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Hotel Bayerischer Hof

**Topic: European Patent Convention, Unified
Patent Court and the German Basic Law**

Preliminary remarks:

The below is a more comprehensive academic legal treatise on the above topic, on which the evening's 30-minute speech is based. This is intended to give people the opportunity to reflect on the topic under their own steam and with some critical distance.

A. Introduction

1. On 13 February 2017 the German Federal Government proposed a bill on the Agreement on a Unified Patent Court dated 19 February 2013 (BT-Drs. 18/11137). According to its opening rationale (A. Problem and objective), this Agreement is to form the cornerstone for the reform of the European patent system, which has been on the cards since the 1960s. The aim of this reform is to strengthen the parameters for the innovative industry within the European internal market over the long term by providing better protection for inventions. This measure is considered to be of special economic significance because, it is claimed, it will establish comprehensive and unified patent protection across Europe for the future. It is further claimed that this can be implemented cost-effectively and realised efficiently in proceedings before the Unified Patent Court with effect for all participating EU member states.

2. Thus, a new association of states is being planned at European level. Given that there is no shortage of associations of states in Europe and around the world, we will naturally start by considering the appropriate foundations for associations of states. To do so we need to carefully and conscientiously take stock of what already “exists in the world” (detached from the managed political and lobbying influences) and the foreseeable repercussions of the project, which any responsible assessment of the “added value” of this project needs to include.

3. In order to develop this far-reaching principle for associations of states, I rely on numerous earlier and recent analyses and observations. I won't quote them individually here, but will refer to them selectively below (further references and documents are archived in the Broß Archive of the Bavarian Bar Association and the library of the Federal Constitutional Court):

Überlegungen zu den Grundlagen von Staatenverbindungen, Festschrift für Herbert Landau, Tübingen 2016, p. 29 et seq.; Wenn rechtsstaatlich-demokratische Ordnungsrahmen stören oder hinderlich sind – Überlegungen zur Entstehung von Parallelwelten –, Festschrift für Wolfgang Krüger, Munich 2017, p. 533 et seq.; Die Patenterteilungspraxis nach dem EPÜ – Erosion des

Rechtsstaates?, GRUR Int. 2017, p. 670 et seq.; Freihandelsabkommen, einige Anmerkungen zur Problematik der privaten Schiedsgerichtsbarkeit. In: Reihe Mitbestimmungsförderung, Report no. 4, ed. Hans-Böckler-Stiftung, Düsseldorf, January 2015; TTIP und CETA. Überlegungen zur Problematik der geplanten Freihandelsabkommen der Europäischen Union mit den Vereinigten Staaten von Amerika und Kanada, Schriften zur kommunalen Daseinsvorsorge, volume 4, Berliner Wassertisch, 2015; Einheitspatent und Einheitliches Patentgericht im europäischen Integrationsprozess – verfassungsrechtliche Perspektive, Zeitschrift für Geistiges Eigentum 2014, p. 1 ff.; Grundrechte und Grundwerte in Europa, JZ 2003, p. 429 et seq.; Überlegungen zum gegenwärtigen Stand des europäischen Einigungsprozesses – Probleme, Risiken und Chancen, EuGRZ 2002, p. 574 et seq.; Nationaler und europäischer Schutz der Bürger- und Menschenrechte, presentation on 3 September 2010 in Rastatt, First Gustav Heinemann Forum, published 2011 (Humanistische Union); Europa – Gesellschaft im Wandel, presentation on 28 September 2012, Freiburg/Breisgau, DAAD-Alumnitreffen; Bundesverfassungsgericht – Europäischer Gerichtshof – Gerichtshof für Kompetenzkonflikte, VerwArch 92 (2001), p. 425 et seq.; Rechtsschutzprobleme im Mehrebenensystem, VerwArch 97 (2006), p. 332 et seq.

4. That being so, our first task is to explore the initial considerations on the Agreement on a Unified Patent Court and see how they fit with the appropriate and adequate bases for associations of states. I refer to this below as the macro-level (B.), which I always establish and observe first of all for this and comparable issues. This is followed by a discussion of selected structural elements of the Agreement on a micro-level (C.). The presentation closes with an outlook (D.).

B. Macro-level

- I. Of the various considerations related to this topic, the initial considerations on the Agreement cited below are worth looking at:
 - CONSIDERING that the fragmented market for patents and the significant variations between national court systems are detrimental for innovation, in particular for small and medium sized enterprises which have difficulties to enforce their patents and to defend themselves against unfounded claims and claims relating to patents which should be revoked;
 - CONSIDERING that the European Patent Convention ("EPC") which has been ratified by all Member States of the European Union provides for a single procedure for granting European patents by the European Patent Office;
 - WISHING to improve the enforcement of patents and the defence against unfounded claims and patents which should be revoked and to enhance legal certainty by setting up a Unified Patent Court for litigation relating to the infringement and validity of patents;
 - CONSIDERING that the Court of Justice of the European Union is to ensure the uniformity of the Union legal order and the primacy of European Union law;
 - RECALLING the obligations of the Contracting Member States under the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), including the obligation of sincere cooperation as set out in Article 4(3) TEU and the obligation to ensure through the Unified Patent Court the full application of, and respect for, Union law in their respective territories and the judicial protection of an individual's rights under that law;
 - CONSIDERING that, as any national court, the Unified Patent Court must respect and apply Union law and, in collaboration with the Court of Justice of the European Union as guardian of Union law, ensure its correct application and uniform interpretation; the Unified Patent Court must in particular cooperate with the Court of Justice of the European Union in properly

interpreting Union law by relying on the latter's case law and by requesting preliminary rulings in accordance with Article 267 TFEU;

- RECALLING the primacy of Union law, which includes the TEU, the TFEU, the Charter of Fundamental Rights of the European Union, the general principles of Union law as developed by the Court of Justice of the European Union, and in particular the right to an effective remedy before a tribunal and a fair and public hearing within a reasonable time by an independent and impartial tribunal, the case law of the Court of Justice of the European Union and secondary Union law;
- CONSIDERING that this Agreement should be open to accession by any Member State of the European Union; Member States which have decided not to participate in the enhanced cooperation in the area of the creation of unitary patent protection may participate in this Agreement in respect of European patents granted for their respective territory.

- 1a. The initial considerations selected here offer various starting points for considering the general principles around associations of states. Intellectually, the first consideration needs to be about what level the new association of states to be created by the Unified Patent Court will be located on. We therefore need to clarify the setting for this new association of states and its position within the existing associations of states that will be affected by the new association of states. To do so, we need to identify and make a proper assessment of the levels of these associations of states that this affects, the interdependencies and obligations between them and, crucially, the political impacts from the states' dealings with one another, leaving the network of legal relationships aside. Only then can we properly "get to work" with the requisite critical distance and the exclusion of external system influences.
- b. As a next step it makes sense to consider the potential members of the new association of states. First we need to establish the starting position for each potential member state as well as its material interests. A likely outcome is a

significant agreement between the states that are potential members, although that is not necessarily the case.

Often, this issue doesn't get the attention it deserves and it's hard, if not impossible, to tell whether the actors are dealing with the issue responsibly. Political will that ignores this issue and the actual circumstances based upon it does no one any favours. Ultimately, what's actually a very welcome idea could become unnecessarily burdened or its cogency reduced. This poses a potential risk of at least a partial collapse.

Brexit is evidence of this, and similarly the severe euro crisis was caused by mistakes made by the political actors during the foundation and development of the European Union in ignoring the above considerations about acceding to associations of states. We can see this in the common clichés and platitudes such as “the finality of Europe”, “irreversible dynamic process” and “no alternative” that are used to explain and support political actions. They actually point to cluelessness and helplessness.

- c. In terms of the potential member states, dual and multiple memberships of the numerous existing associations of states may arise, which create a coordination problem. However, that is by no means all. Instead, during the “pre-foundation phase” in such cases we need to consider very carefully, responsibly and conscientiously whether and under what circumstances various memberships in existing associations of states may cause bumps, frictions or even incompatibilities for the intended new association of states that could erupt after it is set up. Establishing such an association of states on such a “debased” foundation in the vague hope that no one will notice or it won't happen is of little use.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is a good example. The member states of the European Union are also member states of the Convention, as are many other states. The member states of the European Union are bound under international law and all member states of this association of states can rightly

expect that each member state will meet its obligations under the Convention and will satisfy them without reservation. It is therefore unclear what “added value” the European Union’s accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms is supposed to generate. On the contrary: it necessarily gives rise to coordination and harmonisation issues. These can no longer be dealt with in a constitutionally satisfactory manner, because the obligations of the member states of the European Union towards it and those of the existing member states to the European Convention on Human Rights can no longer function autonomously.

Consequently, if the European Union as an association of states accedes to the Human Rights Convention, any breach of the Convention established by the European Court of Human Rights must at the same time result in a liability of all member states of the European Union as its “sponsors”, unless it can be assumed that the European Union is a comprehensive European federal state. This has not been the case to date due to the central structural principle of conferred powers. I additionally refer to the expert’s opinion of the European Court of Justice of 18 December 2014 (C-2/13).

2. On the macro-level, a distinction should be made between two areas that are externally separate, but nonetheless closely intertwined as a result of their interrelationships. These each follow their own rules; however, for the final assessment of the European Patent Organisation as an association of states, they need to be brought together and accordingly considered as a single unit in legal terms:

The area that is most commonly focused on by the participants and the public relates to the purpose and subject matter of the association of states. After all, this is what ultimately gave rise to the project. In the case of the European Patent Organisation, this is the procedure for granting a patent. This also gets a good deal of attention – not always the due amount – and the responsible actors underestimate, neglect or simply lose sight of the scope of other areas that are similarly substantive to an accession to the association of states.

For many associations of states, this is actually the “beating heart” when we take a conscientious and responsible look. These are the staff of the association of states being established and the arrangement of their employment relationships both institutionally and under employment-law.

- a. Things in this context have been in a sorry state for decades. On accession to associations of states, this area is afforded inadequate attention both normatively and structurally – as shown by the decisions of the Federal Constitutional Court on EuroControl (cf. Broß, VerwArch 97 (2006), p. 332 et seq.) and – similarly unsuccessful thus far – constitutional complaints against decisions of the Boards of Appeal and the Enlarged Board of Appeal of the European Patent Office. The contracting states simply abdicate their responsibility to guarantee and effectively safeguard human rights and to ensure adequate judicial monitoring.

This institutional monitoring must be set up within the future association of states. This was overlooked previously when EuroControl was set up. The member states of such an association of states that exists below the level of United Nations global law are subject to a wide range of obligations under international law regarding the observance and guaranteeing of human rights. Let's start with the United Nations Universal Declaration of Human Rights, which, irrespective of its validity and scope, constitutional democracies in particular should not neglect given their claim to validity and their aspiration to set an example to other states when acceding to such associations of states. The European Convention for the Protection of Human Rights and Fundamental Freedoms has also applied at the European level for decades. Further, the member states of the European Union have long been bound by the European Charter of Fundamental Rights.

These very obligations at the level of international law ought to sensitise any states forming an association with the purpose of jointly tackling a role of state due to its international impact to the fact that this project cannot relieve them of their duty to observe and guarantee globally applicable standards of human rights for the people acting in the service of this organisation. Rather, due to

the member states' individual responsibilities under international law, the specified canons oblige them to set up institutions within the new association of states that comply with employment law, social provisions and that afford effective legal protection. Member states are also required to monitor these institutions under constitutional and democratic principles. This requirement derives from their individual national constitution. These obligations are not negotiable, and the German Basic Law reminds us of this in no uncertain terms for the Federal Republic of Germany, with the fixed and immutable obligation for the unrestricted protection of human dignity in Art. 1 para. 3, and the principle of the social state governed by the rule of law in Art. 20 para. 1 and 3 as well as Art. 79 para. 3.

- b. Transferring the guarantee for and legal protection of the staff of such an association of states to another, external association of states that for its part is not subject to the supervision and monitoring of the transferring association of states cannot be reconciled with this starting position. This means that the status of the staff of the association of states and the guarantee of their human rights positions becomes negotiable. However, a state does not have the discretion to decide whether human rights are observed. It cannot dispense with its obligations in this regard by participating in an association of states and arranging its organisational structure accordingly.

Let's use an example to illustrate this. For many years, the European Union and its member states have admonished how many states around the world observe and guarantee human rights – except when this is not deemed financially opportune, in which case it is at best mentioned passing, or even totally ignored. In recent years terrible catastrophes with hundreds of workers for companies from the western world killed due to inhumane working conditions in distant countries raised the question of whether and to what extent commercial enterprises with transnational operations are responsible for observing and complying with human rights of the people who work for them in such places. That being so, the current systemic contradiction of the behaviour and the action of European states, which are subject to the numerous non-negotiable obligations under international law and their

constitutions as we have discussed, must not be further overlooked, let alone argued away.

- c. In this regard, the case law of the Federal Constitutional Court is of little assistance. I demonstrated this in a larger context in VerwArch 92 (2001), p. 425 et seq. and VerwArch 97 (2006), p. 332 et seq. and FS Krüger, p. 29 et seq. We need to note the following in the context of the pending proceedings of the constitutional complaint before the Federal Constitutional Court:

Let's start from the judgment of the Second Senate dated 13 October 2016 in the proceedings on the constitutionality of the approval law on the free trade agreement between the European Union and Canada (BVerfGE 143, 65). The proceedings relate to the issue of a temporary injunction. In this context, let's first look at a passage that relates to the consideration for the pros and cons of the issue of a temporary injunction.

By way of introduction, the Federal Constitutional Court says that if the German Federal Government is forbidden from approving the provisional application of this agreement, this would be a significant encroachment on the – fundamentally broad – leeway of the German Federal Government in questions of European, foreign and foreign commercial policy (BVerfGE 143, 65, S.91).

First, it's worth noting that this is clearly to do with how the levels of international, European and national law of the contracting states are intertwined, which is dependent on the current stage of contractual negotiations. Above all, it is misguided (cf. the decision applied in BVerfGE 80, 74, p. 79 f.) to want to apply principles of international law to interstate relations at the European level.

This is particularly clear when we look at the free trade agreement. On the one hand, the member states did not draft an unambiguous and clearly constituted negotiating mandate for the EU Commission, nor did they follow the procedure and activity with the requisite constitutional and democratic assiduity. The actions, also concealed from the parliamentary public, speak for themselves

and cannot serve to prevent a potentially less comfortable situation from the perspective of international law. Participation internationally – i.e. also at EU level – does not legitimise the neglect of constitutional and democratic principles, the undermining of the democratic principle, and ultimately also disregard for human rights.

Further, the considerations of the Second Senate of the Federal Constitutional Court are informative, if not satisfactory. In terms of whether a temporary injunction against the further participation of the Federal Republic of Germany in the furtherance of the free trade agreement with Canada can be granted, the Federal Constitutional Court is of the opinion that the grounds for opposition require closer consideration. On this, the Federal Constitutional Court states:

“The reason for the scope of discretion on foreign matters is that the shape of international relations and courses of events cannot be determined solely by the will of the Federal Republic of Germany, but is variously dependent on circumstances that are outside its sphere of influence. To enable the various political objectives of the Federal Republic of Germany to be asserted within the framework of the permissible bounds of international and constitutional law, the German Basic Law thus permits the organs of foreign power a broad leeway in assessing matters with a significant impact on foreign policy such as the expediency of a potential course of action..... This leeway for the German Federal Government to make assessments and forecasts about the potential consequences of a free trade agreement between the European Union along with its member states and Canada on the basis of the negotiated draft of CETA as compared to alternative scenarios that predict the behaviour of Canada should CETA fail is subject to only limited oversight by the Constitutional Court.” (BVerfGE 143,65 <91>).

Similarly, the subsequent considerations of the Federal Constitutional Court are not able to allay fundamental reservations against its assessment. It continues:

“This applies in the same way to the European Union. Any failure of CETA, even only provisionally, would have far-reaching impacts on the negotiation and the conclusion of future foreign trade agreements, let alone the deterioration of foreign trade relationships between the European Union and Canada. Thus, it seems obvious that the grant of a temporary injunction would have a negative impact on European foreign trade policy and the international position of the European Union as a whole. This would particularly affect the political endeavours of the Union and its member states who are seeking to influence the standards within the arrangement of global trade relations so as to enhance the international reach of the values anchored in the EU legal system. The European Union’s negotiating position with Canada and also other states as potential contracting partners, as well as the Union’s clout in other foreign-policy contexts, would be significantly weakened if a provisional application – compliant with the customs of international law and already widely practised by the European Union – failed as the consequence of a temporary injunction by the Federal Constitutional Court.” (BVerfGE 143, 65 <91 f.>).

These considerations clearly identify the misunderstandings on accession to associations of states. It is patently difficult to identify the effect mechanisms, connections and more remote effects of the different levels within the business of international law, to determine what they are and pay them the requisite attention based on their significance and content both for the remaining world of states, and also specifically for people and for the protection of the human rights to which they were originally entitled, and protect people as a consequence.

- d. This applies equally to the free trade agreement planned by the European Union as well as the European Patent Convention and Agreement on a Unified Patent Court. The considerations of the Federal Constitutional Court only apply partially, not comprehensively, to the participation of the European Union, and derived from that or – only ever to a lesser extent – also to the Federal Republic of Germany. In terms of the projects of the European Union, we need to consider that EU is not an autonomous actor in the business of

international law when negotiating free trade agreements. It is bound by the negotiating mandate of the member states, and the subject matter of this mandate is limited to trade and economic relations (Art. 207 TFEU). However, this by no means covers everything that the Commission claims as its remit during the negotiations, such as investor protection, arbitral jurisdiction and regulatory cooperation. These negotiating issues clearly have nothing to do with responsibilities delegated to the European Union in accordance with the principal of conferred powers. Instead, what we are faced with is the infiltration and undermining of the democratic principle and the constitutional state aimed at a partial federal state controlled by non-transparent economic lobbyists and non-state courts of arbitration. This robs the member states of the European Union of a not insignificant part of their sovereignty and non-delegated statehood, and the European Union itself does not acquire any constitutional and democratic equivalence because it too has waived any effective monitoring and corrective authority. This is for instance counter to the function of the ECJ as the custodian of the treaties and constitutional court of the EU.

These misconceptions are also at the heart of the European Patent Convention if the member states enter into an association of states with other states to deal with a doubtless important and economically significant state task. However, we are not faced here with political expediencies in the business of international law brought about by the global situation, armed conflicts, and oppressive circumstances facing people, but actually the contrary: these are issues actually created by the member states of the European Union themselves. It is obvious that in this way – as with the free trade agreements – a problem complex must not be created that could provide the lever for significant compromises regarding human rights and constitutional and democratic foundations.

To that extent, the case law of the Federal Constitutional Court needs to be corrected if the key issue is not the comprehensive participation of the Federal Republic of Germany and the EU in the business of international law to resolve problems and crises of the global community or parts of the

community of states, but rather the common tackling of administrative procedures, economic positions, and general international legal business. Even if they are not to ultimately give rise to the formation of an association of states, such projects by no means legitimise the neglect or even disregard of human rights and the generally acknowledged constitutional and democratic principles, no matter how skilfully their guise is selected. The European Union has enough negative role models: Poland, Hungary and Turkey (to name just a few). It is disconcerting enough that it doesn't like to see comparable problems and violations under its own roof. It therefore can only claim a limited level of credibility and cogency for itself.

- e. The following should be noted as regards the structuring of the employment relationships of the staff of the European Patent Organisation – including the legal protection that must necessarily be granted under the canons mentioned at the outset. The guarantee of human rights and the safeguarding of effective legal protection for the staff of the association of states is a primary and substantial obligation as a member state of this new association of states. Connected to this is the fact that, faced with the formation of an association of states with its own legal personality and crowned with immunity, the member states cannot “relinquish” their separate individual obligations to guarantee and safeguard effective protection of human rights for the benefit of the staff. The transfer of legal disputes between the association of states and its staff to the ILO is not consonant with the European Charter of Fundamental Rights, the European Human Rights Convention, and the national catalogues of fundamental rights as well as the status of each individual member state as “master of the contract”.

It may be a difficult lesson to learn that as a state or association of states you are not allowed to outsource human rights, which at the same time would privatise them. The point of view and previous construction we are rejecting here is a veritable invitation to neglect the human rights of the staff and to expose them to arbitrary treatment. In this way each state would have the discretion to use associations of states – here the EU and the European Patent Organisation – to withdraw from elementary obligations for the

protection of people. From this it also follows that the specified decisions of the Federal Constitutional Court for associations of states below the level of United Nations international law requires careful review depending on the subject matter. If the subject matter relates to anything other than matters of trade and economic communication, it needs reformulating: in that context the business of international law is not neutral and above all does not have a constitutional and democratic character. In this case, the floodgates are opened for non-transparent influences and currents that cannot be controlled constitutionally and democratically.

3. First of all, it is clear that the only direct focus of the considerations about the intended project of setting up a patent court at European Union level is this central contractual issue. However, in view of the EU's value set, it is less understandable, and ultimately not acceptable, that it is appropriating a product – the patent granted by the European Patent Office – without considering the “production process” in which this was created. To that extent, we also need to look at the question of the responsibility of the member states of the EU as member states of the European Patent Organisation.

If we treat the obligations under the Charter of Fundamental Rights of the European Union and under the national constitutions to observe and guarantee the inviolability of the dignity of the human, of staff in working life and above that their right and entitlement to form associations as well as their right to their direct private sphere in working life as a serious manifestation of the inviolability of the dignity of the human and not merely a “nice-sounding statement“, the representatives of the governments of the member states of the EU ought to have been aware of the difficulties and negative developments via the administrative council of the European Patent Organisation. For instance, they should have noticed that the structure of the internal organisation of the European Patent Organisation exhibits significant deficits when it comes to the form of the employment relationships. Consequently, the product of the working process within the European Patent Office may not be used as a basis for the new association of states within the

EU due to irreconcilable contradictions with the EU's value set, and in particular due to the Charter of Fundamental Rights.

This point of view illustrates – also generally understandable for non-experts – the discussion regarding the observance of human rights in other states and, similarly, whether global enterprises that have manufacturing operations in remote countries and others (cf. EU Posted Workers Directive and the like) are responsible for the observance and safeguarding of human rights and primarily the dignity of the employee during the working process. In this context referring to exigencies resulting from the globalisation of state and economic relations and to the opposing forces of the other contracting partners in the context of associations of states – as happens increasingly and largely unthinkingly – is an expression of helplessness.

Human rights and above all the inviolability of the dignity of the human are not negotiable and should never be subsumed under economic conditions. Many of the exigencies that are argued for in this respect do not apply in the area we are interested in here. The international patent system fulfils its function smoothly and there is no apparent need to make any compromises to the value system of the EU and the constitutional bases of the participating contracting states. Using administrative costs as an argument to the detriment of staff working in an association of states as a justification and for “glossing over” deficient structures of the internal workings of the operations is by no means legitimate.

- II. If we now look more closely at the Unified Patent Court, we need to consider the following issues individually. To start with, we need to point out that the planned Agreement on the Unified Patent Court within the EU is destined not to succeed from the outset because it is predated by quite fundamental misconceptions. This agreement does not cover patent law per se, but rather the patents granted in accordance with the European Patent Convention. At first look, there may be nothing to objectionable about this. However, if we consider the constellation professionally and objectively with some critical

distance, we notice that the Agreement is only intended to afford judicial protection within the EU if a patent application was successful in accordance with the European Patent Convention. Conversely, no access to the EU's Unified Patent Court is intended for failed applicants in proceedings before the European Patent Office. This finding throws up various questions and casts the whole project into a constitutional and democratic grey area.

1. First of all, there is no apparent objective reason for disregarding the applicant from an EU member state, excluding him from the "blessings" of effective judicial protection through the planned Unified Patent Court. Instead, this looks a lot like arbitrariness. This structure of the planned agreement alone contradicts the initial considerations and reveals them to be "speech bubbles". How cogency and subsequent acceptance is to be achieved by structuring the patent system in this way is not evident. The fact that the essence of the patent process is not the rejection of a patent application, but its success, is completely overlooked. If, as one consideration highlights, this is about boosting innovation, especially for small and mid-sized companies, the only appropriate approach is to structure the procedure for granting a patent transparently, effectively, and appropriately using corresponding staff. Relevant references have already been provided in part I.

However, there is a serious error of judgment with the planned structure of the Unified Patent Court: the member states of the EU at the European Patent Organisation are making themselves dependent on an association of states that exists outside the EU and its organisational structure and constitutional and democratic performance, for a central part of their economic policy: the protection of intellectual property and international competitiveness. This is a fundamental but not unfamiliar mistake in the framework of the association of states that is the EU. By way of comparison, vital and central sovereignty interests and their definition were "outsourced" on the introduction of the euro to non-transparent rating agencies that were located outside the association of states of the Eurozone. We shouldn't easily dismiss these findings by arguing that these are antiquated national ideas. Instead, the issue is that substantial and central constitutional and democratic elements of the EU and its member

states are being undermined and entrusted to a process of erosion, to which the casual approach to the negotiation of the current free trade agreement is also part.

2. However, the construction selected for the Unified Patent Court gives rise to a further fundamental constitutional issue. This construction – which links judicial protection to the patent granted under the European Patent Convention – infringes the elementary constitutional principle of the “uniformity of the legal system”. This can be concluded from the following:

The application procedure for a patent follows the rules of the European Patent Convention. The competent European Patent Office is bound by the legal system of the European Patent Convention. This is an autonomous legal system with 38 member states, of which – in future – 27 will belong to the EU. There is therefore no one-to-one correspondence of the member states, and thus the procedure before the European Patent Office is not part of a unified legal system for the member states of the EU because patents are granted outside the legal system of the EU. This brings about further issues that cannot be resolved constitutionally and democratically outside the parliamentary democratic legitimation process.

- a. The considerations should start by including the fact that the European Patent Office is bound neither by the TEU nor the secondary law of the EU nor the case law of the ECJ (binding on the member states of the EU). Here, too, fundamental misunderstandings in the multi-level system and of associations of states become apparent; for example on agreeing international courts of arbitration in the scope of free trade agreements and other international and national treaties. Legal certainty in a constitutional order and protection of legitimate expectation as a material foundation for economic activity are further thwarted in that the Unified Patent Court assesses and acknowledges a patent that has already been granted from a different perspective than the European Patent Office did within the legal system that applies to it.

- b. The structure of the agreement on a Unified Patent Court throws up a further fundamental constitutional problem. For many observers and followers of the treaty, this may represent a veritable “judicial delicacy”. With the Agreement, the EU buys into the patent granted under the rules of the European Patent Convention. Thus, we see the problem of static or dynamic reference when referring or linking to sets of regulations outside one’s own regulatory competence that is familiar from a different context. Academic teaching uses the example of Art. 140 of the German Basic Law, which is based on the ecclesiastical article of the previously applicable version of the Weimar Constitution. With the decline of the then constitutional legislator, an amendment can no longer be made; this is a static reference. It is transparent and has been included in the will of the current constitutional legislator in this way. At best, it may give rise to a copyright issue.

Including sets of rules that are not fixed for the future and are open to change is a different matter. This is the case with the European Patent Convention and the freedom of manoeuvre of the organs of the European Patent Organisation. To that extent it is of little use that – in future – 27 states of the EU are also members of the European Patent Organisation; because this already expressly possesses its own statehood and also enjoys immunity for its acts and discretion. The administrative procedure relating to a patent application “outsourced” by the Agreement on the Unified Patent Court thus will not follow any fixed, unchangeable rules in future. Given the lack of identity of the member states of the EU with the totality of the member states of the European Patent Organisation, this should be qualified as a dynamic reference. With this impermissible link to the procedure of the European Patent Organisation at the European Patent Office, a further, irresolvable structural defect arises that causes the project to implode.

- III. If we consider the planned Agreement on a Unified Patent Court on the macro-level, it doesn’t take much intellectual effort to realise that no “added value” is provided by the national courts of the member states as compared to the existing European Patent Convention and the national structure of the legal

patent protection. It's also wrong to expect this at the outset because no link between the European Patent Convention and the Agreement on a Unified Patent Court that satisfies general constitutional and democratic requirements has been created. This circumstance becomes all the more problematic when we consider that the structure of the European Patent Convention exhibits significant deficits in connection with human rights and the constitutional and democratic principle both in the field of the patent-grant process and also the organisational structure under employment law. The considerations that the European Patent Convention has been in force for around 40 years without any real complaints and as a consequence that any defects could not be so serious, are misguided and completely inadequate.

For several years there have been repeated complaints about the ECHR and national constitutional courts, above all constitutional complaints to the German Federal Constitutional Court. The rejection of these complaints was by no means a "seal of approval" for the European Patent Convention. Instead, the majority of complaints failed due to an unsubstantiated submission that did not mark out the defects of the European Patent Convention on the macro and the micro-level (to be discussed below) in the form and depth required by law of procedure. Correspondingly, the reasoning on a Chamber decision of the Second Senate of the Federal Constitutional Court dated 27 April 2010 (2 BvR 1848/07), in which I was involved, contained pointers to that extent. We have now illustrated the entire issue, and the structural defects of the European Patent Convention can be identified at the macro and micro-level in both areas without further need for explanation.

Let's add a further perspective. In connection with its ruling dated 13 October 2016 in the proceedings on the temporary injunction against the free trade agreement between the EU and Canada (BVerfGE 143,65), the Second Senate of the Federal Constitutional Court expressed a thought that corresponds to the attacks on the European Patent Convention and Agreement on a Unified Patent Court formulated here. It referred to the fact that the political endeavours of the Union and its member states, who are seeking to influence the standards within the arrangement of global trade

relations so as to enhance the international reach of the values anchored in the EU legal system, must not be impeded (BVerfGE 143,92). It is surprising and disconcerting in equal measure that at European level, where no “considerations under international law” need to be taken into account, there are no identifiable efforts to rectify the severe defects of the structure of European patent law that we have addressed.

C. Micro-level

In turn, the two areas of the patent-grant process and the “world of work” within the European Patent Office each need to be considered separately at the micro-level. This has been criminally neglected for many years by the contracting states of the European Patent Convention and the administrative council they set up. Serious negative developments – above all over recent years – have not been used as an opportunity to exercise the constitutional and democratic oversight bestowed on the administrative council, and also on the governments and parliaments of the member states, effectively in the interest of the staff of the European Patent Organisation and for the benefit of the image of the association of states created by them. In view of this, I will first dedicate the following section to the “world of work” within the European Patent Organisation.

- I. On accession to associations of states, in my opinion there have long been various misconceptions about the form of the employment relationships that contradict the foundations of associations of states. If states join forces to tackle common problems or to perform cross-border tasks more effectively – such as with EuroControl, and also the European Patent Convention due to the internationality of the economic activity with patent protection – the member states need to think closely about the various “cornerstones” of the projects and select appropriate solutions accordingly.

1. With an association of states such as the European Patent Organisation, with staff numbers likely in the thousands and highly differentiated internal structures in terms of workflows, how the world of work needs to be symmetrically governed and structured must be asked at the very outset. Given the sheer numbers of employees, entrusting tasks in this area to institutions outside the association of states is questionable. The association of states, which is equipped with its own legal personality and thus employer's capability, will not retreat to an "island" as soon as it is cut loose from the member states. It is therefore the fundamental responsibility of the member states to satisfy the respective national tasks incumbent on them within the institutions created by them, and to structure their internal life in a constitutional and democratic manner and in accordance with human rights. Only in this way can they assert the values of the EU and human rights and give effect to the standards of the EU. This is an inalienable prerequisite for preserving the cultural standards of the EU in the area of work.

This presupposes that the responsibility of each member state of the association of states to its nationals who enter the service of this institution and additionally to all staff continues and no member state may or is allowed to withdraw from this responsibility by selecting some alternative construction. The solution within the European Patent Organisation – to refer legal disputes between staff and the institution to the ILO – is thus not adequate in this respect. The member states of the European Patent Convention can neither offload their responsibility to protect human rights and fundamental freedoms under their national constitutional law nor under the Charter of Fundamental Rights of the EU or the EHRC by "mortgaging" it to a different external association of states. Pursued to its logical conclusion, this means that any member state that is the host state for an organisational unit has an additional obligation that applies subsidiarily if for instance the home nation of a member of staff of the European Patent Organisation fails to meet its responsibility. The scope and substance of this point of view comes from the fact that otherwise developments such as in Guantanamo could be given free rein unopposed within the European Union and the Federal Republic of Germany.

2. Further, we need to consider that acknowledging immunity for such an association of states should not be legitimised. This is not necessary for the task to be performed properly. Rather, acknowledging the immunity of such an association of states harbours the risk of creating a parallel world that is “liberated” from constitutional and democratic principles and human rights not only in terms of the staff, but also the addressees of the public task.
 3. The current treaty status of the European Patent Convention is consonant neither with the Charter of Fundamental Rights of the EU nor the ECHR, and not with the majority of the constitutions of the member states nor the United Nations Social Pact in terms of employment law. However, recently it has not been the matter itself that is a cause for concern, but rather the person who blows the whistle on it. That being so, it is also little surprise that, despite the initial considerations on the Agreement on a Unified Patent Court and the EU’s aspiration to assert its values internationally as extensively as possible, no efforts at all are apparent to realise this in the manageable field of the European patent law system.
- II. In terms of the patent-grant process in particular, the internal organisation of the judicial panels of the European Patent Office have been subject to extensive criticism for years. It would be pointless to rehearse this difference of opinion once more, even if one or another small facet were added. I have given my opinion on this many times. At the same time, certain supplementary comments are called for.
1. We can see the cluelessness of the member states of the European Patent Organisation and administrative committee, which was convened primarily for control and monitoring of the European Patent Office, in a range of ways. For instance, the spatial separation of the Boards of Appeal and Enlarged Board of Appeal from the “rest” of the European Patent Office is difficult to qualify; because it is a remarkable example of mediocrity of an international

association of states and lacks seriousness in terms of the value set to which the EU constantly strives internally and in the business of international law. Such a measure is also not consonant with the initial considerations on the Agreement on a Unified Patent Court. That is all I have to say on that point.

2. If we now turn to the “added value” outlined by the initial considerations, only two points need to be highlighted. The Unified Patent Court is supposed to make it easier and cheaper to defend a granted patent. The latter aspect again shows us that misconceptions are part and parcel of the association of states. Such projects shouldn’t be tackled from a cost perspective – if they are to be approached responsibly – but rather they need to be the optimum solution for an objective problem and that must be the focal point. The costs are negotiable and can be structured accordingly. Establishing a new organisation for an objective problem from the perspective of the costs it itself incurs is counter to systemic logic. In the past we had “poor law”, legal aid and reductions in the court fees based on the general significance of a dispute etc. if excessively high costs prevented a legitimate prosecution and contradicted the principle of equal treatment in some cases.
 - a. The accusations in the internal operations of the European Patent Office have – to put it mildly – not furthered its performance or enabled an optimum resolution of official business. Extensive friction losses were unavoidable. According to general empirical principles of organisational theory and personnel management, the working outcome depends to a large extent on job satisfaction and the internal working atmosphere. Above all, we cannot expect that an institution that is constantly involved in public disputes will be able to recruit qualified and willing new workers.

The EU neglected such conditions when structuring the Agreement on a Unified Patent Court which – if this comes into being counter to expectations – will come back to bite it.

- b. According to a central consideration, the intended agreement and the establishment of the Unified Patent Court is intended to strengthen the

position of small and mid-sized companies if they are party to a patent dispute. At the event already mentioned at MPI on 13 October 2017, a “mid-market entrepreneur” spoke up and expressed his concern that special inspection groups (maybe better referred to as “support groups”) were to be set up in the European Patent Office for accelerated handling for global enterprises and asked where the oft-cited mid-market companies stood.

In this context, an article by Hoops (NVwZ 2017,1496) on a judicial ruling by the First Senate of the Federal Constitutional Court in connection with the expropriation for the benefit of private companies gives food for thought. In closing he warned that certain constellations could result in preferential treatment for private companies with good political contacts to the detriment of third parties.

Over recent years a notable reserve by the “large patent applicants” has been noticeable within the development of the European Patent Office. Even if they are suffering as a result of the inefficiency of the European Patent Office and its judicial panels, experience tells us that the negative impact on their business should be estimated as being less than on mid-market companies for whom a patent can be of existential importance.

3. In closing, let’s take a closer look at the initial consideration with reference to an effective legal remedy before a court and the right to be heard by a free and impartial court in fair proceedings publicly and within and a reasonable period. The constitutional resolution of this issue was dodged with the establishment of the European Patent Organisation. Over the years it was more or less suppressed and the critics impudently sidelined. The governments of the member states of the European Patent Convention and above all those who are also member states of the EU have disregarded binding canons such as the ECHR and the European Charter of Fundamental Rights. The following points of view are thus relevant in this regard:
 - a. Even if we leave aside the stated canons and national constitutions of the member states, we should still be irritated if we look at the initial consideration

of the Agreement on a Unified Patent Court. This is linked to the European Patent Convention with the grant procedure at the European Patent Office. Accordingly, the internal process for legal remedy at the European Patent Office is material and needs to be examined to establish whether the Boards of Appeal and the Enlarged Board of Appeal satisfy the requirements formulated by the EU for an independent and impartial court. This is clearly not the case.

The head of the administration of the European Patent Office is at the same time also the head of the partial organisation within the European Patent Office for the judicial panels. The president is ultimately also the competent “supervisor” of the judicial panels and their members. The organisational changes made recently change nothing about that. There is a lack of institutional independence of the judicial panels viz their own budget, own legal personality and a management that is independent of the management of the European Patent Office. Whether the organisational changes made by the president of the European Patent Office with the approval of the administrative committee satisfy the requisite democratic legitimation in accordance with the rules of the EU (cf. simply the development of generally applicable principles in BVerfGE 107,59 by the Federal Constitutional Court) is moot. The member states of the EU would be obliged to reject the measures of the president in the administrative committee.

- b. This is not a matter of trivialities or German sensitivities. Even at the Munich diplomatic conference on the introduction of a European patent grant system in 1973, the German delegation expressly referred to the fact that the initiation of a national procedure would not only be possible in cases where the applicant had suffered loss of rights due to the failure of an act, but also following a negative decision of the European Patent Office. In these cases specifically, however, there is a constitutional issue in the Federal Republic of Germany. Under the German Basic Law, any administrative act must be reviewable by a court. However, the Boards of Appeal of the European Patent Office – despite a court-like structure – are not courts, meaning that legal recourse to a German court is an open question.

At the heart here are general constitutional and democratic principles. If the institutional separation of executive and judicature is missing, the constitutional state becomes a farce and human rights are robbed of their protective function. The Federal Constitutional Court set down this principle – which is also universally acknowledged – very early on in its case law (BVerfGE 4, 331) and expressly determined that if an institution whose decisions are to be monitored ultimately also provides the sole impetus for who sits on its monitoring body, then established constitutional principles are contradicted. For these reasons, appeal and complaint committees at German public authorities, such as in the area of social security or financial authorities, are transformed into internal monitoring bodies. We should also not forget that the specific justification for setting up the German Federal Patent Courts (following an amendment to the German Basic Law on creating the competence of the federal government in this respect) was the intermeshing of administrative and judgment-giving activities in one and the same authority headed up by the president. The German Federal Administrative Court developed comprehensive considerations on this in a decision that is still worth reading today (BVerwGE 8, 350).

- c. Time has not stood still and we need further normative development regarding accession to associations of states in line with the constitutional and democratic principles for independent and impartial courts established decades ago by German case law.

For instance, in its Lisbon ruling in 2009 (BVerfGE 123,267) the Federal Constitutional Court stated *inter alia* (op. cit., p. 415/416) that the member states were obliged under **Community law** to grant effective judicial legal protection that must not be impaired by national legal stipulations. The citizen's access to a court could not be fundamentally hampered by primary and secondary legislation or the introduction of non-judicial preliminary proceedings. If the member states of the EU want to set up an EU patent system – which per se is unobjectionable – it is high time that they became aware of their obligations under e.g. the Charter of Fundamental Rights and

the principles of the TEU as well as their national constitutions, for instance the Federal Republic of Germany and its obligations under the German Basic Law. By setting up a Unified Patent Court at EU-level, the time for this could not be more fitting. However, this requires a fundamental modification of the structure of the Agreement.

D. Other prospects

In terms of the organisation and structure of the “world of work” of the European Patent Organisation, we should sketch out a point of view that to date has been outside the current discussion. In its Lisbon judgment, the Federal Constitutional Court referred frequently to the areas of identity that are excluded from “communitisation”. This relates to the state structure principles in Art. 20 of the German Basic Law, i.e. democracy, a social state and one governed by the rule of law, the republic, the federal state and essential substance of elementary fundamental rights for the respect of human dignity. Their principal quality is that they are immutable and contribute to the constitutional identity of Art. 79 para. 3 German Basic Law (BVerfGE 123, p. 343/344). In this context, which relates to the “world of work” and the protection of the employee in accordance with various other opinions in this judgment (e.g. p. 429,430 – including recognition of the right to strike), we need to consider that this “standard” at EU-level is the very minimum required and, if it is breached, the Federal Republic of Germany would have to deny itself integration in this regard.

A relativisation or breach of these standards on accession to a further association of states – be that directly or indirectly via the EU – would represent a circumvention that from the very outset contradicts the general constitutional and democratic standard, and also and unequivocally that of the EU, as is mainly set out in the initial considerations. As regards the treatment and organisation of the “world of work” and the rights of the staff of the

European Patent Organisation, referring them to the ILO for legal recourse is imprudent – irrespective of the structure of their organisation individually and the lack of a guaranteed effectiveness of legal protection – for the simple reason that the EU and its member states have unlimited responsibility for a new partial association of states created by them (including the European Patent Organisation incorporated via the grant procedure) for the guarantee of human rights within the association of states supported by it. This inalienably includes effective legal protection by independent and impartial courts, and that can only be satisfied by internal institutional jurisdiction.