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## CAPÍTULO 4

# Provisional Application of EU Trade and Investment Agreements: A Pragmatic Solution to Mixity Issues

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### 1. INTRODUCTION

EU trade and investment agreements are frequently concluded in the «mixed» form, because they contain aspects covered by EU exclusive competences (such as foreign direct investment) and matters allegedly falling within the scope of Member States' competences (e.g. portfolio investments).<sup>1</sup> Mixity complicates the application of international agreements, because a mixed agreement enters into force when both the Union and *all* its Member States have ratified it. National ratification procedures may take years, and might even be temporarily blocked by political incidents. The delays and uncertainty created by the ratification of mixed agreements may evidently question the credibility and effectiveness of the EU's trade and investment policy.

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1 Opinion 2/15, whose procedure is pending at the moment of writing, will presumably clarify this issue.

To address this problem, the European Union employs a well-established international law tool: provisional application. International subjects frequently decide to give «provisional» application to international agreements before they enter into force,<sup>2</sup> to act more swiftly in case of crises<sup>3</sup> or to bypass lengthy domestic approval procedures.<sup>4</sup> The use of provisional application raises several legal issues. One may wonder, in particular, whether provisionally applied agreements are binding, which parts of the agreements the EU may decide to provisionally apply, and if EU Member States may terminate the provisional application decided by the Union.

Provisional application recently attracted considerable interest, given the possibility that some important trade agreements might be applied on a provisional basis.<sup>5</sup> A political party brought action against the provisional application of CETA (unsuccessfully) before the German Constitutional Court.<sup>6</sup> Several Members of the European Parliament asked questions about provisional application to the Commission.<sup>7</sup> Despite the political saliency of this topic, and the important legal issues it raises, there seem to

2 'Provisional application' is sometimes referred to as 'provisional entry into force'. The latter definition seems theoretically inaccurate and, in any event, it is not used in EU law; hence, it is not discussed in the present analysis. See D. Mathy, 'Article 25 of Vienna Convention 1969', in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, Volume 1 (Oxford University Press, Oxford, 2011) 639, at 647-649; *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, para. 209.

3 On the functions of provisional application, see R. E. Dalton, 'Provisional Application of Treaties', in D. B. Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, Oxford, 2012) 220, at 234-238; Mathy, *supra* note 2, at 643.

4 H. Krieger, 'Article 25. Provisional application', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, Heidelberg, 2012) 407, at 417.

5 See Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Council doc. 10974/16, 5 October 2016.

6 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvE 3/16.

7 See e.g. Question for written answer to the Commission Rule 130 Nikolaos Chountis (GUE/NGL), 24 June 2016 E-005124-16; Question for written answer to the Commission Rule 130 Agnes Jongerius (S&D), 26 April 2016 P-003357-16;

be only a few analyses of the provisional application of EU international agreements at present.<sup>8</sup> The present paper seeks to fill this gap, by investigating the outstanding legal issues raised by the provisional application of the EU's international agreements, focusing on trade and investment. By so doing, the paper demonstrates that provisional application is an effective, though imperfect, solution to the problems created by mixity in respect of the EU's trade and investment policy.

The paper is divided in five sections. The first contextualises the research question, by introducing the problems generated by mixity and the use of provisional application as a possible solution (section B). The subsequent sections verify whether provisional application may effectively solve some of the problems created by mixity. It is contended that that is the case, since provisional application produces legal effects (section C), covers a large part of trade and investment agreements (section D), and cannot be terminated by the Member States, but only by the EU (section E). The overall impact of provisional application is discussed in the conclusion (section F).

## 2. PROVISIONAL APPLICATION AS A POTENTIAL SOLUTION TO MIXITY ISSUES

The Union and its Members often enter into international agreements as a single party. These agreements, as is well known, are defined as «mixed».

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Question for written answer to the Commission Rule 130 Anne-Marie Mineur (GUE/NGL), 11 February 2015 E-002266-15.

- 8 Among the exceptions, see D. Kleimann and G. Kübek, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU The Case of CETA and Opinion 2/15*, EUI Working Paper, 2016; C. Flaesch-Mougin and I. 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 Maresecau* (Brill, The Hague, 2013) 293; G. Garzon-Clariana, 'L'application provisoire des accords de la Communauté', in P. Demaret, I. Govaere and D. Hanf (eds), *30 d'études juridiques européens au Collège d'Europe* (Peter Lang 2005) 479.

The «mixity» of international agreements brings about, at least, two advantages. On the one hand, it signals the political importance of an instrument: an agreement concluded by the Union and its Member States may seem more solemn, and may perhaps raise greater expectations of compliance on the part of the EU's partners. On the other hand, mixed agreements allow the Union and its Members not to rigidly delimit their competences. To conclude an international agreement in its own name, the Union would need to have competences that cover the entire field of application of the agreement. It is easy to imagine that EU Member States may dispute the extent of EU competences in many sectors. A mixed agreement solves this problem because it presents the EU's partners with a single party, composed by the Union and its Member States. Therefore, the Union and its Members do not need to determine beforehand who is competent in each specific area, and may more easily agree to enter into an agreement. That is probably the reason why several trade and investment agreements recently concluded by the EU are mixed: they have a core trade and investment element (falling within EU exclusive competences) as well as secondary elements that may fall within the competences of EU Members, such as maritime and transport or portfolio investments.<sup>9</sup>

Notwithstanding its advantages, mixity is not unproblematic. This technique renders the legal framework of EU treaty-making complex. The division of labour among EU organs, and between the EU and its Members, is often opaque.<sup>10</sup> Moreover, mixed agreements take a long time to enter into force, since they must be ratified by both the Union and its Member States. The Member States' governments might have to seek parliamentary approval for the draft agreement. They might even be obliged, or at least politically compelled, to subject the mixed agreement to a referendum. This procedural complexity frequently results in long ratification periods: while the Union may conclude a EU-only agreement in a few months, it often takes several years before a mixed agreement is ratified by all EU Members.

9 Opinion of AG Sharpston in Opinion procedure 2/15, cit., paras. 168-268.

10 See e.g. *Commission v Council*, C-28/12, U:C:2015:282. See further, M. Gatti and P. Manzini, 'External Representation of the European Union in the Conclusion of International Agreements', 49 *Common Market Law Review* (2012) 1703-1734.

There is also a chance that national parliaments or the national electorate of a Member State may reject the mixed agreement entirely. The risks of mixity are exemplified by national reactions to recent trade agreements concluded by the Union: the opposition of the Walloon Parliament to CETA and the Dutch vote on the EU-Ukraine agreement.

To avert these risks, at least in part, EU institutions often resort to the «provisional application» of international agreements. Such application is presently regulated by Article 218(5) TFEU, according to which «the Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.»<sup>11</sup> This provision is quite succinct, and was never interpreted by the Court of Justice. The provisional application of EU's international agreements, therefore, is characterised by a certain degree of legal uncertainty.

Three aspects of Article 218(5) TFEU require clarification, if one is to verify whether provisional application addresses mixity issues in the field of EU trade and investment policy. In the first place, one may wonder whether provisional application produces legal effects, and if international subjects may invoke provisionally applied norms. Secondly, it is unclear whether provisional application regards the entirety of investment-related agreements or just the parts that fall within EU exclusive competences. Thirdly, it is uncertain whether provisional application may be terminated only by the EU, or by any EU Member too. These problems are investigated in the next three sections, in turn.

### 3. LEGAL EFFECTS OF PROVISIONAL APPLICATION

The fundamental question relating to provisional application regards its legal nature: is it merely a political device or does it produce legal effects?

11 For the sake of brevity, this contribution focuses on the rules that are applicable at present and does not address the historical aspects. On the latter issue, see Flaesch-Mougín and Bosse-Platière, *supra* n. 8, at 295-300.

Article 218(5) TFEU does not expressly address this issue, since it merely refers to «provisional application», without defining it. This expression should arguably be interpreted in line with the meaning it is normally attributed, that is, the meaning it is given under international law. Provisional application is regulated by Article 25 of the Vienna Convention on the Law of the Treaties (1969), as well as by Article 25 of the Vienna Convention of 1986.<sup>12</sup> According to paragraph 1 of these provisions, «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 [parties] have in some other manner so agreed.» This provision seems to constitute a codification of international custom.<sup>13</sup>

The customary rule whereby the parties to a treaty may give it provisional application raises some theoretical issues. An agreement that has not entered into force, by definition, does not produce obligations (aside from *bona fide* duties): how may it produce provisional legal effects? This conundrum has been solved by distinguishing between two legal agreements (in the sense of *negotii*).<sup>14</sup> The first legal agreement, containing substantive obligations, enters into force after ratification. The second legal agreement enters into force immediately upon signature,<sup>15</sup> and provides for the provisional application of the obligations contained in the first agreement.<sup>16</sup> The two agreements may be contained in separate instruments, or be embedded in a single treaty (the latter solution being more common in the EU's practice).

In any event, it seems established that, by agreeing to give provisional application to a treaty, the parties enter into binding commitments.<sup>17</sup> These

12 These provisions are almost identical, see Mathy, *supra* n. 2.

13 Id.

14 Cf. *id.*, at 649-650.

15 Or after a period determined by the parties.

16 Cf. D. Vignes, 'Une notion ambiguë: l'application à titre provisoire des traités', *Annuaire français de droit international* 18 (1972) 181-199, at 192: 'c'est sur base d'un accord très souple que cette application provisoire est décidée. Cet accord a un caractère complémentaire par rapport à l'accord proprement dit.'

17 A. Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Brill, The Hague, 2012), *passim*; Dalton, *supra* n. 3, at 238-239; Krieger, *supra*

commitments are relevant in the international legal order, but may also produce effects in domestic legal orders, notably in the legal order of the Union. The agreement through which the Union gives provisional application to another agreement is an act of an EU institution (the Council),<sup>18</sup> and, like any other agreement concluded by the Union, it may produce effects in the EU's legal order. In some cases, it might even have direct effect and constitute a term of reference for the legality of EU acts.<sup>19</sup>

The binding character of provisional application has been confirmed at the judicial level, particularly by the International Centre for Settlement of Investment Disputes (ICSID), which held that provisional application is not «only aspirational in character». On the contrary, it is «a matter of legal obligation».<sup>20</sup> The EU's Court of Justice seems to share this view, since it held in the *Abuja* case that, by consenting to the provisional application of an international agreement, Greece had consented to the consequences arising from the violations of said memorandum.<sup>21</sup> By virtue of the provisionally applied agreement, Greece was indeed already bound by international obligations.<sup>22</sup> Although this case concerned an agreement among EU Members and the Union,<sup>23</sup> its findings seem applicable also to agreements between the Union and third States, in so far as the Court interpreted the effects of provisional application under international law.

n. 4, at 420; See also *Kardassopoulos v Georgia*, cit., paras. 209-211.

18 Cf. *Haegemann v. Belgium*, Case 181-73, EU:C:1974:41, paras. 3-5.

19 Cf. *Commission v Germany*, C-61/94, EU:C:1996:313, para 52; *Algemene Scheeps Agentuur Dordrecht v Inspecteur der Belastingdienst*, C-311/04, EU:C:2006:23, para 25; *Intertanko and Others*, C-308/06, EU:C:2008:312, para 42; *Kadi and Al Barakat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, para 307.

20 *Kardassopoulos v. Georgia*, cit., para 209.

21 *Greece v. Commission*, C-203/07 P, EU:C:2008:606, para. 61; see also *Greece v. Commission*, T-231/04, ECLI:EU:T:2007:9

22 AG Mazák in *Greece v. Commission*, C-203/07 P, EU:C:2008:270, paras. 67-73.

23 Cf. Flaesch-Mougin and Bosse-Platière, *supra* n. 8, at 320.



#### 4. SCOPE OF PROVISIONAL APPLICATION

One of the main issues currently affecting the EU's trade and investment policy is the delimitation of its scope. For instance, Article 207 TFEU confers the Union competence in respect of «foreign direct investment», but it is unclear whether the notion of foreign direct investment covers aspects such as portfolio investments.<sup>24</sup> Considering that provisional application is given by the Union, through a EU act, one may wonder whether provisional application should cover only issues falling within the scope of EU competences. If that were the case, the usefulness of provisional application might possibly be reduced, since certain parts of the agreements would not be applied until the agreement is formally concluded.<sup>25</sup>

Article 218(5) TFEU does not explicitly regulate this issue, but simply allows the Council to give provisional application to an «agreement». According to Kleimann and Kübek, Article 218(5) implicitly enables the Council to give provisional application to mixed agreements in their entirety.<sup>26</sup> In my view, this argument is unconvincing. The Council can only act within the ambit of its powers, and these powers should not exceed the scope of EU competences. By deciding to give provisional application to a mixed agreement in its entirety, the Council would exercise a power of the

24 This issue will presumably be clarified by the Court of Justice in Opinion 2/15.

25 The EU may certainly give provisional application to the agreements that fall entirely within its competences. Some examples in this sense are reported by Flaesch-Mougin and Bosse-Platière, *supra* n. 8, at 311. It is also certain that EU Members may give provisional implementation to mixed agreements, concerning the areas that fall within their competences, and have done so on some occasions, see e.g. Decision 2011/708/EU, OJ 2011 L 283/1. However, it may be complicated to give provisional implementation to provisions falling within the Member States' competences in practice, given the need to respect all their constitutional requirements in this ambit (not to mention the need to adopt a separate decision of EU Member States, highlighted by case C-28/12, *cit.*).

26 Kleimann and Kübek, *supra* n. 8, at 17: 'Decisions of the Council under Article 218 (5) TFEU, in accordance with EU law and practice, may give effect to treaty provisions irrespective of the division of competences'; see also *id.*, at 19



Union as well as a power of EU Members.<sup>27</sup> Therefore, the German Constitutional Court was probably correct in holding that a Council decision on provisional application of CETA may only apply to those parts of the agreement that lie within the scope of the competences of the European Union.<sup>28</sup>

The practice of the Council confirms that provisional application, in principle, concerns solely EU competences. The decisions giving provisional application to mixed agreements often contain disclaimers such as «the provisional application of parts of the Agreement does not prejudge the allocation of competences between the Union and its Member States in accordance with the Treaties».<sup>29</sup> The Council also delimits the parts of the agreements that are given provisional application (since they fall within EU competences) and those that do not. The institution employs different techniques for this purpose.<sup>30</sup> In some cases, it mentions the provisions of the agreement that are subject to provisional application.<sup>31</sup> In other instances, it lists the provisions that are *not* subject to provisional application (as they fall within Member States' competences).<sup>32</sup> In a third category of cases, it simply states that an international agreement is to be provisionally applied «as concerns elements falling within the competence of the [Union]».<sup>33</sup>

27 The letter of Article 218 TFEU cannot be taken as evidence to the contrary: this provision sets the procedure for the conclusion of EU-only agreements and does not expressly envisage the conclusion of mixed agreements. It is only natural that it should not mention the limitedness of EU competences: the principle of conferred powers is simply taken for granted.

28 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvE 3/16.

29 Council Decision 2014/295/EU, OJ 2014 L 161/1; see also, e.g., Council Decision 2012/734/EU, OJ 2012 L 346/1; Council Decision 2012/735/EU, OJ 2012 L 354/1.

30 See also Flaesch-Mougin and Bosse-Platière, *supra* n. 8, at 312.

31 See e.g. Council Decision 2012/418/EU, OJ 2012 L 204/18.

32 Council Decision 2011/265/EU, OJ 2011 L 127/1; Council Decision 2012/735/EU, OJ 2012 L 354/1.

33 Council Decision 2012/196, OJ 2012 L 111/1; See also, to that effect, Council Decision 2016/123/EU, OJ 2016 L 29/1; Council Decision 2014/494/EU, OJ 2015 L 261/1.

The substantive limitations regarding the provisional application of the EU's trade and investment agreements, in any event, are neither unheard of, nor exceedingly problematic. Like the EU, States have been giving provisional application to *parts* of international agreements for decades. Provisional application is normally decided by governments, while certain provisions of international agreements may require the approval of parliaments: national governments may give provisional application only to the parts of international agreements that do not fall within the scope of parliamentary competences.<sup>34</sup> Similarly, the EU decides upon the provisional application of mixed agreements, but parts of those agreements fall within the scope of Member States' competences: therefore, the Union should give provisional application only to the parts of mixed agreements that do not fall within the substantive scope of national competences.

The relevance of the substantive limitation of provisional application should not be overemphasised, considering that trade and investments agreements are covered, to a large extent, by EU competences. Provisional application, therefore, is likely to concern «the vast majority» of trade and investment agreements.<sup>35</sup>

One should also note that the theoretical limitations of provisional application have not always been respected in practice. The Council has, in some occasions, given provisional application to provisions that, according to the Member States, fall outside the scope of EU external competences. It has, in particular, given provisional application to provisions on portfolio investments<sup>36</sup> in the agreements with Peru and Colombia

34 See A. Geslin, *La mise en application provisoire des traités* (Pedone, Paris, 2005), at 83-84.

35 UK Government's Explanatory Memorandum on the EU-Republic of Korea Trade Agreement, para. 4, <http://webarchive.nationalarchives.gov.uk/20130104161243/http://www.fco.gov.uk/resources/en/pdf/3706546/594588382/594609382/16-EU-KoreaFreeTrade-EM>.

36 The EU's competence in the field of portfolio investments is one of the main legal issues at stake in Opinion procedure 2/15, currently pending.

(2012) and Korea (2011).<sup>37</sup> This behaviour of EU Member States may, at first sight, seem contradictory. On the one hand, they jealously protect their competences, and insist on concluding trade and investment agreements in the mixed form. On the other hand, they allow a Union institution to exercise those same competences at the stage of provisional application. To explain this apparent contradiction, one should consider that the Council Decision that gives provisional application to an international agreement does not imply the conclusion of that agreement by the Union and, consequently, does not engender the pre-emption of national competences. While this practice is problematic and not ubiquitous, in any event, it confirms that provisional application may provide for a pragmatic solution to mixity problems.

## 5. TERMINATION OF PROVISIONAL APPLICATION

Notwithstanding its legal effects and broad scope, the provisional application of mixed agreements might be ineffective in practice, since it might potentially be abruptly terminated. Provisional application normally terminates when the international agreement enters into force,<sup>38</sup> but the parties may terminate it before that moment, by notifying the counterparties of their intention.

Several Treaties concluded by the Union expressly allow for the termination of provisional application, and in some cases they define a procedure for this purpose. A typical clause reads: «Either Party may give written notification to the depositary of this Agreement of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect six months after receipt of the notifica-

37 Council Decision 2012/735/EU, OJ 21 December 2012, Art. 3(1), and Council Decision 2011/265/EU, OJ 2012 L 127/1, Art. 3(1), respectively; see further See Kleimann and Kübek, *supra* n. 8, at 16-18.

38 See e.g. Flaesch-Mougin and Bosse-Platière, *supra* n. 8, at 315-316.

tion by the depositary of this Agreement.»<sup>39</sup> There have indeed been cases, in practice, in which the Union terminated provisional application of an agreement.<sup>40</sup>

The possibility to terminate provisional application reduces legal certainty, and thus the usefulness of provisional application in practice. For instance, a company might find it difficult to base its long-term business plans on the assumption that a provisionally applied agreement will eventually enter into force: there is always the risk that provisional application may be terminated, sometimes at a short notice. This risk might be manageable if the *Union* were the only subject that may bring provisional application to an end. However, legal certainty would be a serious issue if, not only the Union but also each EU *Member State* could terminate the provisional application of a mixed agreement.

The German Constitutional Court hinted at this possibility in its recent judgement on CETA,<sup>41</sup> holding that provisional application of this agreement is compatible with the German Constitution as long as it allows Germany to unilaterally terminate provisional application. At first sight, this interpretation may seem sound. Taking CETA as an example, one may notice that Art. 30.7(3)(c) reads «A Party may terminate the provisional application of this Agreement by written notice to the other Party».<sup>42</sup> One may assume that this reference to «a party» means *any* party to the agreement: the third State, the Union and any EU Member State.

However, such an interpretation seems to disregard the EU principle of primacy. If the Union decides to give provisional application to a mixed agreement, such application covers – in accordance with the principle of conferral

39 Association Agreements with Moldova, OJ 2014 L 260/4, Art. 464(7); see also Association Agreement with Georgia, OJ 2014 L 261/4, Art. 431(7); Association Agreement with Ukraine, OJ 2014 L 161/3, Art. 486(7).

40 See e.g. Council Decision 2012/15/EU, OJ 2012 L 6/1.

41 *Supra* n. 28.

42 Emphasis added.

– issues falling with the scope of EU competences.<sup>43</sup> Considering that provisional application is provided for in a Union act, that falls within the scope of EU competences, it seems reasonable that only the *Union* may decide to amend that act. As a Member State cannot overrule an EU regulation, so it cannot overrule a decision on the provisional application of a mixed agreement.<sup>44</sup>

Against such a reading of the Treaties, one may possibly argue that the opposition of a single Member State may prevent the entry into force of a mixed agreement, thereby rendering provisional application impossible. This argument may seem to be supported by Article 25(2) of the Vienna Conventions, according to which provisional application must be terminated if a subject notifies the other subject of its intention not to ratify the treaty. As is well known, mixed agreements are concluded «by the Union and its Member States of the *one parts*», meaning that the EU and its Member State are actually a single party (sometimes defined «EU party»<sup>45</sup>). If a EU Member State opposed a mixed agreement, the EU party would be incapable of approving the agreement – hence, the latter might perhaps be unable to provisionally apply the mixed agreement under Article 25 of the Vienna Conventions.<sup>46</sup>

At closer inspection, the argument based on Article 25 of the Vienna Conventions seems less convincing. Even if this provision were consistent with customary law (which is uncertain),<sup>47</sup> or were otherwise applicable to the relations between the Union and its partners, it would not imply that a single Member State can terminate provisional application. On the contrary, it would allow the EU party (the EU and *all* its Member States)

43 Similarly, If the Member States decide to give provisional application to a mixed agreement, such application covers only the scope of States' competences (consistently with the principles of conferral and sincere cooperation). If both the Union and its Members decide in favour of provisional application, the entire mixed agreement may be applied on a provisional basis.

44 See also Kleimann and Kübek, *supra* n. 8, at 20.

45 See e.g. Joint Declaration annexed to Agreement with Colombia and Peru, *supra* n. 37.

46 See, to that effect, Flaesch-Mougin and Bosse-Platière, *supra* n. 8, at 316.

47 Cf. Dalton, *supra* n. 3, at 232; Mathy, *supra* n. 2, at 641.

to terminate provisional application. Therefore, a notification within the meaning of Article 25(2) should be performed on behalf of both the Union and its Members, and should be approved by both the Union and *all* its Members. If a Union Member notified the intention of the EU party to terminate provisional application, it would arguably violate its duty of loyalty towards the Union (and towards the other Member States).<sup>48</sup>

An EU State that decided not to ratify a provisionally applied mixed agreement would arguably have to communicate its intention to the Union. Then, the Union might notify the intention of the EU party not to ratify the agreement to the counterparty, thus bringing provisional application to an end. In light of this interpretation of Article 25 of the Vienna Conventions, the Commission is right in holding that the fact that a national parliament voted against a mixed agreement «would not automatically put an end to the provisional application.»<sup>49</sup>

Arguably, the Union would not be obliged to immediately perform the notification desired by the Member State. The recent practice demonstrates that EU Members are not necessarily consistent in their approach to trade and investment agreements; the EU may therefore legitimately wait for a Member State to reconsider its policy, before assuming that the EU party has taken a decision. For instance, the Dutch referendum of April 2016 did not lead the EU to terminate provisional application of the Association Agreement with Ukraine. The Union simply waited for political passions to «cool off», and offered political reassurances in December 2016,<sup>50</sup> eventually convincing the Dutch Parliament to ratify the agreement in February 2017.

48 Cf. *Commission v Luxembourg*, C-266/03, EU:C:2005:341; *Commission v Germany*, C-433/03, EU:C:2005:462; *Commission v Sweden (PFOS)*, C-246/07, EU:C:2010:203.

49 Answer to a Parliamentary question given by Ms Malmström on behalf of the Commission, 8 July 2016, E-003206/2016.

50 See Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Com-

## 6. CONCLUSION

Because of its limited competences, the EU often concludes trade and investment agreements in the «mixed» form, which implies long and uncertain ratification procedures. This paper suggested that the Union may bypass some of the problems created by «mixed» procedures by giving provisional application to trade and investment agreements. The analysis demonstrated that a provisionally applied agreement produces legal effects, and may therefore ensure a certain degree of legal certainty. Secondly, it was submitted that the provisional application of EU trade and investment agreements covers a large part of their substantive scope. Finally, it was contended that provisional application ensures a rather stable legal framework, because only the Union (and not its Member States) can decide to terminate it. Provisional application thus appears as a pragmatic instrument, that enables the Union to swiftly bring trade and investment agreements into application, and consequently enhances the effectiveness of the EU's external policy.

The main virtue of provisional application – its capability to bypass procedural hurdles at the national level – might create a further problem. Several commentators argued that the provisional application of agreements such as CETA violates the prerogatives of national parliaments and consequently has «little [...] to do with democratic accountability».<sup>51</sup> These concerns, in my view, are not well-founded. The provisional application of international agreements is normally ensured by a decision of the *EU* Council, adopted on behalf of the *Union*. This decision should arguably be supervised, not by national parliaments, but by the *European* Parliament.

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munity and their Member States, of the one part, and Ukraine, of the other part, annexed to European Council Conclusions on Ukraine, 15 December 2016.

51 Nick Dearden, cit. in 'EU Ambassador to Canada says EU-Canada free trade deal may become law without UK parliamentary debate', <http://www.globaljustice.org.uk/news/2016/jan/23/eu-ambassador-canada-says-eu-canada-free-trade-deal-may-become-law-without-uk>; see also Stop TTIP, 'The Commission of Illusionists', <https://stop-ttip.org/blog/the-commission-of-illusionists/>.



The latter seems indeed to have obtained a *de facto* veto power regarding the provisional application of, at least, the most «politically important» agreements.<sup>52</sup> A proper parliamentary supervision of provisional application may thus enable the Union to conduct an effective trade and investment policy—ways been respected in practice. , while ensuring respect for its democratic principles.

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Answers to the European Parliament Questionnaire to The Commissioner-Designate Cecilia Malmström Trade, Para. 3(c), [http://www.europarl.europa.eu/hearings-2014/resources/questions-answers/Hearings2014\\_Malmstr%C3%B6m\\_Questionnaire\\_en.pdf](http://www.europarl.europa.eu/hearings-2014/resources/questions-answers/Hearings2014_Malmstr%C3%B6m_Questionnaire_en.pdf). On the events that led to this commitment, see E. Baroncini, 'L'Unione europea e la procedura di conclusione degli accordi internazionali dopo il Trattato di Lisbona', *Cuadernos de Derecho Transnacional* 5 (2013) 5-37, at 21-24.