USSR still looms over any attempt at institutionalizing cooperation in the region, be it even only economic in nature. The structure of the EAEU reflects this. The organization is built with a hierarchical structure, with the SEEC at the top. It is the decision-making body of the EAEU; hence, the decision-making is final only if there is approval from the MS. The EAEU has been built wishing to leave the MS with most of their sovereign powers (*ivi,* p. 52). Hence, in the case of the EAEU, it is even clearer that *mixity* does have

a strong political component.

6. *Serbia's obligations towards the EU*

As mentioned, the FTA concluded by Serbia with the EAEU raises some concerns with regard to possible future incompatibilities with EU law once the Western Balkan (WB) country completes its accession process to the EU. As a candidate country, Serbia has an obligation to align itself with the European Union's foreign policy in order to complete the accession process as part of Chapter 31 of the *acquis*, concerning Foreign, Security and Defence policy as recalled by the 2022 Report of the European Commission (EC) on Serbia. The report which is issued for every country in the midst of the accession process details where the candidate stands for every chapter of the *acquis*, acknowledging the progress made but also what still remains to be done. It is meant as an instrument of the new engagement policy towards the WB to help the countries in assessing their advancement but also in giving them pieces of advice on how to move forward and which aspects still need to be worked on. These country specific reports are an important policy tool which aims at demonstrating on the one hand the newly restored commitment of the EU towards the candidates, and also for the candidate countries' own assessment.

However, despite the alignment in the context of multilateral fora (indeed the country voted alongside European Union countries at the United Nations General Assembly when adopting Resolution A/RES/ES-11/1 condemning Russia's aggression against Ukraine), Serbia has kept developing intense relations and strategic partnerships with the Russian Federation, particularly by refusing to adopt sanctions in response to the Russian/Ukrainian conflict. However, it has worked closely also with the EU by adopting measures and documents concerning conflict prevention. Hence, according to the report, Serbia is only moderately prepared with regard to Chapter 31 of the acquis, since such actions have been interpreted by the EU as backsliding, leading to a drop in the alignment rate in this field from 64% in 2021 to 45% in 2022 (EC, *Report on Serbia*, cit., 2022). From the perspective of the European Commission, such close ties with the Russian Federation are perceived as a possible hindrance to the accession to the EU, since the country is refusing to align itself with the EU's foreign policy, with the regime of sanctions specifically, and is under an obligation to do so as under Article 72 concerning the approximation of laws of the Stabilization and Association Agreement, which is the treaty concluded by the EU and Serbia concerning its accession (EC, *Report on Serbia*, cit., 2022).

Concerns can also be raised concerning the FTA with the EAEU, which includes a provision allowing for the most favoured nation treatment to be applied among the parties, with the consequence that it would be incompatible with the obligations under EU law. However, the founding Treaties of the EU, and particularly the TFEU, have envisaged a tool to avoid instances of incompatibility between the obligations under the EU Treaties and previous obligations undertaken before being a MS of the EU: Article 351.

7. *The application of art. 351 TFEU to the FTA between Serbia and the EAEU*

Article 351 TFEU is a tool especially designed for acceding countries, mindful of the fact that before becoming a MS, the country might have engaged in relations with other states and concluded treaties envisaging obligations which might conflict with those under EU Treaties. From the very beginning, the drafters of the EU Treaties were aware of one crucial issue related to the accession of new MS (but affecting also the founding Members of the EU) concerning international legal commitments of the MS prior to their accession (M. KELLERBAUER, M. KLAMERT, *Article 351 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The EU Treaties and the Charter of Fundamental Rights*, Oxford, 2019, p. 2066).

Article 351 TFEU is meant to settle the conflicts between two main legal orders: the international and the European one. As the jurisprudence of the CJEU has demonstrated, it tries to

solve conflicts in favour of the EU legal order, even if it aims at protecting the rights of third countries and the obligations towards them (C. ECKES, *International Law as Law of the EU: The Role of the European Court of Justice*, in E. CANNIZZARO, P. PALCHETTI, R. A. WESSEL (eds), *International Law,* cit., p. 362). The jurisprudence of the Court of Justice of the EU helped to clarify some aspects of the article and its restrictive interpretation has balanced the wide room for manoeuvre that the MS have to solve the conflict. The provision includes three paragraphs, the first of which includes a subordination clause, according to which previous obligations towards third States prevail over EU Treaty obligations; the second one provides how to eliminate incompatibilities with EU Treaties; and the latter provides for a general obligation for the MS to take into account the general context of the EU legal order when deciding on the most appropriate measures to eliminate said incompatibilities (M. KELLERBAUER, M. KLAMERT, *Article 351,* cit., p. 2066-2067.; F. POCAR, M.C. BARUFFI, *Commentario breve ai Trattati dell'Unione Europea*, Padova, 2014, p. 1555).

In Opinion 2/15, the Court clarified that the scope of the article is to allow the MS to ensure that the rights which third countries can still claim under previously concluded agreement can be respected. In *Annunziata Matteucci v. the Commissariat General aux Relations Internationales of the Communauté française of Belgium*, the Court explained a further aspect concerning the scope of the provision, which covers only agreements concluded with third states and not between the MS. Hence, previous obligations which may derive from an agreement concluded between two MS cannot be invoked to avoid obligations under EU law (Judgment of the Court of 27 September 1988, Case 235/87, *Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales (Foreign Relations Department) of the Communauté française of Belgium*, ECLI:EU:C:1988:460). In *Attorney General v. Juan C. Burgoa* concerning obligations under the London Fisheries Convention from Ireland towards Spain, the Court emphasized the scope *ratione personae* of the article (at the time article 234 of the Treaty of Rome) stating that it does not confer any additional rights upon individuals while at the same time it does not affect the rights which individuals may derive from the agreement (Judgment of 10 October 1980, Case 812/79, *Attorney General v. Juan C. Burgoa*, ECLI:EU:C:1980:231).

The second paragraph establishes that if an incompatibility with the EU treaties is detected, MS shall carry out all appropriate steps to solve it. "All appropriate steps" offers to MS a wide range of possibilities to solve said incompatibilities. For instance, in *The Queen v. Secretary of State for the Home Department,* the ECJ assessed that, where possible, MS have an obligation to abstain from adopting a measure under the previous agreement where such measure is merely allowed but not required (Judgment of 28 March 1995, Case C-324/93, *The Queen v. Secretary of State for the Home Department*, ECLI:EU:C:1995:84, para. 32; re-affirmed also in 2012 in Judgment of the Court of 9 February 2012, Case C-277/10, OJ C 80 *Martin Luksan v. Petrus van der Let*, para. 62). Pocar and Baruffi also suggest that national courts have the option to interpret the international agreement in conformity with EU law. If this is not a feasible alternative, MS are required to proceed with other instruments, such as renegotiation of the agreement and/or to suspend it (F. POCAR, M.C. BARUFFI, *Commentario breve,* cit., pp. 1555-1556).

Ultimately, and only ultimately, if no other alternative is possible, MS are under the obligation to proceed with denunciation of the agreement incompatible with EU law. This aspect concerning denunciation was clarified by the ECJ in *Commission v. Portugal*, a case decided in 2000. As to the exceptionality of denunciation, which was invoked by Portugal, the Court found that even though the MS do have room to choose the appropriate steps to ensure that incompatibilities are eliminated, they are also under an obligation to eliminate them at last. Hence, if difficulties arise concerning o other adjustments then «an obligation to denounce that agreement cannot therefore be excluded» (Judgment of the Court of 4 July 2000, Case C-62/98, *Commission of the European Communities v. Portuguese Republic*, ECLI:EU:C:2000:358, para. 26).

Paragraph 3 embodies a rule which was born in the context of customs unions and regional integration organizations and establishes that parties to a regional integration project are under no obligation to confer the same advantages stemming from the integration projects to third countries not involved in the process (A. TIZZANO, *Trattati dell'Unione*

Europea, Torino, 2014, p. 2550). This paragraph has to be interpreted as a limit in terms of what is granted under the first one, hence MS have to be careful not to extend the same advantages deriving from being a MS of the EU also to third countries. More precisely, according to Kellerbauer and Klamert, paragraph 3 of Article 351 TFEU is meant as a prohibition to extend the most favoured nation treatment to third countries. Such prohibition is an expression of the principle of solidarity, which is a duty under EU law, (M. KELLERBAUER, M. KLAMERT, *Article 351,* cit., p. 2070). Granting the same advantages to third countries which do not share the same burdens of the MS which derive from membership to the EU in virtue of a previous agreement would entail a violation of the duty of solidarity as well as a violation of the obligation under paragraph 3, Article 351 TFEU.

No case law in terms of the most favoured nation treatment clause in relation to Article 351 TFEU can be mentioned yet. If applied to the FTA between Serbia and the EAEU, which as it was recalled includes a provision on the most favoured nation treatment, Article 351 TFEU could not be triggered by Serbia as the FTA includes such a provision. Hence, a clear incompatibility with obligations from EU law arises. The choices that Serbia might have to solve such incompatibility are however slim: interpretation in conformity with EU law, renegotiation and suspension do not seem feasible alternatives. Therefore, the only alternative that Serbia would have at its disposal to eliminate the incompatibility with EU law, when and whether the country becomes EU member, seems to be denunciation, with all the political consequences that this procedure might entail.

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