Solving Mixity by Sidelining Consent

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Daniel Gibson and Yahya Saricicek



The 'Split and Apply' Paradox: Has the EU Solved Mixity at the Cost of Democracy?

Introduction

On the 1st May 2026, the European Union and the four founding members of Mercosur (Argentina, Brazil, Paraguay, Uruguay) began the provisional application of the EU-Mercosur Interim Trade Agreement (ITA), creating a free trade zone of roughly 700 million people (as per the European Commission, 2026). This provisional application took effect while the European Parliament's own referral of the same instrument to

the Court of Justice of the European Union (CJEU) via article 218(11) of the Treaty on the Functioning of the European Union (TFEU) was still pending. This seemingly backwards procedure is no accident. It is the culmination of years of procedural engineering designed to escape 'mixity'; the practice of concluding agreements jointly with the Member States, which hands every national parliament, and in federal states every regional one, a potential veto over ratification. After Wallonia's near-veto of CETA in 2016, the Commission developed a "split-and-apply" architecture which allows it to separate exclusively EU-competence trade pillars from the contested terrain of mixed competence areas. This brief will explore how the current architecture has solved the legal problem of 'mixity', but at the democratic cost that the Mercosur case now highlights with constitutional clarity. The forum through which national objection was once channelled has been removed for the benefit of procedural efficiency; yet nothing has been built to replace it.

The Post- Wallonia Architecture

The Comprehensive Economic and Trade Agreement (CETA) with Canada, negotiated between 2009 and 2014, was initially considered by the Commission as falling entirely within EU exclusive competence under the Common Commercial Policy (Article 207 TFEU). In July 2016, under pressure from the Council, which was anxious to appease domestic opponents of free trade, it was reclassified as a mixed agreement. That single choice, seemingly pro democratic accountability, handed a veto to all 27 Member States and, within Belgium's federal architecture, to its regional parliaments.

On 14 October 2016, the Parliament of Wallonia exercised it; Minister-President Paul Magnette withheld the consent his federal government required, ultimately paralysing the Trade Council and bringing the entire trans-Atlantic agreement to the verge of collapse. A Joint Interpretative Instrument and a separate Belgian declaration rescued the deal on 30 October 2016, but the structural lesson continues to outlive the crisis. Almost a decade on, and ten Member States, including France and Italy, have still not completed ratification (European Commission, n.d.).

It was the Court of Justice that provided the legal opening for an alternative architecture in Opinion 2/15 of 16 May 2017. Ruling on the EU-Singapore agreement, the CJEU held that the Union enjoyed exclusive competence over virtually the entire agreement, identifying only two exceptions: non-direct portfolio investment as well as investor-State dispute settlement, both of which remained a shared competence alongside the Member States (Opinion 2/15, 2017). The implication proved to be as consequential as it was legally elegant. If it were only these two seemingly minor elements that compelled 'mixity', they could be moved into a separate instrument, leaving the commercial core to be concluded by the EU alone under Article 218(6) TFEU (without qualified majority voting in the Council and Parliament's consent – as opposed to absolute majority if it were

deemed mixed). The Commission then applied this reasoning to further agreements – the Singapore and Vietnam agreements were also both divided into trade agreements with separate investor-protection instruments (Conconi et al., 2021), while the agreements concluded with Japan, New Zealand, and Chile were concluded as EU exclusive competence deals. By the time the Mercosur negotiation had reached its final stages, this "split-and-apply" method had evolved from mere improvisation out of necessity following the Wallonia veto into concrete doctrine.

The Mercosur Test

The EU-Mercosur agreement is the most demanding test this doctrine has yet faced. Negotiated since 1999 and concluded politically on 6 December 2024, it carries new commitments towards climate change, enhancing competition, boosting trade and development, and would therefore, once ratified, create the largest free-trade area in the world – worth over 111 billion euros in 2024 alone. It is also the agreement in which this "split and apply" method was most visibly applied. On 3 September 2025, the Commission proposed two separate and parallel legal instruments rather than a single agreement: the EU-Mercosur Partnership Agreement (EMPA), which carries the political dialogue and cooperation provisions that fall under shared competence, and the ITA, which carries the Common Commercial Policy and trade provisions that fall largely within the EU's exclusive domain under Article 3 TFEU.

The utility of this architecture, in the eyes of the EU, is that it allows the ITA to be concluded without national ratification. Signature and provisional application require only a qualified majority in the Council under Article 218(5) TFEU, as well as consent of the European Parliament under Article 218(6) TFEU. The complete bypass of national parliament at this stage was politically cushioned by the 2025 bilateral agreement between the Council and Parliament, allowing the suspension of Mercosur's tariff preferences where imports destabilised EU producers.

On 9 January 2026, the Council was able to authorise signature by 21 votes to 5 (with Austria, France, Ireland, Poland and Hungary opposed and Belgium applying constructive abstention. Consequently, the two instruments were signed in Asuncion, Paraguay, on 17 January (Council of the European Union, 2026). However, this strategy then collided with the very institution it aimed to streamline. On 21 January the European Parliament invoked Article 218(11) TFEU, and submitted three questions to the CJEU; whether dividing the partnership into two instruments respects the division of competences outlined in the Treaties, whether the conditions of the agreement's conclusion and provisional application are lawful, and whether the agreement diminishes the Union's freedom to set its own environmental and consumer health policy (White & Case, 2026). The consent procedure was suspended pending the opinion, yet the ITA, as confirmed by President von der Leyen in February, was brought into provisional application on 1

May 2026, possibly a matter of years before the Court will rule on the matter.

The Cost to Democracy

One cannot critique the democratic issues surrounding mixed agreements without first presenting the Commission's logic, because they do possess a strong argument. Mixity has been seen to produce genuine results regarding free trade agreements; a regional assembly speaking for less than 1% of the Union's population could hold hostage and continent-wide agreement binding some 450 million Europeans. Furthermore, mixed agreements routinely took years to ratify due to the necessity of every Member State's parliamentary approval, whereas EU-only instruments only take months. CETA, provisionally applied in 2017 and still formally unratified, is the standard monument to this very issue. By realigning the procedure to exclusive competence under Article 207 TFEU and therefore to qualified majority voting under Article 218 TFEU, the EU has undoubtedly provided efficiency and consistency that would otherwise be near-impossible. The trouble, however, is that procedural legitimacy and democratic legitimacy are completely distinct, as is highlighted in the Mercosur agreement.

Firstly, the agreement was negotiated for 25 years under directives premised on a mixed and unanimity-based conclusion. Changing the decision rule to qualified majority in the closing phase reads less as clarification than as political gerrymandering. Secondly, the iTA's novel "rebalancing mechanism" permits Mercosur to seek compensatory measures where trade flow is affected (Couveinhes Matsumoto & Robert, 2025). Commentators widely predict that it will be used against the EU's Deforestation Regulation, and in time against the Carbon Border Adjustment Mechanism, ultimately forcing the EU into a "regulatory chill" in which they regulate less ambitiously on the environment for fear of triggering compensation claims (CAN Europe, 2025). Thirdly, by applying the iTA provisionally before the CJEU has spoken, the Commission has ensured that even a future finding of illegality would land after years of accumulated commercial fact.

Most pertinently, the fact remains that 'mixity' was not only a rule governing the boundaries between EU and Member State competence but that it was a forum through which genuine national opposition was forced into the decision-making process before the decision bound anyone. However, removing the forum has not removed the opposition. It has simply redirected it into the CJEU's docket, knife-edge majorities in Strasbourg, and into the thousands of farmers who drove their tractors to the Parliament's doors in January 2026. The Commission's procedural elegance has not escaped political accountability, but only relocated it outside the ratification chambers specifically designed to absorb it, and into arenas far less suitable for the task.

Conclusion

Has the EU solved 'mixity' at the cost of democracy? The honest answer is yes. The legal architecture that mixed agreements have caused,

such as lengthy ratifications, regional vetoes, and agreements being held permanently hostage, has been largely cured by the split-and-apply doctrine. Conversely, the function that 'mixity' also, and more importantly, performed has not been replaced. National electorates continue to hold views on trade that diverge strongly from the Commission's, and the procedural mechanism that once ensured those views were considered before the moment of binding conclusion has simply been switched off.

The Court may well uphold the split, finding that the Commission acted lawfully within the bounds of Articles 207 and 218 TFEU. Such a ruling would settle the legal dispute while leaving the democratic one entirely untouched, given that judicial validation cannot substitute for political consent. Moreover, this question is no longer confined to a single deal, but is the institutional template being used for the modernised EU-Chile agreement, as well as prospective agreements with Mexico, India, and Indonesia. The Union is moving towards a dilemma that it has not yet been willing to acknowledge, that procedural efficiency and democratic legitimacy within external trade policy cannot be maximised at once, but need to be addressed individually.

Whether the Mercosur architecture endures following the 218(11) procedure will fall less on the CJEU's decision, but primarily on whether Europe's publics can be persuaded to accept a trade policy that is increasingly conducted above their heads, with no forum for discussion or objection. Based on the evidence at present, that will be the harder ratification to win.

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