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The European Union and the Law of Treaties: A Fruitful Relationship

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Abstract

This article examines the European Union's (EU) treaty practice from the perspective of the international law of treaties, focusing on its most significant examples. The starting point is the EU's attitude towards the codification of treaty law involving states and international organizations. The article discusses certain terminological specificities and a few remarkable aspects, such as the frequent use of provisional application mechanisms as opposed to much less use of reservations, the contributions regarding treaty interpretation, the wide variety of clauses and the difficulties in determining the legal nature of certain texts. The study underlines that treaty law is a useful instrument for the Union and is further enriched with creative contributions; the outcome is a fruitful relationship.

The European Union's (EU) external action has led to a rich treaty practice (also designated as conventional practice),[1] which is very interesting from the internal perspective of EU law. Additionally, such treaty practice has also given rise to significant judgments of the Court of Justice of the European Union (CJEU) on issues including each institution's treaty-making powers, the requirements stemming from the institutional balance and loyal cooperation principles and hybrid acts.[2] Specialized literature

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1 The Treaties Office Database of the European External Action Service currently provides a list of 977 bilateral agreements and 289 multilateral agreements (available at http://ec.europa.eu/world/agreements/viewClauseCollection.do).

2 Amongst the most recent ones, the following are worth noting: Case C-658/11, *European Parliament v. Council of the European Union* (EU:C:2014:2025); Joined Cases C-103/12 and C-165/12, *European Parliament and European Commission v. Council of the European Union* (EU:C:2014:2400); Case C-28/12, *European Commission v. Council of the European Union* (EU:C:2015:282); Case C-425/13, *European Commission v. Council of the European Union* (EU:C:2015:483); Case C-263/14, *European Parliament v. Council of the European Union* (EU:C:2016:435); Case C-244/17, *Commission v. Council (Accord avec le Kazakhstan)* (EU:C:2018:662).

has increasingly focused on this field. However, treaty practice is also remarkable from an international law perspective, particularly from the standpoint of international treaty law, although it may have received less scholarly attention.[3]

The purpose of this article is to build on the analysis from this specific dimension, focusing on its most prominent features. These prominent aspects highlight that the EU, in its treaty-making capacity, uses all of the instruments made available by treaty law whilst enriching treaty law with creative contributions. An analysis of the EU's treaty practice rejects the notion that modern treaty law is fundamentally ill-equipped to deal with distinct legal actors such as the EU.[4] Rather, treaty law has proven to be a useful and flexible mechanism to fulfil the objectives of the EU's external action as well as to solve sensitive situations that cannot be tackled through EU law for legal or political reasons. This has given rise to a fruitful, yet complex, relationship between the EU and treaty law, where the EU has made some interesting contributions. Nevertheless, this relationship also has some issues that must be tackled.

1 The EU *vis-à-vis* the Codification of Treaty Law

Generally, international organizations have been cautious about this codification initiative.[5] However, during the preparation of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 VCLT),[6] the European Economic Community (EEC) submitted comments and observations to the draft articles prepared by the United Nations International Law Commission (ILC)[7] and was involved in the Vienna Conference.

[3] However, it is worth referring to the following works: D.R. Verwey, *The European Community, the European Union and the International Law of Treaties: A Comparative Legal Analysis of the Community and Union's External Treaty-Making Practice* (2004). Some of them focus on Court of Justice of the European Union's (CJEU) case law, such as F.J. Pascual Vives, *El Derecho de los Tratados en la jurisprudencia comunitaria* (2009); Odermatt, 'The Use of International Treaty Law by the Court of Justice of the European Union', 17 *Cambridge Yearbook of European Legal Studies* (2015) 121.

[4] This was the wording of J. Odermatt at the seminar entitled The European Union and the International Law of Treaties, which was held in the Leuven Centre for Global Governance Studies on 5 November 2014, available at https://ghum.kuleuven.be/ggs/events/2014/doctoral-seminar-odermatt.

[5] In his first report, Special Rapporteur Paul Reuter acknowledged that '[t]he international organizations had in mind two contradictory concerns: on the one hand, a strong desire to see the same juridical regime applied to treaties between States and to agreements concluded by international organizations, and on the other hand the desire to avoid confining the creative freedom of international organizations within rules which would not be fully adapted to their needs'. 'First Report on the Question of Treaties Concluded between States and International Organizations or between Two or More International Organizations, Report of the ILC on the Work of Its Twenty-Fourth Session', 2(2) *ILC Yearbook* (1972) 171, at 186, para. 51.

[6] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 VCLT) 1986, 25 ILM 543 (1986).

[7] See 'Report of the ILC on the Work of Its Thirty-Third Session', 2(2) *ILC Yearbook* (1981) 181, at 201–203; 'Report of the ILC on the Work of Its Thirty-fourth Session', 2(2) *ILC Yearbook* (1982) 127, at 145–146.

Philippe Manin pointed out that the Community was amongst the most active participants, but he also noted some reluctance.[8] It seems like the latter has prevailed, since the EU, to this day, has neither signed nor expressed its consent to be bound by the 1986 VCLT.

Nevertheless, the CJEU has acknowledged the customary nature of several provisions laid down in the 1969 Vienna Convention on the Law of Treaties and in the 1986 VCLT.[9] In this regard, it is worth noting that CJEU case law mostly refers to the first convention, that it includes a few references to both of them[10] and that it very rarely mentions the 1986 convention.[11] This is reasonable where the CJEU hears cases involving treaties concluded only between states,[12] but it is less understandable when the cases involve conventions concluded by the EU itself;[13] the Court's disregard probably has to do with the fact that the 1986 VCLT is not yet in force. The proclivity to mainly rely on the 1969 VCLT is confirmed by the fact that the Court refers to the

[8] 'The Community arrived at the Conference somewhat on the defensive. Not convinced of the need for the exercise and long hesitant about the wisdom of taking part, it finally decided to participate, mainly so that it could prevent the Conference becoming, as has often happened, the source of rules of practice that could later be used against it. It also thought the Conference provided a good opportunity to better acquaint the States and other organizations with its own rules and practices in international relations and to demonstrate its special status.' Manin, 'The European Communities and the Vienna Convention on the Law of Treaties between States and International Organization or between International Organizations', 24 *Common Market Law Review* (1987) 457, at 461.

[9] Vienna Convention on the Law of Treaties (1969 VCLT) 1969, 1155 UNTS 331. Manin put forward that, '[i]n becoming a party to an international convention, a signatory should further a specific interest. This does not, however, essentially seem to be the case as concerns the Community with respect to the 1986 Vienna Convention'. Manin, *supra* note 8, at 481. To this day, only 12 international organizations have expressed their consent to be bound by the convention, whereas five other organizations have simply signed it (this information has been obtained from https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en); this confirms that international organizations remain cautious with regard to the codification of this treaty law dimension.

[10] Case C-344/04, *IATA and ELFAA* (EU:C:2006:10), para. 40; Case T-396/09, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v. European Commission* (EU:T:2012:301), para. 61; Case T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Europe v. European Commission* (EU:T:2012:300), para. 72; Case C-224/16, *AEBTRI* (EU:C:2017:880), para. 62.

[11] Case C-327/91, *French Republic v. Commission of the European Communities* (EU:C:1994:305), para. 25.

[12] As is the case with the Charter of the United Nations (Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [EU:T:2005:331]; Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* [EU:T:2005:332]; Case T-253/02, *Chafiq Ayadi v. Council of the European Union* [EU:T:2006:200]; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [EU:C:2008:461]); the Convention on the Civil Aspects of International Child Abduction 1980, 1343 UNTS 97 (Opinion 1/13 [EU:2014:2303]); the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, 1659 UNTS 202 (Case C-37/00, *Herbert Weber v. Universal Ogden Services Ltd.* [EU:C:2002:122]) or the Convention Defining the Statute of the European Schools 1994, OJ 1994 L 212/3 (Joined Cases C-464/13 and C-465/13, *Europäische Schule München v. Silvana Oberto and Barbara O'Leary* [EU:C:2015:163]).

[13] As the Agreement on the European Economic Area 1992, OJ 1994 L 1/3 (Case T-115/94, *Opel Austria GmbH v. Council of the European Union* [EU:T:1997:3]); the Agreement between the European Union and

VCLT in the singular form – meaning the 1969 VCLT – as if there was only one.[14] Furthermore, treaty law consolidated in both of the conventions has found an insurmountable barrier within CJEU case law; customary rules enshrined in these conventions do not apply to the founding treaties. The consideration of primary law as an autonomous legal order soon led to this outcome, which creates a dichotomy regarding the application of treaty law within the EU.[15]

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the Kingdom of Morocco Concerning Liberalisation Measures on Agricultural and Fishery Products 2010, OJ 2012 L 241/2 (Case T-512/12, *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union* [EU:T:2015:953]; Case C-104/16 P, *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* [EU:C:2016:973]); the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Protocol Setting out the Fishing Opportunities Provided for by the Agreement 213, OJ 2013 L 328 (Case C-266/16, *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* [EU:C:2018:118]); the EC–Israel Association Agreement 1995, OJ 2000 L 147/3, and EC-PLO Association Agreement 1997, OJ 1997 L 187/3 (Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen* [EU:C:2010:91]); the Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999, 2242 UNTS 309 (Case C-410/11, *Pedro Espada Sánchez and Others v. Iberia Líneas Aéreas de España SA* [EU:C:2012:747]; Case C-429/14, *Air Baltic Corporation AS v. Lietuvos Respublikos specialiųjų tyrimų tarnyba* [EU:C:2016:88]; Case C-258/16, *Finnair Oyj v. Keskinäinen Vakuutusyhtiö Fennia* [EU:C:2018:252]) or the United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3 (Case C-15/17, *Bosphorus Queen Shipping* [EU:C:2018:557]).

14 The CJEU claims that '[t]he international law of treaties was consolidated, essentially, in the Vienna Convention', although it was dealing with the EC–Israel Association Agreement 1995, OJ 2000 L 147/3 (*Firma Brita GmbH*, *supra* note 13, para. 40); it also refers to the 'VCLT' in broad terms in Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz* (EU:C:1998:293), para. 24, in spite of the fact that it involved the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia 1980, OJ 1991 L 315/1. Aust has highlighted that most international organizations share this paradoxical tendency to refer to the 1969 VCLT, clarifying that '[t]hey see no particular need for the 1986 Convention, given that its substance is the same as the 1969 Convention'. A. Aust, *Modern Treaty Law and Practice* (3rd edn, 2013), at 349. Moreover, some scholars point out certain biases in the application of treaties by the CJEU; along these lines, Odermatt underlines that the Court does so 'in a novel or selfish manner' and that 'the Court's approach to the VCLT appears to be highly influenced by its approach to the EU law generally, especially with regard to the issue of interpretation. While it has applied the rules of interpretation in Article 31, it has done this mostly in order to examine the "object and purpose" of the agreement'. Odermatt, *supra* note 3, at 143–144.

15 This feature has been discussed within the International Law Commission (ILC) in the context of the codification of the subject subsequent agreements and subsequent practice in relation to the interpretation of treaties. In his first report, Special Rapporteur G. Nolte pointed out that '[t]he European Court of Justice treats the rules of the founding treaties ("primary Union law") as constituting an "autonomous legal order" and accordingly does not refer to the Vienna Convention when interpreting those treaties. In contrast, when the European Court of Justice interprets agreements of the Union with third States it considers itself bound by the rules of customary international law as they are reflected in the rules on interpretation of the Vienna Convention'. First Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, UN Doc. A/CN.4/660, at 12, para. 26; again, in the third report, it noted that '[f]or example, the Court of Justice of the European Union has developed its own practice of interpreting the Founding Treaties of the Union by emphasizing their object and purpose and their effective

2 A Few Terminological Remarks

In the context of the EU, the use of terminology inherent to the law of treaties has some specificities. First of all, the word 'treaty' is exclusively intended for the founding treaties and the accession treaties, whereas the remaining conventional instruments developed by the EU are referred to as 'agreements'.[16] Needless to say, this approach is covered by the freedom of designation enshrined in Article 2(1)(a) of the VCLT. Second, the provisions on international agreements under Title V, Part Five of the Treaty on the Functioning of the European Union (TFEU) use 'conclusion' as a polysemous term.[17] Whereas certain articles use this word to mean a procedure in generic terms,[18] other provisions specifically refer to the final stage of the procedure.[19] This aspect has caught the attention of treaty law scholars regarding the English version of the TFEU. In this connection, it has been stated that:

> [i]n customary international law various different acts are termed the 'conclusion' of a multilateral treaty: the adoption, the opening for signature, the ratification of the treaty, and so on. In the 1969 Vienna Convention on the Law of Treaties the term 'conclusion' (or 'conclude', 'concluded', as the case may be), is used twenty-three times, but the term is not defined in the Convention. Rather, in the Convention, as in customary law, the term appears to be employed in various different meanings, referring to different acts.[20]

In the light of the 1969 VCLT, Mark E. Villiger aptly points out that '"Conclusion" refers to the whole set of procedures – whether simple or complex – which makes a treaty binding. "Concluded" implies a distinct act. States which have "concluded" are bound by a treaty without taking any further formal steps. A "concluded" treaty requires no

implementation. This approach has been explained by the Court to be a consequence of its interpretation of the founding treaties of the European Union as creating a "new legal order" rather than simply an ordinary international organization'. Third Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, UN Doc. A/CN.4/683 (2015), at 10–11, para. 28. Nonetheless, De Witte showed a while ago that European Union (EU) treaty revisions are firmly situated within the scope of the international law of treaties. De Witte, 'Treaty Revision in the European Union: Constitutional Change through International Law', 35 *Netherlands Yearbook of International Law* (2004) 51.

16 Wessel explains the following: 'The use of the term "international agreement" rather than "treaty" therefore has no specific legal meaning, but at least it prevents confusion as in EU law the term "treaties" is reserved for the TEU and the TFEU as well as for the accession Treaties. In other words, for primary EU law.' R.A. Wessel, *Close Encounters of the Third Kind: The Interface between the EU and International Law after the Treaty of Lisbon* (2013), at 38, available at http://sieps.se/en/publications/2013/close-encounters-of-the-third-kind-the-interface-between-the-eu-and-international-law-after-the-treaty-of-lisbon-20138. The same remark can be found in Verwey, *supra* note 3, at 91, and in Alonso, 'Disposición adicional segunda: Régimen de la acción exterior de la Unión Europea', in P. Andrés Sáenz de Santa María, J. Díez-Hochleitner and J. Martín y Pérez de Nanclares (eds), *Comentarios a la Ley de Tratados y otros Acuerdos Internacionales* (2015) 959.

17 Treaty on the Functioning of the European Union (TFEU), OJ 2016 C 202/47.

18 *Ibid.*, Art. 216(1); Art. 216(2); Art. 217; Art. 218(7); Art. 219(1).

19 *Ibid.*, Art. 218(1); Art. 218(2); Art. 218(6); Art. 219(3).

20 Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' 59 *British Yearbook of International Law* (1988) 75, at 75.

further formalities'.[21] Accordingly, when Article 218 of the TFEU provides that the Council shall adopt a decision authorizing the conclusion of the agreement 'si debe intendere, nell'ordinamento giuridico europeo, l'espressione della volontà dell'Unione ad assumere impegni internazionali'.[22] Ultimately, the dual meaning of the term as used by the TFEU in the English version does not pose any legal technical problems, and this is also the case with other language versions.[23]

3 Taking Advantage of the Provisional Application

The provisional application of treaties is particularly useful for the EU. In fact, the EU began to use this provisional application mechanism in 1976,[24] and it has now become one of the most distinct features of the EU's treaty practice. Since 2009, on average, one-third of the agreements concluded by the EU are applied provisionally;[25] the majority of them are bilateral treaties, and many are mixed agreements. To these should be added the various exchanges of letters agreeing on the provisional application of a previously concluded treaty that failed to provide its own provisional application.[26] The reasons why the Union often resorts to provisional application clauses are very straightforward. In a groundbreaking work, Gregorio Garzón Clariana stated:

[21] And he adds that when 'an agreement is concluded. … This means that from that point in time there is a definite engagement that the parties are bound by the instrument under International law'. 'Article 2: Use of Terms', in *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 65, at 78–79. An analysis of the meaning of 'conclusion' having regard to the ILC preparatory works can be found in M. Gardiner, *Treaty Interpretation* (2008), at 209–212. An analysis of scholarly works confirms the wide variety of different meanings, which do not always coincide; accordingly, Verwey, *supra* note 3, at 112, notes the following: 'From a legal standpoint there is no difference between the terms "conclusion", "ratification" and "approval"', and the *Vademecum on the External Action of the European Union*, Doc. SEC (2011)881/3 (2011), at 47, points out that '[c]onclusion is the act of ratification of the agreement, meaning that the agreement becomes binding upon the Union and on Its Member States'.

[22] Baroncini, 'L'Unione Europea e la procedura di conclusione degli accordi internazionali dopo il Trattato di Lisbona', 5 *Cuadernos de Derecho Transnacional* (2013) 5, at 14.

[23] Such as the French or the Italian versions, which are identical to the English version. However, in the Spanish and Portuguese versions, which have the exact same wording, the expression of consent ('*celebración*,' '*celebração*', '*celebrar*') in paras 1, 2 and 6 of Article 218 and Art. 219(3) of the TFEU, *supra* note 17, is incorrect.

[24] This fact is supplied by 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 Members States in the World* (2010) 249, at 257.

[25] As asserted by Passos, 'The External Powers of the European Parliament', in P. Eeckhout and M. López Escudero (eds), *The European Union's External Action in Times of Crisis* (2016) 85, at 118. The current inventory of agreements to which the EU is a contracting party containing a provisional application clause includes 146 (available at http://ec.europa.eu/world/agreements/ClauseTreatiesPDFGeneratorAction.do?clauseID=44). Given the large number of examples there are in practice, the following analysis includes certain references for illustrative purposes only.

[26] This procedure, which is external to the agreement, is often used regarding fisheries agreements in order to prevent disruptions or delays in its application whilst the agreement is pending its entry into force.

> [C]ertaines particularités des relations extérieures de la Communauté rendaient inévitable le recours à cette application. C'est le cas notamment de la 'mixité' qui implique que la compétence pour la conclusion de certains accords appartienne ensemble à la Communauté et à ses États membres, avec comme corollaire un retard considérable à l'entrée en vigueur dû au respect des procédures internes propres à chaque État membre. C'est aussi le résultant de la participation croissante de la Communauté à des conventions multilatérales où l'entrée en vigueur se fait parfois longuement attendre en fonction du nombre de ratifications ou d'adhésions requises.[27]

The EU profits from this instrument's flexibility, thereby developing a so-called 'sophisticated practice'[28] made up of various mechanisms. It has been stated that '[c]onjuguant la liberté offerte par le droit international et celle offerte au plan interne, les modalités d'application provisoire, telles qu'elles apparaissent à travers la pratique du Conseil, sont extrêmement variées', so that '[l]a souplesse offerte pour l'application provisoire se décline à différents niveaux et produit une grande variété de formules qui permettent de s'adapter aux contraintes de chaque relation'.[29]

Formally speaking, it is often provided that the agreement in question shall be applied provisionally from the date of its signing.[30] Nevertheless, sometimes there are other references, such as a date following the signing of the agreement[31] or the notice

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The agreement to which the exchange of letters is referred usually has no provisional application clause, which is subsequently agreed on.

27 'L'application provisoire des accords internationaux de la Communauté', in P. Demaret, I. Govaere and D. Hanf (eds), *European Legal Dynamics: Dynamiques juridiques européennes* (2nd rev. edn, 2007) 485, at 487–488. Maresceau notes that 'the procedure of provisional application has been followed not only in order to accelerate the entry into force of parts of some mixed agreements; provisional application is a pragmatic solution in the EC's external practice and something which is, for example, also used frequently in the area of (non-mixed) bilateral fisheries agreements, specifically to avoid any interruption of fishing activities by Community vessels in the waters of the partner country'. Maresceau, 'A Typology of Mixed Bilateral Agreements', in Hillion and Koutrakos, *supra* note 24, 11, at 13. From a different standpoint, Baroncini underlines the advantages of provisional application regarding those agreements that settle an international dispute amicably. Baroncini, *supra* note 22, at 22.

28 Michie, 'The Role of Provisionally Applied Treaties in International Organizations', 39 *Comparative and International Law Journal of South Africa* (2006) 39, at 44.

29 Flaesch-Mougin and 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 Maresceau* (2014) 293, at 309. F. Couveinhes Matsumoto is not as optimistic with regard to provisional application in his view as for mixed agreements: '[L]'entrée en vigueur provisoire … accentue encore la pression exercée sur les parlementaires nationaux.' Matsumoto, 'L'accord commercial entre l'UE et ses États membres d'une part, et le Pérou et la Colombie d'autre part: un révélateur de deux maladies du droit international actuel', 120 *Revue Générale de Droit International Public* (*RGDIP*) (2016) 293, at 305.

30 This is provided in more than 60 agreements. For instance, amongst the most recent ones, it is worth highlighting the Agreement for Scientific and Technological Cooperation between the European Union and the Kingdom of Morocco Setting Out the Terms and Conditions for the Participation of the Kingdom of Morocco in the Partnership for Research and Innovation in the Mediterranean Area (PRIMA), signed in 2018, OJ 2018 L 106/3, Art. 4, and in the Agreements on the same subject concluded between the EU and the Republic of Lebanon, signed in 2018, OJ 2018 L79/3, Art. 4, and Algeria, signed in 2017, OJ 2017 L 316/3, Art. 4.

31 According to Art. 4(3) of the Protocol to the Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and the Russian Federation, of the Other Part, to Take Account of the Accession of the Republic of Croatia to the European Union, signed in 2014, OJ 2014, L 373/3, '[t]his Protocol shall apply provisionally after

of completion of any required internal procedures.[32] Although the provisional application of a given treaty is usually agreed on for the agreement as a whole, sometimes it only covers some parts or provisions thereof.[33] Furthermore, in some instances, the provisional application clause simply enables the parties to decide on the provisional application in the future.[34] There is a wide variety of matters governed by the agreements, although association, fisheries or air transportation are very common.[35]

The variety of the practice prevents an analysis of all of the forms of provisional application. Thus, this work focuses on the most prominent provisional application clauses enshrined in the agreements concluded by the EU.[36] First, it is worth noting that the most recent association agreements provide for provisional application on a

15 days from the date of this signature'; in accordance with Art. 9 of the Agreement between the European Union and the Kingdom of Norway on Reciprocal Access to Fishing in the Skagerrak for Vessels Flying the Flag of Denmark, Norway and Sweden, signed in 2015, OJ 2014 L 224/3, '[t]his Agreement shall, pending its entry into force, be applied provisionally up to two years from the date of signature'.

32 As set forth, for instance, in Art. 61 of the Framework Agreement between the European Union and Its Member States, of the One Part, and Australia, of the Other Part, signed in 2017, OJ 2017 L 237/7, 'Australia and the Union may provisionally apply mutually determined provisions of this Agreement pending its entry into force. Such provisional application shall commence thirty days after the date on which both Australia and the Union have notified each other of the completion of their respective internal procedures necessary for such provisional application'.

33 Under Art. 22 of the Agreement between the European Union and the Swiss Confederation on the Linking of Their Greenhouse Gas Emissions Trading Systems, signed in 2017, OJ 2017 L 322/3, 'Before the entry into force of this Agreement, Articles 11 to 13 shall be applied on a provisional basis as from the date of signature of this Agreement'; also Art. 198(3) of the Agreement Establishing an Association between the European Community and Its Member States, of the One Part, and the Republic of Chile, of the Other Part, signed in 2002, OJ 2002 L 352/3, provides for the application of 'Articles 3 to 11, Article 18, Articles 24 to 27, Articles 48 to 54, Article 55 (a), (b), (f), (h) (i), Articles 56 to 93, Articles 136 a 162 and Articles 172 to 206' prior to the entry into force of the agreement. Sometimes, the material scope of application of the provisional application provisions is defined by exclusion, as in the Agreement between the European Union and the Kingdom of Norway on Supplementary Rules in Relation to the Instrument for Financial Support for External Borders and Visa, as Part of the Internal Security Fund for the Period 2014 to 2020, signed in 2016, OJ 2017 L 75/3, whose Art. 19(4) sets out that '[e]xcept for Article 5, the Parties shall apply this Agreement provisionally as from the day following that of Its signature'; the Agreements with Iceland (OJ 2018 L 72/3) and Liechtenstein (OJ 2017 L 7/4) on the same matter have the same wording.

34 As in the Multilateral Agreement between the European Community and Its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the Establishment of a European Common Aviation Area, signed in 2006, OJ 2006 L 285/3. According to Art. 29(3) of this multilateral agreement, regardless of the provisions on the entry into force, 'the European Community and its Member States and at least one Associated Party, may decide to apply provisionally this Agreement among themselves from the date of signature'.

35 Flaesch-Mougin and Bosse-Platière remark that 'les types d'accords externes concernés sont aussi bien des accords multilatéraux que bilatéraux, des nouveaux accords que des renouvellements, accords complémentaires ou protocoles additionnels'. Flaesch-Mougin and Bosse-Platière, *supra* note 29, at 296–297.

36 Those provided in general multilateral agreements are not examined herein since they do not illustrate the Union's autonomous practice.

partial basis, leaving it to the EU to determine the specific parts of the agreement covered by the provisional application clause. For instance, the Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Georgia, of the Other Part, signed in 2014, is worded as follows: 'The Union and Georgia agree to provisionally apply this Agreement in part, as specified by the Union.'[37] Thus, one must resort to Council Decision 2014/494 in order to learn the scope of the provisional application.[38] There are additional examples of this, such as the Association Agreement with Moldova,[39] the Enhanced Partnership and Cooperation Agreement with Kazakhstan,[40] the Cooperation Agreement on Partnership and Development with Afghanistan,[41] the Political Dialogue and Cooperation Agreement with Cuba[42] and the Association Agreement with Ukraine;[43] in the latter case, those parts of the agreement to be applied provisionally have been defined by means of two successive council decisions.[44] These clauses are innovative also because, concerning similar agreements, interim

[37] OJ 2014 L 261/4.

[38] Council Decision 2014/494 on the Signing, on Behalf of the European Union, and Provisional Application of the Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Georgia, of the Other Part, OJ 2014 L 261/1, Art. 431(3).

[39] Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and the Republic of Moldova, of the Other Part, signed in 2014, OJ 2014 L 260/4, Art. 464(4). See Council Decision 2014/492 on the Signing, on Behalf of the European Union, and Provisional Application of the Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and the Republic of Moldova, of the Other Part, OJ 2014 L 260/1.

[40] Enhanced Partnership and Cooperation Agreement between the European Union and Its Member States, of the One Part, and the Republic of Kazakhstan, of the Other Part, signed in 2015, OJ 2016 L 29/3, Art. 281(4). See Council Decision 2016/123 on the Signing, on Behalf of the European Union, and Provisional Application of the Enhanced Partnership and Cooperation Agreement between the European Union and Its Member States, of the One Part, and the Republic of Kazakhstan, of the Other Part (Enhanced Partnership and Cooperation Agreement between the European Union and Kazakhstan), OJ 2016, L 29/3.

[41] Cooperation Agreement on Partnership and Development between the European Union and Its Member States, of the One Part, and the Islamic Republic of Afghanistan, of the Other Part (Cooperation Agreement between the European Union and Afghanistan), signed in 2017, OJ 2017 L 67/3, Art. 59(2). See Council Decision 2017/434 on the Signing, on Behalf of the Union, and Provisional Application of the Cooperation Agreement on Partnership and Development between the European Union and Its Member States, of the One Part, and the Islamic Republic of Afghanistan, of the Other Part, OJ 2017 L 67/1.

[42] Political Dialogue and Cooperation Agreement between the European Union and Its Member States, of the One Part, and the Republic of Cuba, of the Other Part, signed in 2016, OJ 2016 L 3371/3. See Council Decision 2016/2232 on the Signing, on Behalf of the Union, and Provisional Application of the Political Dialogue and Cooperation Agreement between the European Union and Its Member States, of the One Part, and the Republic of Cuba, of the Other Part, OJ 2016 L 337I/1.

[43] Association Agreement between the European Union and the European Atomic Energy Community and Its Member States, of the One Part, and Ukraine, of the Other Part, signed in 2014, OJ 2014 L 161/3, Art. 486.

[44] Council Decision 2014/295/EU, of 17 March 2014, on the Signing, on Behalf of the European Union, and Provisional Application of the Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Ukraine, of the

agreements have been concluded with that same purpose in lieu of setting provisional application clauses: applying the treaty prior to its entry into force.[45] Self-evidently, these states were eager to harness the benefits of the agreements, and they have been more than willing to accept this singular approach, which in any case is covered by the flexibility stemming from Article 25 of the 1969 and 1986 VCLTs.

Second, the specificities of the mixed agreements are also reflected in the various forms of their provisional application. It is worth noting that regarding the part of the agreement related to the EU and its member states, the provisional application clause only affects the first and not the latter.[46] Also, unsurprisingly, the relevant provisional application clause often includes safeguard clauses regarding domestic law on the matter, stating that, for instance, '[p]ending its entry into force, the Parties agree to provisionally apply this Agreement, to the extent permitted under applicable domestic law';[47] the agreement 'shall be applied provisionally, in accordance with the national laws of the Contracting Parties'[48] or that the provisional application shall be

Other Part, as Regards the Preamble, Article 1, and Titles I, II and VII thereof, OJ 2014 L 161/1; Council Decision 2014/668 on the Signing, on Behalf of the European Union, and Provisional Application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and Ukraine, of the Other Part, as Regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols, OJ 2014 L 278/1.

45 As provided in Art. 139 of the Stabilisation and Association Agreement between the European Communities and Their States Parties of the One Part, and the Republic of Montenegro, of the Other Part, signed in 2007, OJ 2010 L 108/3; also, in Art. 136 of the Stabilisation and Association Agreement between the European Communities and Their States Parties of the One Part, and the Republic of Serbia, signed in 2008, OJ 2013 L 278/16.

46 For instance, Art. 27(2) of the Cooperation Agreement between the European Union and Its Member States, of the One Part, and the Swiss Confederation, of the Other, on the European Satellite Navigation Programmes, signed in 2013, OJ 2014 L15/3, points out 'Switzerland and the European Union agree, as regards elements of this Agreement falling within the competence of the European Union, to apply it provisionally'. This is also the case regarding some recent association agreements, such as the one concluded with Kazakhstan. Concerning this agreement, Council Decision 2016/123, *supra* note 40, Art. 3(1), points out that 'parts of the Agreement shall be applied provisionally between the Union and the Republic of Kazakhstan, but only to the extent that they cover matters falling within the Union's competence'. Along these lines, see the Cooperation Agreement between the European Union and Afghanistan, *supra* note 41, Art. 59(2); Council Decision 2017/434, *supra* note 41, Art. 3 and Political Dialogue and Cooperation Agreement with Cuba, *supra* note 42, and Council Decision 2016/2232, *supra* note 42, Art. 3.

47 As in the Protocol to Amend the Air Transport Agreement between the European Community and Its Members States and the United States of America, signed in 2010, OJ 2010 L 223/3, Art. 9, and the Ancillary Agreement between the European Union and Its Member States, of the First Part, Iceland, of the Second Part, and the Kingdom of Norway, of the Third Part, on the Application of the Air Transport Agreement between the United States of America, of the First Part, the European Union and Its Member States, of the Second Part, Iceland, of the Third Part, and the Kingdom of Norway, of the Fourth Part, signed in 2011, OJ 2011 L 283/16, Art. 8.

48 Euro-Mediterranean Aviation Agreement between the European Union and Its Member States, of the One Part, and the Government of the State of Israel, of the Other Part, signed in 2013, OJ 2013 L 208/3, Art. 30; this same wording is used by the Euro-Mediterranean Aviation Agreement between the European Union and Its Member States, of the One Part, and the Kingdom of Morocco, of the Other Part, signed in 2006, OJ 2006 L 386/57, Art. 30(1).

effective after 'the Parties have notified each other of the completion of the procedures necessary for this purpose'.[49] In all of these cases, there is a referral to national rules relating to provisional application, which vary depending on the state under consideration. While, in some states, there are no special requirements, in others there are procedural or substantive restrictions. As a result, 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.[50]

The need to comply with internal procedures on the provisional application of third states parties to the agreement sometimes gives rise to certain clauses such as that set out in the Interim Agreement with a View to an Economic Partnership Agreement between the European Community and its Member States, of the One Part, and the Central Africa Party, of the Other Part, of 2009.[51] Under this clause, pending this agreement's entry into force, the parties agree to apply the provisions of this agreement, either by provisional application, where such application is possible, or via ratification of the agreement, subsequently specifying that the European Community shall apply the agreement provisionally, whereas all signatory Central African states may ratify it or apply it provisionally.[52]

[49] These are the terms of the Agreement between the European Union and the Republic of Cape Verde on Certain Aspects of Air Services, signed in 2011, OJ 2011 L 96/2, Art. 8; in the Framework Agreement between the European Union and Their Member States, of the One Part, and the Republic of Korea, of the Other Part, signed in 2010, OJ 2013 L 20/2, Art. 49(2); the Euro-Mediterranean Aviation Agreement between the European Union and Its Member States, of the One Part, and the Hashemite Kingdom of Jordan, signed in 2010, OJ 2012 L 334/3, Art. 29(2); the Free Trade Agreement between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part, signed in 2010, OJ 2011 L 127/6, Art. 15(10)(5)(a); the Partnership and Cooperation Agreement between the European Union and Its Member States, of the One Part, and the Republic of Iraq, of the Other Part, signed in 2012, OJ 2012 L 204/20, Art. 117; the Common Aviation Area Agreement between the European Union and Its Member States and Georgia, signed in 2010, OJ 2012 L 321/3, Art. 29(2) or the Trade Agreement between the European Union and the Member States, of the One Part, and Colombia and Peru, of the Other Part, signed in 2012, OJ 2012 L 354/3, Art. 330(3).

[50] On the contrary, member states are obliged by the provisional application with respect to the matters falling within the competences of the EU in accordance with Art. 216(2) of the TFEU. On the domestic law on provisional application, see A. Geslin, *La mise en application provisoire des traités* (2005), at 207–258; Council of Europe and British Institute of International Law and Comparative Law (eds), *Treaty Making-Expression of Consent by States to Be Bound by a Treaty* (2001), at 83–86; Andrés Sáenz de Santa María, 'Artículo 15: Aplicación provisional', in Andrés Sáenz de Santa María, Díez-Hochleitner and Martín y Pérez de Nanclares, *supra* note 16, 307.

[51] Interim Agreement with a View to an Economic Partnership Agreement between the European Community and Its Member States, of the One Part, and the Central Africa Party, of the Other Part (Interim Agreement between the European Community and the Central Africa Party) 2009, OJ 2009 L 57/2.

[52] Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part (Economic Partnership Agreement between the CARIFORUM States) 2008, OJ 2008 L 289/3, Art. 243(3). According to this partnership agreement, '[p]ending entry into force of the Agreement, the European Community and the Signatory CARIFORUM

This choice between ratification and provisional application granted to the EU's counterparty is not in place in other treaties, where provisional application is only available to the Union, whereas the counterparty would have to express its consent to be bound by the agreement to trigger the provisional application. Among others, this is the case regarding the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and the Republic of Armenia, of the Other Part, signed in 2017.[53]

In the context of mixed agreements, the Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union and Its Member States, of the Other Part (CETA) has further enriched provisional application.[54] This must be highlighted because the provisional application mechanism, although enshrined through a convoluted thicket, has been used to overcome the obstacles encountered during the conclusion of the agreement. Indeed, Article 30(7) thereof provides for the provisional application of the agreement. However, under this provision, the EU is not entitled to determine the matters involved. Thus, the treaty has been provisionally applied on a partial basis regarding the matters falling under the exclusive competence of the EU. This was formalized in a complex manner by means of Council Decision 2017/38,[55] alongside seven statements to be entered in the Council minutes,[56] where this institution defines the general scope and its impact on specific matters, to which three statements by member states should be added. It is worth noting that termination of the provisional application has been expressly considered.

States shall agree to provisionally apply the Agreement, in full or in part. This may be effected by provisional application pursuant to the laws of a signatory or by ratification of the Agreement'; see also Interim Partnership Agreement between the European Community, of the One Part, and the Pacific States, of the Other Part (Interim Partnership Agreement between the European Community and the Pacific States), signed in 2009, OJ 2009 L 272/2, Art. 76(2); Interim Agreement with a View to an Economic Partnership Agreement between, the European Community and Its Member States, of the One Part, and the SADC EPA States, of the Other Part (Interim Agreement between the European Community and the SADC), signed in 2009, OJ 2009 L 119/3, Art. 105(4); Interim Agreement Establishing a Framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the One Part, and the European Community and Its Member States, on the Other Part (Interim Agreement between the Eastern and Southern Africa States and the European Community), signed in 2009, OJ 2011 L 111/2, Art. 62(4).

53 OJ 2018 L 23/4, Art. 385(6); see also Cooperation Agreement between the European Union and Afghanistan, *supra* note 41, Art. 59(3); Enhanced Partnership and Cooperation Agreement between the European Union and Kazakhstan, *supra* note 40, Art. 281(4).

54 OJ 2017 L11/23 (CETA). On the Wallonian Parliament's opposition to CETA, see Couveinhes Matsumoto, 'L'épopée de la Wallonie et la signature de l'AECG/CETA', 121 *RGDIP* (2017) 69, at 69–85.

55 Council Decision 2017/38 of 28 October 2016, OJ 2017 L 11/1080; see also the notice concerning 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, OJ 2017 L 238/9. On the provisional application of CETA, see Iruretagoiena Agirrezabalaga, 'El capítulo sobre inversiones del Acuerdo Económico y Comercial Global de la Unión Europea y Canadá (CETA); análisis crítico de una iniciativa inacabada', 10 *Arbitraje. Revista de arbitraje comercial y de inversiones* (2017) 41, at 51–54; Rodríguez Magdaleno, 'La aplicación provisional del Acuerdo Económico y Comercial Global (CETA): "preludio de la entrada en vigor?"', 8952 *Diario La Ley* (2017).

56 Statements 2, 3, 4, 15, 16, 17, 20, OJ 2017 L 11/11, L 11/14, L 11/15.

Unquestionably, this has been triggered by the uncertainties related to the entry into force of the agreement and the ups and downs of certain states. Along these lines, the Council states that '[i]f the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures',[57] whereas Germany, Austria, Poland and Belgium declared that, as parties to CETA, they can exercise their rights to terminate the provisional application of the agreement unilaterally.[58]

Third, another specificity of the provisional application of treaties entails providing for the provisional application on a date prior to the conclusion of the agreement. See, for instance, Article 13(2) of the Protocol to the Stabilisation and Association Agreement between the European Communities and Their Member States, of the One Part, and the former Yugoslav Republic of Macedonia, of the Other Part, to Take Account of the Accession of the Republic of Croatia to the European Union, which was signed in 2014: 'If not all the instruments of approval of this Protocol have been deposited before 1 July 2013, this Protocol shall apply provisionally with effect from 1 July 2013.'[59] This has been designated by José Martín y Pérez de Nanclares as a retroactive provisional application. He adds that this treaty practice 'challenges even the most settled elements of the Vienna Conventions'.[60] The EU has been implementing this practice regarding the enlargements in order to ensure a smooth and uninterrupted incorporation of new member states into the pre-existing mixed agreements, by means of an additional protocol to each agreement concluded by the Council on

[57] Statement 20, *supra* note 56.

[58] Statements 21, 22, 37, OJ 2017 L 11. Overall, within EU's treaty practice on provisional application, it is uncommon to expressly consider termination of this provisional application; in this regard, see the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and the Republic of Armenia, of the Other Part, signed in 2017, OJ 2018, L 23/4, Art. 385(9); Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Georgia, of the Other Part, signed in 2014, OJ 2014 L 261/4, Art. 431(7); Association Agreement between the European Union and Its Member States, of the One Part, and Ukraine, of the Other Part, signed in 2014 OJ 2014 L 161/3, Art. 486(7); Free Trade Agreement between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part, signed on 2010, OJ 2011 L 127/6, Art. 15(10)(5)(c). The existence of this practice explains the interest expressed by the EU observer in the General Assembly Sixth Committee in having the draft guidelines address in detail the possibilities of terminating or suspending the provisional application. See Sixth Committee, Summary Record of the 18th Meeting, Doc. A/C.6/72/SR.18, 14 November 2017, at 6, paras 44–45; Statement on Behalf of the European Union, 25 October 2018, para. 16, available at https://eeas.europa.eu/headquarters/headquarters-homepage/54130/eu-statement-%E2%80%93-united-nations-6th-committee-provisional-application-treaties_en.

[59] OJ 2014 L 276/3.

[60] 'La Ley de Tratados y otros Acuerdos Internacionales: una nueva regulación para disciplinar una práctica internacional difícil de ignorar', 67 *Revista Española de Derecho Internacional* (2015) 13, at 54: '[P]one a prueba hasta los elementos más asentados de las Convenciones de Viena' (author's translation).

behalf of the Union and its member states and the third state;[61] this questionable technique is also used in other areas.[62]

How can we assess this puzzling practice? Is this practice really shaking the foundations of the VCLTs? Scholars have clearly stated two ideas: on the one hand, that provisional application and retroactivity differ from a conceptual standpoint[63] and, on the other, that Article 28 of the VCLTs shall be taken to mean that the most significant aspect is the applicability of the treaty to be applied retroactively, either because it has already entered into force or because of provisional application.[64] Departing from these comments, the answer to the earlier questions is that a non-existent instrument

[61] This practice started following the Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the Adjustments to the Treaties on which the European Union Is Founded, OJ 2003 L 236/33, thanks to Art. 6(2) thereof, and it has led to a significant number of protocols with this same feature concerning their provisional application. The effective dates of the provisional application are the same as the dates of accession: 1 May 2004, 1 January 2007 and 1 July 2013. There are so many agreements that we are unable to list them all. To this day, the most recent one is the Protocol to the Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and the Kyrgyz Republic, of the Other Part, to Take Account of the Accession of the Republic of Croatia to the European Union, OJ 2018 L 69/3, Art. 4.

[62] For example, in certain sectorial agreements, particularly in the protocols establishing fishing opportunities. Also, in agreements on the incorporation of a third state into EU programmes with a specific temporal scope, as in the Agreement for Scientific and Technological Cooperation between the European Union and European Atomic Energy Community and the Swiss Confederation Associating the Swiss Confederation to Horizon 2020 – the Framework Programme for Research and Innovation and the Research and Training Programme of the European Atomic Energy Community Complementing Horizon 2020, and Regulating the Swiss Confederation's Participation in the ITER Activities Carried out by Fusion for Energy, signed on 5 December 2014, OJ 2014 L 370/3, which provides in Art. 15(1) that the Agreement shall be provisionally applied upon its signature, yet adding that '[p]rovisional application shall take effect from 15 September 2014'; Agreement between the European Community and the Swiss Confederation in the Audiovisual Field, Establishing the Terms and Conditions for the Participation of the Swiss Confederation in the Community Programme MEDIA 2007, signed on 11 October 2007, OJ 2007 L 303/11, where Art. 13 sets forth that '[i]t shall be provisionally applied as from 1 September 2007'; Agreement between the European Union and the State of Israel on the Participation of the State of Israel in the Union programme 'Horizon 2020 – the Framework Programme for Research and Innovation (2014–2020)', signed on 8 June 2014, OJ 2014 L 177/1, where Art. 6(2) provides that '[i]t becomes applicable from 1 January 2014'.

[63] Orihuela Calatayud rightly claims that it is preposterous to broaden the exceptions applicable to the principle of non-retroactivity based on the parties' will, considering that there is an underlying intention to retroactively apply treaty provisions. E. Orihuela Calatayud, *Los tratados internacionales y su aplicación en el tiempo. Consideraciones sobre el efecto inicial de las disposiciones convencionales* (2004), at 51. Villiger notes that 'Article 25 views the treaty's application *pro futuro*, though before its entry into force, whereas the perspective of Article 28 is that of looking backwards in time'. Villiger, 'Article 28: Non-retroactivity of treaties', in *Commentary on the 1969 Vienna Convention on the Law of Treaties*, *supra* note 21, 377, at 385.

[64] Odendahl has wondered if Art. 28 of the Vienna Conventions also refers to the provisional application; in his view, '[s]ince the word "bind" has to be read as "have legal consequences" or "is applicable with respect to a party" the answer is clear: a treaty becomes binding on a party at the moment it becomes applicable to that party, *i.e.* at the moment of its provisional application or, at the latest, at the moment of its entry into force'. Odendahl, 'Article 28: Non-retroactivity of treaties', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012) 477, at 487. In this connection,

cannot be applied retroactively; rather, it would be a case of forced retroactivity.[65] In sum, this is a misuse of the provisional application of treaties. There are no treaty law provisions preventing the retroactive application of an international agreement – that is, taking back its effects, but provisional application is not a suitable instrument for this purpose. This retroactive effect must be implemented through a retroactivity clause that could be activated upon commencement of the provisional application.[66] In fact, there are precedents in the EU's practice for these retroactivity provisions.[67]

Finally, regarding the practice examined above, it is also worth noting that sometimes, prior to the provisional application, unilateral application measures are applied. The Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part, signed in 2008, provides in Article 243(3) that 'the European Community and Signatory CARIFORUM States may take steps to apply the Agreement, before provisional

and based on the ILC works, Dopagne points out that '[w]hen a treaty is applied provisionally pending its entry into force, it seems that the critical date to appraise the retroactivity is the date of the provisional application, and no longer that of the entry into force'. Dopagne, '1969 Vienna Convention: Article 28 – Non-retroactivity of Treaties', in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011), vol. 1 718, at 720.

[65] This was remarked on by Remiro Brotóns concerning a case of Spain's treaty practice: the agreement dated 9 April 1981, supplementing the Agreement for social cooperation concluded between Spain and Bolivia for the establishment of a socio-labour cooperation programme. Article XII thereof provided that the agreement would enter into force upon its signature, adding that it would be effective as from 1 January 1981, three months prior to its conclusion. The Spanish Ministry of Foreign Affairs considered this a form of provisional application. A. Remiro Brotóns, *Derecho internacional público: 2. Derecho de los tratados* (1987), at 287. Orihuela Calatayud, *supra* note 63, at 83, agrees. This author has the following approach: 'Resulta sorprendente y contrario a la lógica del Derecho de los Tratados establecer una retroactividad en relación con la entrada en vigor. Resulta incomprensible y paradójico pretender retrotraer la entrada en vigor de un tratado a un momento en el que éste ni siquiera había empezado a negociarse' (at 82); in my opinion, these claims can also apply to provisional application.

[66] In the third report on the provisional application of treaties, the special rapporteur included the following assertion: 'There are even examples of agreements concluded by exchanges of letters between States and international organizations that provide not only for provisional application but also for retroactive effect.' J.M. Gómez-Robledo, Third Report on the Provisional Application of the Treaties, Doc A/CN.4/687 (2015), at 26, para. 127. In the ILC session held on 14 July 2015, M. Forteau replied that '[t]he way in which the Special Rapporteur described State practice was not always sufficiently clear … the Special Rapporteur mentioned several cases where provisional application could have 'retroactive' effect; however, in the absence of detailed explanations, it was hard to understand what was meant and what the implications of that practice were'. Summary Record of the 3269th Meeting, Held on 14 July 2015, Doc. A/CN.4/SR.3269 (2015), at 14.

[67] The Agreement in the Form of an Exchange of Letters between the European Community and the Hashemite Kingdom of Jordan amending the EC-Jordan Association Agreement, signed in 26 September 2007, OJ 2008 L 207/18, is worded as follows: 'This Agreement shall be applicable retroactively from 1 January 2006'; also the Agreement in the form of an Exchange of Letters between the European Community and the Swiss Confederation on Certain Technical Amendments to Annexes I and II to the Agreement between the European Community and the Swiss Confederation Providing for Measures Equivalent to Those Laid Down in Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments by Reason of the Accession of the Republic of Bulgaria and Romania, signed on 19 May 2009, OJ 2009 L 205/21, provides that '[t]he agreement in the form of an Exchange of Letters enters into force on the date of the reply letter. The application of the provisions of this Exchange of Letters shall have retroactive effect as of 1 January 2007'.

application, to the extent feasible',[68] which takes us to some sort of provisional pre-application on a unilateral basis. Thus, the question is whether this unilateral provisional application falls within the scope of Article 25 of the VCLTs, which has been answered affirmatively.[69]

Ultimately, having regard to the conclusions of this analysis on treaty practice, there is no doubt that the EU is creatively using the provisional application of treaties, sometimes even going beyond the explicit provisions of Article 25 of the VCLTs. However, except for the extreme case of retroactive provisional application, it does not breach these provisions thanks to the leniency and freedom guiding Article 25. This overarching practice outlined so far has been taken into account by the ILC in its current works on provisional application. In its first report, the special rapporteur pointed out that '[t]he recent practice of the European Union is relevant in this regard'.[70] The EU itself is contributing to this practice. Indeed, in the context of the United Nations General Assembly's Sixth Committee and from the beginning of the ILC's works on this matter and in response to every special rapporteur report, the EU observer has expressed its preference for producing guidelines instead of model clauses.[71] The EU Delegation has also submitted to the ILC's consideration several specific aspects.[72]

In other statements, the EU observer has expressly mentioned some examples,[73] which have called for the special rapporteur's attention, leading him to highlight

[68] Economic Partnership Agreement between the CARIFORUM States, *supra* note 52. In this connection the Interim Partnership Agreement between the European Community and the Pacific States, *supra* note 52, Art. 76(4); Interim Agreement between the European Community and the Central Africa Party, *supra* note 51, Art. 98(6); Interim Agreement between the European Community and the SADC, *supra* note 52, Art. 105(6); Interim Agreement between the Eastern and Southern Africa States and the European Community, *supra* note 52, Art. 62(6).

[69] According to Bartels, '[i]n substantive terms, then, there seems to be no reason why the unilateral "application" … could not be considered a case of "provisional application" under Article 25 (1) – unless Article 25 (1) does not recognize *unilateral* provisional application. … Textually, Article 25 simply refers to the act of provisionally applying a treaty: there is no requirement that such an act be mutual. Indeed, this appears to be uncontroversial'. Bartels, 'Withdrawing Provisional Application of Treaties: Has the EU Made a Mistake?', 1 *Cambridge Journal of International and Comparative Law* (2012) 112, at 117. In addresses before the General Assembly Sixth Committee, the EU observer asked the ILC to clarify this issue. See Sixth Committee, *supra* note 58, at 6, para. 42.

[70] J.M. Gómez-Robledo, First Report on the Provisional Application of Treaties, Doc. A/CN.4/664 (2013), at 9, para. 35.

[71] Sixth Committee, Summary Record of the 23rd Meeting, Doc. A/C.6/68/SR.23, 4 November 2013, at 8, para. 33.

[72] Namely, to what extent provisions involving institutional elements, like provisions establishing joint bodies, may be subject to provisional application or whether there are limitations in that respect; whether provisional application should also extend to provisions adopted by such joint bodies during provisional application; whether are there limitations with regard to the duration of the provisional application; how the provisional application provided for in Art. 25 of the VCLT relates to the other provisions of the VCLT and other rules of international law, including responsibility for breach of international obligations. *Ibid.*, at 9, para. 34.

[73] As the provisional application provisions of the Association Agreements with Ukraine, Georgia and Moldova, which not only cover trade but also include provisions related to political dialogue as well as

'the validity and relevance of provisional application in current treaty law and the usefulness of this concept for this regional organization'.[74] This is surely why in the Guide to Provisional Application of Treaties that is being prepared within the ILC, the draft guidelines adopted on first reading expressly refer to international organizations.[75]

4 Creative Contributions to Treaty Interpretation

Both the Association Agreement between the EU and Ukraine and CETA provide examples of treaty interpretative instruments, although they differ from each other. However, in both cases, the purpose was to secure the future of these agreements, the conclusion of which was surrounded by political turmoil. An additional, recent example is the Interpretative Declaration of the European Council (Article 50) and of the European Commission on Article 184 Concerning the Withdrawal Agreement of the United Kingdom from the European Union.[76]

Regarding the first agreement, after the Dutch voters rejected ratification in a referendum, on the occasion of the European Council on 15 December 2016, a 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 was adopted.[77] This decision clarifies the agreement in order to address the 'concerns' expressed in the Netherlands.

This text must be discussed from the perspective of treaty interpretation. The decision fails to define its nature, by simply stating that the heads of state or government of the 28 member states of the EU 'have decided to adopt the following, as their common understanding'. Nevertheless, in its conclusions, the European Council states that it 'takes note' of the decision, adding that the latter 'is legally binding on the 28 Member States of the European Union, and may be amended or repealed only by common accord of their Heads of State or Government'. Similarly, the Opinion of the Legal Counsel on the Draft Decision[78] adds interesting aspects,

institutional provisions. See Sixth Committee, Summary Record of the 23rd Meeting, Doc. A/C.6/70/SR.23, 9 November 2015, at 21, para. 118. During the Sixth Committee meeting held in 2017, the EU observer added new examples. Sixth Committee, *supra* note 58, at 7, para. 49–51.

74 Fifth Report on the Provisional Application of Treaties, Doc. A/CN.4/718 (2018), at 9, para. 27.

75 Doc. A/CN.4/L.910 (2018). This was the assessment of the EU observer at the 73rd session of the General Assembly Sixth Committee: '[T]he European Union is an actor who is actively contributing to shaping the practice in the field of provisional application of treaties. This has now been recognized by both the Special Rapporteur and the ILC, as in the reports and in the commentaries to the draft guidelines they refer on a number of occasions to treaty practice of the European Union to illustrate one guideline or another, or to come to an answer to open questions.' Statement on Behalf of the European Union, *supra* note 58, at para. 6.

76 Doc. EUCO XT 20017/18, 25 November 2018, at 3.

77 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 Community and Their Member States, of the One Part, and Ukraine, of the Other Part, Doc. EUCO 34/16, 15 December 2016, Annex.

78 Doc. EUCO 37/16, 12 December 2016.

defining it 'as an instrument of international law, by which the EU Member States agree on how they understand and will apply, within their competences, certain provisions of an act by which they are otherwise all bound', designated as a 'common understanding', 'agreed by the EU Member States only, and therefore not by all parties to the association agreement to which the Decision makes reference. It is in particular clear that, unless Ukraine declares that it accepts the Decision, its provisions cannot constitute an interpretative instrument binding on Ukraine by virtue of Article 31(2)(b) of the Vienna Convention on the Law of Treaties'.[79]

It is ultimately an agreement concluded in a more simplified manner amongst EU member states,[80] which was noted by the EU–Ukraine Association Council during its meeting on 19 December 2016,[81] that leads to the following question: does this action by the Association Council mean that the decision has been accepted by Ukraine and thereby becomes an instrument related to the treaty within the meaning of Article 31(2)(b) of the VCLT? Or does it remain a unilateral instrument whose effectiveness is evidenced by the fact that it can be enforced *vis-à-vis* its authors? In our opinion, judging by the composition and functions of the Association Council, the first question would be answered in the affirmative.

In turn, regarding CETA, the instrument adopted to overcome the Wallonian Parliament's opposition was the Joint Interpretative Instrument.[82] In its preamble, although generically, it expressly invokes Article 31 of the VCLT. A statement by the Council Legal Service on the legal nature of the Joint Interpretative Instrument legally characterizes this text as follows:

> The Council Legal Service hereby confirms that, by virtue of Article 31(2)(b) of the Vienna Convention on the Law of Treaties, the Joint Interpretative Instrument to be adopted by the parties on the occasion of the signature of CETA, of which it forms the context, constitutes a document of reference that will have to be made use of if any issue arises in the implementation of CETA regarding the interpretation of its terms. To this effect, it has legal force and a binding character.[83]

Nevertheless, from the perspective of Article 31 of the VCLT, it is worth noting that, if it is 'a joint instrument' between Canada and the EU and its member states, it should not be considered to be an interpretative instrument within the scope of subparagraph

[79] European Council, *Opinion of the Legal Counsel on the Draft Decision of the Heads of State or Government, Meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, on One Part, and Ukraine, on the Other*, Case no. EUCO 37/16, LIMITE, JUR 602, 12 December 2016, paras 3, 6, 5 respectively.

[80] According to Wessel, 'the "Decision" thus adopted seems to be nothing less than an international agreement'. Wessel, 'The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement', 1 *European Papers* (2016) 1305, at 1306, to be considered as 'another example of EU Member States finding a way to use a non-EU instrument to deal with an EU issue' (at 1307). On this decision, see also van Elsuwege, 'Towards a Solution for the Ratification Conundrum of the EU-Ukraine Association Agreement?', *VerfBlog*, 16 December 2016, available at https://verfassungsblog.de/towards-a-solution-for-the-ratification-conundrum-of-the-eu-ukraine-association-agreement/.

[81] See Press Release 797/16, 19 December 2016.

[82] OJ 2017 L 11/3.

[83] Statement 38, OJ 2017 L 11/22.

(b), as stated by the Legal Service – that is, 'any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties'. Conversely, it should be placed under subparagraph (a), which reads as follows: 'Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.'

On the other hand, the Withdrawal Agreement of the United Kingdom is clearly in the field of Article 31(2)(b) because the United Kingdom has assumed the aforementioned interpretative declaration on Article 184, and so it is stated in the text, according to which '[t]he European Council and the European Commission take note of the declaration by the United Kingdom, that the United Kingdom shares this interpretation'.[84]

5 Limited Practice Regarding Reservations to Treaties

As opposed to the ample use of provisional application clauses, the EU barely enters reservations to treaties. This may be understandable if we take into account that the majority of concluded treaties are bilateral agreements and that many existing multilateral treaties have a restricted scope and have been promoted by the Union itself; thus, the EU has been able to tailor its needs to the legal framework enshrined in the agreement with no need for reservations. Additionally, treaty practice shows that international organizations rarely resort to reservations.[85]

Accordingly, aside from general multilateral agreements, it is exceptional to find reservation clauses in this kind of treaty; the Agreement Establishing an Association between the European Union and Its Member States, on the One Hand, and Central America, on the Other, which was signed in 2012, is worth mentioning.[86] Article 361 thereof provides that 'this Agreement does not allow unilateral reservations or interpretative declarations'. Furthermore, it is also worth noting the Trade Agreement between the European Union and Its Member States, of the One Part, and Colombia and Peru, of the Other Part, which was also signed in 2012.[87] Article 335 of this trade agreement is worded as follows: 'This Agreement does not allow for reservations within the meaning of the Vienna Convention on the Law of Treaties.'

Finding reservations made by the EU is as hard as finding clauses. Sticking to the ones in force,[88] the reservation placed by the European Community to the 1992

[84] Doc. EUCO XT 20017/18, 25 November 2018, at 3. The letter of the United Kingdom's (UK) permanent representative ambassador to the EU is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759015/HMG_letter_to_the_Secretary-General_of_the_Council_of_the_European_Union_on_Article_184.pdf.

[85] As claimed by Verwey, *supra* note 3, at 129, adding that '[t]he European Commission's stance on reservations is usually a neutral one' (*ibid.*).

[86] OJ 2012 L 346/3.

[87] OJ 2012 L 354/3.

[88] At that time, the Community made reservations to the provisions of certain annexes to the International Convention on the Simplification and Harmonization of Customs Procedures 1973, 950 UNTS 269, in order to take into account the requirements of the customs union. Council Decision 75/199, OJ 1975 L

Convention on the Transboundary Effects of Industrial Accidents is worth mentioning,[89] as well as the reservation entered by the European Community regarding Article 9 of the 1991 Protocol on the Implementation of the Alpine Convention in the Field of Energy[90] to preserve the powers of the European Atomic Energy Community; this organization is also responsible for the reservations made to certain treaties deposited with the International Atomic Energy Agency.[91] To these can be added the reservation made in connection with Article 27(1) of the 2006 United Nations (UN) Convention on the Rights of Persons with Disabilities, which is worded as follows:

> The European Community states that pursuant to Community law (notably Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation), the Member States may, if appropriate, enter their own reservations to Article 27(1) of the Disabilities Convention to the extent that Article 3(4) of the said Council Directive provides them with the right to exclude non-discrimination on the grounds of disability with respect to employment in the armed forces from the scope of the Directive.

100/1. Subsequently, Decision 94/167, OJ 1994 L 76/28, amended the initial reservations, in accordance with the actual convention, which has been amended by a 1999 Protocol, which entered into force in 2007. See Council Decision 2003/231 Concerning the Accession of the European Community to the Protocol of Amendment to the International Convention on the Simplification and Harmonisation of Customs Procedures (Kyoto Convention), OJ 2006 L 86/2, amended by Council Decision 2004/485, OJ 2004 L 162/113.

89 2105 UNTS 457. The reservation made in the context of the approval of the Convention by the Community was replaced in 2007 by the following: 'The Member States of the European Community, in their mutual relations, will apply the Convention in accordance with the Community's internal rules. The Community therefore reserves the right as concerns the threshold quantities mentioned in Annex I, Part I, Nos. 4, 5, and 6 to the Convention, to apply threshold quantities of 100 tonnes for bromine (very toxic substance), 5000 tonnes for methanol (toxic substance) and 2000 tonnes for oxygen (oxidising substance).' The reservation is accompanied by a statement declaring the objectives and principles of the Community's environmental policy and listing the secondary law instruments in the field covered by the convention. Both texts are available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-6&chapter=27&lang=en.

90 OJ 2005 L 337/36. It is a reservation seeking to exclude a treaty provision, according to which: 'Article 9 of the Protocol on "Energy" concerns nuclear power issues. As far as the European Community is concerned, the requirements referred to in Article 9 are provided for in the Treaty establishing the Atomic Energy Community (EURATOM). The decision by which the Alpine Convention was ratified was not based on the Euratom Treaty, but solely on the EC Treaty. The decision authorising the signing of the Protocol will have the same legal basis. Consequently, the European Community will not be bound by Article 9 of the Protocol on Energy, when the Protocol enters into force for the Community.' Council Decision 2005/923, OJ 2005 L 337/27.

91 First, these are the reservations placed in connection with the Convention on the Physical Protection of Nuclear Material 1979, 1456 UNTS 101, on the occasion of the amendment to the convention in 2005 (these reservations are available at www-legacy.iaea.org/Publications/Documents/Conventions/cppnm_reserv.pdf, at 3); since then they are referred to as Convention on the Physical Protection of Nuclear Material and Nuclear Facilities 2005, OJ 2008 L 34/5, available at www-legacy.iaea.org/Publications/Documents/Conventions/cppnm_amend_reserv.pdf (EURATOM also entered reservations). Although they appear as statements, it must be taken into account that their formulation is provided by the convention, and, thus, they qualify as reservations set out in guideline 1.1.6 of the Guide to Practice on Reservations to Treaties, adopted by the ILC in 2011: 'Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty.' With these same characteristics, see the reservations made to the Convention on Nuclear Safety 1994, 1963 UNTS 293,

> Therefore, the Community states that it concludes the Convention without prejudice to the above right, conferred on its Member States by virtue of Community law.[92]

The singularity of its content calls for further analysis. Indeed, Council Decision 2010/48 approving the convention on behalf of the Community calls it a 'reservation',[93] and this is also its designation in the UN database.[94] Nonetheless, its purpose is to declare that, pursuant to Community law, member states may 'enter their own reservations'. Thus, the Community is actually declaring that member states are entitled to make reservations, but the Community is not excluding or modifying the effects of any convention provisions for itself. In other words, the statement simply announces potential reservations to be made by member states in connection with the said article; if we take a look at treaty practice, it is worth noting that, to this day, only seven member states have entered a reservation.[95]

The conclusion of the Convention on the Rights of Persons with Disabilities by the European Community has generated interest for a twofold reason: first, it is the first time that the Community has expressed its consent to be bound by a human rights treaty and, second, the Community played an active role during the conclusion of the convention.[96] However, scholars seem to have overlooked this self-proclaimed reservation,[97] and there is no justification whatsoever in the preparatory act by the European

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available at www-legacy.iaea.org/Publications/Documents/Conventions/nuclearsafety_reserv.pdf, and those related to the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management 1997, 2153 UNTS 303, available at www-legacy.iaea.org/Publications/Documents/Conventions/jointconv_reserv.pdf.

92 Convention on the Rights of Persons with Disabilities, Doc. A/RES/61/106, 13 December 2006.

93 Council Decision 2010/48 Concerning the Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ 2010 L 23/35. Accordingly, its preamble states that 'such approval should, however, be accompanied by a reservation, to be entered by the European Community, with regard to Article 27(1) of the UN Convention' (Recital 6 of the Decision); Art. 1 reads as follows: 'The UN Convention on the Rights of Persons with Disabilities is hereby approved on behalf of the Community, subject to a reservation in respect of Article 27(1) thereof'; finally, the text is enshrined in Annex III to the abovementioned Decision, under the heading 'Reservation by the European Community to Article 27(1) of the UN Convention on the Rights of Persons with Disabilities.'

94 United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General; the information on the Convention on the Rights of Persons with Disabilities is available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

95 Cyprus, Greece, Ireland, Malta, Poland, Slovakia and the UK, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

96 See De Búrca, 'The EU in the Negotiation of the UN Disability Convention', *Social Sciences Research Network*, available at http://ssrn.com/abstract=1525611; Biel Portero, 'El primer tratado de derechos humanos celebrado por la Unión Europea: la Convención de Naciones Unidas sobre los derechos de las personas con discapacidad', 21 *Revista General de Derecho Europeo* (2010) 1, at 1–16; J.R. Marín Ais, *La participación de la Unión Europea en tratados internacionales para la protección de los derechos humanos* (2013), at 55–84; Ferri, 'The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective', 2 *European Yearbook of Disability Law* (2010) 47, at 47–71.

97 Biel Portero simply makes the following claim: 'Con esta reserva el Consejo ha buscado evitar cualquier colisión entre la Convención y el Derecho comunitario.' Biel Portero, *supra* note 96, at 12; the remaining authors referred to in the previous footnote say nothing in this regard.

Commission.[98] In the absence of additional assessment criteria, the guidelines set forth in the Guide to Practice on Reservations to Treaties, adopted by the ILC in 2011, must be examined.[99] This guide defines 'reservation' along the lines of the VCLTs and thus underlines that the purpose of the reservation is 'to exclude or to modify the legal effect of certain provisions of the treaty in their application to … that international organization',[100] which does not happen in the case at stake. This is not an interpretative declaration either since the purpose of interpretative declarations is 'to specify or clarify the meaning or scope of a treaty or of certain of its provisions',[101] which is not the case here. The conclusion is that we are faced with a unilateral declaration that is different from a reservation and from an interpretative declaration.[102]

Whereas there is very little practice on clauses and reservations,[103] it is worth discussing a very original form of joint assessment of reservations entered by third states. It takes place in connection with the scheme of generalized tariff preferences as a special incentive arrangement for sustainable development and good governance (GSP+). Article 9(1) of Council Regulation (EU) 978/2012[104] lays down the criteria to become a GSP beneficiary country. It requires having ratified 27 conventions related to human and labour rights as well as to the environment and governance principles,[105] and it includes additional requirements related to compliance with these conventions, among others, that the beneficiary country 'in relation to any of the relevant conventions, … has not formulated a reservation which is prohibited by any of those conventions or which is for the purposes of this Article considered to be incompatible with the object and purpose of that convention'.[106]

Additionally, Article 15 provides that the special incentive arrangement for sustainable development and good governance shall be withdrawn temporarily where, in practice, the GSP+ beneficiary country has formulated a reservation that is prohibited

98 Proposal for a Council Decision Concerning the Conclusion, by the European Community, of the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities, Doc. COM/2008/0530 final (2008).

99 'Report of the ILC on the Work of Its Sixty-Third Session', 2(2) *ILC Yearbook* (2011) 26.

100 Guideline 1.1.

101 Guideline 1.2.

102 Guideline 1.5 excludes this kind of statements from the scope of application of the Guide.

103 And even more so the practice on objections to treaty reservations. It is worth noting the European Atomic Energy Community's objection to a reservation entered by Pakistan to the Convention on the Physical Protection of Nuclear Material 1979, 1456 UNTS 101, as it was considered incompatible with the object and purpose of the treaty (the objection can be found at www-legacy.iaea.org/Publications/Documents/Conventions/cppnm_reserv.pdf, at 3); it was made in 1991, and it does not oppose the entry into force of the treaty in their mutual relations. The same objection was raised by member states and other states, as can be seen in the previous link. The proposal for a council decision issued by the Commission can be found in Doc. COM/2001/0583 final (2001). Pascual Vives refers to the objection raised by the European Community to the Soviet Union and Cuba reservations to the 1978 and 1979 protocols related to the fourth and fifth extensions of the Wheat Trade Convention and of the Food Aid Convention comprising the International Wheat Agreement 1986, 1429 UNTS 71. Pascual Vives, *supra* note 3, at 118–119.

104 Council Regulation 978/2012 Applying a Scheme of Generalised Tariff Preferences and Repealing Council Regulation (EC) 732/2008, OJ 2012 L 303/1.

105 Listed in Annex VIII to Regulation 978/2012.

106 The provision specifies that the reservations shall not be considered to be incompatible with the object and purpose of a convention unless a process explicitly set out for that purpose under the convention has so determined; or in the absence of such a process, the Union where a party to the convention, and/or a

by any of the relevant conventions or that is incompatible with the object and purpose of that convention as established in Article 9(1)(c). Therefore, the classic bilateral nature of reservations is left behind, and the mechanisms for reservation control become an instrument to promote EU values.

6 The Apotheosis of Clauses and the Allowed Risks of the Disconnection Clause

Another salient feature of the EU's treaty practice is the inclusion of clauses through which the Union preserves its legal system, develops its policies and advances its values. The Treaties Office database provides a list of 31 kinds of clauses,[107] which are not controversial from a treaty law perspective because they stem from the principle of the free will of the parties; within treaty practice, this kind of mechanism is commonly used, and negotiators are free to use them. However, the so-called disconnection clause is somewhat controversial. Marise Cremona describes it as follows:

> Disconnection clauses within an international agreement are designed to protect the autonomy of the Community, and now the Union, legal order by providing that as between EU Member State parties to agreement, the relevant provisions of Union law shall apply rather than the provisions of the international agreement. Disconnection clauses may be used where the EU is itself party alongside the Member States (mixed agreements), where Member States are parties but the EU is not, and even where the EU alone is a party.[108]

Some authors consider that the first treaty including a disconnection clause was the 1988 Convention on Mutual Administrative Assistance in Tax Matters;[109] since then, there has been a significant practice regarding this kind of clause.[110] From the Union's

qualified majority of member states party to the convention, in accordance with their respective competences as established in the treaties, objected to the reservation on the grounds that it is incompatible with the object and purpose of the convention and opposed the entry into force of the convention as between them and the reserving state in accordance with the provisions of the VCLT.

[107] European External Action Service, Treaties Office Database, the information about clauses is available at http://ec.europa.eu/world/agreements/viewClauseCollection.do.

[108] Cremona, 'Disconnection Clauses in EU Law and Practice', in Hillion and Koutrakos, *supra* note 24, 160, at 160. This author provides a useful description of the various types of disconnection clauses (at 162–170); another classification can be found in Economides and Kolliopoulos, 'La clause de déconnexion en faveur du droit communautaire: una pratique critiquable', 110 *RGDIP* (2006) 273, at 274–278.

[109] Council of Europe Convention on Mutual Administrative Assistance in Tax Matters, ETS no. 127 (1988). See Smrkolj, 'The Use of the "Disconnection Clause" in International Treaties: What Does It Tell Us about the EC/EU as an Actor in the Sphere of Public Internacional Law?', *Social Sciences Research Network* (2008), available at http://ssrn.com/abstract=1133002. According to Klabbers, '[it] is possibly the first treaty in which it is contained'. J. Klabbers, *Treaty Conflict and the European Union* (2008), at 220; and Cremona seems to be equally cautious when she refers to the convention as '[o]ne of the first (perhaps the first)'. Cremona, *supra* note 108, at 168.

[110] There are many scholarly works on this matter, and they reached their peak level during the first decade of the 21st century; in addition to the works mentioned in other footnotes in this section, see also Borrás, 'Les clauses de déconnexion et le droit international privé communautaire', 1 *Festschrift für Eric Jayme (herausgegeben von H.P. Mansel-T. Pfeiffer-H. Kronke-Ch. Kohler-R. Hausmann)* (2004) 57, at 57–72.

perspective, the advantages thereof are self-evident; as the European Commission has pointed out several times, it prevents the fragmentation of EU law and the segmentation of the internal market, thereby safeguarding the primacy of EU law.[111] However, it has been rightly noted that '[o]bviously, by pointing to the benefits for Community law of use of the disconnection clause, the Commission's reasoning fails to respond to concerns about its effects on the international legal order at large'.[112]

Notwithstanding the foregoing, from an international law perspective, the assessment of the disconnection clause is very different. In this regard, the study carried out by Constantin P. Economides and Alexandros G. Kolliopoulos is a mandatory reference.[113] This work claims that disconnection clauses can undermine the principle of equality of the parties in an international treaty, adding that, if this practice became widespread, international law could be damaged.[114] The report of the work of the Study Group of the International Law Commission on the Fragmentation of International Law, which was finalized by Martti Koskenniemi, echoing the abovementioned study,[115] also warns about the potential impact of this clause, stating that '[t]he inclusion of such clauses to multilateral treaties has given some cause to concern. It has seemed difficult to classify them by reference to provisions in the Vienna Convention and the effect of the proliferation of such clauses to the coherence of the original treaty has seemed problematic'.[116] This study group adds that '[w]hat may seem disturbing about such clauses is that they are open to only some parties to the original treaty and the content of the Community law to which they refer may be both uncertain and subject to change'.[117] Nevertheless, this report highlights that the effect – and, thus, the risk – of this clause depends on its specific wording, and it also provides some guidelines to assess its conformity with international law on a case-by-case

[111] See, e.g., the reasons outlined regarding the Council of Europe Draft Convention on Cybercrime, Doc. SEC (2001) 315 (2001). Licková summarizes similar arguments developed by the Council's legal service. Licková, 'European Exceptionalism in International Law', 19 *European Journal of International Law* (2008) 463, at 486. Amongst other advantages, Cremona claims that the disconnection clause facilitates the conclusion of mixed agreements, highlights the unity of the Union and its member states and visibilizes the obligations of member states at an international level. Cremona, *supra* note 108, at 185–186.

[112] Klabbers, *supra* note 109, at 222.

[113] Economides and Kolliopoulos, *supra* note 108.

[114] Due to their expressiveness, we include some sentences herein: 'L'accord qui contient une clause de déconnexion acquière ainsi le caractère d'un traité quasi inégal.' Economides and Kolliopoulos, *supra* note 108, at 288; '[L]a clause de déconnexion … vide la règle *pacta sunt servanda* de son contenu … elle heurte violemment le principe de la primauté du droit international sur le droit propre des Parties … La clause de déconnexion est donc en contradiction manifeste avec l'esprit de ces deux principes fondamentaux du droit international' (at 292); 'la clause … risque d'affaiblir le droit international en engendrant una fragmentation négative' (at 300).

[115] Which is mentioned four consecutive times. M. Koskenniemi, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Doc. A/CN.4/L.682, 13 April 2006, at 148–149.

[116] *Ibid.*, at 149.

[117] *Ibid.*, at 149–150.

basis,[118] departing from the following assumption: 'The validity of a disconnection clause flows from party consent.'[119]

This has been a debated topic within the Council of Europe, where the reluctance of various states towards disconnection clauses has triggered explanatory statements and technical improvements of the clause.[120] In 2007, the Committee of Ministers' Deputies invited the Committee of Legal Advisers on Public International Law (CAHDI) to examine the legal consequences of the disconnection clause in international law, in general, and for Council of Europe conventions containing such a clause, in particular; the report was approved in 2008.[121] The report agrees on the need for a case-by-case analysis, whilst highlighting 'the importance of ensuring, when it is necessary to include "disconnection clauses" in future conventions, that all the parties to the convention are able

[118] *Ibid.*, at 150–151. The conclusions of the Study Group specify the requirements to be met by these clauses; they may not affect the rights of third parties, they should be as clear and specific as possible, they should address specific provisions of the treaty and they should not undermine the object and purpose of the treaty. 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 2(2) *ILC Yearbook* (2006) 177, at 182. When drafting the Guide to Practice on Reservations to Treaties in 2011, the ILC placed the disconnection clause amongst the alternatives to reservations; accordingly, the commentary to guideline 1.7.1 provides the following: 'The reference to agreements, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves is made for the same reasons. For example, the European Union and its member States have inserted in multilateral treaties so-called "disconnection clauses" on the basis of which they purport to exclude the application of the treaty in their relations with one another, which continue to be governed by European Union law.' Report of the ILC on the Work of Its 63rd Session, UN Doc. A/66/10/Add. 1 (2011), at 125.

[119] *Ibid.*, at 151. As noted by Klabbers, '[a]s long as other States agree to this (and this is usually the case) there is legally not much of a problem; politically, though, insisting on the inclusion of a disconnection clause smacks a bit of the exercise of raw power'. J. Klabbers, *An Introduction to International Organizations Law* (3rd edn, 2015), at 283.

[120] Among others, see the Statement of the European Community and Its Member States in Connection with the Council of Europe Convention on the Prevention of Terrorism (CETS no. 196); Statement of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS no. 197) and the Statement of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS no. 198), all of them from 2005, clarifying the meaning of the disconnection clause and ensuring the full applicability of the conventions with regard to non EU parties (the statements can be found in Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism (2005), at 29–30, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3811; Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (2005), at 57, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3812; Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005), at 45–46, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3813; see also the opinions of the state delegations expressed on the occasion of the 35th meeting of the Committee of Legal Advisers on Public International Law (CAHDI). CAHDI, Meeting Report (2008), at 15, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800549e4.

[121] At the 36th meeting of the CAHDI; its text makes up Appendix IV of the CAHDI, Meeting Report (2008), at 25, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680054b0e.

to identify the applicable EC/EU rules so as to allow each party to ascertain the extent of each of the respective parties commitment'.[122] Also, the CAHDI deems convenient for regional economic integration organizations such as the EU to make 'a declaration specifying the scope of their competence over the issues covered by the treaty'.[123] Moreover, taking advantage of the fact – as it claims – that the notion of a 'disconnection clause' 'is not a term of art in international law',[124] the CAHDI calls for reconsideration and puts forward certain suggestions to change its denomination,[125] such as 'EU clause'[126] or 'transparency clause',[127] without actually picking any of them. This change-of-name proposal is a formal and smart, yet superficial, modification. Nevertheless, the disconnection clause technique has improved in practice, thereby eliminating the most concerning extreme cases.

7 Classification Difficulties

The EU and its member states frequently adopt texts that they designate in different ways. Additionally, if we examine the content of these texts from the perspective of treaty law, we might ask ourselves some questions in light of recent practice.

A *Are There Hidden Treaties?*

The notion of a 'hidden treaty' refers to an instrument laying down treaty-like international legal obligations that is neither presented nor designated as a treaty.[128] Some legal instruments that could be in this dubious list are some of the measures adopted to face recent crises. This is the case with some of the numerous and diverse legal instruments drafted to tackle the economic and financial downturn. In this connection, it is worth mentioning the European Financial Stability Facility Framework Agreement,

[122] Meeting Report, *supra* note 121, at 50. On the vicissitudes of the disconnection clause in the Council of Europe, see De Schutter, 'The Two Europes of Human Rights. The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe', 14 *Columbia Journal of European Law* (2008) 536, at 536–542.

[123] Meeting Report, *supra* note 121, at 51.

[124] *Ibid.*, at 44.

[125] *Ibid.*, at 52.

[126] Noted by Juncker, 'A Sole Ambition for the European Continent', in Report by Jean Claude Juncker, Prime Minister of the Grand Duchy of Luxembourg, to the attention of the Heads of State or Government of the Member States of the Council of Europe, Parliamentary Assembly, Doc. 10897, 11 April 2006, available at http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=11264&lang=en. However, in the CAHDI's view, 'this term is already in use for various other types of clause, and does not reflect the fact that the "disconnection clause" may be in general terms and not specific to the EU'. Meeting Report, *supra* note 121, at 52.

[127] Proposed, among others, by Kuijper, 'Disconnection Clauses', *European University Institute*, at 6, available at http://www.eui.eu/Documents/DepartmentsCentres/AcademyofEuropeanLaw/CourseMaterialsUL/UL2010/Kuijper/KuijperReading4.pdf.

[128] This accurate expression, taken from Lipson, is used by González Vega, '"Tratados ocultos" Sobre ciertas manifestaciones de la acción concertada "no convencional" en el marco de las competencias "reservadas" a los tratados internacionales', in *El Derecho internacional en el mundo multipolar del siglo XXI. Obra Homenaje al Profesor Luis Ignacio Sánchez Rodríguez* (2013) 75, at 78.

signed in 2010, and its amendment, signed in 2011.[129] Some member states have adopted it as an international treaty and others have not, whereas the scholarly doctrine has been divided with regard to the classification thereof.[130] The international instruments to bail out Greece, Ireland, Portugal and Spain are also controversial regarding their legal nature.[131]

Some other instruments that could qualify as hidden treaties stem from the measures adopted to tackle the so-called refugee crisis. This is the case with the Resolution of the Representatives of the Governments of the Member States Meeting within the Council on Relocating from Greece and Italy 40,000 Persons in Clear Need of International Protection as well as with the Conclusions of the Representatives of the Governments of the Member States Meeting within the Council on Resettling through Multilateral and National Schemes 20,000 Persons in Clear Need of International Protection, which were both adopted in July 2015;[132] from the international law perspective, these texts could be considered to be simplified agreements because they are acts adopted by representatives of the member states acting, not in their capacity as members of the Council but, rather, as representatives of their governments.

The EU–Turkey Statement of 18 March 2016 on the migration crisis probably also deserves to make this list.[133] Although both its heading and its content seem to bypass treaty terminology,[134] it has been stated that:

> [b]oth the text and context of the EU-Turkey Statement support the view that it is a treaty. The parties 'decided' to end the irregular migration from Turkey to the EU, and, to that purpose, they 'agreed' on a number of action points. … The EU-Turkey Statement now at issue is also being implemented. … All this indicates that the EU-Turkey Statement was meant to sort legal

[129] European Financial Stability Facility Framework Agreement (and Amendment), 7 July 2010 (amended on 21 July 2011), available at www.esm.europa.eu/sites/default/files/20111019_efsf_framework_agreement_en.pdf.

[130] According to De Witte, it is not a treaty. B. De Witte, 'Using International Law in the Euro Crisis: Causes and Consequences', ARENA Working Paper no. 4 (2013), at 4, available at www.sv.uio.no/arena/english/research/publications/arena-working-papers/2013/wp4-13.pdf; conversely, Pastor Palomar claims the opposite. Pastor Palomar, 'El Derecho internacional en los mecanismos de rescate financiero en la zona euro', in F. Aldecoa Luzárraga, C.R. Fernández Liesa and M. Abad Castelos (eds), *Gobernanza y reforma internacional tras la crisis financiera y económica: El papel de la Unión Europea* (2014) 285, at 297–301; Pastor Palomar, 'The interplay between EU Law and International Law to Set Up the Eurozone Rescue Mechanisms', in J. Schmidt, C. Esplugues and R. Arenas (eds), *EU Law after the Financial Crisis* (2016) 5, at 5–23.

[131] See Pastor Palomar's thoughts on these instruments. Pastor Palomar, *supra* note 130, at 292–297, and 301–304.

[132] Doc. 11097/15, 20 July 2015, available at www.consilium.europa.eu/media/22985/st11097en15.pdf.

[133] The EU has summarized it through a press release. Press Release 144/16, 18 March 2016, available at www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf, but its full text has been published, among others, by the House of Commons, which is available at www.publications.parliament.uk/pa/cm201516/cmselect/cmeuleg/342-xxix/34206.htm.

[134] However, D. Tusk, president of the European Council, used the word 'agreement' five times in his remarks after the meeting. D. Tusk, Statements and Remarks, Doc. 151/16, 18 March 2016, available at www.consilium.europa.eu/en/press/press-releases/2016/03/18-tusk-remarks-after-euco-turkey/.

> effects. This, in turn, indicates that both parties intended to bind themselves and that, therefore, it is a treaty.[135]

In this vein, it has also been considered that '[i]n spite of its elusive title, the Statement appears to be an international agreement',[136] as well as that, '[w]ith regard to its content, there is little doubt that the Statement is not a mere declaration of principles, but rather a full-fledged normative scheme, spelling out specific conduct for the parties. … With regard to the intent, the phraseology used in the Statement clearly indicates that the parties intended its provisions to be binding in their reciprocal relations'.[137]

Nevertheless, through three orders dated 28 February 2017,[138] the General Court accepted the EU institutions' explanations whereby they rejected the paternity of the agreement[139] and disregarded all appearances, despite their clarity,[140] concluding that the statement must not be considered an act adopted by the European Council or by any other institution for that matter. The General Court added that, even assuming that an international agreement could have been concluded in an informal manner, such an agreement would have been entered into by the heads of state or government of the EU member states and the Turkish prime minister.[141] Following an analysis of these shocking orders, some scholars have been critical of the General

[135] Den Heijer and Spijkerboer, 'Is the EU-Turkey Refugee and Migration Deal a Treaty?', *EU Law Analysis*, 7 April 2016, available at http://eulawanalysis.blogspot.com.es/2016/04/is-eu-turkey-refugee-and-migration-deal.html. These authors draw the following conclusion: 'We are therefore of the view that the EU-Turkey Statement is a treaty with legal effects, despite its name and despite internal EU rules not having been observed.' Along these lines, Gatti points out 'that the leaders of EU States intended to "hide" the binding nature of the statement'. Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)', *EJILTalk!*, 18 April 2016, available at www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/. Conversely, Peers adopts a formal perspective to take the opposite stance: 'Since the agreement will take the form of a "statement," in my view it will not as such be legally binding.' Peers, 'The Draft EU-Turkey Deal on Migration and Refugees: Is It Legal?', *EU Law Analysis*, 16 March 2016, available at http://eulawanalysis.blogspot.com.es/2016/03/the-draft-euturkey-deal-on-migration.html.

[136] Cannizzaro, 'Disintegration through Law?', 1 *European Papers* (2016) 3, at 3, available at http://europeanpapers.eu/en/e-journal/disintegration-through-law.

[137] *Ibid.*, at 4.

[138] Case T-192/16, *NF v. European Council* (EU:T:2017:128); Case T-193/16, *NG v. European Council* (EU:T:2017:129); Case T-257/16, *NM v. European Council* (EU:T:2017:130).

[139] According to the European Council, 'to the best of its knowledge, no agreement or treaty in the sense of Article 218 TFEU or Article 2(1)(a) of the Vienna Convention on the law of treaties of 23 May 1969 had been concluded'. Case T-192/16, *supra* note 138, para. 27; Case T-193/16, *supra* note 138, para. 28; Case T-257/16, *supra* note 138, para. 26; the Commission made the following statement: '[I]t was not a legally binding agreement but a political arrangement'. Case T-192/16, para. 29; Case T-193/16, para. 30; Case T-257/16, para. 28, and the Council claimed 'that it had not been in any way involved'. (Case T-192/16, para. 30; Case T-193/16, para. 31; Case T-257/16, para. 29).

[140] For instance, the use of the terms 'European Union' and 'Members of the European Council', the press release with the double heading 'European Council/Council of the EU' posted on the European Council's website or the presence of the Presidents of the European Council and the Commission.

[141] 'The Court considers that, even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, that agreement would have been an agreement

Court. They blame the Court for disregarding the general rule of the interpretation of treaties laid down by Article 31 of the VCLT, along with Article 34, according to which a treaty does not create either obligations or rights for a third state without its consent, given that the EU has undeniably undertaken obligations.[142] Although the appeals filed against the orders provided the CJEU with an opportunity to clarify the matter, distinguishing appropriately between the text's legal nature and the procedural and competence issues, an order of 12 September 2018 dismissed these appeals as being manifestly inadmissible.[143]

B *Are There Made-Up Treaties?*

This expression is used in connection with the 2011 Declaration on the Granting of Fishing Opportunities in EU Waters to Fishing Vessels Flying the Flag of the Bolivarian Republic of Venezuela in the Exclusive Economic Zone off the Coast of French Guiana, which is included as an annex to a council decision.[144] Following the actions for annulment filed by the European Parliament and the Commission, Advocate General Eleanor Sharpston examined in her opinion the legal consideration of the said declaration. She was in favour of considering it a unilateral act within the meaning of public international law.[145] However, in its judgment of 26

concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister.' Case T-192/16, *supra* note 138, para. 72; Case T-193/16, *supra* note 138, para. 73; Case T-257/16, *supra* note 138, para. 71.

142 Uría Gavilán, 'El Tribunal General se declara incompetente para conocer de los recursos de anulación contra la Declaración de la Unión Europea y Turquía de 18 de marzo de 2016', 49 *La Ley Unión Europea* (2017) 1, at 7–8. Cannizzaro refers to Art. 7(3) of the 1986 VCLT to conclude that 'an international instrument that plainly falls within the competence of the EU, negotiated by the President of the European Council and by the President of the European Commission – two organs entrusted with the international representation of the EU – adopted at a meeting of the European Council and Turkey held in the headquarters of the European Council, communicated in the form of a press release of the European Council and posted in its website, whose wording immediately conveys the idea that its consent has been agreed upon by Turkey and the EU, cannot but be attributed to the EU'. Cannizzaro, 'Denialism as the Supreme Expression of Realism: A Quick Comment on *NF v. European Council*', 2 *European Papers* (2017) 251, at 256. Conversely, Fernández Arribas advocates a joint analysis from the perspective of the international law of treaties, the international law of international organizations and EU law, which casts doubts on the recognition of the EU-Turkey Statement as an international agreement. Nonetheless, her main claim is that the European Council has no competence to conclude international agreements. Arribas, 'The EU-Turkey Statement, the Treaty-Making Process and Competent Organs: Is the Statement an International Agreement?', 2 *European Papers* (2017) 303, at 303–309.

143 Joined Cases C-208/17 P, *NF v. European Council*; C-209/17 P, *NG v. European Council*; C-210/17 P, *NM v. Council* (EU:C:2018:705).

144 Council Decision 2012/19/EU, OJ 2012 L 6/8.

145 See Joined Cases C-103/12 and C-165/12, *European Parliament and European Commission v. Council of the European Union* (EU:C:2014:334) paras 83–98, Opinion of Advocate General Sharpston issued on 15 May 2014. As has been stated, '[t]he Opinion delivered by Advocate General Sharpston bears the hallmark of true inter-judicial dialogue. The Advocate General provided a rigorous analysis of the juridical character of both international agreements and unilateral acts in international law and critically examined both the relevant case-law of the ICJ and the work of the ILC before concluding that the Decision in question constituted in fact a unilateral juridical act'. Kassoti, 'Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface', 8 *European Journal of Legal Studies* (2015) 21, at 47.

November 2014,[146] based on a questionable interpretation of Article 62(2) of the UN Convention on the Law of the Sea,[147] the CJEU did not hesitate to consider it an international treaty, although there had been no negotiations with Venezuela and the Declaration itself provides that the EU may withdraw its undertaking at any time by means of another unilateral declaration.[148]

The foregoing aspects lead one to think that it was not an international agreement[149] and, thus, that the CJEU had 'made it up'. Probably, the absence of legal basis and procedure to make binding unilateral declarations by the EU[150] influenced the Court's decision, which led the Court to move the declaration to a better known and more comfortable area of international agreements, although at the expense of distorting or denaturing the concept of the treaty and disregarding the concept of unilateral act, which is too high a price to pay from the perspective of international law.

[146] Joined Cases C-103/12 and C-165/12, *European Parliament and European Commission v. Council of the European Union* (EU:C:2014:2400).

[147] Convention on the Law of the Sea 1982, 1833 UNTS 3. See De Pietri, 'La doctrina de los actos unilaterales pasa inadvertida ante el TJUE: Comentario a la sentencia de la Gran Sala del Tribunal de Justicia de 26 de noviembre de 2014, asuntos acumulados C-103/2012 y C-165/2012, *Parlamento Europeo y Comisión/Consejo*', 24 *La Ley* (2015) 22, at 27–28.

[148] Council Decision 2012/19/EU of 16 December 2011 on the Approval, on Behalf of the European Union, of the Declaration on the Granting of Fishing Opportunities in EU Waters to Fishing Vessels Flying the Flag of the Bolivarian Republic of Venezuela in the Exclusive Economic Zone off the Coast of French Guiana 2011, OJ 2012 L 6/8, section 4, provides that 'the European Union may at any time withdraw, by way of unilateral declaration, the specific undertaking expressed in this Declaration to grant fishing opportunities'. According to Ricardo Gosalbo Bono, '[L]a Declaración puede tipificarse como un instrumento unilateral que emana de la UE destinado a producir efectos jurídicos conforme al Derecho internacional. … Se trata de un instrumento unilateral porque nada en el texto de la Declaración sugiere que la validez de tal compromiso dependa de la aceptación ulterior de Venezuela. La Declaración tampoco impone obligaciones a Venezuela sin su consentimiento… Es más, en la Declaración, la UE se reserva el derecho a retirar, en cualquier momento, mediante una declaración unilateral, el compromiso específico expresado en la Declaración'. Gosalbo Bono, 'Insuficiencias jurídicas e institucionales de la acción exterior de la Unión Europea', 50 *Revista de Derecho Comunitario Europeo (RDCE)* (2015) 231, at 267.

[149] This is De Pietri's view, *supra* note 147, at 29–30. Gosalbo Bono is not categorical about it, but the same conclusion could be inferred from its considerations. Gosalbo Bono, *supra* note 148, at 269–270. According to Oanta, the CJEU 'fuerza mucho al considerarlo un acuerdo internacional, perdiendo, de este modo, una excelente ocasión para pronunciarse, por vez primera, sobre la capacidad de la UE para emitir actos unilaterales'. She also makes the following consideration: '[L]a situación a la que se enfrenta Venezuela podría considerarse bien como un acto unilateral adoptado por la UE.' Oanta, 'Tres sentencias claves para la delimitación del contorno jurídico de las competencias convencionales de la Unión Europea en el ámbito pesquero', 53 (2016) 201, at 217 and 218 respectively. Undoubtedly, the declaration fulfils what Kassoti designates as indicators of unilateralism: the absence of a treaty law context, the absence of a rule that requires reciprocity and the absence of a context of negotiations. E. Kassoti, *The Juridical Nature of Unilateral Acts of States in International Law* (2015), at 98–104.

[150] In this regard, Odermatt notes that '[h]ad the Court determined the instrument to be a unilateral declaration, as the AG had recommended, it would have been faced with the complex task of determining which EU rules should apply to adoption of such instruments'. Odermatt, *supra* note 3, at 127. Advocate General Sharpston suggested applying Art. 218(6)(a)(v) of the TFEU by analogy. Opinion of the Advocate General Sharspton delivered on 15 May 2014, Joined Cases C-103/12 and C-165/12, *supra* note 145, paras 123, 184. Rapoport has proposed unifying the procedures to conclude EU international commitments, including those regarding unilateral declarations. Rapoport, 'La procédure de conclusion des accords externes de l'Union Européenne: quelle unité après Lisbonne?', in I. Govaere *et al.*, *supra* note 29, 149, at 160–161.

8 The EU and Treaty Law: A Fruitful Relationship

The EU's overreaching and convoluted treaty practice provides very attractive material for analysis. We are confronted with an ever-changing picture and, thus, a very stimulating scenario from a scholarly perspective, which unfolds at the junction between EU law and international law. In an overall perspective, the frequent recourse to provisional application stands out as one of the most remarkable features of the conventional practice of the EU. The flexibility offered by this institution makes it possible to achieve useful solutions for the particularities of the Union's external relations through a diversity of increasingly innovative formulas, both from a formal and material point of view, which explains its growing consideration for the ILC in its work currently underway on provisional application. Also, the autonomy of the will of the parties consecrated by the law of treaties is used by the EU to deploy a wide set of clauses through which it preserves its legal system, develops its policies and extends its values, among which the so-called disconnection clause attracts attention. Along with these outstanding characteristics, the recent practice of adopting interpretive instruments of diverse nature should be noted, which is emerging as an aspect with potential for the future. Finally, the dark side of the conventional activity of the Union has a punctual, but significant, tendency to escape from the law of treaties by holding texts that contain international obligations of a legal nature but that have not been qualified as treaties or whose authorship has not been assumed by the EU.

The study performed so far has attempted to highlight some of the most complex and distinct aspects that can be noted from the standpoint of international treaty law, whose flexibility allows the Union to safeguard its interests whilst contributing new and enriching approaches. The fact that sometimes the possibilities offered by this area of the international legal order are pushed to the limit – as well as by states – does not blur this conclusion.