
Provisional Application of Treaties: The EU's Contribution to the Development of International Law

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Abstract

Provisional application has become a quasi-automatic corollary to the signature of mixed bilateral European Union (EU) agreements. Resort to provisional application is thereby informed by a rationale hitherto unknown in international law: it allows federal polities where the federal level does not have exclusive treaty making powers to develop an effective external action that is not hindered by that polity's complex internal division of competences. This article argues that the EU has also developed a rather consistent practice in relation to provisional application. The EU thereby distinguishes between its treaty partners whereby some of them simply agree that the EU unilaterally determines the scope of provisional application. Because of the reference to the EU's internal division of competence, the internal law of the parties, something that is typically not relevant under international law, acquires legal significance. The EU's practice is found to be largely in line with the Draft Guidelines on Provisional Application that are being elaborated by the International Law Commission, although clearly it is also more refined on some points. Lastly, the article identifies one pressing issue which requires clarification, and which is not properly addressed in the Draft Guidelines. That is the question on the fate of the provisional application by the EU of part of a mixed agreement where one individual EU member state has decided not to ratify that agreement.

1 Introduction

The European Union (EU) is a prolific actor on the international plane, with an ever-expanding list of multilateral and bilateral agreements.¹ In its treaty practice it regularly relies on the technique of provisionally applying agreements before their entry

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¹ Odermatt, 'The Development of Customary International Law by International Organizations', 66 *International and Comparative Law Quarterly* (2017) 491, at 504.

into force. That technique has also become more common in general state practice in international law.² Although the EU relies on the device of provisional application for all sorts of agreements, this is especially true of the EU's so-called bilateral mixed agreements. These are agreements concluded with a third country (or a group of third countries) by both the EU and its 27 individual member states as a single, collective EU party. The present article argues that the EU, through its practice of mixed agreements, relies on an entirely novel rationale, hitherto unknown in international law, in its recourse to the technique of provisional application. As will be shown, provisional application facilitates the external action of a federal polity such as the EU without requiring its constituent member states to retreat from the international arena. In its reliance on provisional application, the EU has established a remarkable practice, the consistency of which should be assessed in light of international law. In addition, one could tentatively argue that the EU has thereby also contributed to the development of international law in this area. The present article will therefore first look into the general issue of provisional application and Article 25 of the Vienna Convention on the Law of Treaties (VCLT) and the traditional rationales underpinning the technique.³ Next, the EU's practice in concluding mixed agreements, i.e. agreements to which both the EU and its member states are parties together with one or more third countries or international organizations, will be briefly commented on and explained in light of the EU's constitutional order of competences.

Having laid down this groundwork, the contribution will subsequently focus on the EU's practice of provisionally applying bilateral mixed agreements signed or concluded after the entry into force of the Lisbon Treaty, showing a new rationale for provisional application.⁴ The EU's practice in relation to mixed agreements will then be commented on in light of the work by the International Law Commission (ILC) and the Draft Guidelines on Provisional Application which it is developing.⁵ The analysis will look into how the EU is effectively contributing to the development of international law, focusing on the issues related to the decision-making behind provisional application, the extent of provisional application, the reference to the internal law of the parties and the question of the termination of provisional application.

2 Provisional Application of International Agreements

In international state practice, the provisional application of international agreements has become a more common practice,⁶ even if the topic is hardly discussed in

² Arsanjani and Reisman note that 'the urgent need for provisional application of more contemporary treaties soon expanded to other matters [than peace treaties]'; Dalton adds that '[i]n recent years, the incidence of provisional application between States has continued to increase'. See Arsanjani and Reisman, 'Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards', in F. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011) 86, at 88; Dalton, 'Provisional Application of Treaties', in D. Hollis (ed.), *The Oxford Guide to Treaties* (2012) 220, at 221.

³ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 ('VCLT').

⁴ The post-Lisbon agreements covered are listed in note 33.

⁵ For a more internal EU-perspective on provisional application, see Flaesch-Mougin & Bosse-Platière, 'L'application provisoire des accords de l'Union européenne', in I. Govaere et al. (eds), *The European Union in the World: Essays in Honour of Marc Mareceau* (2014) 293.

⁶ R. Lefeber, 'Treaties, Provisional Application', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011), § 1, available at <https://bit.ly/31Ui3z9>.

scholarly contributions.⁷ A desire to ensure that the VCLT would reflect actual practice indeed explains why a clause on provisional application was ultimately included in the final text.⁸ The parties agreed on Article 25 VCLT following intense debates on, for example, the legal status of provisionally applied agreements and the relationship with national constitutional law.⁹ Article 25 of the VCLT reads:

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if
 - (a) the treaty itself so provides; or
 - (b) the negotiating States have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

The lack of legal precision for which Article 25 VCLT has been criticized¹⁰ must then be understood as part of the trade-off between the need to acknowledge the existing practice of provisional application and the lack of a broader consensus on the detailed rules that ought to govern provisional application. This lack of a broader consensus might have been the result of limited practice, but it also has implications for the question about the status of Article 25 VCLT as part of customary international law.¹¹ Although this falls outside the scope of this article, it should be noted that, thus far, the clarification and interpretation of this provision have been largely left to arbitration tribunals.¹² While arbitration awards are only binding *inter partes* and their

⁷ Hafner also observes this: see Hafner, 'Die vorläufige Anwendung internationaler Verträge', in W. Benedek, H. Folz, H. Isak, M. Kettmann and R. Kicker (eds), *Bestand und Wandel des Völkerrechts* (2014) 145, at 146.

⁸ For clarity's sake, reference will be made to the 1969 VCLT rather than the 1986 VCLT-IO even if the EU's practice as an international organization is discussed, since Article 25 of the VCLT-IO simply mirrors Article 25 VCLT. See *supra* note 3 and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, not yet in force, 25 ILM 543 ('VCLT-IO').

⁹ Mathy, 'Article 25', in O. Corten and P. Klein (eds), *Les Conventions de Vienne sur le Droit des Traités: Commentaire article par article* (2006) 1047, at 1050.

¹⁰ A. Geslin, *La mise en application provisoire des traités* (2005), at 111; Rogoff and Gauditz, 'The Provisional Application of International Agreements', 39 *Maine Law Review* (1987) 29, at 41.

¹¹ Mathy notes that it was possible to regard Article 25(1) VCLT as crystallizing established practice, while Article 25(2) VCLT clearly did not codify customary international law and was an instance of the progressive development of international law. See VCLT, *supra* note 3, Art. 25; Mathy, *supra* note 9, at 1049. Dalton, citing Villiger, notes that subsequent developments in state practice have meant that Article 25(2) VCLT now also reflects custom. See Dalton, *supra* note 2, at 232; M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 357.

¹² Notably the elaborate provisional application clause of the Energy Charter Treaty has been interpreted, together with Article 25 VCLT by arbitration tribunals. See for instance the decisions in the *Yukos* and *Kardassopoulos* cases to the effect that Article 26 VCLT (*pacta sunt servanda*), rather than Article 18 VCLT, applies to provisionally applied agreements, see Interim Award on Jurisdiction and Admissibility, *Yukos*, 30 November 2009, PCA Case No. AA 228, paras 319–320; Decision on Jurisdiction, *Kardassopoulos*, ICSID Case No. ARB/05/18, 6 July 2007, paras 205ff. In *Petrobart* an arbitration tribunal had to decide

precedential value depends on the quality of the reasoning and its reception in the legal community, there are clear legitimacy concerns in promoting the development of international law by such tribunals.¹³ Although he was not critical of this development, ILC member Giorgio Gaja referred to these arbitration decisions when discussing the outstanding issues of provisional application¹⁴ that led the ILC to appoint a Special Rapporteur, Juan Manuel Gómez-Robledo, to map and analyse state practice on provisional application in order to draft a Guide to Provisional Application of Treaties.¹⁵ The different Draft Guidelines which have now been elaborated will be commented upon in Section 4 to shed light on the EU's treaty practice.

A *The Reasons for Resorting to Provisional Application*

Although Lefeber notes that identifying the reasons why parties decide on provisional application 'involves a degree of speculation',¹⁶ there seem to be two generally accepted reasons. That is to say (i) to address urgent issues, such as peace treaties or crisis management, and (ii) to ensure continuity, for example when an agreement establishing an international organization is reviewed and replaced by a new agreement.¹⁷ In addition to these two universally accepted reasons, Michie has identified a further four based on state practice, adding: (iii) the (interim) application of non-urgent treaties where future ratification is guaranteed,¹⁸ (iv) legal consistency, (v) facilitating the setting up of new international organisations and (vi) the circumvention of obstacles to entry into force.¹⁹

whether the ECT was still provisionally applied by the UK on behalf of Gibraltar, even if the UK had excluded Gibraltar from in its instrument of (final) ratification. See *Petrobart*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 126/2003, Arbitral Award, 29 March 2005, at 62–63, available at www.italaw.com/sites/default/files/case-documents/ita0628.pdf. The Swedish Court of Appeal upheld the award on this point. See Svea Court of Appeal, Case no. T 5208-05, 19 January 2007, translation available in 4 *Transnational Dispute Management* (2007) 5, available at www.transnational-dispute-management.com/article.asp?key=1125, at 8.

¹³ See von Bogdandy & Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23 *European Journal of International Law (EJIL)* (2012) 7, at 18–19.

¹⁴ See Report of the ILC of its 63rd session, Doc. A/66/10, 26 April-3 June and 4 July-12 August 2011, Annex C, § 5.

¹⁵ For the most recent draft, see ILC, 'Sixth report on the provisional application of treaties, by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur', Doc. No. A/CN.4/738, 24 February 2020.

¹⁶ Lefeber, *supra* note 6, § 2.

¹⁷ Secretariat of the International Law Commission, Memorandum on Provisional Application of Treaties, A/CN.4/658, at 11–15. Mathy, *supra* note 9, at 1050–1052; Arsanjani and Reisman, *supra* note 2, at 87–90.

¹⁸ This was also specifically noted by the Expert Consultant, Mr Waldcock, during the Vienna Conference. See Secretariat of the International Law Commission, 'Memorandum by the Secretariat', Doc. No. A/CN.4/658 (1 March 2013), at 13.

¹⁹ A. Michie, 'The Provisional Application of Treaties with Special Reference to Arms Control, Disarmament and Non-Proliferation Instruments' (2009) (PhD thesis, available at <https://bit.ly/2Z6uAOC>, 2009), at 23–47. Lefeber (*supra* note 6) identified the adoption of confidence building measures as another function which Michie includes in the sixth category. In his first report on the provisional application of treaties, Special Rapporteur Juan Manuel Gómez-Robledo essentially comes to the same conclusion but proposes a slightly different typology. See International Law Commission (ILC), 'First report on the provisional application of treaties, by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur', Doc. No. A/CN.4/664 (3 June 2013), at 6–9.

Turning to the EU's treaty practice, the EU (formerly European (Economic) Community)²⁰ initially resorted to the technique of provisional application for the reasons generally identified in international state practice. One of the first agreements that was provisionally applied by the EU was the Fifth International Tin Agreement.²¹ As Michie notes, commodity agreements are a classic example of resorting to provisional application in order to ensure legal continuity.²² Further, ever since the EU acquired the (exclusive) competence to conclude fisheries agreements, it has consistently relied on the option to provisionally apply such agreements. The 1979 Agreement with Senegal, for instance, was provisionally applied before entry into force for reasons of urgency, given the approaching fishing season.²³ Any subsequent agreements, renewing both parties' commitments, are then typically provisionally applied to ensure continuity.²⁴ More recently, a new, third, reason why the EU resorts to the device of provisional application may be identified in that it allows the EU to circumvent the delay caused by the lengthy ratification procedures for its so called 'mixed' agreements (see Section 3).²⁵ It is this specific function of the technique of provisional application in the EU's treaty practice that will be further analysed in this contribution.

B Alternatives to Provisional Application

Before elaborating on the notion of a 'mixed agreement' and before setting out the precise legal context in which this type of agreement is concluded by the EU, it may already be noted here that while provisional application is by now part and parcel of the EU's practice of mixity, this was not always the case. Originally, bilateral mixed agreements concluded by the EU and its member states with third countries were typically complemented by bilateral 'interim agreements'. The interim agreements contained all the provisions of the mixed agreement for which the EU had exclusive competence, and which therefore could be concluded by the EU on its own, without requiring, or even permitting, the formal involvement of the member states as individual subjects of international law. As a consequence, interim agreements could enter into force speedily following ratification by the EU and the third state concerned. Once the mixed

²⁰ In the remainder of this article, EU will be used to refer to both the EU (pre- and post-Lisbon) and the EEC and EC (pre-Lisbon).

²¹ See Council Decision 76/626 of 21 June 1976 on the Provisional Application of the Fifth International Tin Agreement, OJ 1976 L 222/1.

²² See Michie, *supra* note 19, at 33. See also Arsanjani and Reisman, *supra* note 2, at 89–90.

²³ See Council Decision 79/569 of 12 June 1979 concerning the conclusion of the Agreement in the form of an exchange of letters on the provisional application of the Agreement between the Government of the Republic of Senegal and the European Economic Community on fishing off the coast of Senegal and of the Protocol and the exchanges of letters relating thereto, OJ 1979 L 154/25.

²⁴ See, e.g., Council Decision 81/1055 of 21 December 1981 on the conclusion of an Agreement in the form of an exchange of letters providing for provisional application of the Agreement between the Government of the Republic of Senegal and the European Economic Community amending the Agreement on fishing off the coast of Senegal, and of the Protocol thereto, OJ 1981 L 379/64.

²⁵ Hoffmeister, 'Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States', in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (2010) 249, at 257.

agreement (containing, but not limited to, all the provisions of the interim agreement) was ratified by all parties (thus including the EU member states), it would subsume the interim agreement. Of course, since the interim agreement contained only the provisions coming under EU exclusive competence, and given the perennial disagreements within the EU (typically between the Commission, on the one hand, and member states and the Council, on the other) about the precise scope of the EU's exclusive competence, the typical interim agreement essentially took over only those provisions for which the EU's exclusive competence was beyond any doubt. In practice this meant that only the trade component of the mixed agreement was replicated in the interim agreement.²⁶

This situation was remedied by the Amsterdam Treaty which amended Article 300 EC to include a clause allowing a decision on the signature of an agreement to 'be accompanied by a decision on provisional application before entry into force'.²⁷ At the time, Dashwood rightly foretold that this new provision would 'make it no longer necessary to enter into freestanding interim agreements'.²⁸ Today, the technique of the interim agreement is not relied upon anymore.²⁹ However, while from a material point of view the techniques of the interim agreement and provisional application appear identical, this is very different from a procedural point of view.

For EU purposes, provisional application is decided by the Council upon a proposal by the Commission. In contrast, since an interim agreement still is a fully fledged agreement, it is subject to the proper ratification procedure as now defined in Article 218 of the Treaty on the Functioning of the European Union (TFEU).³⁰ Whereas pre-Lisbon – i.e. before the entry into force of the Lisbon Treaty³¹ – trade agreements (which the interim agreements essentially were) did not require the consent of the European Parliament, such consent is now prescribed by Article 218(6)(a)(v) TFEU. As a result, the number of internal procedural differences between deciding on an interim agreement and deciding on provisional application has grown. Provisional application of the trade provisions of an agreement do not require the Parliament's

²⁶ Some years before the practice of concluding interim agreements was effectively discontinued, the EU also concluded an interim agreement containing provisions on public procurement and competition next to the traditional trade component. See Council Decision 98/504 of 29 June 1998 concerning the conclusion of the Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the United Mexican States, of the other part, OJ 1998 L 226/24.

²⁷ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2 October 1997, OJ 1997 C 340/1, Art. 1(56) ('Amsterdam Treaty'); Treaty establishing the European Economic Community, 25 March 1957, 294 UNTS 3 ('EC').

²⁸ Dashwood, 'External Relations Provisions of the Amsterdam Treaty', in D. O'Keefe and P. Twomey (eds), *Legal Issues of the Amsterdam Treaty* (1999) 202, at 206.

²⁹ The last examples predate the entry into force of the Lisbon Treaty and are the interim agreements concluded with a number of Western Balkan states, reproducing some of the trade related provisions of the stabilization and association agreements (SAAs) concluded with these countries. On the SAAs, see M. Maresceau, *Bilateral Agreements Concluded by the European Community* (2006), at 365ff.

³⁰ Treaty on the Functioning of the European Union, 18 December 2007, OJ 2016 C 202/47 ('TFEU').

³¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 17 December 2007, OJ 2007 C 306/1 ('Lisbon Treaty').

consent,³² while its consent would be required for an interim agreement containing the very same trade provisions.

In addition, from an international law perspective there are also significant differences. Since an interim agreement is a proper international agreement, it is essentially governed by the relevant rules on issues such as reservations, entry into force, suspension and termination as codified in Articles 19–24, 54 and 56–62 VCLT. In contrast, the same issues relating to the provisional application of an agreement are not elaborately spelled out by Article 25 VCLT, if at all, hence the current work of the ILC.

While post-Lisbon, the practice of concluding interim agreements has perished, that of provisionally applying signed agreements prior to their entry into force has seen significant developments. Of some 269 international agreements signed by the EU post-Lisbon, 117 contain a provisional application clause of which 38 are mixed (out of the 61 mixed agreements).³³ Focusing on the bilateral mixed agreements, the current practice also goes beyond only provisionally applying some trade-related and institutional provisions (see Section 4).

³² A gentleman's agreement has nonetheless been worked out between the Parliament and the Commission that foresees the Parliament giving (or withholding) its consent before the decision on provisional application is taken. See A. Suse and J. Wouters, 'The Provisional Application of the EU's Mixed Trade and Investment Agreements', Working Paper No. 201 (May 2018), at 9–11; Passos, 'The External Powers of the European Parliament', in P. Eeckhout and M. Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (2016) 85, at 122–123. Three important caveats may be noted, however: (i) while it is the Commission that proposes the provisional application (together with the proposal for signature) of an agreement, the decision itself is taken only by the Council; (ii) the practice only relates to trade agreements and association agreements (which always contain an important trade component), not to other agreements; (iii) while the Commission committed itself to follow this new practice, it also reserved to itself a possibility to derogate in those cases where the file at issue is particularly urgent or technical.

³³ The figures are based on a search on the EU Treaties Database (<http://ec.europa.eu/world/agreements/default.home.do>). The following list contains the Council decisions on provisional application that figure in the present contribution, in the OJ the mixed agreements to which these decisions relate are published in the same issue on the pages following the decisions. The Council decisions/agreements are grouped together based on the type of agreement at issue: Decision of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council 2010/417 on the Air Transport Agreement with Canada, 30 November 2009, OJ 2010 L 207/30; Decision of the Council and of the Representatives of the Governments of the Member States, meeting within the Council 2011/708 on the Air Transport Agreement with the USA, Iceland, and Norway and the Ancillary Agreement with Iceland and Norway, 16 June 2011, OJ 2011 L 283/1 ('Ancillary Agreement'); Decision of the Council and of the Representatives of the Governments of the Member States, meeting within the Council 2012/708 on the Aviation Area Agreement with Georgia, 15 October 2010, OJ 2012 L 321/1; Decision of the Council and of the Representatives of the Governments of the Member States, meeting within the Council 2012/750 on the Euro-Mediterranean Aviation Agreement with Jordan, 15 October 2010, OJ 2012 L 334/1 ('Aviation Agreement with Jordan'); Decision of the Council and of the Representatives of the Governments of the Member States, meeting within the Council 2012/639 on the Common Aviation Area Agreement with Moldova, 7 June 2012, OJ 2012 L 292/1 ('Aviation Agreement with Moldova'); Council Decision of the Council and of the Representatives of the Governments of the Member States, meeting within the Council 2013/398 on the Euro-Mediterranean Aviation Agreement with Israel, 20 December 2012, OJ 2013 L 208/1 (air transport agreements); Council Decision 2009/156 on the Stepping Stone Agreement with Côte d'Ivoire, 21 November 2008, OJ 2009 L 59/1; Council Decision 2009/850 on the Interim Agreement on Economic Partnership Agreements (EPA) with the Southern African Development Community (SADC) States, 5 May 2009, OJ 2009 L 319/1; Council Decision 2012/196 on the Interim Agreement on EPA with the Eastern and Southern African States (ESA), 13 July 2009, OJ 2012 L 111/1; Council Decision 2016/1623 on the EPA with the SADC States, 1 June 2016, OJ 2016 L 250/3; Council Decision 2016/1850

3 On EU Mixed Bilateral Agreements and Their Provisional Application

The mixed agreements which are the main subject of this article are a special kind of international agreements that may be concluded by federal-type polities, where both the federal and the state levels (under the internal constitution) have treaty-making power in relation to the areas within their purview.³⁴ In the event that an international agreement covers such different areas, and assuming the international capacity of the sub-federal entities is recognized by the federal entity's counterparty, the agreement will be concluded as a mixed agreement. The federal and sub-federal entities commit themselves jointly under international law, presenting themselves as one 'meta' party (at least in bilateral agreements).³⁵ Of course, in most federacies, the federal level is exclusively competent to enter into international relations (regardless of the internal division of competences), which rules out the possibility of concluding

on the Stepping Stone EPA with Ghana, 21 November 2008, OJ 2016 L 287/1 (trade and development agreements); Council Decision 2012/418 on the Partnership and Cooperation Agreement (PCA) with Iraq, 21 December 2011, OJ 2012 L 204/20 ('PCA with Iraq'); Council Decision 2013/40 on the Framework Agreement with Korea, 10 May 2010, OJ 2013 L 20/1 ('Korea Framework Agreement'); Council Decision 2016/123 on the Enhanced PCA with Kazakhstan, 26 October 2015, OJ 2016 L 29/1; Council Decision 2016/2079 on the Partnership Agreement (PA) on Relations and Cooperation with New Zealand, 29 September 2016, OJ 2016 L 321/1 ('PA with New Zealand'); Council Decision 2016/2118 on the Strategic Partnership Agreement (SPA) with Canada, 28 October 2016, OJ 2016 L 329/43; Council Decision 2016/2232 on the Political Dialogue and Cooperation Agreement with Cuba, 6 December 2016, OJ 2016 L 337/1; Council Decision 2017/434 on the Cooperation Agreement on Partnership and Development with Afghanistan, 13 February 2017, OJ 2017 L 67/1; Council Decision 2017/1546 on the Framework Agreement with Australia, 29 September 2016, OJ 2017 L 237/5; Council Decision 2018/1197 on the Strategic Partnership Agreement (SPA) with Japan, 26 June 2018, OJ 2018 L 216/1 (horizontal agreements); Council Decision 2011/265 on the Korea Free Trade Agreement (FTA), 16 September 2010, OJ 2011 L 127/1; Council Decision 2012/734 on the Association Agreement (AA) with Central America, 25 June 2012, OJ 2012 L 346/1; Council Decision 2012/735 on the Trade Agreement with Colombia and Peru, 31 May 2012, OJ 2012 L 354/1; Council Decision 2014/295 on the AA with Ukraine, 17 March 2014, OJ 2014 L 161/3; Council Decision 2014/492 on the AA with Moldova, 16 June 2014, OJ 2014 L 260/1; Council Decision 2014/494 on the AA with Georgia, 16 June 2014, OJ 2014 L 261/1; Council Decision 2017/37 on the Comprehensive Economic and Trade Agreement with Canada, 28 October 2016, OJ 2017 L 11/1; Council Decision 2018/104 on the Comprehensive and enhanced Partnership Agreement (CEPA) with Armenia, 20 November 2017, OJ 2018 L 23/1 (trade or association agreements); Council Decision 2010/652 on the Cooperation Agreement on Satellite Navigation with Norway, 11 March 2010, OJ 2010 L 283/11; Council Decision 2011/901 on the Agreement on Galileo with the USA, 16 December 2011, OJ 2011 L 348/1; Council Decision 2014/20 on the European Satellite Navigation Programmes Cooperation Agreement with Switzerland, 23 September 2013, OJ 2014 L 15/1 (sectoral agreements).

³⁴ This is not to say that only federal type polities conclude mixed agreements. The early mixed agreements are a case in point. Basdevant referred to these agreements as '*mi-collectif*', or semi-collective, see Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', 15 *Recueil des cours de l'Académie de droit international de La Haye* (1926), at 555ff. However, the renewed reliance in international law on mixed agreements since the second half of the 20th century is largely due to the EU's treaty practice. See K. Stein, *Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft* (1986), at 198.

³⁵ This is different in the case of multilateral mixed agreements where there is a genuine multitude of contracting parties, i.e. not just the EU and its member states, on one hand, and a third country, on the other.

mixed agreements. Still, some atypical federacies exist.³⁶ Belgium is one,³⁷ the EU is another.

For both polities, the internal division of competences retains its relevance when the federal level acts on the international plane. Since the *topos* of shared or concurrent competences is alien to the Belgian federal setup, the federal and regional (sub-federal) levels only having exclusive competences, an international agreement covering federal and regional (state) competences necessarily has to be concluded as a mixed agreement. In theory, this is different in the case of the EU, since the default category of competences under the EU Treaties is that of shared (concurrent) competences where both the EU and the EU member states can act.³⁸ As long as an international agreement does not cover areas coming under exclusive member state competence, it could then be concluded as an EU-only agreement. For this to happen, the Council of the EU (bringing together the member states) would have to decide to exercise the EU's shared competences, thereby pre-empting the member states.³⁹ However, in so far as the international agreement covers areas coming under shared competence, an option always remains to allow the member states to be formal parties to the agreement even if from a purely legal perspective this is not required.

In practice, the member states in the EU Council typically limit the exercise of EU competence in the external sphere to areas under the EU's exclusive competence when horizontal, rather than sector-specific, agreements are concluded. In other areas, the Council will typically decide that the EU refrains from exercising its shared competences, leaving the necessary legal space for the member states to be involved. [Table 1](#) sets out the main scenarios in terms of the competences at issue and the possible resulting configuration of treaty parties on the EU side.

The reasons why the EU member states insist that the EU refrain from exercising its shared competences when concluding international agreements have been amply discussed elsewhere and do not require an exhaustive discussion here.⁴⁰ Suffice it to note that the choice of a mixed agreement means that member states will be *formal* parties to the agreement, one of the most visible acts of their retained sovereignty; this choice thus ensures that the member states retain a national identity on the international plane. It also allows the member states to constrain the EU's reach and limit possible pre-emption by the EU concluding an agreement which might otherwise reduce the possible scope for member state action.⁴¹ In terms of competences, mixity is convenient because it allows the precise division of competences between the EU and the member states to be held in abeyance.⁴² By concluding the agreement as one

³⁶ See Weiler, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle', in D. O'Keefe and H. Schermers (eds), *Mixed Agreements* (1983) 35.

³⁷ For a discussion of the rather complex law of Belgian external relations, see Ingelaere, 'De internationale betrekkingen', in B. Seutin and G. Van Haegendoren (eds), *De transversale bevoegdheden in het federale België* (2017) 151, at 151–190.

³⁸ This follows from TFEU, *supra* note 30, Art. 4(1).

³⁹ See *ibid.* Arts. 2(2), 3(2).

⁴⁰ See notably one of the first contributions on the topic, Ehlermann, 'Mixed Agreements: A List of Problems', in O'Keefe and Schermers, *supra* note 36, at 3.

⁴¹ See the discussion on a possible reverse ERTA effect, *infra* note 81.

⁴² Van der Loo and Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions', 54 *Common Market Law Review* (*Comm. Mkt. L. Rev.*) (2017) 735, at 738.

Table 1. Nature of EU competences and types of international agreements

Areas covered by international agreement coming under	Type of international agreement
EU exclusive competence	Mandatory EU-only agreement
EU exclusive competence + shared competence	Facultative EU-only or facultative mixed agreement
Shared competence	Facultative EU-only, facultative mixed or facultative member states-only agreement
EU exclusive competence (+ shared competence) + member states exclusive competence	Mandatory mixed agreement

meta-party, all matters under the agreement are by definition covered in terms of competences.⁴³ In terms of the decision-making power, the choice of a mixed (rather than an EU-only) agreement typically does not strengthen a member state's position. While a mixed agreement evidently gives every member state a veto right, the member states will most often already have a veto right in the Council of the EU. This will be the case at least in politically significant agreements, since they will typically come under one of the exceptions which provide that the Council must conclude an agreement by unanimity rather than by a qualified majority vote.⁴⁴ In short, mixity remains very attractive to member states despite all the practical and legal problems raised by concluding a facultative EU-only agreement as a facultative mixed agreement. Some of these problems are the following: Mixity might prove problematic in terms of disentangling the international responsibility of the EU meta-party,⁴⁵ the implementation of the agreement by the EU meta-party; the unclear division of competences between the EU and its member states; the representation of the EU side in the institutional structures set up by the agreement;⁴⁶ etc.

Of course, the most pressing practical issue resulting from concluding an international agreement as a mixed agreement is that in an EU of 27 member states, at least 28 different ratification procedures have to be completed on the EU side before the agreement can enter into force. This is where the technique of provisional application comes into play, as it is relied upon by the EU precisely to offset the negative effects of the considerable delays between the signing of a mixed agreement and its formal entry into force.⁴⁷ Where provisional application remains the exception in state practice,⁴⁸

⁴³ See Treaty on European Union, 18 December 2007, OJ 2016 C 202/13, Art. 5(2) ('TEU').

⁴⁴ See TFEU, *supra* note 30, Arts. 218(8), 207(4).

⁴⁵ Kuijper, 'International Responsibility for EU Mixed Agreements', in Hillion and Koutrakos, *supra* note 25, at 208.

⁴⁶ See, for example, the problematic revision of the arrangements between the Council and the Commission regarding the exercise of membership rights in the Food and Agriculture Organization FAO by the EU and its member states. For the Commission proposal in this file, see European Commission, COM (2013) 333 final.

⁴⁷ Michie, *supra* note 19, at 3-4.

⁴⁸ Kempen and Schiffbauer, 'Die vorläufige Anwendung völkerrechtlicher Verträge im internationalen Mehrebenensystem', 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2017) 95, at 99.

it has become the rule for the EU's mixed bilateral agreements. In light of the different functions of provisional application identified above, the provisional application of mixed agreements would then seem *prima facie* to come under the function of 'the circumvention of obstacles to entry into force'. However, the examples cited in this regard by Michie relate purely to *political* impediments in bilateral relations (e.g. the provisional application of the 1977 Maritime Boundary Agreement between Cuba and the USA⁴⁹) or in multilateral settings (e.g. the provisional application of the 1996 Comprehensive Nuclear-Test-Ban Treaty).⁵⁰ Evidently, these impediments are of a different nature than the impediments to the entry into force of a mixed agreement in the EU context, which furthermore are domestic rather than international.⁵¹ Indeed, the provisional application of EU bilateral mixed agreements is always *originally* envisaged and is an almost automatic corollary to the decision on the mixed nature of the agreement. In fact, it is only when the internal constitutional law of the partner third country does not allow provisional application that the EU will not provisionally apply mixed agreements.⁵²

The present article therefore argues that the EU has created a new and specific function for the legal device of provisional application: in a composite federal system where treaty-making power is shared between the federal and the state level, provisional application facilitates the decision to turn a facultative EU-only agreement into a facultative mixed agreement by formally concluding an agreement in a mixed form, but applying it as if it were an EU-only one. The device of provisional application allows the member states in the EU Council to reconcile two conflicting political objectives: on the one hand, the member states do not want to wait several years before seeing the effective application of the commitments entered into by virtue of an international agreement. On the other hand, the member states want to continue being involved as formal parties to major agreements, something which becomes impossible if those agreements are concluded by the EU on its own. Provisional application then creates a way out of this dilemma and facilitates the decision in favour of 'mixity'. It thereby also allows the EU and its member states (as a meta-party) to remain an attractive partner to the outside world even when agreements are concluded as mixed agreements.⁵³

⁴⁹ Cuba–United States Maritime Boundary Agreement, 16 December 1977, 17 ILM 110.

⁵⁰ Michie, *supra* note 19, at 35–36.

⁵¹ This was also noted as such by Special Rapporteur Juan Manuel Gómez-Robledo, see ILC, *supra* note 19, at 9.

⁵² See, e.g., the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States and the Socialist Republic of Vietnam, OJ 2012 L 137/1.

⁵³ Of course, the device of provisional application is no miracle cure, either. As the Comprehensive Economic and Trade Agreement (CETA) saga shows, mixity still has the potential of significantly undermining the EU's attractiveness as an international partner. The Commission was of the opinion that the CETA should be an EU-only agreement, but for political reasons agreed to have it signed and concluded as a mixed agreement. Just before the planned signature of the CETA, however, the government of one of the Belgian regions blocked the procedure (which it could do because of the CETA's mixed nature), a compromise being reached only at the eleventh hour, allowing for the CETA's signature and provisional application. See *supra* note 33.

Assuming this practice by the EU is legally sound,⁵⁴ an inherent limit to the decision on provisional application, which is taken by the Council pursuant to Article 218(5) TFEU, is that it can only relate to those provisions of the agreement (i) for which the EU has been conferred a competence and (ii) for which it also exercises a competence (cf. the EU may have a shared competence without exercising it). However, if the exact scope of the provisional application is spelled out methodically in the EU's decision on provisional application this would again make the technique less attractive and would go against part of the *raison d'être* of having mixed agreements in the first place, since it would require the EU and the member states to articulate the division of competences between the EU and the member states with precision. As will be illustrated below, however, the EU Council's decisions on provisional application are drafted in rather ambiguous terms, allowing the provisional application of (parts of) an agreement without definitively settling the question whether the EU has exercised competence with regard to those parts, thus adding to the attractiveness (for EU member states) of the technique of provisional application.⁵⁵ As will be shown, under international law this does raise questions on legal certainty for the EU's treaty partners.

4 The EU's Contribution to the Development of International Law

Having concisely set out the internal law of the EU which explains its practice of concluding mixed agreements and the resulting practical need to rely on the technique of provisional application, it is now possible to explore how the EU has contributed to the development of international law. The very first application of this new (or EU-specific)

⁵⁴ Kempen and Schiffbauer claim that the EU's practice is illegal. Based on the premise that a provisionally applied agreement is separate but accessory to the main agreement, they find that either the parties to both agreements ought to be the same (which they are not in current EU practice) or the provisionally applied agreement is not 'accessory' anymore and requires its own negotiating and ratification process (which it does not in current EU practice). See Kempen and Schiffbauer, *supra* note 48, at 116–117. Similarly, see Bäumler, 'Vom Vertragstext zum Inkrafttreten: Das Vertragsschlussverfahren im Mehrebenensystem am Beispiel CETA', 51 *Europarecht* (2016) 607, at 626. Those views appear unconvincing, since they assume that a mixed agreement is an indissoluble whole in so far as no clear division of competence (e.g. through a declaration of competence) has been made. Yet the case law of the Court of Justice of the European Union (CJEU), for example concerning the WTO agreements, where it identifies which parts are covered by EU competence, clearly speaks against this. Further, under VCLT, *supra* note 3, Art. 25, the provisional application of *parts* of an agreement is allowed. In addition, taking mixity to such an extreme as proposed by Kempen and Schiffbauer would deny the separate legal personalities of the EU and its member states and would ignore the typical definition of the parties in a mixed agreement which, on the EU side, may be *either* or both the EU *or/and* the member states.

⁵⁵ Subject to this caveat, it is therefore doubtful to claim that 'it is not guaranteed that the mixed agreement will be subject to provisional application in all of the member states in regard to those aspects of the mixed agreement that do not fall within the Union's competence', as does Andrés Sáenz de Santa María, since member states must only provisionally apply the agreement insofar as it comes under EU competence and the duty to do so is purely an EU obligation similar to the duty to apply agreements *formally concluded* by the EU pursuant to Article 216(2) TFEU. See Andrés Sáenz de Santa María, 'The European Union and the Law of Treaties: A Fruitful Relationship', 30 *EJIL* (2019) 721, at 731.

function of the device of provisional application related to the 1995 Interregional Framework Cooperation Agreement (IFCA) between the EU and Its Member States with the Mercosur and Its Party States.⁵⁶ The provisional application only extended to some of the trade-related clauses⁵⁷ of the IFCA and to the institutional provisions facilitating the implementation of the agreement.⁵⁸ Materially, then, the scope of provisional application was the same as the typical scope of the interim agreements concluded by the EU (see Section 2.B).⁵⁹

Since the IFCA itself did not provide for its provisional application, provisional application was put into effect through a separate exchange of letters.⁶⁰ In addition, given that the EU Treaties at the time did not explicitly allow recourse to provisional application, the Council's decision on the provisional application did not identify a specific legal basis in the Treaties.⁶¹

By now, however, it has become established practice for the Commission to include a clause on provisional application in an agreement's general provision on its entry into force and for the Council to decide on the provisional application at the same time as it decides on authorizing the signature of the agreement. The old practice of provisionally applying agreements through a separate exchange of letters has thus been discontinued. In mixed agreements concluded by the EU, provisional application commences when both parties have exchanged notifications informing each other that the necessary internal procedure for provisional application has been completed. The agreements thus typically prescribe provisional application in a mandatory manner, although some agreements merely allow for provisional application.⁶² The EU's rather consistent practice is therefore a more refined version of the second type of source of provisional application identified by Special Rapporteur Gomez-Robledo in his second report,⁶³ i.e. where the obligation to provisionally apply arises out of the signature of the parties but the commencement depends on a further reciprocal unilateral decision.

⁵⁶ Interregional framework Cooperation Agreement between the European Community and Its Member States and Mercosur, 15 December 1995, OJ 1999 L 112/66 ('IFCA').

⁵⁷ Notably the provision on cooperation in relation to intellectual property (and for the agreement with Chile, see note 58) (also the provision on public procurement) was not provisionally applied.

⁵⁸ An identical procedural approach was taken for the provisional application of the framework cooperation agreement with Chile. See Exchange of Letters between the European Community and Chile concerning the provisional application of certain provisions of the Framework Cooperation Agreement. OJ 1996 L 209/2.

⁵⁹ As Neframi rightly notes, given that it is the Council of the EU deciding on either provisional application or an interim agreement, such a decision cannot (in principle) cover the agreement's provisions coming under Member State competence. See E. Neframi, *Les accords mixtes de la Communauté européenne: aspects communautaires et internationaux* (2007), at 297 n.509.

⁶⁰ See Council Decision 96/205 concerning the provisional application of certain provisions of the Interregional Framework Cooperation Agreement between the European Community and Its Member States, OJ 1996 L 69/1.

⁶¹ See Council Decision 96/205 (agreement with Mercosur), OJ 1996 L 69/1; Council Decision 96/504 (agreement with Chile), OJ 1996 L 209/1.

⁶² An example of the latter exception may be found in the PA with New Zealand, *supra* note 33.

⁶³ See, 'Second report on the provisional application of treaties by Special Rapporteur Juan Manuel Gómez-Robledo', Doc. A/CN.4/675, 9 June 2014, at 7–9.

This shows how the EU through its external action has contributed to the development of international law on this issue. This since provisional application is by default a necessary corollary to a (mixed) bilateral agreement which third countries may want to conclude with the EU. Simply put: if a third country wants to conclude a non-sector-specific bilateral agreement with the EU, it will typically have to accept that on the part of the EU this will be a mixed agreement, and the EU will insist that a clause on provisional application also be introduced.⁶⁴ Based on its established practice, the EU will then propose specific modalities governing provisional application to its treaty partners. The information provided to the Special Rapporteur by a number of delegations testifies to this: states such as South Korea, Paraguay and El Salvador reported that they have effectively (almost) never relied on provisional application (in bilateral relations) unless it was in their relations with the EU.⁶⁵ Similarly, Norway and the Swiss Republic reported that a lot, if not most, of the instances of resorting to the mechanism of provisional application were in their legal relations with the EU.⁶⁶ Without the EU's peculiar constitutional setup, then, those states would not have been as familiar (if at all) with the mechanism of provisional application of international agreements.

Despite the very high degree of consistency in the EU's approach to provisional application, some differentiation in the EU Council's approach may still be noted: its decisions setting out precisely which provisions of the agreement to be signed will be provisionally applied vary greatly and the extent to which the identified provisions will be provisionally applied will also be qualified (Section 4.A); this practice may shed light on the difficult internal division of competences within the EU (Section 4.B) which may negatively affect the EU's partners' interests (Section 4.C). Lastly, this contribution will also look at the question who at the EU side may terminate the provisional application of mixed agreements (Section 4.D). While these issues may originate from peculiarities inherent in EU law, it will be clear that they raise problematic and relevant questions of international law since (i) the requirement that both parties have mutually *agreed* on provisional application may be undermined; (ii) the interests of EU partners may be undermined because of the resulting legal uncertainty on the exact scope and extent of provisional application; (iii) the reference in the agreements to the internal law of the EU might require the EU's partners under international law

⁶⁴ An interesting exception is Vietnam. Of all the framework or cooperation agreements concluded by the EU and its member states, only the one with Vietnam does not provide for its provisional application since Vietnam's constitutional law does not seem allow for it, at least in the specific context at issue.

⁶⁵ See the ILC, 66th Session, 19 February 2015, Comments by South Korea, available at <https://bit.ly/2ZUDxto>; ILC, 68th Session, 18 August 2016, Comments by Paraguay, available at <https://bit.ly/2ZQvaie>; ILC, 69th Session, 2017, Comments by El Salvador, available at <https://bit.ly/3gHoYQj>. A similar issue may be noted even in relation to an EU member state. Austria joined the EU in 1995 and at that time argued that its Constitution did not allow for provisional application; however, Hafner reports that that position has now changed in light of the EU's practice. See Hafner, *supra* note 7, at 147.

⁶⁶ See the ILC, 66th Session, 27 January 2014, Comments by the Swiss Republic, available at https://legal.un.org/docs/?path=..//ilc/sessions/66/pdfs/french/pat_switzerland.pdf&lang=F; ILC, 66th Session, 31 January 2014, Comments by Norway, available at https://legal.un.org/docs/?path=..//ilc/sessions/66/pdfs/english/pat_norway.pdf&lang=E.

to ascertain on their own the EU's internal division of competences; and (iv) the question who on the EU side may terminate provisional application is evidently of interest to the EU's partners.

A Defining the Scope and Qualifying the Extent of Provisional Application

The mixed agreements which the EU concludes do not necessarily spell out the scope of provisional application themselves, in which case this is left to the parties to decide on later. In so far as the agreement itself does not define the scope of provisional application, two basic approaches are followed by the Council in its decisions on signature and provisional application.⁶⁷ Following a positive approach, the Council identifies those provisions that will be provisionally applied, while a negative approach will list the provisions that will not be provisionally applied.

In practice, both the negative and positive approaches to determining the provisional application of a mixed agreement are almost always complemented with a further qualification of the extent of provisional application.⁶⁸ In the aviation agreements, the clauses on entry into force contain a general reservation to the effect that the agreement will be provisionally applied in so far as possible under domestic law.⁶⁹ For the EU

⁶⁷ For an exception where it did, see, e.g., PCA with Iraq, *supra* note 33, Art. 117. An even more remarkable variant of this approach may be found in relation to the Korea Framework Agreement (*supra* note 33), where the entire agreement is provisionally applied. Since this is a mixed agreement, it is of course legally impossible for the Council to decide on the full provisional application in absence of a delegation by the member states. Kleimann and Kübek seem to refute this by noting past institutional practice whereby the (member states in) Council agree(d) to a provisional application which *prima facie* extended to provisions coming under national exclusive competence. See Kleimann and Kübek, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15', 45 *Legal Issues of Economic Integration* (2018) 13, at 27–28. However, '[i]n accordance with settled case-law, a mere practice on the part of the Council cannot derogate from the rules of the Treaty and cannot therefore create a precedent that is binding on the EU institutions'. See Case C-684/15, *Commission v. Council*, ECLI:EU:C:2017:803, para. 42. As a result, and a fortiori, institutional practice, even if settled, cannot override the principle of conferral laid down in the TEU, *supra* note 43, Art. 5. Other cases (apart from the Korea Framework Agreement, *supra* note 33) where the Commission proposed the full provisional application without recourse to a hybrid act are the Euro-Mediterranean Aviation Agreement with Israel, Doc. COM (2012) 688 final, 22 November 2012 ('Aviation Agreement with Israel'); the FTA with Korea, COM (2010) 136 final, 9 April 2010; Cooperation Agreement with Norway on Satellite Navigation, COM (2009) 453 final, 4 September 2009; Stepping Stone EPA with Ghana, COM (2008) 440 final, 10 July 2008; the CETA with Canada, COM (2016) 470 final, 5 July 2016; etc. The alternative option to decide on the full provisional application of a mixed agreement through a single decision jointly taken by the EU and the member states has been ruled unconstitutional by the Court of Justice in the *Hybrid Acts* case. See Case C-28/12, *Commission v. Council*, ECLI:EU:C:2015:282 ('*Hybrid Acts*'). Following this judgment, the Council changed its practice, but according to some it still does not comply with the spirit of *Hybrid Acts*. See, e.g., Castillo de la Torre, 'On "Facultative" Mixity: Some Views from the North of the Rue de la Loi', in M. Chamon and I. Govaere (eds), *Facultative Mixity in Post-Lisbon EU External Relations: Law and Practice* (2020) 229, at 233–234.

⁶⁸ See, e.g., Article 12(4) of the Agreement. Similarly, see the Interim Agreement on EPA with the SADC states; Interim Agreement on EPA with the ESA States and the Stepping Stone EPA with Ghana, *supra* note 33.

⁶⁹ See Aviation Agreement with Israel, *supra* note 33, Art. 30(1); Aviation Agreement with Moldova, *supra* note 33, Art. 29(2); Ancillary Agreement, *supra* note 33, Art. 8; Accession Agreement to the US Air Transport Agreement, OJ 2011 L 283/3, Art. 5; Air Transport Agreement with Canada, *supra* note 333, Art. 23(2); Aviation Agreement with Jordan, *supra* note 33, Art. 29(2); Aviation Area Agreement with Georgia, *supra* note 33, Art. 29(2).

meta-party, this reference arguably captures the EU's limited competences. Yet other agreements are explicit on this, referring to provisional application in so far as the provisions come under EU competences.⁷⁰ In those cases, the Council subsequently decides that the EU will not simply provisionally apply a number of provisions but only so 'to the extent that they cover matters falling within the Union's competence' which may include 'matters falling within the Union's competence to define and implement a common foreign and security policy [CFSP]'.⁷¹ Sometimes it is added that the provisional application 'does not prejudice the allocation of competences between the Union and its Member States'.⁷² When this limit on the extent of provisional application is also foreseen in the agreement itself, such as in the case of the Cooperation Agreement with Norway on Satellite Navigation,⁷³ it is clear that the EU's contracting party has accepted this. However, when the Council adds this qualifier only later on in its decision on provisional application,⁷⁴ the situation is much less clear.

Of course, from an internal legal perspective, these qualifiers are superfluous and redundant: if the Council decides on provisional application, the latter can by definition only relate to provisions for which the EU is competent in the first place⁷⁵ and a Council decision on provisional application cannot in any way alter the treaty-defined allocation of competences. This also holds true for any references to the CFSP. Since the Council's decision on provisional application will cite a CFSP legal basis, it is evident that the provisional application also extends to the CFSP provisions.⁷⁶ As a rule, these statements should not be included in the Council's decisions, which should restrict themselves to identifying the relevant provisions of the agreement to be provisionally applied. If such a statement is exceptionally necessary to clarify the extent

⁷⁰ See EPA with the SADC States, *supra* note 33, Art. 113(3); Interim EPA with the SADC States, *supra* note 33, Art. 105(4); Cooperation Agreement on Satellite Navigation with Norway, *supra* note 33, Art. 12(4); EPA with the Eastern and Southern African States, *supra* note 33, Art. 62(4); European Satellite Navigation Programmes Cooperation Agreement with Switzerland, *supra* note 33, Art. 27(2).

⁷¹ See, e.g., Council Decision 2017/434 on the Cooperation Agreement on Partnership and Development with Afghanistan, *supra* note 33, Art. 3.

⁷² See, e.g., Council Decision 2016/1623 on the EPA with the SADC States, *supra* note 33, Art. 3(1).

⁷³ Cooperation Agreement with Norway on Satellite Navigation, *supra* note 33, Art. 12(4) provides: 'Norway and the European Union, as regards elements falling within its competence, agree to apply provisionally this Agreement' (emphasis added).

⁷⁴ See, e.g., Council Decision 2011/265 on the Signing and Provisional Application of the FTA with Korea, OJ 2011 L 127/1, Preamble, recital 9.

⁷⁵ As noted above, this could only be different if the member states mandate the Council to decide on the provisional application on their behalf. However, as a general rule for any delegation, a mandate cannot be presumed but must be granted explicitly. See, analogously, Case C-301/02 P, *Tralli v. ECB*, ECLI:EU:C:2005:306, para. 43.

⁷⁶ However, also on this point a recent decision of the Court will probably frustrate future mixed action. In *Kazakhstan*, the Court applied the centre of gravity test and absorption doctrine to potential TEU and TFEU legal bases. The Court essentially held that the CFSP aspect of the agreement with Kazakhstan was ancillary and that a separate CFSP–TEU legal basis was therefore unwarranted. See Case C-244/17, *Commission v. Council*, ECLI:EU:C:2018:662 ('*Kazakhstan*'). This should mean that, in the future, horizontal cooperation agreements are no longer signed, provisionally applied, or concluded on the legal basis of TEU, since the CFSP component of such agreements is always very limited.

to which the EU can ensure provisional application, that statement must be more detailed and informative than the current laconic ones.

Some further clarifications on the scope of the decision on provisional application are undoubtedly legally significant. For instance, the Association Agreement (AA) with Central America provides that the parties *may* provisionally apply Part IV of the agreement.⁷⁷ Here, provisional application itself is clearly optional but there does not seem to be a choice on its scope (i.e. either the whole Part IV is applied provisionally or there is no provisional application at all). Still, in its decision, the Council confirmed the provisional application of Part IV with the exclusion of Article 272 on the criminal enforcement of IP infringements. The aspect of criminal enforcement is typically something which the EU member states perceive as coming under exclusive national competences, but this also means that the EU has unilaterally altered the extent of provisional application.

In its decision on the signature and provisional application of the Strategic Partnership Agreement (SPA) with Japan, the Council for the very first time explicitly clarified that the EU will provisionally apply a number of provisions ‘to the extent that they cover matters for which the Union has already exercised its competence internally’.⁷⁸ Readers familiar with EU law will recognize here a veiled reference to the European Agreement on Road Transport (ERTA) doctrine, which stipulates the threshold to be met for the EU to acquire exclusive competence as a result of Article 3(2) TFEU.

This type of clarification might figure more prominently in the future as an indirect consequence of the Court’s jurisprudence, notably the 2017 *COTIF* case.⁷⁹ Prior to that case, a significant number of EU member states had consistently defended the view, both in the Council and before the Court, that the only type of EU competence in external relations is exclusive competence. Hence, if in the absence of an explicit competence in the Treaties it could not be shown that the EU had a priori exclusive competence (now codified in Article 3(1) TFEU) or that the EU had an exclusive competence by virtue of the ERTA doctrine (now codified in Article 3(2) TFEU),⁸⁰ the EU did not have any external competence at all. From this perspective, restricting the provisional application to the ‘matters falling within the Union’s competence’ is the same as restricting it to the ‘matters falling within the Union’s exclusive competence’. While this view was hardly, if at all, defended in legal doctrine, it took until the end of 2017 for the Court in the *COTIF* case to unequivocally confirm that the EU might also enjoy and exercise a *shared* external competence.

When the Council subsequently had to decide on the provisional application of the SPA with Japan, a number of member states, notably France, insisted that the EU

⁷⁷ *Supra* note 33, Art. 353(4).

⁷⁸ The first time the Council included such a provision was in its Decision 2016/2118 on the SPA with Canada, see *supra* note 33.

⁷⁹ See Case C-600/14, *Germany v. Council*, ECLI:EU:C:2017:935 (*‘COTIF’*).

⁸⁰ On the latter codification, see Chamón, ‘Implied Exclusive Powers in the ECJ’s Post-Lisbon Jurisprudence: The Continued Development of the ERTA Doctrine’, 55 *Comm. Mkt. L. Rev.* (2018) 1101, at 1101–1142.

should not exercise a shared competence and that instead it should only exercise its exclusive competences.⁸¹ Despite Article 47 of the Agreement not referring back to the internal law of the parties when listing the parts of the agreement that would be provisionally applied, the Council in its decision added that part of the Agreement's provisions would be provisionally applied 'to the extent that they cover matters for which the Union has already exercised its competence internally'.⁸² As noted, this hints at an ERTA effect⁸³ but it also redefines the extent of the Agreement's provisional application, as compared to what had been agreed with Japan in the Agreement. In addition, the Council also added a qualifier to a further number of provisions of the Agreement, which would be provisionally applied 'to the extent that they cover matters falling within the Union's competence to define and implement a common foreign and security policy'.⁸⁴

How should the Council's different approaches be assessed from an international law perspective? A distinction has to be made between the situation where the international agreement itself refers back to the internal law of (one of) the parties and the situation where such a reference is unilaterally introduced by one of those parties. The first scenario is envisaged in Draft Guideline 12 worked out by the ILC, but the commentary shows how problematic a reference to the internal law of (one of) the parties is.⁸⁵ It is thus noted that Draft Guideline 12 acknowledges and recognizes that provisional application depends on the internal law of the parties. However, the commentary equally stresses that there must be an agreement between the parties on the reference to limitations to internal law and that the purpose is to make clear whether any limitations deriving from internal law exist but not to have an agreement between the parties on the applicability of such limitations. Finally, the commentary stresses

⁸¹ For the member states this is not just an issue of principle but also one with potentially significant practical ramifications. After all, one of the (few) legal reasons why member states might want to insist on facultative mixity is to pre-empt a so-called 'reverse' ERTA effect. Dony notes that there are elements for and against such an effect in the Court's case law and that the original draft Constitutional Treaty of 2003 explicitly referred to *internal* common rules being affected, whereas the final and current Article 3(2) TFEU only generally refers to common rules being affected. See Dony, 'Retour sur les compétences externes implicites de l'Union', 54 *Cahiers de droit européen (CDE)* (2018) 109, at 163–164. See also M. Klamert, *The Principle of Loyalty in EU Law* (2014), at 186; Cremona, 'EU External Relations: Unity and Conferral of Powers', in L. Azoulai (ed.), *The Question of Competence in the European Union* (2014) 65, at 70; Groux, 'Le parallélisme des compétences internes et externes de la Communauté européenne', 14 *CDE* (1978) 3, at 24; Dashwood and Heliskoski, 'The Classic Authorities Revisited', in A. Dashwood & C. Hillion (eds), *The General Law of EC External Relations* (2000) 3, at 14; Heliskoski, 'The Exercise of Non-Exclusive Competence of the EU and the Conclusion of International Agreements', in K. Lenaerts et al. (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (2019) 293, at 310.

⁸² See Council Decision 2018/1197 on the SPA with Japan, *supra* note 33, Art. 4(b).

⁸³ See Case 22/70, *Commission v. Council*, ECLI:EU:C:1971:32 ('ERTA'). For an ERTA effect, however, it is not sufficient that there is internal EU law covering the area concerned – that internal law must also be affected.

⁸⁴ See Council Decision 2018/1197 on the SPA with Japan, *supra* note 33, Art. 4(b).

⁸⁵ Report of the International Law Commission, 69th Session, Doc. A/72/10, 1 May–2 June and 3 July–4 August 2017, at 128.

that it 'should not be construed as encouraging States or international organizations to include in the agreement on provisional application limitations derived from the internal law of the State or from the rules of the organization'.⁸⁶ The EU's practice may have then contributed to including Guideline 12 in the Draft Guidelines, even if the Special Rapporteur had earlier noted that:

[T]he debate in both the Commission and the General Assembly made it clear that no reference to internal law under any circumstances should be included in the draft guidelines, so as not to create the false impression that the provisional application regime would be subordinated to the internal law of States.⁸⁷

The EU's practice of referring to its internal law in the agreement's clauses on provisional application indeed results in problems of treaty interpretation. In the example above, Norway has clearly accepted a limit on the provisional application by the EU, i.e. there is an agreement as required by Guideline 12, but the question 'what falls within the EU's competences' is not resolved. This scenario thus leads to problems such as the one in the *Yukos* cases under the Energy Charter Treaty (ECT) where the international tribunals found that the extent to which provisional application of the ECT was possible under the internal law of one party was a matter verifiable by the other parties.⁸⁸ However, while they held that Russian law was not opposed to provisional application, the awards were quashed by a Dutch tribunal that found that the Russian Constitution did not allow for the provisional application *in casu*.⁸⁹ These cases highlight that the reference to internal law in the agreement itself raises the thorny issue of who exactly will verify 'the extent of the EU's competences' and how much deference should be awarded to the EU's own interpretation of its competences if a dispute arises. Important in this regard is that the agreements' clauses on dispute settlement are typically included in the scope of provisional application.

The second scenario then raises problems of an even more fundamental nature, since it could give rise to the EU either arguing that its consent to provisionally apply parts of the agreement had been invalid or to the EU invoking its internal law as a justification for its failure to provisionally apply the agreement. In the Draft Guidelines on Provisional Application, these two situations are governed by Draft Guidelines 10 and 11 which respectively reflect Articles 27 and 46 of the VCLT. As the commentary to Guideline 10 makes clear:

⁸⁶ *Ibid.*, at 146 (at the time this Draft Guideline was numbered as draft Guideline 11).

⁸⁷ See International Law Commission, Fourth Report on the Provisional Application of Treaties, Doc. A/CN.4/699, 23 June 2016, at 10.

⁸⁸ Criticizing this, see Arsanjani and Reisman, *supra* note 2, at 95–96. Third countries and international organizations should not normally concern themselves with legal developments in other countries or international organizations. See Rensmann, 'Article 46: Provisions of Internal Law Regarding Competence to Conclude Treaties', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2018) 835, at 864. For the agreement, see Energy Charter Treaty, 17 December 1994, 2080 UNTS 100 ('ECT').

⁸⁹ See Rechtbank Den Haag [District Court of The Hague], *The Russian Federation v. Veteran & Yukos*, ECLI:NL:RBDHA:2016:4230. An appeal against this decision is pending before the Gerechtshof Den Haag [Court of Appeal of the Hague] in cases C/09/477160/HA ZA 15-1; C/09/477162/HA ZA 15-2; and C/09/481619/HA ZA 15-112.

A failure to comply with the obligations arising from the provisional application of a treaty or a part of a treaty with a justification based on the internal law of a State or rules of an international organization will engage the international responsibility of that State or international organization. Any other view would be contrary to the law on State responsibility, according to which the characterization of an act of a State or an international organization as internationally wrongful is governed by international law and such characterization is not affected by its characterization as lawful by internal law.⁹⁰

As a result, unless the parties agree by a separate agreement, the EU cannot modify the extent of provisional application without incurring responsibility under international law. Given the high threshold set by Article 46 VCLT, reflected in Draft Guideline 11, in practice the EU could never rely on an argument based on the EU's internal division of competences since such a breach would not 'be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States or, as the case may be, of international organizations and in good faith'.⁹¹ After all, as the next section discusses, the internal delimitation of competences is continuously contested between the EU institutions and member states.

B The Provisional Application as a Proxy for the Precise Delimitation of Competences Between the EU and Its Member States

As noted above, one of the key features of mixed bilateral agreements which makes them attractive to both the member states individually and to the EU as a whole is that they do not require the member states and the EU to spell out the precise delimitation of competences between them. While the multilateral agreements which are open to regional economic integration organizations (REIOs) typically require REIOs to provide a declaration of competence,⁹² such declarations are never provided for in the EU's bilateral (mixed) agreements. Instead, the other party accepts that the member states, and the EU as a meta-party, fulfil all the commitments laid down in the agreement. One could argue that from an international law perspective, the division of competences within the EU is not relevant, but if the provisional application clause in an agreement refers back, directly or indirectly, to the internal law of the parties, that division of competences does become relevant. This is true especially if, following the reasoning of the tribunals in the *Yukos* cases, it is for the different contracting parties concerned to ascertain themselves of each other's internal law.⁹³

In principle, a decision on provisional application of an agreement⁹⁴ should tell us something about the precise delimitation of the competences that are involved and

⁹⁰ Report of the International Law Commission, 69th Session, Doc. A/72/10, 1 May-2 June and 3 July-4 August 2017, at 144.

⁹¹ *Ibid.*, at 145.

⁹² On this practice, see Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?', 17 *European Foreign Affairs Review* (2012) 491.

⁹³ *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, available at www.italaw.com/cases/1175.

⁹⁴ As noted, however, not all bilateral mixed agreements are provisionally applied. This is typically the case when the constitutional rules of the third country with which an agreement is signed do not allow for provisional application. See, e.g., Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and Its Member States, of the one part, and the Socialist Republic of Viet Nam.

relied upon, as Van der Loo and Wessel rightly remark.⁹⁵ However, both authors immediately note that the resulting picture is far from clear or perfect. This already follows from the discussion in Section 4.A. To illustrate, when the Council Decision on the provisional application of the Comprehensive and Enhanced Partnership Agreement (CEPA) with Armenia provides for the provisional application of Titles I and V of the Agreement, one cannot simply infer that the EU is competent for those Titles since the decision equally restricts this to ‘the extent that those Titles cover matters falling within the Union’s competence’.⁹⁶ In contrast, these decisions do allow a glimpse into the division of competences in so far as they sometimes reveal disagreements between the Commission and the Council. After all, pursuant to Article 218(5) TFEU, a Council decision authorizing the signature and provisional application of a negotiated agreement is always based on a Commission proposal (Section 4.B(1)).⁹⁷ These decisions may also help to identify those (remaining) areas that come under exclusive member state competence (Section 4.B(2)).

1 *Inter-Institutional Disagreements on the Scope of EU Competences*

Sometimes the Council simply endorses the scope of provisional application as proposed by the Commission. This may also happen when the Commission proposes the provisional application of the full agreement, which in itself is questionable for a mixed agreement (see Section 3). The Council will then typically add a qualification that the provisional application only extends to the ‘elements falling within the competence of the EU’.⁹⁸ However, the Council may also opt for a more restricted scope than the one proposed by the Commission, and proceed to a precise indication in its decision of the agreement’s provisions that will be provisionally applied. The Council will do so through the negative⁹⁹ or positive¹⁰⁰ approach or a combination of both (see Section 4.A).¹⁰¹

In light of most member states’ pre-COTIF understanding of the scope of EU external competences,¹⁰² one would expect the Council to follow a rather consistent approach in that only those provisions coming under a priori or supervening exclusive competences (see Section 4.A) would be provisionally applied. In reality, however, the decision on the scope of provisional application seems inspired as much by reasons

⁹⁵ Van der Loo and Wessel, *supra* note 42, at 754.

⁹⁶ Council Decision 2018/104 on the CEPA with Armenia, *supra* note 33, Art. 3.

⁹⁷ To be precise, the proposal is made by the actor that has negotiated the agreement. Only in the case of CFSP agreements is this going to be the High Representative rather than the Commission. A joint proposal by the Commission and the High Representative is also possible; however, the Court’s decision in *Kazakhstan* (*supra* note 70) will have an impact on this *modus operandi*.

⁹⁸ In relation to the Stepping Stone EPA with Ghana, compare the proposal of the European Commission in COM (2008) 440 final, *supra* note 67, with Council Decision 2016/1850, *supra* note 33.

⁹⁹ See, e.g., Council Decision 2012/735 on the trade agreement with Columbia and Peru, *supra* note 33.

¹⁰⁰ See, e.g., Council Decision 2017/1546 on the Framework Agreement with Australia, *supra* note 33; Council Decision 2017/434 on the Cooperation Agreement on Partnership and Development with Afghanistan, *supra* note 33.

¹⁰¹ See, e.g., Council Decision 2017/38 on the CETA with Canada, *supra* note 33.

¹⁰² See *supra* note 79.

of political expediency as by legal reasons. A first, very clear area in this regard are the provisions coming under the CFSP which are routinely provisionally applied, yet clearly do not fall under the EU's exclusive competences.¹⁰³

The provisions which the Council in the past has excluded from provisional application, sometimes in disagreement with the Commission, are varied in terms of their nature and content: weapons of mass destruction (WMD) clauses;¹⁰⁴ clauses setting norms on administrative and judicial proceedings;¹⁰⁵ consular protection;¹⁰⁶ protection of intellectual property;¹⁰⁷ criminal enforcement;¹⁰⁸ cooperation with the International Criminal Court;¹⁰⁹ money laundering;¹¹⁰ maritime transport;¹¹¹ taxation;¹¹² border security;¹¹³ non-agricultural appellations of origin;¹¹⁴ cultural cooperation;¹¹⁵ forestry;¹¹⁶ and portfolio investment.¹¹⁷

By definition, these clauses should fall into either of two categories: first, matters which the member states in the Council (rightly or wrongly) believe to come under exclusive member state competence.¹¹⁸ Yet, two very similar provisions may sometimes be provisionally applied for one agreement and be excluded from provisional application for another agreement.¹¹⁹ A second group of clauses comes under EU shared or supporting competences but are not provisionally applied because of reasons of political expediency. The broad horizontal partnership and cooperation agreements which the EU has concluded with Australia, Afghanistan, Canada, Cuba, Korea, New Zealand, Iraq, Japan, etc. are cases in point. These horizontal agreements have been concluded with very diverse countries, but all follow a

¹⁰³ According to Bribosia (at least under the original Constitutional Treaty) CFSP is a special kind of shared competence, see Bribosia, 'La répartition des compétences entre l'Union et ses États membres', in M. Dony and E. Bribosia (eds), *Commentaire de la Constitution de l'Union européenne* (2005) 47, at 63.

¹⁰⁴ See the horizontal agreements with Australia, Afghanistan, Japan and Iraq, the AA with Ukraine and the CEPA with Armenia and the Trade Agreement with Colombia and Peru, *supra* note 33.

¹⁰⁵ See the CETA with Canada, *supra* note 33, Arts 27.3, 27.4; AA with Ukraine, *supra* note 33, Arts 285 and 286; Trade Agreement with Colombia and Peru, *supra* note 33, Arts 291, 292. The decisions for the CETA and the Ukraine AA, *supra* note 33, explicitly provide that provisional application is only excluded in relation to national procedures.

¹⁰⁶ See PDCA with Cuba, *supra* note 33, Art. 35; CEPA with Armenia, *supra* note 33, Art. 21.

¹⁰⁷ See Trade Agreement with Colombia and Peru, *supra* note 33, Art. 202.

¹⁰⁸ See CETA with Canada, *supra* note 33, Art. 20.12; AA with Ukraine, *supra* note 33, Art. 158; AA with Central America, *supra* note 33, Art. 272.

¹⁰⁹ See the horizontal agreements with Australia, Afghanistan, Iraq and Japan, the AA with Ukraine and CEPA with Armenia, *supra* note 33.

¹¹⁰ See PDCA with Cuba, *supra* note 33, Art. 29; CEPA with Armenia, *supra* note 33, Art. 18; SPA with Japan, *supra* note 33, Art. 34; Iraq PCA, *supra* note 33, Art. 107.

¹¹¹ See PDCA with Cuba, *supra* note 33, Art. 55.

¹¹² See *ibid.* Art. 58; Chapter 2 of Title IV of the CEPA with Armenia, *supra* note 33, Title IV, ch. 2; SPA with Japan, *supra* note 33, Art. 19.

¹¹³ See PDCA with Cuba, *supra* note 33, Art. 71.

¹¹⁴ See *ibid.* Art. 73.

¹¹⁵ See FTA with Korea, *supra* note 33.

¹¹⁶ See CEPA with Armenia, *supra* note 33, Art. 46(e)(1).

¹¹⁷ See *ibid.* Art. 205; the CETA with Canada, *supra* note 33, ch. 8.

¹¹⁸ See Section 3.

¹¹⁹ See Section 4.B.2.

similar structure and content, although, evidently, the detailed provisions and exact commitments vary.

Of these horizontal agreements, only the one with Korea was provisionally applied in full.¹²⁰ For the others, a significant number (and sometimes most) of the provisions are excluded from provisional application, even if these provisions *prima facie* come under EU (shared) competence and even if they do not impose clear obligations. One example here are the provisions on money laundering, which are typically excluded from provisional application except in the case of the Korea Framework Agreement. Legally speaking, the clauses on money laundering could be included in the provisional application but for political reasons (on the EU or third-country side) these commitments are only taken up with the formal entry into force.

A typical WMD clause, which figures in every horizontal agreement, is another example of a clause that, from a legal standpoint, could be included in the provisional application (given the EU's competence in CFSP). This makes it all the more remarkable that it is rather consistently excluded, the exceptions being the Political Dialogue and Cooperation Agreement (PDCA) with Cuba and the Framework Agreement with Korea.

Provisions on taxation, portfolio investment and cultural cooperation are an even more poignant case. These are areas which, at least to member states, come close to exclusive national competence. In fact, one of the oft-cited reasons explaining the mixed nature of the Korea Free Trade Agreement was its protocol on cultural cooperation.¹²¹ At the same time, the provision on cultural cooperation in the SPA with Japan is provisionally applied.¹²² Conversely, and as Kleimann and Kübek note, the provisions on portfolio investment of the Korea FTA were provisionally applied.¹²³ In relation to taxation, the relevant provisions in the Comprehensive Economic and Trade Agreement (CETA) with Canada, the Southern African Development Community (SADC) Interim EPA and the PCA with Iraq are provisionally applied.¹²⁴ As a result, and in relation to the Iraq PCA, the EU can be deemed to have exercised a competence when agreeing that both its member states and Iraq remain free to fiscally discriminate on the basis of a taxpayer's place of residence.¹²⁵ Of course, the Council's decision contains the proviso that provisional application is limited to matters coming under the EU's competence but if the provision on taxation would be deemed not to be covered, it would mean that most-favoured-nation treatment granted under the PCA's trade chapter would effectively extend to tax matters, which arguably could not have been the intention of the Council.

¹²⁰ See *supra* note 33.

¹²¹ Given the limited substantive commitments made in relation to cultural cooperation, it is challengeable whether the protocol indeed triggered a legal need for mixity. See Chamon, *supra* note 80, at 152.

¹²² Admittedly, the commitments *vis-à-vis* Korea were more far-reaching than those laid down in Article 41 of the SPA with Japan, *supra* note 33, but it is still remarkable that provisional application was agreed to in this area.

¹²³ Kleimann and Kübek, *supra* note 67, at 27.

¹²⁴ See *supra* note 33.

¹²⁵ See Iraq PCA, *supra* note 33, Art. 26(3).

2 *The Theoretic Existence of Exclusive National Competences and Possible Workarounds*

Some provisions are typically excluded from provisional application, suggesting that these come under exclusive national competence. Perhaps the best example is the criminal enforcement of intellectual property law, although again this was included in the provisional application of the Korea FTA. Yet in relation to the Association Agreement with Central America where the Commission also proposed the full provisional application, the Council excluded the single clause of the agreement which dealt with criminal enforcement. From a legal perspective, such clauses seem to fall outside EU competence if they cannot be brought under Article 83(2) TFEU. That provision only allows for the adoption of minimum rules on criminal offences and sanctions in so far as necessary to ensure the effective implementation of harmonized EU rules.

The mixed agreements' provisions setting out certain guarantees for administrative and judicial proceedings which the Council typically excludes from provisional application¹²⁶ might also be said to come under exclusive national competence. At least for judicial proceedings, this finds some support in the Court of Justice of the European Union's (hereinafter CJEU or Court of Justice) Singapore Opinion, where it ruled that the agreement's investor–state dispute settlement (ISDS) provisions did not come within the EU's exclusive competence given their impact on national jurisdictions.¹²⁷ Crucially, however, the Court did not arrive at this conclusion by finding that this area comes under exclusive national competence but only because the provisions on ISDS could not be qualified as ancillary.¹²⁸

This raises one critical issue: although the existence of exclusive national competence is generally presumed, it is far from straightforward to actually identify an area or subject that is completely out of reach of EU law. As Lenaerts noted in 1990, '[t]here simply is no nucleus of sovereignty that the Member States can invoke, as such, against the [EU]'.¹²⁹ As Dashwood has also noted, the scope of EU law is even more vast than the competences of the EU.¹³⁰ Is it then sufficient for ancillary provisions to come within the scope of EU law or is EU competence required?

Further, even if a core of exclusive national competence can be identified, a lingering legal question has recently come to the forefront: if an agreement concluded by

¹²⁶ See Section 4.B(1).

¹²⁷ Opinion 2/15 re the Singapore Free Trade Agreement, ECLI:EU:C:2017:376, paras 292–293.

¹²⁸ See Chamon, 'Mixity in the EU's Post-Lisbon Free Trade Agreements', in I. Bosse-Platière and C. Rapoport (eds), *The Conclusion and the Implementation of EU Free Trade Agreements: Constitutional Challenges* (2019) 39, at 44–45.

¹²⁹ Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *American Journal of Comparative Law* (1990) 205, at 220. While in theory a distinction can be made between member states' reserved and retained competences, the Court approaches both types of competences similarly, see De Witte, 'Exclusive Member State Competences: Is There Such a Thing?', in S. Garben and I. Govaere (eds), *The Division of Competences between the EU and the Member States* (2017) 59, at 59–73.

¹³⁰ See Dashwood, 'The Limits of European Community Powers', 21 *European Law Review* (*Eur. L. Rev.*) (1996) 113, at 114.

the EU contains provisions coming under exclusive national competence, can such an agreement still be an EU-only (rather than compulsory mixed) agreement? Or can the Council at least include provisions of the agreement coming under exclusive national competence within the scope of the agreement's provisional application? Kleimann and Kübek note that the Council could rely on Article 352 TFEU to do so,¹³¹ but this would imply that the matter at issue is not a genuinely exclusive national competence to begin with. A second option may be envisaged in so far as those provisions are purely ancillary. The application of the absorption doctrine is indeed well established in the case law of the Court of Justice, but only when a choice has to be made between two (or more) different legal bases in the TFEU, and following the *Kazakhstan* case also in relation to the legal bases in the TEU and TFEU. By contrast, the CJEU has not been explicit on whether the absorption doctrine can also be applied in vertical (rather than horizontal) configurations. While some see scope for such an application of the doctrine,¹³² Advocate General Kokott has dismissed the possibility, noting that it would violate the principle of conferred powers.¹³³

However, if one were to accept a vertical application of the absorption doctrine, it would undermine the legal case for excluding provisions in international agreements coming under exclusive national competence from provisional application by the EU (or conclusion by the EU for that matter). In this regard, three different types of ancillary provisions may be identified: (i) those that constitute commitments only for the other party,¹³⁴ (ii) those that are a necessary adjunct to ensure the effectiveness of the main provisions¹³⁵ and (iii) substantive provisions that are only limited in scope.¹³⁶ The provisions on safeguards in administrative and judicial proceedings, criminal enforcement, etc., which the Council typically leaves to the member states, would then come under the second category and would not legally *require* member state involvement. Similarly, provisions on political dialogue, WMD, etc., while symbolically important, only prescribe limited (if any) clear obligations, which means they could come under the third type of ancillary provisions. Of course, these hypotheses are contested and remain to be tested by the Court of Justice.¹³⁷ In addition, even if the CJEU would confirm that the absorption doctrine may be applied vertically, it would only mean that in a number of scenarios compulsory mixity would morph into facultative mixity, i.e. the member states' involvement would not be legally required anymore but it would still be permissible and possible if the (member states in the) Council insist(s) on leaving a legal space for the member states.

¹³¹ See Kleimann and Kübek, *supra* note 67, at 28.

¹³² See the discussion in Chamon, *supra* note 128; see also Prete, 'The Constitutional Limits to the Choice of Mixity after EUSFTA, COTIF I, MPA Antarctic and COTIF II: Towards a More Constructive Discourse?', 45 *Eur. L. Rev.* (2020) 113, at 116–120.

¹³³ Opinion of AG Kokott in Joined Cases C-626/15 and C-659/16, *Commission v. Council*, ECLI:EU:C:2018:362, para. 82.

¹³⁴ Opinion 1/94 re *GATS and TRIPS*, ECLI:EU:C:1994:384, para. 68.

¹³⁵ Case C-137/12, *Commission v. Council*, ECLI:EU:C:2013:675, para. 70.

¹³⁶ Case C-268/94, *Portugal v. Council*, ECLI:EU:C:1996:461, paras 75–76.

¹³⁷ See Section 4.B(1).

In summary, while the decision on the provisional application of a mixed agreement in principle ought to be informative of the division of competences between the EU and the member states (the EU not being able to apply provisions for which the member states are competent), in practice this is not the case. The scope of provisional application should therefore not be equated with the scope of EU competences. This is so, first, because the Council's decision on provisional application is typically not guided purely by legal considerations, i.e. provisions for which the EU is undoubtedly competent might still be excluded from provisional application for political reasons. Second, provisions that are provisionally applied cannot *a fortiori* be considered to come under EU competence in light of the Council's rather consistent practice to subject its decision to a sweeping reservation, limiting the provisional application of specifically identified provisions 'to the extent that they come under EU competence' or 'to the extent that the EU cover matters for which the EU has acted internally'. For EU partners, this is not only problematic in terms of legal certainty but also because any reference in the agreement to the internal law of the parties might impose on them a duty to ascertain themselves of the exact internal division of competences in the EU.

C Provisionally Applying Mixed Agreements: Relegating the EU's Partners' Interests?

From the perspective of the EU's treaty partners, the disagreements between the European Commission and the Council of the EU on the scope of provisional application may thus appear rather disturbing.¹³⁸ After all, while Article 25 VCLT gives parties a large amount of freedom in deciding on the precise (procedural) modalities for provisional application, for agreements concluded by the EU it is now standard practice that the agreement itself will contain a provision on (the scope of) provisional application. As noted above, provisional application is thus reciprocally¹³⁹ defined between the parties, creating legitimate expectations on the part of the EU's contracting parties. At first sight this seems difficult to square with subsequent intra-EU disagreements on which parts of the agreement should actually be provisionally applied.

However, looking again into the agreements' specific provisions on entry into force reveals that through careful legal drafting, the EU and its partners have catered for these problems. Different types of provisions have been worked in this regard, depending on the status and type of partner, but most involve in some way that the EU's partner accepts a degree of legal uncertainty. As a result, the technique of provisional application allows the EU to ease intra-EU tensions on the precise delimitation of competences at the expense of legal certainty for the third party concerned. In political terms then, it appears that the EU's partners tolerate this 'European exceptionalism' as

¹³⁸ This is not always so. On the provisional application of the Iraq PCA (*supra* note 33), the Commission and the Council disagreed but in that case the provisional application was precisely defined in the agreement and the Commission had proposed a broader scope of provisional application while the Council restricted it to what the agreement provided.

¹³⁹ Exceptionally, the EU has concluded mixed agreements which, apart from allowing provisional application, also allow the unilateral application of (parts of) the agreement before provisional application itself. See EPA Agreement with the ESA States, *supra* note 33, Art. 62(4); Interim EPA with the SADC States, *supra* note 33, Art. 105(6).

an acceptable trade-off, given the EU's economic clout and its attractiveness as a treaty partner. Still, different treaty partners clearly receive different treatment.

For instance, very elaborate clauses can be found in the CETA, the Korea FTA and the EU–Singapore Free Trade Agreement (EUSFTA) (in its draft version before Opinion 2/15) where the parties agreed to provisionally apply the agreement (in full) but equally providing that: 'In the event that certain provisions of [the] Agreement cannot be provisionally applied, the Party which cannot undertake such provisional application shall notify the other Party of the provisions which cannot be provisionally applied.'¹⁴⁰ Subsequently, if the other Party 'does not object to provisional application within ten days of the notification that certain provisions cannot be provisionally applied, the provisions of [the] Agreement which have not been notified shall be [provisionally applied]'.¹⁴¹ In contrast, the Strategic Partnership Agreement (SPA) with Canada provides that the EU will decide on which parts of the agreement it will provisionally apply and subsequently foresees a decision by Canada in which it needs to agree to the scope as set out by the EU before provisional application can commence.¹⁴²

Such a measure of formal equality (albeit completely tailored to fit the EU's needs) between contracting parties seems absent in the EU–Afghanistan Cooperation Agreement on Partnership and Development (CAPD) and the Association Agreements with Ukraine, Georgia and Moldova which provide that both Parties 'agree to provisionally apply [the] Agreement in part, *as specified by the Union*'.¹⁴³ As noted by Andrés Sáenz de Santa María, these states were eager to conclude an agreement with the EU and therefore accepted this measure of inequality.¹⁴⁴ Given the flexibility of Article 25 VCLT, as reflected on this point in Draft Guideline 4, this practice also seems acceptable under international law.

D Terminating the Provisional Application of a Bilateral Mixed Agreement: The Case of the CETA

A final issue that has surfaced more recently raises the question as to what happens to a (partially) provisionally applied mixed agreement when one of the EU's member states subsequently refuses to ratify the agreement.¹⁴⁵ Regarding the termination of

¹⁴⁰ See EU–Singapore Free Trade Agreement, Art. 17.12(4) ('original EUSFTA') (on file with the author); Korea FTA, *supra* note 33, Art. 15(10)(5); CETA, *supra* note 33, Art. 30.7(3)(a).

¹⁴¹ Original EUSFTA, *supra* note 140, Art. 17.12(4); Korea FTA, *supra* note 33, Art. 15(10)(5); CETA, *supra* note 33, Art. 30.7(3)(a).

¹⁴² See SPA with Canada, *supra* note 33, Art. 30(2).

¹⁴³ See PCAD with Afghanistan, *supra* note 33, Art. 59(2); AA with Ukraine, *supra* note 33, Art. 486(3); AA with Georgia, *supra* note 33, Art. 431(3); Article 464(3) of the AA with Moldova, *supra* note 33, Art. 464(3) (emphasis added).

¹⁴⁴ Andrés Sáenz de Santa María, *supra* note 55, at 730.

¹⁴⁵ Another question is whether an individual EU member state can terminate the provisional application (decided upon by the Council of the EU) of a mixed agreement. Although it should evidently be answered in the negative, the question is still raised because of the blatantly erroneous finding of the German Federal Constitutional Court (in interim proceedings on the validity of the CETA), arrogating this power to the German government. See Bundesverfassungsgericht [Federal Constitutional Court, FCC] (BVerfG), Judgment of the Second Senate of 13 October 2016, 2 BvR 1368/16, para. 72. For a more elaborate challenge of the German FCC's assertion, see Suse and Wouters, *supra* note 32, at 20–22; Kleimann and Kübek, *supra* note 67, at 29–30.

provisional application, Article 25(2) VCLT first refers back to the (or an) agreement between the parties themselves, adding a second option allowing the unilateral termination of provisional application by a party if it has ultimately decided not to be a party to the agreement. This is also reflected in Draft Guideline 9, which foresees that apart from the situation in which a state or international organisation does not intend to become a party to the agreement, the termination of provisional application may be provided for in the agreement itself or if it is otherwise agreed. This leaves the question *when* termination is required and *who* may terminate provisional application.

The provisions in the EU's mixed bilateral agreement do not always contain specific rules on a possible termination of the provisional application of the agreement¹⁴⁶ (and this for instance unlike the elaborate provision in Article 45(3) of the Energy Charter Treaty).¹⁴⁷ The question therefore arises whether under Article 25(2) VCLT and Draft Guideline 9, the provisional application *must* be terminated when one member state of the EU decides not to ratify the mixed agreement, a question which is never foreseen in either the EU's mixed agreements or the Council's decision on provisional application.¹⁴⁸ A related question is whether Article 25(2) VCLT and Draft Guideline 9, as a reflection of customary international law,¹⁴⁹ exhaustively regulate the scenarios in which provisional application may be terminated.¹⁵⁰

In practical terms, the main question here has become relevant following the uncertain ratification procedure of the CETA with Canada.¹⁵¹ In this regard, Suse and Wouters point to Poland's objections as regards the envisaged composition of the dispute settlement body.¹⁵² The former Italian populist government had also threatened

¹⁴⁶ For those that do, see, e.g., AA with Ukraine, *supra* note 33, Art. 486(7); EPCA with Kazakhstan, *supra* note 33, Art. 281(10); Korea FTA, *supra* note 33, Art. 15.10(5)(c); the CETA with Canada, *supra* note 33, Art. 30.7(3)(c).

¹⁴⁷ For a discussion, see Dalton, *supra* note 2, at 241ff. For the Energy Charter Treaty, see *supra* note 88.

¹⁴⁸ Only because of the obstacles putting into doubt the signature of the CETA did the Council include a clear statement on the fate of provisional application when ratification remains forthcoming. See Statements to be entered in the Council minutes Nos 21 ('Statement by Germany and Austria regarding the termination of provisional application of CETA'), 22 ('Statement by Poland regarding the termination of provisional application of CETA') and 37 ('Statement by the Kingdom of Belgium on the conditions attached to full powers, on the part of the Federal State and the federated entities, for the signing of CETA'), OJ 2017 L 11/15.

¹⁴⁹ See *supra* text at note 11.

¹⁵⁰ Although that question will not be further addressed here, Bartels seems to assume it does, all the while noting that VCLT, *supra* note 3, Art. 25(2) cannot be considered customary international law if it precludes parties from terminating provisional application as a means to put pressure on other contracting parties to ensure the proper ratification of the agreement. See Bartels, 'Withdrawing Provisional Application of Treaties: Has the EU Made a Mistake?', 1 *Cambridge Journal of International and Comparative Law* (2012) 112, at 118.

¹⁵¹ This is not to say that the CETA is the first case in which the entry into force (or provisional application) of a mixed agreement is put into doubt because of objections raised by individual Member States subsequent to the signature of the mixed agreement. In this regard, Rosas notes the so-called Grappa incident of 1999–2000, see Rosas, 'The Future of Mixity', in Hillion and Koutrakos, *supra* note 25, at 367, 368. Van der Loo and Wessel also draw attention to the Dutch referendum rejecting the Association Agreement with Ukraine, see Van der Loo and Wessel, *supra* note 42, at 735ff.

¹⁵² See Shotter and Brunsden, 'Poland Threatens to Block Part of EU–Canada Trade Deal', *Financial Times* (6 September 2017), available at <https://on.ft.com/3iJNToa>.

to refuse ratification because the CETA would insufficiently safeguard Italian appellations of origin and recently the Cypriot Parliament refused ratification because CETA insufficiently protects Halloumi cheese.¹⁵³ In this regard, Van der Loo and Wessel note that ‘as long as not all the parties have ratified the agreement, the provisional application can continue indefinitely, [since t]he clauses on provisional application in mixed agreements or the respective Council decisions do not impose a “deadline” on the provisional application’.¹⁵⁴ According to those authors, the situation would be different when a member state gives *formal* notification of its intent not to ratify the agreement, since the agreements’ provisions on entry into force and the Council’s decisions on provisional application typically foresee in the provisional application *pending* the agreement’s entry into force. Van der Loo and Wessel, relying also on a formal Council position adopted at the occasion of the signature of the CETA,¹⁵⁵ argue that provisional application would have to be terminated given that the ratification of the agreement would have failed definitively.¹⁵⁶ Suse and Wouters acknowledge that this may be so under EU law, but argue that under international law this is not the case. This since the decision on provisional application by the Council can only relate to those provisions for which the EU is competent, meaning that ‘the Member States do not qualify as “States between which the treaty is being applied provisionally” . . . in the sense of Article 25(2) VCLT’.¹⁵⁷ While correct on its terms, the reasoning of Suse and Wouters loses force when one takes into account that the 1969 VCLT only relates to the treaties between states and in no way envisages the possibility of mixed agreements.

The EU’s mixed bilateral agreements themselves typically contain a provision identifying the parties to the agreement, providing that:

the Parties mean, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union.¹⁵⁸

In the terms of a (bilateral) mixed agreement itself, there is always one third country on the one part and the member states and the EU on the other part (constituting a meta-party). The ‘states’ to which Article 25(2) VCLT refers must then in the context of a mixed agreement be interpreted as the third country, on the one hand, and the EU meta-party, on the other hand. Since a mixed agreement can only enter into force once it is ratified by all constituent parts of the EU-party, a definite refusal by just one of these constituent parts would be sufficient to meet the requirement for termination

¹⁵³ Sisto and Jones, ‘Italy Says It Won’t Ratify EU–Canada Trade Deal; Canada Plays Down Threat’, *Reuters* (13 July 2018), available at <https://reut.rs/31R0Pmq>; Chamon and Verellen, ‘Whittling Down the Collective Interest’, *Verfassungsblog*, 7 August 2020, available at <https://verfassungsblog.de/whittling-down-the-collective-interest/>.

¹⁵⁴ Van der Loo and Wessel, *supra* note 42, at 759.

¹⁵⁵ See Statement of the Council (no. 20) regarding the termination of provisional application of the CETA, OJ 2017 L 11/15 (‘Statement No. 20 of the Council’).

¹⁵⁶ See Van der Loo and Wessel, *supra* note 42, at 760.

¹⁵⁷ Suse and Wouters, *supra* note 32, at 18.

¹⁵⁸ See, e.g., Korea FTA, *supra* note 33, Art. 1.2.

under Article 25(2) VCLT.¹⁵⁹ The key issue then is when the impediment to ratification can be deemed to be permanent and definitive. As Suse and Wouters correctly point out, only rarely would this threshold be met in practice.¹⁶⁰ An initial, adverse ruling by a national constitutional court or a failure to ratify by a national parliament in itself would not be sufficient in this regard. Instead, one could argue that under the EU principle of sincere cooperation, which requires member states to ‘facilitate the achievement of the Union’s tasks’,¹⁶¹ they would first have to seek and exhaust possible solutions to overcome any legal and political obstacles to ratification. In addition, under the very same principle, combined with the principle of conferral, the legal and political obstacles raised at the national level could, in the first place, relate only to matters for which the member states are competent.¹⁶²

In light of this, the possible Polish, Cypriot and Italian objections to the CETA are also markedly different. While the Court of Justice in Opinion 2/15 has confirmed that the EU’s exclusive competence did not extend to the investor state dispute settlement mechanism,¹⁶³ it has equally confirmed in the case on the Lisbon Agreement on Appellations of Origin and Geographical Indications that the EU’s exclusive competence in Common Commercial Policy extends to both agricultural and non-agricultural appellations of origin.¹⁶⁴ While the Polish government would thus object on issues coming under shared competence (or perhaps even exclusive national competence), the Cypriot and Italian governments would be acting *ultra vires* since only the Council of the EU is competent to decide on commitments under the CCP.

Finally, this brings us to the second issue, which is that of an actor’s ability to terminate provisional application. As noted by Andrés Sáenz de Santa María, a number of member states have claimed the competence to terminate the provisional application of the CETA.¹⁶⁵ This position was also defended by the German government before

¹⁵⁹ While the requirements of VCLT, *supra* note 3, Art. 25(2) would be met, it is unclear whether Article 25(2) VCLT would also require the termination of the provisional application. While it would appear to make little sense in provisionally applying an agreement for which it is positively assured that it will never enter into force, an obligation to terminate provisional application does not follow from the text of Article 25(2) VCLT.

¹⁶⁰ Suse and Wouters, *supra* note 32, at 20.

¹⁶¹ See TEU, *supra* note 43, Art. 4(3).

¹⁶² See Opinion 2/15, ECLI:EU:C:2016:992, para. 568 (per AG Sharpston). See also Van der Loo and Wessel, *supra* note 42, at 745.

¹⁶³ Opinion 2/15 re the Singapore Free Trade Agreement, ECLI:EU:C:2017:376, paras 290–293.

¹⁶⁴ Case C-389/15, *Commission v. Council*, ECLI:EU:C:2017:798. See also Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 31 October 1958, 923 UNTS 205 (‘Lisbon Agreement’).

¹⁶⁵ Andrés Sáenz de Santa María, *supra* note 55, at 733. Poland, Germany and Austria (but not Belgium) have noted they would do so ‘in accordance with EU procedures’ but this of course is impossible. If EU procedures are followed it can only be the Council that terminates provisional application, not the individual member states. See Statements to be entered in the Council minutes Nos 21, 22, and 37, *supra* note 148.

the German Federal Constitutional Court and endorsed by the latter.¹⁶⁶ but it stands in contrast to the Council's view that the provisional application would be terminated 'in accordance with EU procedures'.¹⁶⁷ That arguably is the better view, since the decision on provisional application is also taken by the Council in accordance with EU procedures. The fact that EU member states now claim this competence therefore results in a serious risk of a second Grappa incident. As Rosas explains, when the provisional application of the association agreement with South Africa was about to commence (on 1 January 2000), Italy made certain last-minute demands related to denomination of 'grappa' and threatened that it would not ratify the agreement, meaning that the agreement could not be provisionally applied either (pursuant to Article 25 VCLT). A solution was ultimately negotiated, but the Commission also took the position that EU member states had no independent say any longer in so far as the Council had decided on provisional application.¹⁶⁸ For the EU's partners, this internal EU issue of course results in a great deal of legal uncertainty. As a result, it would have been welcome if the Draft Guideline 9 or the commentary thereto had been more explicit thereon. Draft Guideline 9 could have for instance referred back to the internal law of the parties, given that such a reference has also been included in Draft Guideline 12, or been more explicit on the identity of the terminating state or international organization by clarifying that the termination may be notified *only* by the state or international organization that decided on the commencement of provisional application in line with Draft Guideline 5.¹⁶⁹

5 Conclusion

Reliance on the device of provisional application is by now part and parcel of the EU's treaty-making practice. In addition, it has become a quasi-automatic corollary to the EU Council's decisions to sign mixed bilateral agreements. As an international law actor, the EU has thus devised a new function for the instrument of provisional application, hitherto unknown. Provisional application allows federal polities such as the

¹⁶⁶ The Constitutional Court observed that Germany's statement provided that this would be done 'in accordance with EU procedures' but then noted that 'it is not apparent that this reference would restrict the right deriving from Article 30.7(3) letter c CETA to unilaterally terminate the provisional application of the Agreement'. See BVerfG, Order of the Second Senate of 07 December 2016, 2 BvR 1444/16, ECLI:DE:BVerfG:2016:rs20161207.2bvr144416, para. 30; the CETA with Canada, *supra* note 33, Art. 30.7(3) (c). See also BVerfG, Judgment of the Second Senate, 13 October 2016, 2 BvR 1368/16, ECLI:DE:BVerfG:2016:rs20161013.2bvr136816, para. 72.

¹⁶⁷ See Statement No. 20 of the Council, *supra* note 155.

¹⁶⁸ Rosas, *supra* note 151, at 368–369.

¹⁶⁹ See 'Sixth report on the provisional application of treaties, by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur', *supra* note 15, at 21, 32.

EU, where both levels of government are constitutionally competent to act (independently) on the international plane, to pursue effective external action, minimizing the cumbersome effects of the polity's complex internal division of competences.

Conversely, the technique of provisional application has allowed the EU member states, as constituent parts of the EU federal polity, to remain visible actors on the international scene, since provisional application also minimizes the cumbersome legal and practical consequences of concluding a facultative EU-only agreement as a facultative mixed agreement. Without a possible recourse to provisional application, the instrument of a mixed agreement would be far less attractive to the EU member states and more agreements would be concluded by the EU alone.

Since the Treaty of Lisbon has not done away with the practice of concluding facultative bilateral mixed agreements, the EU's practice in provisionally applying agreements remains a rich and vibrant area of study, not just from an EU law perspective but also from an international law perspective which shows the EU's contribution to the development of international law. Thus, because the EU by necessity relies on provisional application in its treaty practice and because it is a prolific international actor, it familiarizes a lot of states with the mechanism of provisional application.

Further, the EU follows a rather consistent practice whereby provisional application is foreseen in the agreements themselves without needing recourse to separate instruments to agree on provisional application. The relevant clauses may be worded in a way that provisional application is possible but not mandatory. The commencement of provisional application for most agreements is not directly linked, but evidently still subsequent, to signature, and instead depends on both parties having notified each other of having taken the necessary internal measures to allow the (provisional) application.

Given its internal division of competences, the provisional application of mixed agreements by the EU is by default always partial, since a mixed agreement implies that the EU does not exercise competence for the entire agreement and therefore cannot provisionally apply the complete agreement. The above analysis has shown that the EU relies on different techniques to solve the conundrum of defining the scope of provisional application without having to define the scope of the exercise of EU competences (which, from an EU perspective, would make mixed agreements much less attractive). Thus, some of the EU's partners accept a reference to the EU's internal law in the agreement's clause on provisional application. This of course implies some risk for the EU's partners since it might result in their being required to ascertain themselves of the EU's internal division of competence, an issue which they could otherwise ignore.

Often the precise scope of provisional application is defined in the agreement, but is then qualified in the Council's subsequent (internal) decision on provisional application. From an international law perspective, this is of course problematic since provisional application was mutually agreed upon in accordance with the terms set out in the agreement. Alternatively, in some agreements, the EU's partners may have simply accepted that the scope of provisional application will be defined by the EU itself. Some EU partners clearly have more clout than others, since the clauses on provisional

application in the agreements which they conclude with the EU provide that the EU may propose the precise scope of provisional application but that this subsequently remains to be accepted by them. The EU's practice thus is largely in line with the Draft Guidelines on Provisional Application that are being elaborated by the International Law Commission, although clearly it is more refined in some respects.

Nevertheless, some important questions remain unresolved. Thus, in theory, the provisional application of mixed agreements by the EU should tell us something about the internal division of competences within the EU and the elusive notion of exclusive national competence. While this is at first sight a purely internal issue, which is of limited relevance from an international law perspective, it becomes relevant when references to the internal law of the parties are included in the agreements' clauses on provisional application. This issue then is not simply factually relevant for the EU's partners and they instead might even be required under international law to ascertain themselves thereof.

Finally, there is the question of the termination of the partial provisional application of mixed agreements. The analysis has shown that the agreements concluded by the EU are typically silent on when and how provisional application must be terminated. The ILC Draft Guidelines are not helpful on this point, but *a fortiori* member states, as individual parties, can have no say on this even if the final and definite refusal of a single EU member state should lead to the termination of provisional application under international law. The uncertain fate of the CETA with Canada might test this hypothesis in the future.