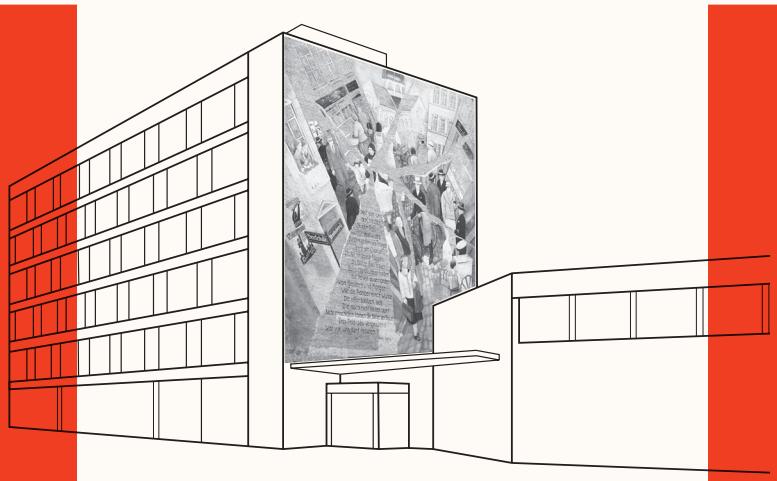

Karsten Nowrot

European Republicanism in (Legitimation) Action: Public Participation in the Negotiation and Implementation of EU Free Trade Agreements

Rechtswissenschaftliche
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Hamburger Sozialökonomie

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Contents

A. Two Observations on the Relevance of Change*

The starting point of this contribution is, first, a factual observation and, second, a normative finding; both being concerned with changing circumstances and equally shifting perceptions thereof as well as the consequences resulting from these developments. First, to start with a primarily factual observation, the negotiation and conclusion of regional economic integration agreements, in particular also the ones signed by the European Union (EU), today often enjoy a quite high degree of public attention, thereby indicating the more recently changing character of international economic law in general – and of trade and investment agreements in particular – as an increasingly political law.

While seen from a global perspective most certainly many areas of the international economic legal order admittedly always have been – and continue to be – contested among states, in particular those adhering to different ideologies,[1] the normative contractual design of foreign economic relations has – viewed from the domestic perspective of most countries – for a long time primarily been the concern of a comparatively small circle of experts. In particular, international negotiations aimed at concluding multilateral, regional or bilateral treaties in the realm of international economic law have in previous decades normally not attracted a substantial attention on the side of the politically interested broader public. This finding most certainly applied also to the member states of the EU. Consequently, the fact that these negotiations were traditionally largely conducted by governmental representatives – quasi or even literally – "behind closed doors"[2] usually didn't give rise to critical discussions among the citizens of the political community concerned.

* The contribution is based on a presentation given by the author at the conference "European Union in International Affairs – Protecting and Projecting Europe" organized by the Institut d'Études Européennes at the Université Libre de Bruxelles (IEE-ULB), the United Nations University Institute on Comparative Regional Integration Studies (UNU-CRIS) as well as Egmont – The Royal Institute for International Relations in Brussels, Belgium on 16 to 18 May 2018.

1 See for example already US Supreme Court, *Banco Nacional de Cuba v. Sabbatino*, Judgment of 23 March 1964, 376 U.S. 398, 428 *et seq*. (1964) ("There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. […] It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations."); International Court of Justice, *Barcelona Traction Case*, ICJ Reports 1970, 3, 47 *et seq*. ("Considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding corporations, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests.").

2 See thereto, e.g., *Marceddu*, Journal of International Economic Law 21 (2018), 681-682 ("Traditionally, international negotiations were conducted by diplomatic or governmental representatives behind closed doors, with few official documents subsequently being released to the public, and without allowing public participation in any political debate. States tended to refrain from opening up the law- and policy-making process or from sharing sensitive information with the public. […] Investment and trade policy-making did not constitute an exception to this trend. Indeed, they have fully conformed to the custom of secret negotiations: they have not traditionally been accompanied by democratic deliberations, and even parliaments have tended to play a minor role in the oversight of treaty-making."); *Hepburn*, American Journal of International Law 112 (2018), 658 (662) ("often negotiated and concluded by the executive without parliamentary oversight"); as well as more generally also for example *Krüger*, Allgemeine Staatslehre, 507-508; *Tietje*, Internationalisiertes Verwaltungshandeln, 182 *et seq.*; *Tietje/Nowrot*, in: Morlok/Schliesky/Wiefelspütz (eds.), Parlamentsrecht, 1469 *et seq*.

As evidenced for example by the intensive and controversial public debates in a number of EU member states with regard to the negotiations leading to the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada which has been signed by the parties on 30 October 2016 and is provisionally applied since 21 September 2017,[3] as well as first and foremost the Transatlantic Trade and Investment Partnership (TTIP) negotiated between the United States and the EU since July 2013 (with the negotiations being currently on hold), this situation has changed in an unprecedented way.[4] Foreign trade and investment policy today often enjoys a high degree of public attention in many countries, among them also many EU member states, including controversial deliberations among and within political parties and has thus obviously turned into a politicised area of law in the true sense of the meaning.[5] From a broader perspective, this finding has for example more recently quite vividly been expressed by *Michael J. Trebilcock* stating that "popular and scholarly debates over the virtues and vices of economic globalization ensure that international trade policy has forever forsaken the quiet and obscure corners of trade diplomacy that it once occupied, and become a matter of 'high politics'".[6] The transformation into a more politicised field of law, although occasionally viewed with suspicion and most certainly not without challenges, is in principle to be welcomed already because of the fact that it brings with it the possibility of realizing one of the central overarching objectives of – what might be characterized as – an emerging constitutionalized international economic law,[7] namely supporting the continued conversion of the normative framework dealing with international economic relations into a more human-oriented legal order.[8]

Why has this situation more recently changed in an unprecedented way, in particular also as far as the general public in many EU member states is concerned? The underlying reasons for this shift and comparative new trend are most certainly manifold. However, prominently among them is surely the in part considerably more comprehensive policy approach towards

3 OJ EU L 11/23 of 14 January 2017.

4 On this observation see also for example European Commission, Trade for All – Towards a More Responsible Trade and Investment Policy, October 2015, 18 ("Trade policy is more debated today than at any time in recent years, with many asking whether it is designed to support broad European interests and principles or the narrow objectives of large firms."); see also more recently, e.g., European Commission, Report on the Implementation of the Trade Policy Strategy Trade for All – Delivering a Progressive Trade Policy to Harness Globalisation, COM(2017) 491 final of 13 September 2017, 12-13; as well as *Oeter*, in: Ipsen/Epping/Heintschel von Heinegg (eds.), Völkerrecht, § 51, para. 57; *Calliess*, ZEuS – Zeitschrift für europarechtliche Studien 20 (2017), 421 (422 *et seq.*).

5 Generally on the notion of 'political law' see, e.g., *Isensee*, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Vol. XII, 483 *et seq*.; *Stern*, Das Staatsrecht der Bundesrepublik Deutschland, Vol. I, 14 *et seq.*, each with further references.

6 *Trebilcock*, Advanced Introduction to International Trade Law, 9. On the perception of international economic law as political law see also, e.g., *Tietje*, in: Tietje (ed.), Internationales Wirtschaftsrecht, 1 (3); *Nowrot*, Zeitschrift für Gesetzgebung 31 (2016), 1 *et seq*.; *Nowrot/Tietje*, Europarecht 52 (2017), 137-138.

7 Generally on the concept and normative ordering idea of global constitutionalism in international economic law see for example *Petersmann*, Constitutional Functions and Constitutional Problems of International Economic Law, 210 *et seq*. and *passim*; *Petersmann*, in: von Bogdandy/Mavroidis/Mény (eds.), European Integration and International Co-ordination – Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann, 383 *et seq*.; *Petersmann*, Loyola of Los Angeles Law Review 37 (2003), 407 *et seq*.; *Nowrot/Sipiorski*, Archiv des Völkerrechts 55 (2017), 265 *et seq.*; *Stoll*, in: Cremona *et al.* (eds.), Reflections on the Constitutionalisation of International Economic Law – Liber Amicorum for Ernst-Ulrich Petersmann, 201 *et seq*.; *Nettesheim*, in: Classen *et al.* (eds.), „In einem vereinten Europa dem Frieden der Welt zu dienen …" Liber amicorum Thomas Oppermann, 381 (389 *et seq*.); *Tietje*, in: Dicke *et al.* (eds.), Weltinnenrecht – Liber amicorum Jost Delbrück, 783 (794 *et seq*.); *Tietje/Nowrot*, in: Tietje/Nowrot (eds.), Verfassungsrechtliche Dimensionen des Internationalen Wirtschaftsrechts, 9 *et seq.*; *Trachtman*, in: Lang/Wiener (eds.), Handbook on Global Constitutionalism, 395 *et seq*.; *Behrens*, Archiv des Völkerrechts 45 (2007), 153 *et seq.*; *Stoll/Holterhus*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 339 *et seq.*; *Cass*, The Constitutionalization of the World Trade Organization, 3 *et seq*.

8 On the perception of a righly increasingly individualized and human-oriented public international law see, e.g., *Peters*, Beyond Human Rights – The Status of the Individual in International Law, 2016; *Teitel*, Humanity's Law, 3 *et seq.*

the regulatory content of free trade agreements negotiated also by the EU in recent years with its focus on, among others, the establishment of quite comprehensive and elaborate – albeit, viewed from the perspective of the international (economic) system as a whole, neither unprecedented nor at least uncommon[9] – institutional steering structures ("treaty bodies"),[10] on normatively addressing the economic relevance of so-called behind-the-border issues[11] as for example manifested in the concept of regulatory cooperation[12] as well as on substantive and procedural investment protection, including the stipulation of international investor-state dispute settlement mechanisms.[13] All of these features have in common that they result in a shrinking of domestic policy space and regulatory autonomy of the contracting parties that goes well beyond traditional free trade agreements that focus primarily on border measures and do not stipulate investment protection standards.

To mention but one example, the investment provisions protecting against indirect expropriation[14] as well as the guarantee of fair and equitable treatment[15] have, *inter alia*, by setting certain standards for domestic administrative procedures, in particular in light of the occasionally quite far-reaching understanding of these protection standards by some investment arbitration tribunals, developed a considerable potential to codetermine the design of certain segments of the domestic legal orders of the respective host states.[16] Thereby, it hardly needs to be emphasized that stipulating restrictions on the "policy space" of states on the basis of international legal obligations and thus providing conditions of legal certainty for private economic operators are among the central – and in principle indispensible – purposes of international economic agreements. However, it also has to be re-called in this connection, that the regulatory autonomy enjoyed by the contracting parties is very far from being merely an end in itself. Rather, it is first and foremost a means to pursue – and indeed even finds its justification and legitimation exclusively in the pursuit of – the promotion and protection of public interest concerns, among them for example human rights, public health, developmental needs, environmental issues as well as social and labour standards. In light of the enhanced effectiveness and considerably expanded scope of application of regional economic integration agreements, the possibility of disputes increasingly arises which involve impairments of economic interests of private business actors such as foreign investors covered by respective protection standards of international investment agreements that are justified by the host state in question based on

9 Generally thereto *Tietje*, German Yearbook of International Law 42 (1999), 26 *et seq.*; *Nowrot/Tietje*, Europarecht 52 (2017), 137 (150 *et seq.*).

10 Specifically with regard to the realm of EU free trade agreements see for example *Weiß*, European Constitutional Law Review 14 (2018), 532 *et seq.*; *Weiß*, Europäische Zeitschrift für Wirtschaftsrecht 27 (2016), 286 *et seq.*; *Nettesheim*, Umfassende Freihandelsabkommen und Grundgesetz, 21 *et seq.* and *passim*.

11 On the widening of the focus of regulatory approaches in international trade agreements by increasingly going beyond addressing only border measures and including behind-the-border issues see, e.g., *Cottier*, Journal of International Economic Law 17 (2014), 671 *et seq.*

12 On the concept of regulatory cooperation and its implementation in the realm of regional economic integration agreements see for example *Nowrot*, Zeitschrift für Gesetzgebung 31 (2016), 1 *et seq*., with numerous further references.

13 Concerning the protection of foreign investments in EU agreements and the implications arising in this regard see, e.g., *Griebel*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 304 *et seq.*; *Reinisch*, European Yearbook of International Economic Law 8 (2017), 247 *et seq.*; *Dimopoulos*, EU Foreign Investment Law, 2011; as well as the contributions in *Bungenberg/Griebel/Hindelang* (eds.), International Investment Law and EU Law, 2011; and *Bungenberg/Reinisch/Tietje* (eds.), EU and International Investment Agreements, 2013.

14 On the concept of indirect expropriation in international investment agreements see, e.g., *Kriebaum*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 959 (971 *et seq.*).

15 Generally on the standard of fair and equitable protection in international investment agreements see for example *Dolzer/Schreuer*, Principles of International Investment Law, 130 *et seq.*; *Jacob/Schill*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 700 *et seq.*

16 See also, e.g., *Tietje*, Internationales Investitionsrecht im Spannungsverhältnis, 10 *et seq*.; *Dolzer*, New York University Journal of International Law and Politics 37 (2005), 953 *et seq*.; *Krajewski/Ceyssens*, Archiv des Völkerrechts 45 (2007), 180 *et seq*.

a recourse to (non-economic) public interest concerns like the protection of public health or the environment.[17] Against the backround of these regulatory features and their potential normative consequences, modern and more comprehensive free trade agreements, most certainly including those negotiated and concluded by the EU, are perceived by an increasing number of politically interested persons and groups as a category of transnational regulatory design worth taking a closer (and not infrequently more critical) look at.

Second, and this leads us to a normative finding concerning these changing steering structures and perceptions thereof, it is precisely these more "intrusive" regulatory features of modern comprehensive free trade agreements – as well as, for example, the increasing prevalence and regulatory importance of transnational governance regimes in general – that have first and foremost also given rise to certain legitimacy challenges. And indeed, these legitimacy challenges that arise in connection with the normatively relevant steering activities of modern governance structures in the transnational realm have already been qualified as "emerging as one of the central questions – perhaps *the* central question – in contemporary world politics".[18] As already evidenced by an ever-growing literature dealing with this topic in general or at least with some of its aspects, this most certainly also applies to the regulatory features of recent EU free trade agreements.[19] Thereby, taking into account the complexity of this issue, it hardly needs to be emphasized that it will neither be feasible to elaborate, nor is this comparatively short contribution aimed at elaborating, on all of the manifold implications of the possible "legitimacy deficits" in something even close to a comprehensive way.

Rather, and in order to make a long and complex story short, let it initially suffice here to recall that it is ever more recognized that traditional concepts of democratic legitimacy developed under the conditions of the nation-state – some of which finding their normative manifestations also for example in Article 10 (1) and (2) of the Treaty on European Union (TEU) – alone provide an increasingly inadequate and insufficient basis for legitimizing the respective transnational steering regimes, already because of the fact that the diversity and complexity of regulatory mechanisms in the international realm does in general not allow for the establishment of comparable allocative structures.[20] There are obviously a number of different conclusions and consequences potentially to be drawn from this finding. However, in case one accepts, together with what probably amounts by now to a majority of legal scholars, as

17 For respective scenarios see, e.g., *Voon/Mitchell*, Journal of International Economic Law 14 (2011), 515 *et seq.*

18 *Moravcsik*, in: Held/Koenig-Archibugi (eds.), Global Governance and Public Accountability, 212 (emphasis in the original); see also, e.g., *Hoffmann-Riem*, Archiv des öffentlichen Rechts 130 (2005), 5 (66).

19 See for example *Ohler*, European Yearbook of International Economic Law 8 (2017), 227 *et seq.*; *Weiß*, European Constitutional Law Review 14 (2018), 532 *et seq.*; *Nettesheim*, Umfassende Freihandelsabkommen und Grundgesetz, 21 *et seq.* and *passim*; *Tietje*, ZEuS – Zeitschrift für europarechtliche Studien 19 (2016), 421 *et seq.*; *Grzeszick*, Neue Zeitschrift für Verwaltungsrecht 35 (2016), 1753 *et seq.*; *Classen*, ZEuS – Zeitschrift für europarechtliche Studien 19 (2016), 449 *et seq.*; *Bautze*, Kritische Justiz 50 (2017), 404 *et seq.*; *Schroeder*, Europarecht 53 (2018), 119 *et seq.*; *Tauschinsky/Weiß*, Europarecht 53 (2018), 3 *et seq.*; *Schill*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 78 (2018), 33 *et seq.*; *Streinz*, in: Bungenberg/Herrmann (eds.), Die gemeinsame Handelspolitik der Europäischen Union, 71 *et seq.*; *Proelß*, ZEuS – Zeitschrift für europarechtliche Studien 19 (2016), 401 *et seq.*; *Groh*, ZEuS – Zeitschrift für europarechtliche Studien 19 (2016), 433 *et seq.*

20 See thereto for example *Tietje*, Deutsches Verwaltungsblatt 118 (2003), 1081 (1094 *et seq.*); *Peters*, Elemente einer Theorie der Verfassung Europas, 645 *et seq.*; *Ruffert*, Die Verwaltung 36 (2003), 293 (313); *Ruffert*, in: Trute *et al.* (eds.), Allgemeines Verwaltungsrecht, 431 (454); *Delbrück*, Indiana Journal of Global Legal Studies 10 (2003), 29 (36 *et seq.*); *Nowrot*, in: Fenwick/Van Uytsel/Wrbka (eds.), Networked Governance, Transnational Business and the Law, 231 (247); *Kingsbury/Krisch/Stewart*, Law and Contemporary Problems 68 (2005), 15 (48 *et seq.*); *Teubner*, in: Brunkhorst/Kettner (eds.), Globalisierung und Demokratie, 240 (269 *et seq.*); *Ladeur*, in: Ladeur (ed.), Public Governance, 89 (113); *Kokott*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 63 (2004), 7 (30); *Schliesky*, Souveränität und Legitimität, 389 *et seq.*; *Peuker*, Bürokratie und Demokratie in Europa, 154 *et seq.*, 191; *Zoellner*, Das Transparenzprinzip, 439 *et seq.*; *Rost*, Die Herausbildung transnationalen Wirtschaftsrechts, 222; *Hoffmann-Riem*, in: Schmidt-Aßmann/Hoffmann-Riem (eds.), Strukturen des Europäischen Verwaltungsrechts, 317 (375).

the most appropriate consequence a resulting need for a conceptual modification of our understanding of legitimacy, it seems possible – by taking recourse to the distinction between "input-oriented" and "output-oriented" models of legitimacy as developed by *Fritz W. Scharpf*[21] and in order to reduce the existing (factual and scholarly) complexities by way of systemization[22] – to broadly distinguish between three main lines of argumentation in the literature.[23]

Some scholars have developed – on the basis of exclusively "input-oriented" legitimizing strategies – transnational concepts of democracy such as for example the model of a "cosmopolitan democracy" by *David Held*,[24] even though the implementation of such an "enormously ambitious agenda for reconfigurating the constitution of global governance and world order"[25] in practice appears for the time being rather unrealistic.[26] On the other end of the spectrum are those academics that argue for entirely "output-oriented" models of transnational legitimacy.[27]

However, the majority of those legal scholars who are currently sympathetic towards a conceptual change of the understanding of legitimacy, favor more complex approaches[28] comprising of "input-oriented" as well as "output-oriented" elements.[29] According to these pluralistic models,[30] it is necessary to determine with regard to every individual regulatory regime whether a sufficient number of legitimizing factors exist that substitute or mutually reinforce

21 See, e.g., *Scharpf*, Demokratietheorie zwischen Utopie und Anpassung, 21 *et seq.*; *Scharpf*, Regieren in Europa, 16 *et seq.*; *Scharpf*, in: Schuppert/Pernice/Haltern (eds.), Europawissenschaft, 705 (708 *et seq.*).

22 Generally on this underlying purpose pursued by approaches of systemization or categorization see, e.g., *Luhmann*, Kölner Zeitschrift für Soziologie und Sozialpsychologie 19 (1967), 615 (618 *et seq.*); as well as already *Bruner/Goodnow/Austin*, A Study of Thinking, 12 ("A first achievement of categorizing has already been discussed. By categorizing as equivalent discriminable different events, the organism *reduces the complexity of its environment*.") (emphasis in the original).

23 See thereto also already *Nowrot*, in: Dilling/Herberg/Winter (eds.), Transnational Administrative Rule-Making, 255 (271 *et seq.*).

24 See for example *Held*, Democracy and the Global Order, 221 *et seq.*; *Held*, in: Archibugi/Held (eds.), Cosmopolitan Democracy, 96 (106 *et seq.*); *Held*, in: Held/Koenig-Archibugi (eds.), Global Governance, 240 *et seq.*; *Held*, in: Archibugi/Held/Köhler (eds.), Re-imagining Political Community, 11 (21 *et seq.*).

25 *McGrew*, in: Held/McGrew (eds.), Global Transformations, 500 (503).

26 On this perception see also already for example *Scharpf*, in: Schuppert/Pernice/Haltern (eds.), Europawissenschaft, 705 (733 *et seq.*); *Bodansky*, American Journal of International Law 93 (1999), 596 (600); *Peters*, Elemente einer Theorie der Verfassung Europas, 750 *et seq.*; *Peters*, Common Market Law Review 41 (2004), 37 (41); *Delbrück*, Indiana Journal of Global Legal Studies 10 (2003), 29 (40); *Elsig*, Journal of World Trade 41 (2007), 75 (91); *Zürn/Leibfried*, in: Leibfried/Zürn (eds.), Transformations of the State?, 1 (22); *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 627 *et seq.*; *Zoellner*, Das Transparenzprinzip, 442 *et seq.*

27 See, e.g., *Peters*, Elemente einer Theorie der Verfassung Europas, 580 *et seq.*; *Tietje*, Deutsches Verwaltungsblatt 118 (2003), 1081 (1095); *Scharpf*, Demokratietheorie zwischen Utopie und Anpassung, 21 *et seq.*; see thereto also *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 628 *et seq.* For a critical perception of such exclusively "output-oriented" models of legitimacy see for example *Schliesky*, Souveränität und Legitimation, 604 *et seq.*; *Dederer*, Korporative Staatsgewalt, 169 *et seq.*; *Zoellner*, Das Transparenzprinzip, 447; *Germann*, in: Arndt/Barth/Gräb (eds.), Christentum-Staat-Kultur, 411 (424 *et seq.*); *Müller-Franken*, Archiv des öffentlichen Rechts 134 (2009), 542 (552 *et seq.*).

28 On the need for more complex legitimation models see already for example *Lübbe-Wolff*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 60 (2001), 246 (281); *Möllers*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 65 (2005), 351 (384); *Groß*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 66 (2007), 152 (171).

29 On this perception see, e.g., *Schliesky*, Souveränität und Legitimation, 588 *et seq.*

30 Generally on these pluralistic concepts of legitimacy see also, e.g., *Hoffmann-Riem*, Archiv des öffentlichen Rechts 130 (2005), 5 (66 *et seq.*); *Hoffmann-Riem*, in: Schuppert (ed.), Der Gewährleistungsstaat, 89 (105 *et seq.*); *Schuppert*, in: Ipsen/Schmidt-Jortzig (eds.), Festschrift für Dietrich Rauschning, 201 (205 *et seq.*); *Krisch*, European Journal of International Law 17 (2006), 247 *et seq.*; *Trute*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, Vol. I, § 6, paras. 15 *et seq.*; *Pache*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 66 (2007), 106 (139 *et seq.*); *Kahl*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, Vol. III, § 47, para. 66; *Mehde*, Neues Steuerungsmodell und Demokratieprinzip, 563 *et seq.*; *Franzius*, VerwArch 97 (2006), 186 (210 *et seq.*).

each other.[31] Although there is no *numerus clausus* with regard to the potential aspects to be taken into account,[32] it is nevertheless possible to identify a number of factors to which particular importance is frequently attributed to in the legal literature. Among them is from an "output-oriented" perspective the effective realization of the common good, generally regarded as one of the most important legitimizing factors for the respective regulatory structures.[33] In order to facilitate this optimal orientation towards the realization of the common good, a prominent position is – in the realm of "input-oriented" factors – occupied, *inter alia*, by the requirements of transparency in the decision- and rule-making processes as well as in particular also of opportunities for a more direct and more sustained participation by interested and affected societal actors.[34] Specifically with regard to the governance realm of the EU, some of these last-mentioned approaches and concepts indeed find their normative recognition for example in Article 10 (3) and Article 11 TEU as well as in Article 15 and Article 24 of the Treaty on the Functioning of the European Union (TFEU).

B. Republican Legitimacy in Disguise: On the Normative Foundations of Pluralistic Legitimation Strategies

Although the respective mechanisms and means as normatively enshrined in particular in Article 10 (3) and Article 11 TEU are stipulated in this EU treaty in its title II under the heading "provisions on democratic principles", it has already rightly been emphasized that a closer look at their quasi-constitutional foundations reveals that not all of the factors considered to be of relevance in these more complex and pluralistic legitimation approaches are in fact manifestations of democratic legitimacy in the narrower sense of the concept.[35] This applies

31 *Hoffmann-Riem*, in: Schmidt-Aßmann/Hoffmann-Riem (eds.), Strukturen des Europäischen Verwaltungsrechts, 317 (377); *Hoffmann-Riem*, Archiv des öffentlichen Rechts 131 (2006), 255 (264); *Schliesky*, Souveränität und Legitimation, 715 *et seq.*; *Kotzur*, in: Bauer *et al.* (eds.), Demokratie in Europa, 351 (371); *Schuppert*, in: Ipsen/Schmidt-Jortzig (eds.), Festschrift für Dietrich Rauschning, 201 (209); *Trute*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, Vol. I, § 6, paras. 56 *et seq.*

32 *Schliesky*, Souveränität und Legitimation, 719.

33 On this perception see for example *Schmidt-Aßmann*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 56 (1997), 294 (295); *Hoffmann-Riem*, in: Schmidt-Aßmann/Hoffmann-Riem (eds.), Strukturen des Europäischen Verwaltungsrechts, 317 (377); *Trute*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, Vol. I, § 6, para. 53; *Pache*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 66 (2007), 106 (141); *Schuppert*, Staatswissenschaft, 416; *Tietje*, Deutsches Verwaltungsblatt 118 (2003), 1081 (1095); *Zoellner*, Das Transparenzprinzip, 448; *Schliesky*, Souveränität und Legitimation, 691.

34 See thereto, e.g., *Hoffmann-Riem*, in: Schmidt-Aßmann/Hoffmann-Riem (eds.), Strukturen des Europäischen Verwaltungsrechts, 317 (377); *Schuppert*, in: Heyde/Schaber (eds.), Demokratisches Regieren in Europa?, 65 (72); *Kahl*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, Vol. III, § 47, para. 66; *Pache*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 66 (2007), 106 (140); *Lübbe-Wolff*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 60 (2001), 246 (279 *et seq.*); *Sommermann*, in: Dupuy *et al.* (eds.), Festschrift für Christian Tomuschat, 1051 (1063); *Ruffert*, Die Verwaltung 36 (2003), 293 (313 *et seq.*); *Zoellner*, Das Transparenzprinzip, 445 *et seq.*; *Charnovitz*, Journal of International Economic Law 7 (2004), 675 (680 *et seq.*); *Delbrück*, Indiana Journal of Global Legal Studies 10 (2003), 29 (40 *et seq.*); *Trute*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, Vol. I, § 6, para. 55; *Groß*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 66 (2007), 152 (172 *et seq.*); *Rost*, Die Herausbildung transnationalen Wirtschaftsrechts, 218 *et seq.*

35 See thereto for example *Klabbers/Peters/Ulfstein*, The Constitutionalization of International Law, 338 *et seq.*; *Delbrück*, Indiana Journal of Global Legal Studies 10 (2003), 29 (43 *et seq.*) ("Surrogates for Democratization"); *Sommermann*, in: Dupuy *et al.* (eds.), Festschrift für Christian Tomuschat, 1051 (1063); *Gärditz*, Die Öffentliche Verwaltung 63 (2010), 453 (456 *et seq.*); *Peuker*, Bürokratie und Demokratie in Europa, 193 *et seq.* See in this connection also the

in particular, to mention but one example, to the orientation towards an effective realization of the common good; considered to be one of the central elements in pluralistic legitimation models,[36] but nevertheless not among the factors that are easily attributable to the ordering idea of democratic legitimacy.[37]

Rather, some of these elements, among them first and foremost the orientation towards the common good, but also for example the idea of a sustained public participation by interested societal actors in the governance processes of a political community, are more appropriately qualified as alternatives to, or surrogates for, democratic legitimacy that find their overarching normative basis in the principle of republicanism;[38] a constitutional ordering concept whose relevance in the context of the transnational realm,[39] and especially also in the process of European integration in general as well as the EU legal order in particular,[40] has only more recently received increasing attention in the (legal) literature. Viewed through this quite useful and enlightening prism of republicanism, the more complex, pluralistic legitimation approaches comprising of "input-oriented" as well as "output-oriented" elements, intended also to provide

respective critical remarks by the Federal Constitutional Court of Germany in its judgment of 30 June 2009 on the constitutionality of the Lisbon Reform Treaty, BVerfGE 123, 267 (379-380).

36 See already *supra* under A.

37 On this perception see also already for example *Isensee*, Salus publica – suprema lex?, 39 *et seq.*; *Isensee*, in: Gröschner/Lembcke (eds.), Freistaatlichkeit, 163 (165 and 169); *Gröschner*, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, Vol. II, § 23, para. 40; *Nowrot*, Das Republikprinzip in der Rechtsordnungengemeinschaft, 382 *et seq.*; *Kluth*, Parlamentarische Gesetzgebung, 12; *Jestaedt*, Demokratieprinzip und Kondominialverwaltung, 160; *Anderheiden*, Gemeinwohl in Republik und Union, 298; *Seiler*, Der souveräne Verfassungsstaat, 126 *et seq.*; *Horn*, in: Depenheuer/Grabenwarter (eds.), Verfassungstheorie, § 22, paras. 25 *et seq.*; *Depenheuer*, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, Vol. III, § 36, para. 47; *Peuker*, Bürokratie und Demokratie in Europa, 193 *et seq.*; *Huber*, in: Bauer/Huber/Sommermann (eds.), Demokratie in Europa, 491 (512).

38 Concerning the republican roots of the orientation towards the common good see, e.g., *Michelman*, Florida Law Review 41 (1989), 443 (445); *Müller-Franken*, Der Staat 44 (2005), 19 (27); *Klein*, Die Öffentliche Verwaltung 62 (2009), 741 (745); *Sellers*, Kentucky Law Journal 86 (1997/98), 1 (2); *Gröschner*, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, Vol. II, § 23, paras. 40 *et seq.*; *van Gerven*, The European Union, 213; *Anderheiden*, Gemeinwohl in Republik und Union, 225 *et seq.*; *Delbrück*, Indiana Journal of Global Legal Studies 2 (1994), 45 (64); *Tomkins*, Our Republican Constitution, 61 *et seq.*; *Doehring*, Allgemeine Staatslehre, para. 322; *Craig*, European Law Journal 3 (1997), 105 (114 and 116); *Kluth*, Parlamentarische Gesetzgebung, 12; *Criddle*, Georgia Law Review 46 (2011), 117 (126); *Gröpl*, Staatsrecht I, para. 529; *Kirchhof*, Die Allgemeinheit des Gesetzes, 271 *et seq.*; *Shepard*, Albany Government Law Review 2 (2009), 354 (362); *Johnson*, Fordham Law Review 79 (2010), 265 (291); *Sales*, Duke Law Journal 49 (1999), 339 (379); *Nowrot*, in: Gräfin von Schlieffen *et al.* (eds.), Republik, Rechtsverhältnis, Rechtskultur, 163 (194 *et seq.*); *Nowrot*, Das Republikprinzip in der Rechtsordnungengemeinschaft, 361 *et seq.* With regard to the relationship between public participation and the principle of republicanism see for example *Sunstein*, Yale Law Journal 97 (1988), 1539 (1541 *et seq.*, 1548 *et seq.*, 1555 *et seq.*); *Sunstein*, Chicago-Kent Law Review 66 (1990), 181 ("Republicans also put a high premium on active citizen participation in public affairs."); *Michelman*, Harvard Law Review 100 (1986), 4 (19); *Michelman*, Yale Law Journal 97 (1988), 1493 (1499 *et seq.*); *Nowrot*, Das Republikprinzip in der Rechtsordnungengemeinschaft, 408 *et seq.*; *Maihofer*, in: Benda/Maihofer/Vogel (eds.), Handbuch des Verfassungsrechts, § 12, para. 61; *Frankenberg*, Die Verfassung der Republik, 121 *et seq.*; *Craig*, Public Law and Democracy, 318 *et seq.*; *Craig*, European Law Journal 3 (1997), 105 (116 *et seq.*).

39 On the actual, or at least potential, relevance of the republican principle for the international system and its legal order see, from the perspective of legal scholars, already for example *Delbrück*, in: Beyerlin *et al.* (eds.), Festschrift für Rudolf Bernhardt, 777 (792 *et seq.*); *Delbrück*, Indiana Journal of Global Legal Studies 2 (1994), 45 *et seq.*; *Besson*, in: Besson/Martí (eds.), Legal Republicanism, 205 *et seq.*; *Klein*, Die Öffentliche Verwaltung 62 (2009), 741 (746 *et seq.*); *Klein*, in: Gräfin von Schlieffen *et al*. (eds.), Republik, Rechtsverhältnis, Rechtskultur, 141 *et seq.*; *Nowrot*, Das Republikprinzip in der Rechtsordnungengemeinschaft, 547 *et seq.*; *Sellers*, Republican Principles in International Law, 1 *et seq.*; *Sellers*, Connecticut Journal of International Law 11 (1996), 403 *et seq.*; *Sellers*, in: Besson/Martí (eds.), Legal Republicanism, 187 *et seq.*

40 With regard to the possibility and usefulness to apply the republican constitutional principle to the legal realm of the EU see, e.g., *von Bogdandy*, Common Market Law Review 42 (2005), 913 *et seq.*; *Klein*, Die Öffentliche Verwaltung 62 (2009), 741 (746 *et seq.*); *Nowrot*, in: Neuwahl/Haack (eds.), Unresolved Issues of the Constitution for Europe, 107 *et seq.*; *Craig*, European Law Journal 3 (1997), 105 (113 *et seq.*); *Gröschner*, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, Vol. II, § 23, para. 75; *Guérot*, Warum Europa eine Republik werden muss!, 84 *et seq.* and *passim*; *van Gerven*, The European Union, 213 *et seq.*; *Anderheiden*, in: Gräfin von Schlieffen *et al.* (eds.), Republik, Rechtsverhältnis, Rechtskultur, 127 *et seq.*; *MacCormick*, Questioning Sovereignty, 137 *et seq.*

a more solid level of legitimacy for comprehensive transnational regulatory regimes such as modern EU free trade agreements, thus actually have their normative foundation in the concept of democratic legitimacy as complemented by republican strands of legitimation.

C. Involvement of the General Public in the Negotiation of EU Regional Economic Integration Regimes

These republican supplements – among them especially the possibilities for the involvement of the general public as well as of individual non-state actors – have in particular more recently also been taken recourse to by EU institutions – and citizens – in the first phase of EU regional economic integration treaties, namely the negotiation of these agreements. Despite the challenges posed by what could be labelled the primarily executive approach to international (treaty) negotiations and the inherent limits to publicity and inclusiveness resulting from it,[41] the constitutional treaty framework of the EU provides now for in principle comparatively far-reaching stipulations in this regard; stipulations that have also inspired EU institutions to adopt in the present context a policy approach that is increasingly characterized by the fostering of transparency and the solicitation of stakeholders' input.[42]

Among these stipulations is the European citizens' initiative in accordance with Article 11 (4) TEU and Article 24 TFEU;[43] an instrument allowing for the possibility of political standard-setting by EU citizens, whose given relevance in the context of the common commercial policy in general and of EU free trade agreements in particular has more recently been subject to an important clarification by the General Court in the case of *Efler et al. v. European Commission*[44] dealing with the legality of a Commission's refusal to register the proposed European cititzens' intiative "Stop TTIP".[45] In addition, we witness in recent years a number of notable measures by EU institutions aimed at fostering transparency in the present context; an indispensable prerequisite for public participation as for example enshrined in Article 1 (2) and Article 10 (3) TEU as well as Article 15 TFEU. They include the (subsequent) publication of negotiating mandates by the Council[46] as well as the more recent practice of the Commission

41 Generally thereto for example *Tietje/Nowrot*, in: Morlok/Schliesky/Wiefelspütz (eds.), Parlamentsrecht, 1469 *et seq*.; as well as more specifically in the present context of negotiations of EU free trade agreements also *Wendel*, European Yearbook of International Economic Law 8 (2017), 61 (77); *Hoffmeister*, Archiv des Völkerrechts 53 (2015), 35 (38).

42 On this perception see also, e.g., *Marceddu*, Journal of International Economic Law 21 (2018), 681 (693-694).

43 From the realm of secondary EU law see also Regulation (EU) No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens' Initiative, OJ EU L 65/1 of 11 March 2011; as well as generally on this instrument for example European Commission, Report on the Application of Regulation (EU) No 211/2011 on the Citizens' Initiative, COM(2015) 145 final of 31 March 2015; European Commission, Report on the Application of Regulation (EU) No 211/2011 on the Citizens' Initiative, COM(2018) 157 final of 28 March 2018; *Guckelsberger*, Die Öffentliche Verwaltung 63 (2010), 745 *et seq.*; *Wendel*, European Yearbook of International Economic Law 8 (2017), 61 (63 *et seq.*); *Tiedemann*, Neue Zeitschrift für Verwaltungsrecht 31 (2012), 80 *et seq.*

44 General Court, Case T-754/14, *Michael Efler et al. v. European Commission*, judgement of 10 May 2017. See thereto also *Wendel*, European Yearbook of International Economic Law 8 (2017), 61 (68 *et seq.*).

45 See thereto initially European Commission, C(2014) 6501 final of 10 September 2014; as well as subsequently European Commission, Decision of 4 July 2017 on the Proposed Citizens' Initiative Entitled "Stop TTIP", C(2017) 4725 final of 4 July 2017. For further information on this proposal, which has been subsequently withdrawn by the organizers on 9 July 2018 see <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2017/000008/en?lg=en> (accessed 3 December 2018).

46 See for example Council of the European Union, Negotiating Directives for an Economic Integration Agreement with Canada of 24 April 2009, 9036/09 EXT 2 of 15 December 2015; Council of the European Union, Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America of 17 June 2013, 11103/13 DCL 1 of 9 October 2014; Council of the European Union, Negotiating Directives for a Free Trade Agreement with Countries of the Association of South East Asian Nations (ASEAN) on behalf

to publish certain documents related to ongoing treaty talks, among them in particular also original EU text proposals used in the respective negotiations.[47] Examples of the last-mentioned approach concern a number of EU text proposals related to, among others, the negotiations on a free trade agreement with Indonesia,[48] the negotiations on a respective treaty with New Zealand,[49] the negotiations of a free trade agreement with MERCOSUR (Argentina, Brazil, Paraguay and Uruguay),[50] the negotiations of a free trade agreement with Australia,[51] the negotiations of a modernized association agreement with Chile,[52] the negotiations of a free trade agreement with the Philippines,[53] as well as the negotiations of a Deep and Comprehensive Free Trade Area (DCFTA) with Tunisia.[54]

Finally, in the realm of participation by means of dialogues and consultations as envisioned in the paragraphs one to three of Article 11 TEU, it seems worth recalling that in recent years the Commission has initiated an increasing number of public consultations in the present context of international trade and investment relations, in particular also in connection with, or in preparations of, negotiations on the conclusion of free trade agreement with third countries. The oldest important example in this regard was the online public consultation process, in the period from 27 March 2014 until 13 July 2014, on investment protection and investor-to-state dispute settlement in the envisioned Transatlantic Trade and Investment Partnership Agreement with the United States of America.[55] In this comparatively short period of time, the Commission received a total of nearly 150.000 replies;[56] a fact that clearly underlines again the changing character of international economic law as an increasingly political law.[57] Subsequent topics of public consultations initiated by the Commission included the future of EU-Mexico trade and economic relations (2 July to 31 August 2015), the future of EU-Australia and EU-New Zealand trade and economic relations (11 March to 3 June 2016), a possible

of the European Community and its Member States of 2 April 2007, 8104/07 EXT 1 of 4 March 2016; Council of the European Union, Directives for the Negotiation of a Free Trade Agreement with Japan of 29 November 2012, 15864/12 ADD 1 REV 2 DCL 1 of 14 September 2017; Council of the European Union, Directives for the Negotiation of a Modernised Association Agreement with Chile of 8 November 2017, 13553/17 ADD 1 DCL 1 of 22 January 2018; Council of the European Union, Negotiating Directives for a Free Trade Agreement with Australia of 8 May 2018, 7663/18 ADD 1 DCL 1 of 25 June 2018; Council of the European Union, Negotiating Directives for a Free Trade Agreement with New Zealand of 8 May 2018, 7661/18 ADD 1 DCL 1 of 25 June 2018; as well as, albeit only indirectly related to EU free trade agreement negotiations, Council of the European Union, Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes of 1 March 2018, 12981/17 ADD 1 DCL 1 of 20 March 2018.

47 See thereto also more recently European Commission, Transparency Policy in DG TRADE, November 2018, available under: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395> (accessed 3 December 2018).

48 See the respective information and documents available under: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1620> (accessed 3 December 2018).

49 See the respective information and documents available under: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1867> (accessed 3 December 2018).

50 See the respective information and documents available under: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1769> (accessed 3 December 2018).

51 See the respective information and documents available under: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1865> (accessed 3 December 2018).

52 See the respective information and documents available under: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1793> (accessed 3 December 2018).

53 See the respective information and documents available under: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1637> (accessed 3 December 2018).

54 See the respective information and documents available under: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1490> (accessed 3 December 2018).

55 See thereto also the information under: <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179> (accessed 3 December 2018).

56 On this number as well as for further details see in particular also European Commission, Report – Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), SWD(2015) 3 final of 13 January 2015.

57 See thereto already *supra* under A.

modernization of the trade part of the EU-Chile association agreement (9 June to 31 August 2016), the negotiations on a deep and comprehensive free trade agreement between the EU and Tunisia (21 November 2016 to 22 February 2017), the implementation of the EU-Korea free trade agreement (8 December 2016 to 3 March 2017) as well as a multilateral reform of investment dispute resolution (21 December 2016 to 15 March 2017).[58]

D. Public Participation in the Implementation Phase of EU Free Trade Agreements

Although occasionally overlooked or underestimated, the possibilities for public participation are currently not confined to the negotiation phase of regional economic integration agreements concluded by this supranational organization. Rather, more recent EU free trade agreements also increasingly foresee venues and mechanisms for the active involvement of interested and affected individuals and other private actors in the subsequent implementation as well as progressive development of these steering regimes; thereby also acknowledging the character of these trade and investment treaties as "living instruments"[59] that benefit from continued, and again in particular also republican, means of legitimation.

In order to illustrate this more participatory and inclusive approach agreed upon by the contracting parties of modern EU free trade agreements, attention might be drawn here to three different regulatory concepts and frameworks that have more recently become increasingly common features of regional economic integration agreements concluded by this supranational organization and its member states. The first of these steering approaches concerns the possibilities for public participation in the field of trade and sustainable development as well as, quite closely related, with regard to covered trade-related labor and environmental issues.[60] To mention initially but one example, Article 237 of the EU Association Agreement with Georgia, signed on 27 June 2014 and entering into force on 1 July 2016,[61] stipulates in this regard that each contracting party "shall ensure that any measure aimed at protecting the environment or labour conditions that may affect trade or investment is developed, introduced and implemented in a transparent manner, with due notice and public consultation, and with appropriate and timely communication to and consultation of non-state actors".

Furthermore, with regard to the institutional dimension of public participation, Article 240 (4) of the EU-Georgia Association Agreement requires the parties to "convene new or

58 For additional information on these as well as numerous other public consultations initiated by the Commission see: <https://ec.europa.eu/info/consultations_en> (accessed 3 December 2018).

59 See in this connection for example on the perception of the European Convention on Human Rights as a "living instrument" European Court of Human Rights (ECHR), *Tyrer v. United Kingdom*, Appl.-No. 5856/72, judgement of 25 April 1978, para. 31 ("The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions."); as well as, e.g., ECHR, *Demir and Baykara v. Turkey*, Appl.-No. 34503/97, judgement of 12 November 2008, para. 68; ECHR, *Rantsev v. Cyprus and Russia*, Appl-No. 25965/04, judgement of 7 January 2010, para. 277; *Wildhaber*, in: Arsanjani *et al.* (eds.), Essays in Honor of W. Michael Reisman, 569 (571 *et seq.*); *Letsas*, in: Fitzmaurice/Elias/Merkouris (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties, 257 (263 *et seq.*); with regard to the realm of primary EU law see for a quite similar view on the EU treaties for example *Lenaerts/Gutiérrez-Fons*, Common Market Law Review 47 (2010), 1629 (1669) ("'EU's living constitution'"); *Schwarze*, Deutsches Verwaltungsblatt 126 (2011), 721 (722); as well as finally concerning the normative character of the Charta of the United Nations as a "flexible, living constitution" or a "living instrument" *Delbrück*, in: Akkerman *et al.* (eds.), Liber Amicorum Bert V.A. Röling, 73 (79); *Fassbender*, The United Nations Charter, 130 *et seq.*

60 See thereto also already for example *Nowrot*, ZEuS – Zeitschrift für europarechtliche Studien 20 (2017), 493 (504).

61 OJ EU L 261/4 of 30 August 2014.

consult existing domestic advisory group(s) on sustainable development with the task of advising on issues relating to this Chapter. Such group(s) may submit views or recommendations on the implementation of this Chapter, including on its (their) own initiative." These domestic advisory groups "shall comprise independent representative organisations of civil society in a balanced representation of economic, social, and environmental stakeholders, including, among others, employers and workers organisations, non-governmental organisations, business groups, as well as other relevant stakeholders" (Article 240 (5) EU-Georgia Association Agreement). In addition, a joint civil society dialogue forum is created on the basis of Article 241 of this agreement that shall be convened once a year in order to conduct a dialogue between the contracting parties and relevant non-state actors on sustainability aspects including environmental concerns.[62] With regard to the composition of the forum, the parties have committed themselves to promote – in the words of Article 241 (1) – "a balanced representation of relevant interests" and stakeholders by inviting, *inter alia*, representative organizations of employers, workers, environmental interests and business groups to participate in the dialogue forum. Moreover, Article 23.8 (5) of CETA even stipulates with regard to covered labor issues that each contracting party "shall be open to receive and shall give due consideration to submissions from the public on matters related to this Chapter, including communications on implementation concerns. Each Party shall inform its respective domestic labour or sustainable development advisory groups of those communications".[63] Quite similar procedural and institutional frameworks aimed at facilitating the participation of citizens and of other non-state actors are stipulated, among others, in the Articles 13.9 *et seq.* of the free trade agreement between the EU and its member states, of the one part, and the Republic of Korea, of the other part, signed on 6 October 2010 and in force since 13 December 2015,[64] in Article 299 of the EU-Ukraine Association Agreement that entered into force on 1 September 2017,[65] in the Articles 12.13 *et seq.* of the free trade agreement between the EU and the Republic of Singapore as signed on 19 October 2018,[66] in the Articles 373 *et seq.* of the EU-Moldova Association Agreement[67] as well as in the Articles 16.10 of the Economic Partnership Agreement signed by the EU and Japan on 17 July 2018.[68]

A second steering approach of relevance in the present context concerns the possibilities for private actor participation in the field of regulatory cooperation.[69] Article 21.8 of CETA stipulates in this regard that in order to "gain non-governmental perspectives on matters that relate to the implementation of this Chapter [on regulatory cooperation], 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." Implementing this stipulation, the European Commission initiated, among others, a public consultation on proposals for regulatory cooperation activities in the

62 For a general account of this regulatory approach in economic integration agreements see, e.g., OECD, Environment and Regional Trade Agreements, 2007, 149 *et seq*.

63 A similar provision with regard to covered environmental issues is enshrined in Article 24.7 (3) of CETA.

64 OJ EU L 127/6 of 14 May 2011.

65 OJ EU L161/3 of 29 May 2014.

66 The text of the EU-Singapore Free Trade Agreement is for example available under: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (accessed 3 December 2018).

67 OJ EU L 260/4 of 30 August 2014.

68 The text of the EU-Japan Economic Partnership Agreement is for example available under: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684> (accessed 3 December 2018).

69 Generally on the concept of regulatory cooperation with particular reference to regional economic integration agreements see, e.g., *Nowrot*, Zeitschrift für Gesetzgebung 31 (2016), 1 *et seq*., with numerous further references.

Regulatory Cooperation Forum under CETA in February 2018.[70] Comparable participatory approaches are for example enshrined in the Articles 18.7 and 18.10 of the EU-Japan Economic Partnership Agreement.

Finally, a third participatory option worth at least briefly drawing attention to relates to the involvement of representatives of the general public and other non-state actors in the dispute settlement mechanisms established under EU free trade agreements. Article 14.15 of the EU-Korea Free Trade Agreement together with Article 11 of Annex 14-B (Rules of Procedure for Arbitration) of this treaty foresees in principle, albeit subject to certain qualifications,[71] the competence of the arbitration panel to receive "unsolicited written submissions from interested natural or legal persons of the Parties, provided that they are made within 10 days of the date of the establishment of the arbitration panel, that they are concise and in no case longer than 15 typed pages, including any annexes, and that they are directly relevant to the factual and legal issues under consideration by the arbitration panel" (Article 11 (1) of Annex 14-B). This possibility for non-state actors to submit *amicus curiae* briefs[72] to the arbitration panel in dispute settlement proceedings between the contracting parties of the regional economic integration agreement at issue – an approach that has been already for a number of years time quite controversially debated in the realm of WTO dispute settlement[73] as well as in the area of investor-state arbitration proceedings[74] – is for example also enshrined in Article 264 in connection with Annex XX, paras. 37 *et seq.* of the EU-Georgia Association Agreement, in Article 14.17 (2) in connection with Annex 14-A, paras. 42 *et seq.* EU-Singapore Free Trade Agreement, in Article 3.41 (2) in connection with Annex 9, paras. 42 *et seq.* of the Investment Protection Agreement between the EU and its member states, of the one part, and the Republic of Singapore, of the other part, signed on 19 October 2018,[75] in Article 400 in connection with Annex XXXIII, paras. 37 *et seq.* of the EU-Moldova Association Agreement, in Annex 29-A, paras. 43 *et seq.* of CETA, in Article 319 in connection with Annex XXIV, paras. 37 *et seq.* EU-Ukraine Association Agreement as well as in Article 21.17 of the EU-Japan Economic Partnership Agreement.

Furthermore, specifically with regard to investor-state disputes settlement proceedings, a quite similar participatory option for interested natural and legal persons in the form of submitting *amicus curiae* briefs is foreseen in Article 8.36 (1) of CETA in connection with Article 4 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, effective

70 See thereto the information under: <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=248> (accessed 3 December 2018). On the respective public consultation initiated by the Canadian government in the period between 10 February and 11 April 2018 see the information under: <https://open.canada.ca/data/en/dataset/c45c4cda-7134-4e65-8e99-5214eb07bcf3> (accessed 3 December 2018).

71 See in particular Article 11 (1) of Annex 14-B of the EU-Korea Free Trade Agreement: "Unless the Parties agree otherwise within three days of the date of the establishment of the arbitration panel, […].".

72 Generally on the historical development and functions of *amicus curiae* submissions see for example already *Krislov*, Yale Law Journal 72 (1963), 694 *et seq.*; *Wiik*, Amicus Curiae before International Courts and Tribunals, 43 *et seq.*, 74 *et seq.*; *Ruthemeyer*, Der amicus curiae brief im Internationalen Investitionsrecht, 42 *et seq.*, 63 *et seq.*

73 On the respective discussions with regard to the WTO legal order see already some time ago, e.g., *Howse*, European Law Journal 9 (2003), 496 *et seq.*; *Umbricht*, Journal of International Economic Law 4 (2001), 773 *et seq.*; *Razzaque*, Non-State Actors and International Law 2 (2002), 169 *et seq.*; *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 398 *et seq.*; *Wiik*, Amicus Curiae before International Courts and Tribunals, 109 *et seq.*

74 Concerning the position of *amicus curiae* briefs in international investor-state arbitration proceedings see for example *Levine*, Berkeley Journal of International Law 29 (2011), 200 (208 *et seq.*); *Fach Gómez*, Fordham International Law Journal 35 (2012), 510 (534 *et seq.*); *Wiik*, Amicus Curiae before International Courts and Tribunals, 115 *et seq.*; *Tams/Zoellner*, Archiv des Völkerrechts 45 (2007), 217 *et seq.*; *Ruthemeyer*, Der amicus curiae brief im Internationalen Investitionsrecht, 78 *et seq.*; *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, Article 44, Rn. 122 *et seq.*; *Zachariasiewicz*, Journal of International Arbitration 29 (2012), 205 *et seq.*

75 The text of this investment agreement is for example available under: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (accessed 3 December 2018).

since 1 April 2014,[76] as well as in Article 3 of Annex 8 ("Rules on Public Access to Documents, Hearings and the Possibility of Third Persons to Make Submissions") of the EU-Singapore investment agreement signed on 19 October 2018.

E. Is it Enough?

In light of these in principle quite remarkable – and, quantitatively speaking, surely not modest – possibilities for the involvement of the general public as well as individual non-state actors during the negotiation phase of regional economic integration agreements concluded by the EU as well as in particular also during the subsequent implementation phase of this new generation of treaties, we finally turn to what amounts probably to be the most challenging issue: Do these republican elements of legitimation, most certainly viewed together with the main pillars of democratic legitimacy of the EU common commercial policy provided by the European Parliament,[77] the governments of the EU member states acting in the Council as well as the parliaments at the national level, establish as a whole a sufficient level of legitimacy for the modern type of EU free trade agreements and the regulatory features stipulated therein? There seems to be no easy answer available, already in light of the incontrovertible finding that attributing and measuring legitimacy is very far from a mathematical operation. Much has already been – and much more could surely be – said about this issue. Nevertheless, for the purposes of this comparatively short contribution, I intend to confine myself here to two remarks.

First, there appears to be an increasing awareness among EU institutions and member states that the participatory opportunities for private actors, including the general public, specifically also during the implementation phases of regional economic integration agreements can be, and in fact should be, further enhanced. This is for example evidenced by the findings made in the non-paper "Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements" more recently published by the Commission services on 26 February 2018.[78] Among the issues, identified and discussed in a respective consultation process involving, among others, the European Parliament, EU member states, the European Economic and Social Committee, civil society groups, businesses as well as academics, and being of relevance in the present context are the exchange of best practices between the domestic advisory groups established under the different free trade agreements as well as the creation of clear and transparent rules as well as procedures for respective civil society structures.[79]

76 The text of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration is for example available under: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html> (accessed 3 December 2018).

77 Generally on the considerably increased parliamentarization of the EU common commercial policy on the basis of the Lisbon Treaty see, e.g., *Krajewski*, in: Bungenberg/Herrmann (eds.), Common Commercial Policy after Lisbon, 67 *et seq.*; *Bungenberg*, European Yearbook of International Economic Law 1 (2010), 123 (129 *et seq.*); *Bungenberg*, ZEuS – Zeitschrift für europarechtliche Studien 20 (2017), 383 (386 *et seq.*); *Cremona*, European Yearbook of International Economic Law 8 (2017), 3 (26 *et seq.*).

78 Non-Paper of the Commission Services, Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements, 26 February 2018, available under: <http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf> (accessed 3 December 2018). See thereto also, e.g., *Potjomkina*, Multistakeholderism in the EU's Trade Governance, 3 *et seq.*

79 See thereto Non-Paper of the Commission Services, Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements, 26 February 2018, p. 5, available under: <http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf> (accessed 3 December 2018).

Other innovations, intended to improve public participation in the enforcement of free trade agreements, include a considerable broadening of the material scope of competences of the domestic advisory groups as well as the joint civil society fora[80] by covering not merely the issue of trade and sustainability but potentially the implementation of the whole free trade agreements;[81] an approach envisioned by the EU to be put into treaty practice beginning with the EU-Mexico free trade treaty on which an agreement in principle has been announced by the parties in April 2018.[82] Finally, to mention but one further example, the document foresees – aside from a more general commitment of the Commission to improved transparency and communications in trade policy and negotiations – a more efficient system to respond to submissions received from citizens and other stakeholders. In this regard, the non-paper states, *inter alia*, that the "Commission services are committed to responding to written submissions from citizens on TSD [trade and sustainable development] in a structured, transparent and time-bound way. In particular, the Commission will acknowledge receipt within 15 working days, indicating the responsible services, and presenting opportunities for submitting additional information. It will respond within two months from the date of receipt providing information about any follow up, and including justification of any action taken. Should an additional period of time for analysis be needed, because of the complexity of the matters raised, the Commission will inform the author as soon as possible and within the above mentioned time-limit, indicating the necessary extra time needed".[83] Viewed from an overarching perspective of legal theory, these ongoing attempts aimed at improving the participation of citizens and other non-state actors in the implementation of EU free trade agreements clearly correspond to the normative character of the republican legitimation factors as principles and thus as "optimization requirements relative to what is legally *and* factually possible"[84] at a given time.[85]

Second, and with regard to the respective allocation of decision-making competences in the present context, it seems worth recalling that the determination whether a sufficiently high level of legitimacy for the modern type of EU free trade agreements has been achieved is most certainly not made by (legal) scholars with any legitimate claim to ultimate authority but, first, by those political actors that have the competence and decide to sign as well as ratify the international agreements at issue and, second, by those supranational and domestic judicial bodies entrusted with the task of assessing these treaties in light of respective constitutional requirements, as well as, third and ultimately, by the peoples of Europe themselves by, among others, participating in elections at the regional, national and supranational level. This last-mentioned finding does not only hint at another very fundamental element of public participation in connection with EU regional economic integration agreements but also seems, and in fact should be perceived as being, quite reassuring from the perspective of democratic and republican self-government as a whole.

80 See thereto also already *supra* under D.

81 See thereto Non-Paper of the Commission Services, Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements, 26 February 2018, p. 6, available under: <http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf> (accessed 3 December 2018).

82 On the negotiations of a new EU-Mexico free trade agreement see the information provided on the internet under: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/mexico/> (accessed 3 December 2018).

83 Non-Paper of the Commission Services, Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements, 26 February 2018, p. 12, available under: <http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf> (accessed 3 December 2018).

84 *Alexy*, A Theory of Constitutional Rights, 67 (emphasis in the original).

85 Generally on the allocation of the republican principle within the discussion on the distinction between rules and principles see *Nowrot*, Das Republikprinzip in der Rechtsordnungengemeinschaft, 505 *et seq.*, with numerous further references.

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